REMARKS: *Inside the Cage of the System (制度的笼子里): Standards Setting, National Security Values, Tech Platforms, Regulation, and the Central Contradiction of Legality in the Current Historical Era*

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First I want to thank Marcelo Thompson, Han Zhu, and Dean Fu Hualing, and all those who organized this workshop. And I am especially grateful for the opportunity to address you in person. In today's post-COVID world, it is rarer now to be physically among such august companions.

The Workshop speaks to technology platforms and their relationship with three distinct and now intertwined legal-political spheres. Together these make up the internal sub-cages of the system which has traditionally been manifested in the constituting and regulatory cages of law and politics.[1]

> The first is the domain of standard setting. For tech platforms that suggests *three sub-domains*. The first is of quality control; the second is of operational integrity; and the third is of a constitution of both that conforms to the normative and regulatory structures of the legal-political domains in which it is situated.

> The second speaks to the relationship between the standards setting domain in tech platforms, and that of national security. The challenge here is alignment, coordination, and synergy, internally (as between the two regulatory sub-domains), and overall coordination with the all-around regulatory policies of the governance unit.

> The third speaks to the alignment of the first two with the overarching political-normative structures of both the political unit that seeks to regulate, and superior domain into which it is embedded. Here one speaks in this case to the positive alignment between political-economic model of the Special Administrative Region, and the larger one of the national governmental apparatus and its political-economic model. These alignments are meant to produce internal coordination and modalities for external interaction.

It is clear by now that my focus for these remarks will be on *domains*. It is important, in that context to recall the origins of that term. In the cultural linguistics of Latin and its foundational Roman ideologies,

Inside the Cage of the System (制度的笼子里)
Remarks (白 轲)
Larry Catá Backer (白 轲)

2

Workshop/Conference: Technological Platforms and National Security in Hong Kong: The Domain of Standards Setting
Law and Technology Center; Center for Chinese Law University of Hong Kong
25 August 2023

one speaks here of *domus*, a house or household or estate.[2] But one also speaks to the relationship between a *domus* and its *dominus*–its lord, master, owner, or overseer (perhaps captured by the old term 掌握 (Zhǎngwò) with its sense of also understanding things and making use of them). The fundamental relation, and one critical for the rationalization of platforms within law, standards and the overarching and intertwined mandate of national security are between a thing (*domus*) and the 'someone' or 'something' that has been given *dominion* (统治 (Tǒngzhì)), which also implies sovereign rights (主权 (Zhǔquán)).

A domain–physical or abstract–then references a defined space over which a certain measure of authority is claimed and may be exercised. They are relational terms in the sense that each acquires its character through a relationship with something else–the superior authority that vests dominion, the normative premises that define overlordship, and the expectations that coalesce as a household or territory–physical or virtual. It follows that *dominion*, *dominus,* and *domus* are neither self-defining terms nor autonomous concepts in politics or law. They represent the manifestation of an ideological view which both defines their character and orders them within the universe of social relations to which they apply. These, then, describe the insides of traditional cages of the system (制度的笼子里 (zhìdù de lóngzi lǐ) constituted as the domains of law, of authority, and of the foundational norms through which they are tested, assessed, and legitimated. In this sense, one can understand standard setting as a mediator between the constitution of tech platforms and the objectives of national security, all within the constraints and objectives of the two greater domains of the Special Administrative Region and overall all, the institutions and political-economic system of the nation. These can have a legal basis, and they must conform to the normative baselines of the political-economic model and with that, its national characteristics in any current historical era.

These fundamentals then make clearer the challenge of something that initially sounds so straightforward–applying standard setting from the legal domain to the operation of tech platforms in the tech domain in ways that conform to the national security law in the political domain. I will speak to its principal challenge in the current historical era. That is the challenge of producing *static rules* constructed in ancient and *traditionally developed analogue forms*–words, text, objectives bound up around systems of administrative discretion ultimately exercised by technical and political officials in complex interlocking organizational frameworks–in an evolving environment in which the domains are virtual and the effective *forms of regulation are digital and dynamic* as to space, time, and place.

More importantly for the great work now being undertaken in Hong Kong and other places, the challenges point to the fundamental issue of governance in the middle of the 21st century–the coordination and alignment of analogue and digital governance in a domain that is no longer merely physical and static but now also virtual, dynamic, and non-human. I will speak to the impact of *regulatory interludes* on the project of regulating tech platforms through standards in the shadow of national security and under the umbrella of the superior constituting law of the state and its patriotic political vanguard. And I will speak to the consequences for such an enterprise where that expression of dominion

Workshop/Conference: Technological Platforms and National Security in Hong Kong: The Domain of Standards Setting
Law and Technology Center; Center for Chinese Law University of Hong Kong
25 August 2023

must co-exist in a rich ecology of other domains with which it must interact. Its basis is the operating premise of the human condition in the third decade of the 21st century—that this is an era of interlude, not of ideology but of the manifestation and communication of human ordering where the centrality of the human is de-centered by silicon encased intelligence.

Western philosophy speaks to historical *moments of interlude;* that is of eras that occur when distinct ways of seeing , experiencing, and ordering the human, human collectives, and the world around them either exist together or in which one is giving way to another.[3] These ordering imaginaries[4] provide the foundation on which three principal aspects of social relations may be undertaken. The first is the translation of core modalities of perception and cognition into premises around the human condition and its management. The second is the expression of those premises in social relations as law, politics, economics, and culture. The third is the deployment of language to permit the communication of meaning and purpose binding imaginary, perception-premise, and rule ordering together. But where, as in this case, new technologies upend the certainties of communication and thus of the scope of perception—where it is possible to speak and thus understand differently, the edifice of structural expression as law is itself placed in a space between how things had been understood and done and how things are now about to be done.

In a similar vein, Marxist-Leninist philosophy, expressed as political ideology *speaks to the dialectics of contradiction*.[5] Dialectical contradiction exists in space, place, and time, and has national characteristics. It is both a snapshot of a current historical era, and a process for moving from one historical era to another. Here every historical era is an interlude (even if brief or long) in a flow of dialectics leading toward a culmination. The principal contradiction of any era is the snapshot of the flow of dialectics, that is in the movement of aspects of contradiction that acquire substance and form in relation to each other in that moment. The challenge of tech platforms in the shadow of national security constitutes oppositional aspects of contradiction that might be mediated by standards, but those standards themselves, as distinct expressions of platform cognition and of the cognition of national security, then poses an expressive contradiction that is inherent in, and perhaps superior to, the operational contradiction of tech platform and national security alignment.

Does one address this contradiction in the old language of constitutional normativity and the cage of textual regulation, or does one imbed the contradiction in the expressiveness of code and program, or does one embed constitutional normativity in code and program? Here, perhaps, then, one comes to the *principal contradiction of interlude in the current era*, within which the problem of standards applied to tech platforms under conditions of national security norms and rules assumes a secondary position. That is, one might identify the principal contradiction as one of focus and communication of legality in the shadow of the space between analogue and digital imaginary.

To a large extent, the legal structures that manifest a particular world view and its operationalization in social relations focuses on a picture, that is, on a specific moment of time, space and place. That is the way, for example, a *balance sheet is meant to take a snapshot of a dynamic process of production* (the end

product of the application of rules, norms, expectations, practices and the like which never cease) , or for that matter the way a statute, an administrative apparatus, and sometimes even a constitution, is fixed in time, place and space as if by memorializing an instant it can freeze them all in relation to the world on which they are to be given effect.

On the other hand, the sensibilities and operations of the tech platform shifts the principal focus from the picture of an instant to the flow of iterative relations in motion that when frozen paint the static picture. These are the spaces between these pictures and static moments that are captured in analog thinking and traditional law Instead focus shifts to the constant movement from picture to picture. That is the way, for example, one approaches the income statement of a financial statement, or perhaps better, the statement of cash flow, or perhaps best (and here we come closest to the platform)—to the general ledger, that is to the systematized record of the flow of transactions. One focuses here on process and on the bytes of data that never stop but that constitute the object whose management has profound effect on the operation of the thing for which it is applied (in this example a business, but also a legal system, or better still, the discretionary operation of an administrative apparatus).

The concept of *interlude* in the expression of legality, then, brings us face to face with technology, and its manifestation in the platform--that great interactive ledger, populated by producers and consumers (in a great dialectic of mutual engagement), along with its structures. But that points to yet *another manifestation of interlude*, of conceptual spaces between normative orders. Technology speaks to the reconstitution of the understanding of the world around us *from one grounded purely in the physical to one that appears to be moving toward the digital*. That is, technology—and the tech platform as a critical expression of that domain—is moving from a world conception built around an ontology of purely carbon based reality to a silicon encased intelligence. The creation of that silicon encased intelligence has allowed for the construction of holographic realities, increasingly in the form of descriptive and predictive analytics. It has also produced a self-reflexive generative intelligence that has the potential to construct its own modalities of intersubjectivity, of self-knowledge, that can be opaque to its carbon based creators. That trajectory ought to be of some concern to officials who still believe that traditionally constructed and analogue-based means of regulation may have significant meaningful resonance, much less an effect on. these emerging modalities of social physical-virtual relations.

A question emerges from these insights: in the face of technology, what might the characteristics of regulatory contradiction, and interlude, consist of? Let me suggest its most significant elements.[6]

(1) The analog is *wired*, that is, it is physically connected; the digital is *signal*, both in the sense of transmission and in the sense of its flow of iterative actions which give the signal form and to some measure predictability. The analog thinks in terms of big box stores, or large malls, of a police, procuratorate, and administrative officials rounding up the usual carbon based subjects for processing. The digital goes virtual. It encodes and simulates physical space so that it is both true to itself and accessible to its subjects. But in the process it controls the viewpoint and it guides the users in accordance with its program. .

(2)The analog *transmits in words and sounds and visual effects*, it is grounded in the senses of the physical world centered on humanity; the digital *is code*; the digital transmits as a manifestation of code in relation to its input and analytics and is grounded in the capacity for conversion of instruction (object) into a representation (its signification) in a virtual landscape. The analog is the word of written statutes and constitutions (even where one can, U.S. style, drive an interpretive truck through its text); it is incarnated in a direct relationship between the senses of the recipient and the modes of transmission of its sources. The digital speaks the language of code. It is the coder and the scrum master, the modeler and the analyst that create the environment in which stimulation is administered. This is 'social credit' and data based governance built on ratings and algorithm.

(3) The *analog is housed in carbon based life forms*, principally humans, its essential narcissism is the essence of a self-love that has fueled civilization to date; the *digital is a silicon based intelligence housed in inorganic casings*; its essential narcissism is derivative; in its generative forms digital intelligence may exceed the state of imitation and achieve a measure of autonomy, becoming its own subject. Humanity was the center of all things. That center has shifted to the hologram in computer and phone screens; in robotics, and AI based advisors, scribes, theorists and the like. Silicon based intelligence can now likely apply the law better than a carbon life form, if what one is looking for is consistency and predictability. One can code for variation as well. And bias.

(4) The analog is *structured through norms, rules, presumptions* that are elastic, though when expressed as text constructs the modern edifice of legality for a political collective; the digital *is programmed*; though it too can be constituted in a way that can generate form, based on its own iterative interaction with itself through its inputs. The analogue is an exercise in the qualitative that is implemented through acts of carbon life form based discretionary acts. The digital is a program the input of which is data and the output of which is governed by the analytics of its programing. It is made in the image of its creator, to be sure, including all of the foibles that make carbon based life human.

(5)The analog is *dialectics*, which constitutes the dynamic guts of its programing; it is the essence of *deductive processes* from the most general to the most specific; the digital is *iterative*, which constitutes its own programmatic guts, it is the essence of the *inductive processes* starting from its data to produce general conclusions. The constitutional law of the globe, its normative structures and the cage of its regulations are essentially deductive (and dialectic) as well as qualitative. Silicon based processes are iterative and inductive—they are spiraling feedback loops rather than the linearity that humans are taught are the basis of cognition and order. The best example of the differences, and the likely widening separation between the generation of AI generative and human knowledge might be seen today in the efforts to develop *Claude*—the constitutional AI.[7]

All of this has a bearing on the issues we confront today. Let me end by briefly identifying six core areas that will feel the effects of this analog-digital interlude most intensely.

Workshop/Conference: Technological Platforms and National Security in Hong Kong: The Domain of Standards Setting
Law and Technology Center; Center for Chinese Law University of Hong Kong
25 August 2023

First are platforms. Tech platforms, of course, are the object of legislative efforts, especially in the context of National Security. Nonetheless, the efforts stumble as the legislative efforts, primarily analog crash against the impermeable barriers of the platforms digital characteristics. Some key areas include: (a) definitions of platforms that do not redefine the entirety of social relations as forms of platform; (b) the focus of legislation—code, coders, programs, analytics, generative AI—or the institutional superstructures within which all of those elements contribute to the national security challenge; (c) the self-regulation loop in which the techniques and sensibilities of the apparatus of national security may well include those subject to constraint and regulation; (d) regulatory objectives beyond information production and information leaks; these include quality control, data-analytics integrity; (e) alignments between the functional differentiation of platform engagement, national security, and regulation; producers, consumers, coders, enforcers and owners have different regulatory profiles bridging the analog and digital.

Second are interlinkages between cages of legal regulation. Much of this is approached in the traditional context of the analog, as if the object of regulation—tech platforms, existed solely in physical space and place. The discursive dialectics of the interlinkages between statute, regulation, regional constitution, and national constitution—and the effect of the overarching political-economic model and its vanguard -- are well known and well worn; as are the discursive tropes of interpretation. But the digital version of these interlinkages has hardly been explored, and ignoring them merely reduces the value of analog efforts. The regulation of the digital must follow its logic—impacts data integrity, analytic accountability and bridges across the analog-digital *interlude* with respect to accountability.

Third are the legalities of risk. As rule of law has moved from its normative and qualitative underpinnings to a compliance based regime governmentalizing individual and private collective activities; both the matrices of risk bearing and risk control, and the allocation of liability (once that has been defined) pose challenges aligning the digital and analog contexts. Of greater importance, of course, are the allocation of rights bearers. Certainly the state, but to some extent also individuals. Social credit regimes have pioneered that discussion in the context of data integrity and the output of algorithms.

Fourth looks at the way that standard setting is likely to acquire both an analog and digital dimensions. We have, at last, mostly come to understand the regulatory character of standard setting. We have also come to understand the way that this authority has been delegated to expert bodies, constrained only by those norms and values with which they are charged. But more difficult to digest are the regulatory consequences of digitalized standards—where standards are built into code. Alignment between analog and digital standards remains terra incognita—but there effects on national security objects as well as quality control and integrity require substantially more development.

Fifth, considers the challenge for national security accountability of developing means of blending analog and digital receptors in furtherance of its objectives. Here the collisions of analog and digital measures can have profoundly effect. Analog measures, of course, proceed first from the HKSAR National Security

law, as embedded in the HKSAR Basic Law; but that itself is further embedded within national constitutional constraints. Where these must be undertaken through tech platforms, or where tech platform language and sensibilities must be used to transpose measures, digital measures will be necessary. These may include data scrapping, accountability protocols for modeling and AI, auditing protocols, and the like. Lastly, the goals of national security—which may include stability, trustworthiness, development, patriotism (solidarity), and fulfillment of policy—add a further layer of rationalization and alignment.

Sixth touches on the governance gaps of interconnectivity. It is all well and good to develop national measures, or even those compatible with national measures but that reflect the scope of HKSAR autonomy. But these measures may then either subject outbound activity to incompatible requirements, or make inbound investment impossible to maintain lawfulness between systems. For example, it is likely that national security measures, especially with respect to data and information, will have substantial impact on the ability of HKSAR firms working abroad or foreign firms with operations in HKSAR with respect, for example, to mandatory supply chain due diligence measures, modern slavery measures, and the like.

This, then, is the description of the parts that will define the inside of the institutional cage (制度的笼子) in any system. The task that faces officials, policymakers, vanguards, and academics, then, in any specific time, place, and space, is straightforward. First, understand the analog and the digital elements of the parts necessary for assembling the cage—national security law (SAR and national), tech platforms, and constitutional norms, scope, objectives, and applications. Second, understand the way that these parts are to fit together and the effect of discretionary choices about parts in the shape and utility of the cage; discretionary choices are relational in analog and digital regulatory spaces. Third, develop a means of aligning analog and digital legalities and their legal subjects. And Last, undertake these tasks sensitive to the overall leadership of political vanguards whose policy choices will determine the way that these interludes will be bridged and these contradictions resolved within the cage of the system.

It is from here that the journey from the analog to the digital really begins. And, as well, the extraordinary engagements which now follow.

Thank you.

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[1] Cf., "Xi Jinping Vows 'Power Within a Cage of Regulations'," *Xinhua* 23 January 2013; available [http://www.china.org.cn/china/2013-01/23/content_27767102.htm].
[2] Etymology Online, Domain; available [https://www.etymonline.com/word/domain].

Inside the Cage of the System (制度的笼子里)
Remarks (白 轲)
Larry Catá Backer (白 轲)

8

Workshop/Conference: Technological Platforms and National Security in Hong Kong: The Domain of Standards Setting
Law and Technology Center; Center for Chinese Law University of Hong Kong
25 August 2023

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[3] Jan M. Broekman, *Knowledge in Change: The Semiotics of Cognition and Conversion* (Dordrecht: Springer, 2023), pp. 83-92.

[4] Jean-Paul Sartre, *The Imaginary: A Phenomenological Psychology of the Imagination* (Jonathan Webber, (trans); London and New York: Routledge, 2004).

[5] Mao Zedong, "On Contradiction" (August 1937) available [https://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1_17.htm].

[6] Larry Catá Backer, "An encounter with Jan M. Broekman, *Knowledge in Change: The Semiotics of Cognition and Conversation* (Cham, Switzerland: Springer Nature, 2023)," *International Journal for the Semiotics of Law* 2023 (forthcoming) .

[7] Anthrop\C, Claude's Constitution (9 May 2023); available [https://www.anthropic.com/index/claudes-constitution]; Yuntao Bai et al.; "Constitutional AI: Harmlessness From AI Feedback," arXiv:2212.08073v1 [cs.CL] (15 December 2022); available [https://arxiv.org/pdf/2212.08073.pdf].