

Justice & Social Credit

Marcelo Thompson &
Zhang Xin[†]

“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly”. — Martin Luther King Jr., Letter from the Birmingham Jail.

“Through credit information exchange and sharing ..., ensure that those keeping trust receive benefits in all respects, and those breaking trust meet with difficulty at every step”. — State Council of the People’s Republic of China, Planning Outline for the Construction of a Social Credit System

I. Introduction

I.1. Justice in High Modernity: An Overview of the Argument

Scholarly discussions on China’s Social Credit System have so far been centered on a paradigm shift thought to be embodied by the SCS as a form of normative ordering. In those discussions, the SCS has been presented as reflecting a new ‘*rule-by-reputation*’¹ paradigm or, alternatively, a new ‘*rule-by-trust*’ one.² The emphasis of both such approaches has been on an arguable supersession, by regulation through Social Credit, of the institutional normative forms of ordering that have long-since presided over modern liberal societies — namely, those forms of ordering anchored on a Nation-state that both ‘rules by

[†] Marcelo Thompson, DPhil (Oxford), Assistant Professor of Law, The University of Hong Kong, and Zhang Xin, PhD (Peking), Associate Professor of Law, Associate Dean, Faculty of Law, University of International Business & Economics, Beijing; Visiting Scholar, Fairbank Center for Chinese Studies, Harvard University. This work has had a long gestation. Significant parts of it have been presented at: the Amsterdam Privacy Conference 2018, hosted by the Institute for Information Law (IViR), at the University of Amsterdam, and the Law, Science, Technology & Society Research Group, Vrije Universiteit Brussel (VUB); the 2018 Conference (ICON-S) of the International Society of Public Law and the Inaugural HKU Technology Law Symposium 2019 (Rising to Legal Challenges in the Age of AI), both hosted by the Faculty of Law, The University of Hong Kong. The authors are thankful to participants for helpful and encouraging feedback in these opportunities. The paper has been accepted for forthcoming presentations at the Association of Internet Researchers (AoIR) 2019 Conference, hosted by Queensland University of Technology, as well as at the Beijing Forum 2019, hosted by Peking University.

¹ Xin Dai, *Toward a Reputation State: The Social Credit System Project of China* (June 10, 2018). Available at SSRN: <https://ssrn.com/abstract=3193577>

² Yu-Jie Chen, Ching-Fu Lin, and Han-Wei Liu, “‘Rule of Trust’: The Power and Perils of China’s Social Credit Megaproject” (2018) 32:1 *Columbia Journal of Asian Law* 1-36.

law’ and finds in the law the source and the limits of its authority (a notion captured by the idea of ‘rule of law’). Both such views about the SCS, however, reveal mere fragments of a much more complex reality.

This paper presents an alternative view of China’s Social Credit System, understanding the SCS, rather than as a form of displacement of rule-of-law regimes, as a natural evolution of the ways in which the normative repertoires of liberal societies instantiate justice commitments under conditions of what Anthony Giddens characterizes as ‘high modernity’ — that is, conditions of extreme accentuation of the consequences of modernity.

By liberal societies the paper understands nothing more than those societies that hold a commitment to the values of personal autonomy, equality, and self-respect, and that recognize what John Rawls called the ‘fact of reasonable pluralism’ — that is, the fact that in any society with a liberal outlook there will always be a wide range of reasonable views people are entitled to hold. On the argument presented in this paper, there is nothing in the conceptualization of the SCS that cannot, as a matter of principle, be reconciled with such values. In fact, as the paper will argue, in conditions of high modernity, commitment to such values *requires* something like the Social Credit System to emerge.

That is so, in particular, due to a phenomenon inherent to high-modern societies, which the paper terms ‘the fact of articulation’ — and which can be divided into three aspects. The first is that the reflexive relationship abstract systems at the root of modern societies — scientific and technological systems in particular — hold with individual identity increasingly leads to the articulation of identity attributes in some more-or-less explicit material form.

Second, in conditions of high modernity, this growing materiality of individual identity progresses exponentially, in terms of its pace and extension, as well as of the depth of its entanglement with the *actual* human attributes it — however improperly — refers to. The third and final aspect has to do with the role that, in Western societies, unlike in China, private technological corporations have been allowed to play with little restraint by State authorities — namely, one of leveraging the first two aspects above to extend their dominance over the ways people develop their individual identities in the information environment.

As a fact, the articulation of identity attributes is inexorable, an unavoidable product of the working of large-scale abstract systems. One of the central characteristics of modern societies is indeed the emergence of such systems, which increase the complexities of contemporary life while *also* enabling people to navigate such complexities by bracketing off concerns they would otherwise have. It is the assurance provided by such systems that enables one to board an airplane, undergo a complex surgery, or perform a substantial financial transaction.

Yet, trust is not always present, and abstract systems, in their technological instantiations — from the network effects of social media platforms to the entrenched biases of artificial intelligence systems — constrain *regardless* of trust. As they do so, such systems encroach most fundamentally on the development of human subjectivity, making one’s identity attributes the domain

of someone else. This alienation of human subjectivity carried out by the technological instantiation of abstract systems is, in effect, the central problem of our time.

Inexorable though the fact of articulation is, however, its detrimental effects need not be — if only regulatory mechanisms are in place that safeguard the appropriate recognition of individual attributes. The SCS is one such mechanism, and certainly, so far, the most prominent one.

Interestingly, such regulatory mechanisms are a two-way route. On one hand, they are needed to protect individuals against the misrecognition of identity attributes by the instantiations of abstract systems. On the other, trust in abstract systems *itself* depends, in turn, on the appropriate articulation of attributes *of the actors in charge of such systems*. In effect, at a deeper level, trust is always trust *in people*. In understanding how central this reciprocal relationship between *identity* and *trust* is for the governance of contemporary societies, one can appreciate the importance of regulatory mechanisms, such as the SCS, that safeguard its proper development.

Now, in modern societies, the ultimate repository of trust has typically been the State. In stabilizing normative expectations concerning abstract systems — a role performed by the law — the State provides assurances that enable trust in such systems to be established. But this trust-validating role can only take place where the State and the law are *themselves* trusted — which in turn has increasingly been affected, if not determined by the works of other, private abstract systems.

Interestingly, then, the legitimacy of State power and the authority of law *also* depend on how regulatory mechanisms reign in private actors and ensure the appropriate articulation of identity attributes. To date, however, this regulatory role has fallen chiefly to traditional, rules-based institutional forms — typically through the laws of defamation and privacy, but also more generally through the recognition of individual rights. In high-modern societies, however, the fact of articulation calls for new, embedded regulatory approaches, capable of responding in kind and at appropriate speed to the growing materiality of identity processes.

Applied to the State, such mechanisms open new avenues for a certain democratization of identity processes at the root of State authority — moving beyond the precarious and unverifiable forms of trust and its validation that have so far characterized the exercise of authority in modern liberal societies. These new mechanisms are consistent with values that underpin Chinese society — values of harmony and *self-cultivation*, of correlativity between power, *merit* and self-respect — and which, the paper will argue, are not foreign to the political culture of Western liberal societies themselves.

It is in such a context that one needs to understand China's Social Credit System — i.e. as a much-needed response to the fact of articulation, and one whose complexity defies simplistic characterizations of the System as a rule-of-trust or rule-of-reputation antithesis to the rule of law. What the Social Credit System does is to institutionally reimagine a relationship — that between trust, identity *and* the law — which lies at the very heart of modern social processes.

And it does so not to supersede but to rejuvenate the role legal institutions have traditionally performed in validating trust and the identity claims on which trust is based.

In doing so, the Social Credit System responds to the central problem of justice of our time, posed by the fact of articulation — namely: how to instantiate the relationship between trust, identity and the law in institutional mechanisms that enable people, from individuals to the officials of abstract systems, to appropriately evaluate and articulate the truth about their attributes and the different forms of action on which these are based. Such a problem can be approached from a negative dimension and from positive ones. Negatively, it calls on public institutions to see to it that the fact of articulation, inexorable though it is, does not work to supplant individual identity. Positively, it requires the reorientation of the ways such institutions pursue *corrective* and *distributive justice* policies, and approach such policies as part of a wider, *normative* conception of justice.

From a *corrective justice* perspective, the Social Credit System enables the adoption of soft signaling mechanisms concerning one's attributes — for instance through an actual scoring system — instead of hard forms of punishment that historically have come at great cost to individuals and groups, and which are largely unjustified, barbaric even, at the present stage of civilization. From a *distributive justice* perspective, the SCS's soft signaling mechanisms can replace or be combined with traditional institutional mechanisms that seek to remedy social inequalities through the redistribution of resources. For example, the fact that one's credit score may take inequalities of opportunity into account enables a fairer assessment of merit and the equally fair attachment of public opportunities to one's achievements — from rewards regarding the pursuit of public goods to opportunities of access to public office.

This is a key aspect where value systems East-and-West may converge in a richer appreciation of liberal purposes. No society that truly values individual autonomy — and which, in doing so, necessarily holds free will as a possibility — can object to the view that, insofar as *public goods* are concerned, the achievement of such goods is to be praised and its neglect, reproved. Now, *what* goods are public is a separate question. It may be that, in an information age, the public good per excellence is knowledge, and that no liberal theory makes sense that does not recognize the liberating value of knowledge — which is also a central value in the Confucian philosophical project. That being the case, the reward of its achievement through the attachment of public opportunities to it — be these opportunities of political participation or opportunities of access to public office — cannot be objected to. A liberal theory of justice, in this sense, demands excellence. But excellence, in turn, requires appraisal.

All aspects above converge in such a theory of justice, which is one that can more broadly be characterized as *normative*. In it, while concerns with corrective and redistributive policies remain, these are reoriented within a focus on the articulation of judgements in the information environment more widely. Such a focus, in a way, can be seen to concern the truth of aspects of the world

in general, as reasons springing from such aspects — in their articulation — define people’s possibilities of action. It is in this sense that it can be said such a focus is a normative one.

But were public institutions to lend themselves to become the arbiters of truth in all respects, the scope of individual autonomy would shrink to non-existence. Rather, in attending to how reasons get articulated in the information environment, the core of such concerns by public institutions must be first and foremost with the articulation of identity attributes. And this is the specific and fundamental concern a system like the SCS responds to.

There is, indeed, no more fundamental a concern. It is only on the grounds of people’s understanding of themselves — from within the boundaries and the vantage point of human subjectivity — that any aspect of the world makes sense at all. As Paul Ricoeur would have it, “every understanding is self-understanding”. And it is thus on such forms of self-understanding as are enabled or disabled by reasons articulated in the information environment that any meaningful theory of justice in the 21st century must turn its attention to.

I.2. Assumptions and Non-Assumptions

This paper takes China’s Social Credit System as a point of departure for a broader argument concerning the interplay between the evaluation and articulation of individual attributes and ideas of *justice* more broadly. Accordingly, since the SCS is our point of departure, the fundamentals and evolution of the SCS need to be explained, and we will turn to these shortly. We try, however, not to be overzealous in doing so. On one hand, a number of most helpful introductions to the SCS already exist. Besides, while preconceptions and mischaracterizations *also* surely do exist, readers will most likely be familiar, at least in general lines, with the idea of the SCS as a reputational platform, based on the collection and evaluation of individual and institutional credit information in different areas.

On the other hand, the argument in the paper, for the most part, does not depend on any remarkably particular contours of the specific form of Social Credit System adopted in China. The central question, rather, concerns whether *a* SCS of sorts could — and maybe should — be adopted in liberal societies in general, to address certain pervasive and, to a large extent, perverse consequences of the ongoing, private-driven, heightening of modern social processes.

It might be, thus, more fitting to start our discussion by introducing a few key assumptions in our argument about the SCS as well as the liberal framework within which we will approach the topic. The first assumption, already alluded to above, is what John Rawls termed the fact of reasonable pluralism. Such an outlook, thus, is not conducive to ideas of uniformity, and nothing in the argument here presupposes that the SCS will be a tool of exclusion of reasonable options and interpretations of reality.

The fact of reasonable pluralism also entails that a framework for regulating the basic structure of society cannot fairly exclude any such options or

interpretations, comprehensive though they might be, from the realm of private choice. Yet, at the same time, such a framework cannot overlook the pervasive, cumulative effects of the *articulation* of private choice in the information environment. Indeed, it needs to recognize that, given what was above characterized as *the fact of articulation*, private choices themselves may work to the detriment of the plural forms of value that liberal societies so cherish — including values of order and stability that are essential for them, as well, to thrive.

We will later seek to further understand the fact of articulation in the context of modern social processes. But it may be worth to already depart from here with the suggestion that, while a liberal outlook does not admit of a pursuit of *uniformity* amongst different possibilities of choice (and does not accept, thus, the exclusion of minority views in favour of a “mainstream culture”), the fact of articulation does mean that a liberal framework needs, nevertheless, to pursue forms of *harmony* between the *articulation of reasons* reflected in private choices (for instance, by technological platforms) and the consequences of how such reasons get articulated. This simple conclusion, we believe, is of immense significance for contemporary liberal theory — and, in turn, is at the heart of forms of governance entailed in the SCS, for some metric of evaluation is of the essence of ascertaining harmony in how reasons get articulated.

Two further assumptions are more straightforward. The first is that, whereas the SCS, in its regulatory framework, embodies a series of principles and commitments — for instance, regarding possibilities of social participation in the development of the System — this paper takes such principles and commitments at their face value. In other words, it assumes the expression of such principles and commitments to be sincere. It would make no sense to evaluate a System which, as will be seen, seeks to build sincerity under an assumption that its founding documents are insincere. To the extent that such principles and commitments reflect an improvement in governance practices in China — and possibly in liberal societies in general — this is something that must count in the System’s favor.

The second assumption, here, is one of feasibility of the technical and political ambitions of the SCS. While there are no means available at this point to determine whether the System will, in fact, work, what the paper seeks to evaluate is the theoretical soundness of the System’s expressed justifications — and of broader justifications that could be brought to bear on its understanding and possible applicability in the context of modern liberal societies more broadly.

Now, let us turn to what the paper does *not* assume. The paper does not assume that the adoption of a Social Credit System necessarily needs to result in the ravaging and elimination of a private domain. Not does it assume the SCS needs to consist in a totalitarian system of surveillance and control.

Not that surveillance, as we will see, is something intrinsically reprehensible; but nor does the sheer existence of the SCS mean the accomplishment of the System’s goals must necessarily be based on extreme forms of surveillance and control. If anything, a certain widening of the scope of public reason might be

indeed witnessed in the context of the SCS. Such a widening, however — although justified by the fact of articulation — does not need to be limitless, and certainly it is not necessarily incompatible with the existence of a private domain.

Thus, it is important not to too readily surrender to views sustained in Western scholarship and media, according to which the SCS would amount to a “Orwellian nightmare”, a cybernetic mechanism of behavioral control where Big Brother and big data conspire to finally realize the totalitarian impulses of China’s autocratic leaders³. Preferable are views represented in moderate studies where the SCS is approached in more detached ways, as part of an emerging governance architecture in contemporary China, marked by more embedded technological efforts.⁴ These studies offer insights as to how digital technologies are transforming China’s governance landscape — at the same time that they more granularly illustrate the challenges in articulating a balance between the different forces at play in the information environment. Such are the challenges, as Mireille Hildebrandt notes, of how responding to the “massive normative impact” that more embedded forms of intelligence have in our everyday life “[w]ill change the mélange of positive and negative freedom that forms the backbone of constitutional democracy”.⁵

Such is also the challenge, more broadly, of responding to the fact of articulation — and, particularly, of doing so in the light of existing liberal theories of Justice —, which we hope this paper will help she lights on, taking the SCS as a point of departure.

II. Context, Origins & Contours

II.1. Evaluation and Freedom

That China’s Social Credit System introduces a framework for the evaluation of individual attributes is nothing new, nor is it, by definition, something inherently oppressive, anti-liberal. In Parts III and IV below, the paper considers more substantively why this is so, placing the SCS in the context of discussions on trust in modern liberal institutions and ideas of justice more generally. At a more immediate level, it is interesting to understand how the SCS’s practices of evaluation of individual attributes, rather than a form of

³ E.g. “Orwell’s Nightmare: China’s Social Credit System.” Asian Institute for Policy Studies, 28 February 2017. Stefan Brehm and Nicholas Loubere, “China’s dystopian social credit system is a harbinger of the global age of the algorithm”.

⁴ E.g. Vivienne Shue and Patricia Thornton, *Beyond Implicit Political Dichotomies and Linear Models of Change in China*, in Vivienne Shue and Patricia Thornton, *To Govern China: Evolving Practices of Power*, Cambridge University Press, 2017.

⁵ Mireille Hildebrandt, *A Vision of Ambient Law*

oppression, are a natural evolution of ordinary normative practices, of legal nature or otherwise.

In effect, evaluation is indissociable from normative life. Societies everywhere, from the most democratic to the most ruthlessly authoritarian, must tell good from bad in how they organize their social practices and design their institutions. Individuals cannot think and act according to any set of reasons if not by endorsing these upon reflection, on the grounds of their perceived worth. And as people reason upon and evaluate different forms of action, the value ascribed to such actions ultimately carries over to those who undertake them. People themselves, in the attributes that compose their identity, become a repository of the value of the things they do.

Insofar as we recognize the existence of free will, there can be nothing wrong with ascribing value — and responsibility — to human action and those who undertake it autonomously. Evaluation is indeed a requirement and an expected consequence of autonomous action. It is the denial of its exercise, not its pursuit, which is a violation of human freedom.

Nor is the institutional articulation of the value ascribed to human action, pervasive though it may be, itself an anti-liberal ideal. Quite the contrary, contemporary liberal institutions, like a judiciary operating under the rule of law, evolved precisely to preside over the most significant forms of ascription of value to people and their actions. Guilty or innocent, liable or not liable, bankrupt, impeached, are all declarations that normatively stabilize — and institutionalize — judgements of value of such a sort. And they are so in ways that vastly improve upon the idiosyncrasy, instability and informality of judgments carried out in earlier forms of society.

In stateless, band and village societies, such judgments would be carried out by actors — from Shamans to Chieftains — whose authority was ultimately constrained by public opinion. Adjudication in those settings would not be based on general principles of justice that one could find stably and explicitly articulated anywhere. There were just no such detached forms of reasoning to guide an impartial and independent adjudicator. In many cases, exercises of divination would work as a cloak for the reading of public culture and public sentiment. Weak kinship backing and a troubled history of relationships within the group were, more often than not, the chief motivation for a negative finding. It is a trace of more mature societies that law has evolved in them precisely to address deficiencies of such a sort.

Law does so by explicitly articulating people's normative expectations and lending stability to these. The publicity of law and of its forms of operation entails that, as a rule, law's application and its consequences are also articulated publicly. In enabling people to plan ahead and bind themselves through time, law lifts people from the troubles of a life of uncertainty and is thus an instrument of liberation. And it is so, even though, through its binding force, law *also* causes people to experience its consequences as it works as a filtering device for how people present themselves in the world.

Insofar as law is a genuine instrument of the human will, there is indeed nothing inherently oppressive in how it casts its light on people's image. That is

particularly so since a profoundly important part of law's operation relates to how it affects the public presentation of authority by state and non-state actors alike. And that attributes of actors in a position of authority are assembled and enacted under law's spotlights is an important element of what we understand as the rule of law.

It is in the context of these ideas that we should direct our attention to the experiment of unprecedented scale that China's Social Credit System consists in, and which epitomizes how the institutional apparatus of the law can operate as a filtration device for the public articulation of individual attributes.

Simply put, the SCS is intended to be a nation-wide platform for credit evaluation of individuals and organizations, encompassing all areas of societal life. Due to be fully implemented by 2020, the SCS is policy of the highest level, put forward by the State Council itself. Its defining traits are articulated, amidst other documents, in a Planning Outline from 2014 and a set of Opinions from 2016. The SCS's overarching ideal is the promotion of a "consciousness of sincerity" and trust, the low levels of which have been identified as an obstacle to social development in China.

China's SCS has been approached so far by Western media and literature through somewhat restricted lenses. In the prevailing accounts, the system has been reduced to a tool of authoritarian surveillance and social control, and a mechanism of ascription of individualized numerical scores, though, it will be seen below, the SCS is necessarily neither. While there surely are challenges concerning what the system sets out to achieve, these challenges, as the SCS's very purposes, are not new, nor are they extraneous to liberal societies.

SCS's most interesting challenges indeed concern the identification of the appropriate scope for state action — that is, of the justifiable boundaries between the legal system and social morality, and of the proper thresholds for state intervention without encroachment upon the space necessary for individual self-authorship. They concern, thus, the pursuit of a harmonious relationship between the public and individual spheres which belongs as much in political philosophy of Confucian orientation as in liberalism itself.

As relationships between the public and the private are considered, it is vitally important not to miss the large picture — that is, that the institutionalization of mechanisms for the evaluation and filtration of public image by the State does not exist in a vacuum. Rather, such mechanisms are deployed by an ecology of other actors in society as well. In fact, the institutional apparatus which is now evolving in China has *also* found its way in Western societies — albeit in less vast, systematized, and theorized forms — *precisely* in response to the actions pervasively undertaken by private actors.

In the United States, instruments such as the Fair Credit Reporting Act and the Equal Credit Opportunity Act have developed to address the often unjust and non-transparent ways filtration and classification mechanisms are deployed by private actors. There is, in this sense, a composite architecture that, though not entirely assimilated *by* the state — as it does not happen in China either — , reflects an intricate articulation between the institutional order and the hidden

normativity of decisions that have a pervasive impact on how people articulate their attributes and lead a life based on them.

To the extent that legal interventions make sense in principle — to address private abuses and generally perform functions which are proper to the law and the state — the real questions go beyond the naïve reductionism of presenting China as the Big Brother. The real, and much more interesting questions to be asked about the SCS are, on one hand, *procedural* ones, involving how decisions are made and institutionalized by the system. These involve due process concerns regarding possibilities of defense, appeal and rehabilitation — i.e. aspects of *corrective* justice — , but, unsuspectedly, they also involve *distributive* justice concerns. These are concerns with whether evaluation mechanisms in the system can be deployed to adjust for inequalities of opportunity of different kinds — introducing, thus, positive forms of algorithmic bias. Evaluation mechanisms would thus pursue a deeper correlation between personal effort and merit, reducing the illiberal sway of inherited natural and social endowments. In a society that respects free will, will is only as free as it is laid bare.

From a *substantive* dimension, there are, of course, deep privacy questions regarding the place of the public interest in data protection regimes. This paper, however, postpones such questions, assuming for the time being they can be positively addressed — and that they can be so in societies of different political orientations. Evaluation being intrinsic to how the very idea of law operates, merely extending the institutional apparatus of the state does not per se constitute an abuse. The apple of discord will always be whether such an extension is carried out in ways necessary to advance one or more legitimate interests. It is from the perspective of such interests that this paper will be approached.

Whereas privacy concerns relate to possibilities of individual self-authorship, there are issues of collective, political nature for which the SCS may work as a profoundly unique experience. These issues concern contributions that the SCS can make not only for the opening of China's political system but, more generally, for the conduct of public affairs in more liberal societies as well. Differently from what may appear at first sight, the SCS establishes the foundations for an extended type of democracy — one to be exercised not only in the episodic circumstances when one enters a voting booth, but in the daily experience of political life more broadly.

The Social Life of the Social Credit System

It is a ubiquitous comparison, from media outlets to the scholarly literature to technology-related conferences — and even some not quite: China's Social Credit System is like the “Nosedive” episode in the dark, and quintessentially British “Black Mirror” series. In that episode, Lacie Pound (a character played by Bryce Dallas Howard) goes through an ordeal of real-life obstacles posed by the frivolous use of ratings that people can freely ascribe to each other without any form of institutional constraint. Throughout the episode, Lacie is prevented

from boarding flights, obtaining a mortgage, and eventually finds herself in prison when her ratings drop to zero.

Yet, even as some of the consequences produced by SCS can mirror part of Lacie’s tragedy (e.g. people are right now being prevented from boarding airplanes due the inclusion of their names in blacklists — as it also happens, incidentally, in the US itself) the essence of the Black Mirror episode could not be more different from what China is setting out to achieve.

In fact, to a large extent it might be said that the Black Mirror episode is the *antithesis* of the SCS; that it is what one gets where no intervention by the State seeks to embed social values in a system of evaluation and filtration of individual attributes — systems, these, which will find their way into existence whether the state plays a role in creating them or not.

In his now 20-year-old “Code”, Lawrence Lessig foresaw a world where cyberspace would “become increasingly controlled and regulable *through digital identity technologies*”. Lessig’s book is somewhat of a well-worn reference in the field,⁶ yet his ideas in this regard could not have been more prescient. For him, cyberspace’s architecture would degenerate into something very different from its founding myth as a space of freedom and decentralization. And the problem, Lessig warned, was not with the government per se stepping in, as those who first wrote on the topic had argued. “We have every reason to believe”, he noted, “that cyberspace, left to itself, will not fulfill the promise of freedom. Left to itself, cyberspace will become a perfect tool of control”. The thrust of Lessig’s prediction can now be observed much beyond the restricted confines of the Internet.

The great paradox then is the following for the critics of China’s Social Credit System: if identity is at the core of concerns with regulability and freedom, and if private actors are the chief cause of concern, how can we address such concerns without the kind of institutional guarantees that only the law can provide? It seems unavoidable that a Social Credit System of sorts — and one as encompassing as the nature of problems we face — would and ought to unfold.

Data Protection Authorities might do the job to some extent in guarding our privacy, but the issues here — issues concerning the fairness of judgements made by the algorithmic systems of corporations that secretly run our lives — are not issues that DPAs can truly address. Even though the problem here is in part a privacy problem, it simply isn’t just or chiefly a privacy problem. The problem, as Lessig also foresaw, is a *constitutional one*.

It is a problem that transcends in much the Black Mirror idea of a frivolous system of reciprocal rating. It is felt everywhere a formidable group of omniscient corporations — from financial institutions to credit rating agencies to unprecedentedly powerful Internet intermediaries — define, as the oracles of a Greek tragedy, the individual images and lives we will go on to have.

⁶ It is also a work on the law that says surprisingly little about its nature, leaving the apparently unimportant topic to an appendix.

Data Protection Principles such as data minimization, proportionality, legitimacy are only as powerful as the shape of the aims and stories in whose context they are read and individual will, exercised. Yet, for all the justifiable hatred reflected in recent technological backlash, the Constitution of such goals and stories is far from something people can autonomously define. Surely there is a need to go beyond data protection principles, to write a new Constitution for how identity attributes are ascribed, for how the individual image people present is evaluated and filtered according to criteria people have under their control.

Such a Constitution, in turn, to be made effective, cannot rely exclusively on Command and Control mechanisms or on the form of rules articulated in human-readable language. For, would that be enough to compete with the plethora of different regulatory modalities deployed by our digital overlords? The scholarly literature has proposed the use of “embedded” or “architectural” regulatory modalities able to respond to technological forms of normativity found in the information environment around us — of “Ambient Law”, in response to “Ambient Intelligence”. And it is fundamental, indeed, to have a significant deal of institutional or, more specifically, *constitutional* imagination in thinking how to address the deep challenges affecting individual identity.

Which is to say that policies currently in place in China, from Internet filtering to the Social Credit System, should not be seen as an exercise in illiberal forms of censorship and oppression. Rather, China may be at the forefront of policies that Western, self-proclaimed liberal societies may have no choice but adopting as well — beyond the institutional forms that they *already* adopt. Whether such systems are illiberal and oppressive or not needs to be assessed by inquiring into whether they seek to contribute to or undermine individual autonomy. This, in turn, can only be examined from the perspective of contemporary approaches to personal autonomy, which see personal autonomy as a situated value, whose fulfilment is only possible within the context of social forms of good.

Is China’s SCS an illiberal platform of oppression? There are two points worth being addressed in this regard. The first point, which we consider in this section, concerns whether the SCS, in its conception, recognizes individual rights and the importance of redress against violations, as well as whether it recognizes the value of individual participation in the construction of the system. These perspectives relate to both substance and procedure at individual and collective level. Participation in the construction of the system has an unequivocal political dimension, as it relates to the conduct of public affairs. But there are deeper political contributions of the system, embedded in a larger conception of justice, transcending usual distributive concerns, to which we turn in Part IV.

First, it is worth understanding the bottom-up approach of history system. It has undergone 20 years since the term “social credit” was first referenced as a national issue in the document issued by the State Council that aiming for clearing up the “triangular debts chain” in nationwide in April 1990.⁷ The SCS thereafter has

⁷ After China began to implement the reform and open policy, provinces, cities, autonomous regions, and various enterprises were linked together by two types of debt chains-linear and

experienced three development phases. The initial exploration was marked by the emergence of credit intermediation agencies such as the China Credit Management Co. Ltd⁸ and Shanghai Fareast Credit Rating Co., Ltd.⁹, the first generation of professional social credit rating organizations in China. Chinese government and state-owned corporations subsequently began to develop the credit rating system in order to control the risks of corporate financial lending. Many credit guarantee agencies were also set up for supporting small firms under the government support since 1994.

From 1999 to 2003, the SCS construction stepped into the pilot phase. In 1999, the first national research project entitled the “Construct National Credit Management System” (CNCMS project) was unveiled by the Chinese Academy of Social Science (CASS), the top think tank in China. Nevertheless, it is surprisingly that the project was funded by a female entrepreneur called Huang Yunwen who first worked in a private export trading company and then started her own business in chip research in Shenzhen. Multiple inspirational business trips to the U.S. made her realize the importance of credit in developing business and economy. Based on a detailed fieldwork in the U.S., she drafted a detailed report and submitted it to the prime minister Zhu Rongji in July 1999. Her report was reviewed by Zhu Rongji immediately and an official joint meeting among six department leaders in the State Council was triggered only three days later. Huang’s report successfully put the social credit construction on the Party’s agenda. Only two months later, prime minister Zhu Rongji approved the ShangHai Credit Ltd. to launch a pilot social credit project and initiated a plan to explore the feasibility of credit information sharing among the related departments in the State Council. Inspired by this successful petition, Huang funded the CNCMS project researchers to extensively visit the U.S NACM, Creditreform, Graydon, etc. to learn leading global credit rating practices. In 2000 January, the team submitted the second report to introduce the international practices and lessons to prime minister Zhu Rongji. In 2002 and 2003, the first two ground breaking books—*principles of social credit system construction* and *modern credit study*, also funded by Huang, were released. In 2002, the Ministry of Education also listed social credit management as a major for college education. Huang Yunwen was therefore praised as “the first pioneer of the social credit construction in China”. Now she served as a consultant in the credit association in Shenzhen.¹⁰

triangular. Triangular debt means a debt default affecting two parties as a result of a third party being unable or unwilling to repay a loan. In 1990s, many Chinese companies were experiencing increasing pressure to collect loan repayments. As a response to address the severe triangle debt problem, the State Council launched on a leading group for clearing up the triangle debt and began to pay attention to the social credit of the whole society and Chinese market. See Roderick MacFarquhar ed., *The Politics of China: The Eras of Mao and Deng*, Second Edition, Cambridge University Press, 1997, p.490; Gucheng Li, *A Glossary of Political Terms of the People’s Republic of China*, ; Fang Yunyu, Triangle debt a growing problem: MIIT, *Global Times*, 2012-08-30, <http://www.globaltimes.cn/content/729937.shtml>; http://www.china.com.cn/zhuanti2005/txt/2002-12/20/content_5249879.htm, last accessed on October 1, 2018.

⁸ <http://www.ccx.com.cn/index.php?m=content&c=index&a=lists&catid=9>, last accessed on October 1, 2018.

⁹ http://www.sfecr.com/en/ydgc/index_192.aspx, last accessed on October 1, 2018

¹⁰ Li Gang, Huang Yunwen: Pushing Forward the Construction of Social Credit System, *China Daily*, 2012-10-30, <http://cpc.people.com.cn/n/2012/1030/c83083-19431601.html>; Chinese Broadcast Web, Huang Yunwen: The First Person for Social Credit Construction in China,

As a measure to boost China’s market economy and a response to moral crisis in politics, the SCS construction entered into a period of rapid development after 2003. The 16th National Congress of the Communist Party of China proposed “rectify and standardize the order of the market economy and establish a social credit system compatible with a modern market economy”¹¹. A series of “top-level design”¹² documents aiming for boosting the construction of the social credit system were subsequently released (Table 1), prioritized under the leadership of Xi Jinping and Li Keqiang. Several pilot projects were also launched since 2003¹³. One of the most critical and detailed plans is the Planning Outline for the Construction of a Social Credit System (2014-2020)¹⁴. In that document, the State Council of the PRC expresses its intentions of establishing a “social credit system” (SCS) in both public and private sectors and, with this, to achieve a “culture of sincerity” that overcomes the current state of affairs. This state of affairs, as conveyed in the Planning Document, is one in which the “social consciousness of sincerity” is low, agreements are not honoured and trust is not kept as it should. The plan, in turn, is to make use of a credit investigation system set to cover the entire society and credit information exchange among all sectors—at the same time seeing to it that “mechanisms to protect the rights and interests of credit information subjects” are in place (id.) (a point to which we turn again shortly).

Enactment Time	Document Title	Critical Content
November 2002	Full text of Jiang Zemin's Report at 16th Party Congress	rectify and standardize the order of the market economy and establish a social credit system compatible with a modern market economy
October 2003	Decision of the Central Committee of the Communist Party of China on Issues concerning the Improvement of the Socialist Market Economy	enhance the business start-ups and innovations of enterprises and citizens to form a sound credit foundation and market order
March 2007	Opinions of the General Office of the State Council Concerning the Construction of SCS	It is urgent to accelerate the building of the social credit system and provide guiding ideology, targets and basic principles for building the SCS

<http://finance.sina.com.cn/roll/20120831/084613010179.shtml>, 2012-08-31, last accessed on 2018-09-29.

¹¹ Full text of Jiang Zemin's Report at 16th Party Congress on Nov 8, 2002, <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429125.html>, last accessed on 2018-09-29.

¹² Top level design documents are aiming for providing guidance and central coordination from the Party perspective.

¹³ Since August 2018, there are authorized a total number of 262 cities and districts implemented the SCS and there are four provinces (Hebei, Hubei, Zhejiang, Shanghai) issued local regulations on social credit. See Credit China, https://www.creditchina.gov.cn/zhengcefagui/xinyonglifa/201711/t20171122_96702.html; <https://creditcity.creditchina.gov.cn/>, last accessed on October 1, 2018.

¹⁴ <https://chinacopyrightandmedia.wordpress.com/2014/06/14/planning-outline-for-the-construction-of-a-social-credit-system-2014-2020/>, last accessed on 2018-09-29.

October 2011	Decision of the Party's Seventh Session of the Sixth Plenary	Taking the credit construction as the salient issue and strengthen sincerity in government affairs, commercial integrity, societal integrity and judicial credibility
December 2012	Regulation on the Administration of Credit Investigation Industry	General principles; Credit Reporting Agencies; Rules for Credit Reporting Business; Disputes and Complaints; Financial Credit Information Basic Database; Regulatory Supervision; Legal Liability; Supplementary Provisions
July 2014	Planning Outline for the SCS Construction (2004-2020)	By 2020, basically having established a fundamental legal framework and a standard system for social credit; basically having completed a credit investigation system covering the entire society with credit information and resource sharing; basically having completed credit supervision and management systems, having a relatively mature credit service market system, and giving plenty of autonomy to mechanisms to encourage keeping trust and punish breaking trust.

Table 1. Critical Top-Level Design Documents issued by CCP and the State Council 2002-2014; Source: Collected by authors

One fundamental aspect that most accounts of the SCS so far fail to pay heed to is the social dimension of the planned system. While recognizing the “organizational, guiding, promoting and demonstration roles of the government”, the outline also speaks – as its very first principle – of a “joint construction [of the system] with society”, of a focus on “encouraging and mustering social forces”, “broadening participation”, “moving forward together”, and “shap[ing] joint forces for social credit construction” (id.). Indeed, besides the development of governmental and commercial sincerity, the plan focuses on “comprehensively mov[ing] forward the construction of social sincerity” as the basis for building the entire social credit system, “giv[ing] prominence to the fundamental role of ‘natural persons’ in the construction of a social credit system”, which in turn requires the “establish[ment] and perfection of credit records for natural persons in economic and social life” (id.).

On the same note, a comprehensive set of Opinions recently issued by the State Council affirms that, while the government is expected to play a leading role in the construction of the SCS, it must also “give reign to the forces from

all sides”, “stimulate the common participation and joint governance of the entire society”, and “realize the effective convergence of government leadership and social action” (State Council, 2016). Hence, while, at first sight, the system may seem to reflect a comprehensive conception of political justice (Rawls, 2005), that “sincerity and promise-keeping ... become common value pursuits and behavioural norms for the entire society” (State Council, id.) may, in the end, be but a cornerstone of the social basis of self-respect (Rawls, 1999).

It is true also, however, that, socially embedded though the system may be, its social uses may have detrimental outcomes to natural persons and organizations. This is evident in the language of deterrence and retribution for breach of trust utilized in the planning outline, and in the establishment of “rewarded reporting systems” through which natural persons can communicate breaches of the system of trust. In effect, dozens of PRC government departments have signed different Memorandums of Cooperation regarding the imposition of joint disciplinary measures, in different respects, to persons and corporations identified as dishonest (People’s Daily Online, 2016; China Economics, 2016). Measures taken by the relevant departments have already led to significant limitations to dishonest subjects – with, for instance, millions of passengers prevented from boarding a plane or a train, billions of dollars from being declared as investments, and dozens of thousands people from holding positions as legal representatives, directors and deputies of corporations (China Economics, 2016).

The SCS does have the intent of being an internally coherent system from which to evaluate individual identity. The State Council’s Opinions, as if in reflection of the famous quote by Martin Luther King Jr, speaks of the imposition of “restrictions everywhere” ensuing from the “breach of trust anywhere”. It is unclear, however, if and to what extent such restrictions will eventually result in a unified credit score being assigned to all citizens. The Planning Outline itself defines as parts of its intended mechanisms to “[e]stablish uniform social credit coding systems for natural persons, legal persons and other organizations”, as well as to “[p]erfect corresponding structures and standards, and promote the broad use of uniform social credit codes in economic and social activities” (State Council, 2014).

The literature, however, is discordant as to whether these mechanisms will be reflected in a single, nation-wide number, pointing instead to pilot initiatives currently being undertaken at the city level, as well as to the fact that nation-wide mechanisms so far have limited themselves to the creation of blacklists (for disciplinary measures) and redlists (for measures of incentive). The adoption of blacklists, as noted before, is surely not a singularity of the Chinese legal system. Rather, these are found in Western societies as well, from Megan’s Law sex offenders registries to no-fly lists for suspected terrorists. In China, they have so far been deployed for the most part in cases of repeated contraventions of a court order.

Yet, beyond the focus on blacklists, or even the media obsession with unified credit scores, it is worth noting that the SCS also has as one of its focus — and a particularly important one — the adoption of measures of incentive. In effect,

the Planning Outline, speaks of “perfect[ing] operational mechanisms for the social credit system *with rewards as the focus point*”. In 2016, the State Council issued a guiding opinion¹⁵ to accelerate the implementation of the joint mechanisms to incentivize compliance behavior of natural and legal persons. It established six mechanisms to reward and encourage the trust behavior at central level. For instance, it provides “green track” and “tolerant approval” procedures¹⁶ to speed up the approval progress of specific administrative licenses and examinations for citizens who have kept positive social credit records for three continuous years. As for private actors, the guiding opinion also allows the relative regulators reduce the frequency of regulatory investigations by applying big data analytics to categorize different credit compliance levels among business entities and encourage financial institutes to provide trustworthy entities with discounts for specific financial loans. Moreover, through relying and collaborating with social organizations such as industry associations, the guiding opinion encourages them to release and promote the trustworthy companies on their websites and government websites. In practice, the National Development and Reform Commission, State Administration of Taxation, and General Administration of Customs (GAC) have led more than 50 departments to sign three joint rewarding cooperation memorandums to incentivize the A-class taxpayers, excellent youth volunteers and advanced corporations verified by the GAC by forming favorable and rewarding policies¹⁷. At local levels, various preferential rewarding policies were invented as strong incentives for trustworthy behaviors. For example, citizens in Nanjing with good social credit records are freely accessible to public libraries and museums. They also get preferential prices or discounts on public transportation and even allowed to pay the medical bills after receiving complete services.¹⁸ The logic behind those measures is cultivating a culture and awareness for Chinese citizens and corporations that credit is a fundamental quality in modern Chinese society and reputation is an intangible asset of market economy.

Rights and Mechanisms of Redress

Firstly, the government tried to establish a complete and systematic cycle for credit governance. It proposed an “ex ante promise-keeping, interim classified regulation and ex post joint reward and punishment” mechanism by setting up the “National Credit Information Sharing Platform” as the data backbone of the SCS in 2015. Credit China

¹⁵ The State Council issued the Guiding Opinions on Establishing and Improving the System of Joint Incentive for Credit Compliance and Joint Punishment for Dishonesty and Accelerating the Social Credit System Construction in May 2016. See http://www.gov.cn/zhengce/content/2016-06/12/content_5081222.htm, last accessed on September 30, 2018.

¹⁶ “tolerant approval” refers to a special and favorable administrative license approval procedure. It allows the administrative department to give certain tolerance to applicants when they could not provide required and complete application non-critical materials for a given specific application. The qualified citizens would be allowed to provide the supplement materials by mail or email after receiving the approval instead of submitting them twice personally. See “Tolerant Approval Is a Positive Administrative Reform”, The Beijing News, May 14.

¹⁷ Xu Shaoshi, Enhancing Construction of SCS joint rewarding and punishment mechanism, China Credit, January 19, 2017, http://www.creditsd.gov.cn/21.news.detail.dhtml?news_id=60061, last accessed on September 30, 2018.

¹⁸ Zhang Qiaosu, The Nanjing Credit Compliance Card: A Good Reward for the Trustworthy Person, Xinhua Net, http://m.xinhuanet.com/2018-07/27/c_1123186475.htm, last accessed on October 2, 2018.

portal was also operated in the same year to provide credit inquiry service and publish related government information to ensure the citizens' right to know¹⁹. The webpage is very user-friendly, and it only takes less than one minute to get accurate query result for all types of legal persons. Citizens can also receive free credit information report after registration and verification personal identities on the website of the Credit Reference Center of the People's Bank of China²⁰.

Secondly, there are many formal and informal participation channels for stake holders to be involved in the decision-making process from central and local levels to strengthen the right to participate for Chinese citizens. For instance, in the drafting process of the Regulation on the Administrative of Credit Investigation Industry, the State Council Legislative Affairs Office (LAO) released the first and second bill drafts to solicit opinions from the public on their e-participation website in 2009 and 2013²¹. All citizens were able to submit comments via e-participation platform of the State Council, write emails or mail the comment letters to the LAO within the notice-and-comment period. Many articles including the right to be forgotten or consent requirement of credit information collection or collection forbidden of sensitive personal data have aroused public attention²² and several official responses were released openly and timely²³. At city level, the trend of embracing public participation in local legislation for recent years also allows the citizens, corporations and social organizations' comments to be incorporated into the legislative decision-making process. For instance, legislators in Shanghai conducted extensive and substantial legislative investigations, consulting meetings and workshops to the local national peoples' deputies and social organizations. They also provided disability-friendly website for public commenting and deploying popular social media such as Wechat to foster effective public participation²⁴. Many articles including the definition of credit information, publication of dishonesty list, and credit repair service were therefore formulated influenced by the public opinion²⁵.

Thirdly, there exists multiple effective non-judicial and judicial redress mechanisms to provide remedies and reparation for the citizens and legal persons. Apart from

¹⁹ Credit China, <https://creditchina.gov.cn/>, last accessed on October 1, 2018.

²⁰ The Service Platform of Personal Credit Information, <https://ipcrs.pbccrc.org.cn/>, last accessed on October 2, 2018.

²¹ The first and the second draft of the Regulation on the Administrative of Credit Investigation Industry was released online at http://www.gov.cn/gzdt/2011-07/22/content_1911822.htm; http://www.gov.cn/jrzq/2009-10/12/content_1437069.htm, last accessed on October 1, 2018.

²² Hainan Economic News, Hotly Debate from the Public on the Legislative Draft of the Regulation on the Administrative of Credit Investigation Industry, <http://finance.ifeng.com/bank/special/zhengxintx/zzyh/20091015/1337423.shtml>, last accessed on 09-30-2018.

²³ The Head of the People's Bank of China's Response to Media Queries, http://www.gov.cn/gzdt/2013-12/09/content_2545018.htm, last accessed on October 2, 2018; The Spokesperson of the Legislative Affairs Office of the State Council Responded to Media Queries, <http://legal.people.com.cn/n/2013/0130/c42510-20371593.html>, last accessed on October 2, 2018.

²⁴ The disabled-friendly website of Shanghai Municipal Development & Reform Commission, <http://www.shdrc.gov.cn/gk/zcjd/zcwjld/27774.htm>;

²⁵ Liu Kun, Why the Leaders of the National Development and Reform Commission Made Such A Positive Comments on Social Credit Legislation of Shanghai? Shanghai Observer, November 15, 2016.

ensuring the right to social credit information and the right to participate as noted above, Chinese citizens and legal persons are also entitled to object to decisions made by the social credit institutes, the right to repair social credit and erasing social credit records after five years. For instance, Article 25 of the Regulation on the Administration of Credit Investigation Industry stipulated that data subject has the right to raise disputes and requests for correction if he or she finds the gathered, stored or distributed data by credit reporting agencies is erroneous or missing. Upon receiving the objection, credit reporting agencies or data providers are required to label the disputed data in accordance with CRRA's requirements, verify and resolve the disputes within 20 business days by providing a written notification. The Credit Reference Center of the People's Bank of China also subsequently issued the Procedure on Personal Social Credit Dispute Resolution on Financial Credit Information Basic Database to specify and institutionalize the procedure of dispute resolution on credit information for citizens²⁶. Taking Ningxia People's Bank of China as an example, there were 88 disputes on financial credit information reported and resolved in a timely manner in 2017²⁷. It is also worth to note that the Opinions on Improving Norms on Protection of Property Rights issued by the CPC Central Committee and the State Council states that the governments at all levels "shall bear legal and economic liabilities for breaching of contract behaviors" in the investor-government disputes. Recently, in order to institutionalize and implement the Opinion, the Supreme People's Court is committed to provide judicial remedies for local and foreign investors' losses in a situation that local governments breaking promises to give favorable investment policies as a result of the replacement of leadership²⁸.

In addition to the non-judicial redress mechanisms, all data subjects are entitled to take legal actions and demand legal and equitable remedies. Based on a thorough examination on the website of the China Judgements Online, the largest court judgements database in the world, it can be found that data subjects adopted two approaches to resolve the disputes on social credit information. There are 10 administrative litigations against credit reporting agencies such as the local Housing Fund Management Center and the provincial Administration of Quality Supervision, Inspection and Quarantine filed by individuals from 2015 to 2017. Surprisingly, there are 2763 civil lawsuits (Figure 1) filed by individuals against social credit institutes or financial institutes regarding incorrect credit records under the Civil Law and the Regulation on the Administration of Credit Investigation Industry, etc. from 2010 to 2018. It can be seen from those cases that judicial remedies have played as a major redress mechanism for data subjects in the SCS. In the typical judicial opinion of Xiao Gen v. The An Yuan County Branch of the Agricultural Bank of China (2016), the court stated that citizens have the right to seek correction of credit information and individual's credit reputation is protected under the legal framework of the right of reputation. Thus, the judicial decision supported the plaintiff's claim and the An Yuan

²⁶ the Procedure on Personal Social Credit Dispute Resolution of Financial Credit Information Basic Database, Credit Reference Center of the People's Bank of China, <http://www.pbccrc.org.cn/zxzx/kefzx/201401/d364653267254254aaca0a8d20db65dd.shtml>, last accessed on October 1, 2018.

²⁷ The Problems and Suggestions on Resolutions of Personal Disputes on Credit Information, China Credit Journal, September 19, 2018.

²⁸ Correction Dishonesty of Government Affairs Should Depend on Powerful Judicial Remedies, Credit China, January 9, 2018.

County Branch of the Agricultural Bank of China were required to delete Xiao Gen's overdue adverse credit record within 15 days after the decision was effective.²⁹

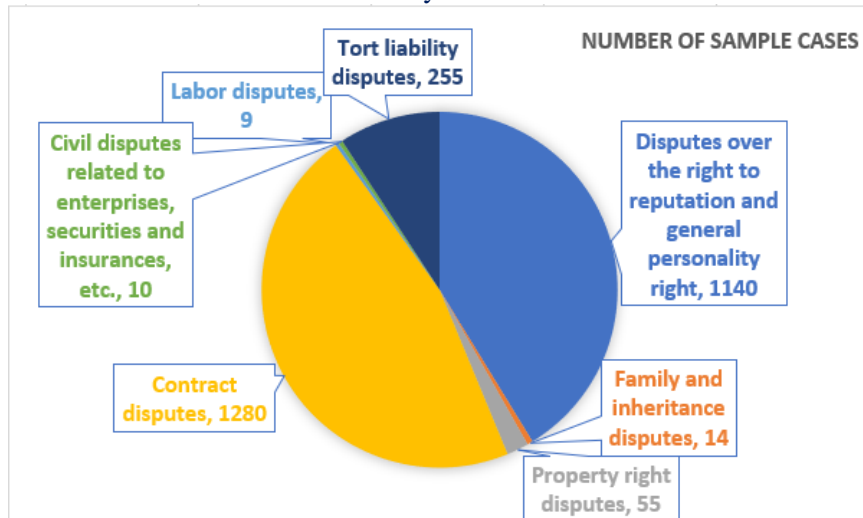


Figure 1. Types of civil lawsuits concerning social credit system (2010-2018) (source: China Judgements Online)

In sum, however it may turn out in practice, at least in concept one should not infer that the SCS is a sheer system of surveillance of citizens and corporations with the aim of perpetuating top-down, authoritarian Party rationale. As seen above, the SCS in reality presents more granularity in its desiderata. It envisions possibilities of social participation in its development, recognizes individual rights and creates possibilities of redress, and, beyond the sheer pursuit of discipline, it seeks to encourage and sanction desirable forms of behavior. All these, we must recall, are not ideas which are extraneous to the legal system of liberal societies around the world. The institutional innovation here lies in the means, in the ambition to redefine the constitutional forms through which we so far have sought to regulate individual identity.

Rather than delivering this Constitution to the hands of large-scale corporations, as it so far has happened in Western societies, or seeking to concentrate its development exclusively in the hands of the state (as it has been widely assumed by observers to be the chief end of China's Social Credit System), there is an inherently liberal and, why not say, democratic aspiration in a system that recognizes the sovereignty of the people in the regulation of attributes based on which their individual and social lives will be lived. Whether the Planning Outline and Opinions simply pay lip service to these ideals remains to be seen. Yet, as the system develops, it will be able itself to be

²⁹ Xiao Gen v. The An Yuan County Branch of the Agricultural Bank of China (2016), <http://wenshu.court.gov.cn/content/content?DocID=81e120bb-1ff0-42ef-91da-63d44639394b&Keyword=%E4%B8%AD%E5%9B%BD%E5%86%9C%E4%B8%9A%E9%93%B6%E8%A1%8C%E8%82%A1%E4%BB%BD%E6%9C%89%E9%99%90%E5%85%AC%E5%8F%B8%E5%AE%89%E8%BF%9C%E5%8E%BF%E6%94%AF%E8%A1%8C>, last accessed on October 2, 2018.

evaluated in accordance with the commitments it sets out to pursue. In the context of an opening China, this is surely not a trait observers of the system should withhold praise to.

III. Trust, Reputation, and the Constitution of Modernity

III.1. Social Credit and Constitutional Constraints

A laudable trait of the Social Credit System is its aim to encompass the State itself. Evaluation in the system extends to public officials and works, inclusively, as a criterion to determine party membership. In effect, the Planning Outline affirms that sincerity in government affairs is the very “*crux* of the social credit system’s construction”, “sincerity of all sorts of governmental actors play[ing] an important model and guidance role for the construction of sincerity among other social subjects”. Specific tasks defined by the outline in this regard — and instantiated in a lengthy document dividing tasks between different governmental bodies — are the following: i) “persisting in administration according to the law”; ii) “giving rein to the demonstration role of government in sincerity construction”; iii) “accelerating the construction of government trust-keeping and commitment mechanisms”; and iv) “strengthening sincerity management and education among civil servants”.

The last of such tasks calls on the different PRC bodies to “establish civil servant sincerity dossiers, enter civil servants’ personal credit information concerning reports on events, records of sincerity and cleanliness in government affairs, the results of annual evaluations, acts violating laws, disciplines and contract into their files, and make civil servants’ sincerity records into an important basis for assessment, employment and rewards” (State Council, 2014). In its Opinions, the State Council very clearly extends the disciplinary mechanisms of restriction on qualifications to hold positions to prospective or current civil servants *and Party members* (State Council, 2016).

Whether such mechanisms will escalate all the way to high-level party hierarchy remains, as all things in the SCS, to be seen. Detractors may argue that the system risks being used to keep low-cadre members of the Party in line, or to persecute political opponents. But why should we evaluate a system exclusively for its perversion? Seen from such lenses, any system could be a readily pervertible one, no matter how high it stood, what values it pursued. A Constitution is only as good or as bad as its text, not one’s flights from it.

Now, it might seem like a wild flight of imagination to call the SCS’s planning a Constitution. Formally, at least, it surely isn’t one. The SCS is not a solemn, hierarchically sovereign norm, but rather a set of policy documents — thoughtfully articulated though these might be. It determines no normative membership in a formal system of rules. Materially, however, the SCS extends

the institutional normative order in China in ways that are, if not constitutional, at least quasi-constitutional in vision and scope.

Scope-wise, the SCS demarcates the realm of legitimate action by state authorities. In this sense, it can be said to embody the bounding qualities Constitutions typically embody — those guarantees, articulated in the constitutional text, that power won't be exercised beyond normatively circumscribed domains. Yet, there is something fundamentally different in the ways the SCS articulates such guarantees — something which is at the same time novel *and* of the essence of Constitutional authority.

Constitutional authority typically rests on a claim to legitimacy of a certain kind — namely, a claim to legitimate constitutional status. Such a claim is introduced by a certain institutional normative order and recognized by those who live under such an order. Ultimately, however, what gets recognized are the legitimacy *attributes* of the institutional order and of the officials normatively empowered within it.

How are such attributes articulated? Historically, this articulation has followed a loose and somewhat invisible formulation. Hence, social contract arguments have been varyingly characterized as a matter of logical presupposition, or as part of a thought experiment entertained in societies of a certain kind. The workings of the social contract, and of the legitimacy attributes it instantiates, have never been explicitly articulated. And this has been one of the greatest problems of Constitutional authority. How do we make sure we *do* know enough about the attributes of those we invest with authority? Or how do we navigate moments of rupture of the legitimacy upon which constitutional authority rests?

Notice that the very existence of a legal order necessarily depends on a certain factual support, on a threshold not being crossed below which the obedience to such an order gives way to lack of conformity. This is so even under theories, such as Hans Kelsen's or HLA Hart's, for which the identification of valid law does not depend on any extra-legal considerations. Even under these theories, a legal system indeed depends, for its existence, on a certain factual support, a social basis upon which its practice may legitimately endure. Such a factual support may be more or less intense, and the reasons for its existence may vary dramatically. Remove it, however — which is always a matter of threshold — , and the whole architecture of legal normativity comes tumbling down.

What the SCS provides, in turn, in ways no existing form of institutional normativity can provide, is an architecture of gradation that, on one hand, cushions against the risk that cumulative normative disappointment may lead to abrupt institutional collapse and, on the other hand, solidifies the recognition afforded to the claims based on which constitutional authority is bestowed.

Indeed, through the deployment of reputational mechanisms, the SCS works as a proxy for legitimacy attributes. In doing so, it enables the ongoing visualization and evaluation of such attributes, strengthening the fabric of the constitutional compact, and delivering pervasive assurances that state authorities will not stray away from the constituted order. The kind of

institutional stability these assurances engender is of the essence of constitutional authority — and a much-desired staple of Chinese politics.

III.2. Reimagining the Modern Paradigm

The Social Credit System, thus, performs a task of constitutional nature. It sets boundaries within which state authority will be recognized and exercised. It has, in this sense, a certain *bounding* quality that Constitutions typically have. Now, such a bounding quality, though often taken to be the defining trait of a constitution, is only part of what constitutions are about.

The defining value of a constitution, in fact, lies not in how a constitution constrains, but in how it conceives of and indeed constitutes an original order upon which life in a given society will be lived. Constitutions, have, so to say, a certain *imaginative* quality.

There is no more liberating a trait of a Constitution, nor a more powerful one. The constitutional orders that emerged in the classical modern period parted with a past of superstition and tradition. They were premised on the imagining of a future based on the values of human reason and progress. Such orders have been decisive engines of emancipation, giving an ever-growing range of people the power to expect a future better than their existing experiences.

Yet, such orders were also based on a technological paradigm that came to define human existence in not entirely anticipated ways. The challenge of our time is to attend to such a shift of paradigms, and to the regulatory constraints it imposes upon our emancipatory possibilities.

In a way, it might appear there is nothing new in the idea that human development may be constrained by technological processes. Concerns with the effects of technology upon society are far from a recent, turn-of-the-century phenomenon. They go back at least as far as Plato, and have traveled through the ages to the very heart of the critique of modernity developed by Max Weber, already in the early days of the twentieth century.

What more aptly characterizes our time, however, is an *exponential intensification* of such processes.³⁰ It is such an intensification that has led Western societies to transition, from the constitutional orders established in the modern period, towards a novel institutional paradigm — and one yet to be fully understood.

As Boaventura de Sousa Santos has ably explained, one of the reasons for such a transition has been a growing asymmetry between our capacity for action and our capacity for prediction.

The emergence of legal modernity in Western societies was, in effect, founded upon new institutional arrangements, which, under the limited authority of a Nation State, provided security of expectations and, with it, new emancipatory possibilities. These new possibilities stemmed from scientific and technological

³⁰ Giddens (“Rather than entering a period of post-modernity, we are moving into one in which the consequences of modernity are becoming more radicalised and universalised than before”. Pace of change / scope of change)

processes that found space and incentives to thrive under the new arrangements. Yet, while modern institutional orders harboured scientific and technological processes, some burdened such processes with virtually no constraints. It was, in effect, in Western societies, where such processes operated under the least constraints, that they experienced not only the greatest intensification, but were left at liberty to compete with and displace important individual and social values.

It is in this meaningful sense that we can understand the paradigmatic crisis described by Santos, where the lack of predictability ensuing from technological processes threatens to engulf the very existence of legal institutions and the values they sustain — and where, rather than a source of emancipation, science and technology turn into — predominantly a source of constraint, with law itself becoming a surrogate of techno-scientific processes. In modern legal orders, for Santos, emancipation collapses into regulation. In his words:

“The collapse of emancipation into regulation signals, above all, that we are witnessing a paradigmatic crisis of science. Given the role played by law for the past two hundred years, however, I believe we are also witnessing a paradigmatic crisis of law. As I said, law became a second-rate rationalizer of social life. It embodies a kind of surrogate scientificization of society. Law represents thus the closest we get — at least for the time being — to the full scientificization of society that could only be brought about by modern science itself. But, in order to perform this function, modern law had to surrender to the cognitive-instrumental rationality of modern science and become scientific itself.

Therefore, the paradigmatic crisis of modern science carries with itself the paradigmatic crisis of modern law. To conceive of the present crisis of modern science and modern law as a paradigmatic crisis implies the belief that the solution of the crisis as defined by modernity — as a dialectical tension between regulation and emancipation — is no longer viable and that we are, therefore, entering a social, cultural, and epistemological transition toward a new paradigm”.

Such a paradigmatic shift away from legal modernity may appear, at first site, to stem from nowhere but the *intensification* of scientific and technological processes that took place at the turn of the millennium. While such an intensification may appear to be purely quantitative matter, at some point quantitative increase produces qualitative change,³¹ as it has here — with unequivocal political connotation.

Recent shifts in public attitude in Western societies towards technology are a sign of such transformations. Whereas the twentieth century had been

³¹ See Carl Schmitt, *The Concept of the Political* (noting that “[t]he often quoted sentence of quantity transforming into quality has a thoroughly political meaning. It is an expression of the recognition that from every domain the point of the political is reached and with it a qualitative new intensity of human groupings”).

characterized by a quasi-religious fascination with technology,³² the new century rapidly grew aware of the perils of accelerating technological change. If then technology appeared to be, as Schmitt described it, an objective, neutral domain serving everyone—indeed, a place of “refuge ... from the inextricable problems of all other domains”—now there can be no doubts technology is obviously far from neutral.

III.3. The Fact of Articulation Revisited

We are painfully aware that, in its design, in its use plans, technology reflects value-choices that are deeply intertwined with the wider moral, legal, political and otherwise normative universes that technology, increasingly often, displaces.

Take the Internet, for instance, in whose liberating potential people so fundamentally believed in its early days; that primordial Internet, seen as a new commons of the mind, where voices of all sort would ‘glom on’ and ‘route around’ the walled gardens that constrained earlier modes of cultural production, from the TV to CompuServe. Instead of cocooning in siloed communities or being plagued by problems of information overload — let alone by the hatred, misinformation, and triviality of all sorts — people would develop peer-produced mechanisms of filtration to overcome all such problems of their own accord. From the government, it was expected little more than to protect the institutions of collective action spontaneously emerging from the information environment.

Most symptomatic of the regulatory optimism of those early days was the blank check given to Internet platforms through regimes of immunity from any sort of responsibility regarding content they held.

We all know how the story has ended so far. That profusion of voices that a frictionless Internet was to empower at no cost joined up in a siren song. Unchecked informational behemoths emerged to undermine the authority of the Nation State, the development of political processes, and, ultimately, the very idea of truth. Contemporary information and communication technologies, which came so full of promises, and around which diametrically opposite passions and interests seemed to coalesce, would thus go on to give place to stark political conflicts of their own.

What came to characterize our time however, was not the sheer existence of such conflicts, nor was the realization that they exist — for what a naïve particularity that would be! Rather, what came to characterize our time was the intensification of technological processes brought about by information-based technologies and, now we might add, a desperate need to find an answer to the existential dangers posed by such an intensification.

In effect, the new millennium started as the beginning of a rational movement to seek to undo the potential materialization of such dangers — from

³² See Carl Schmitt, *The Age of Neutralizations and Depoliticization*, characterizing the technological as the central domain of thought of the 20th century.

environmental cataclysm to, more relevantly here, the economic alienation of the ways we define the very boundaries of ourselves, or, to put it nicely, of our practices of construction and recognition of human subjectivity.

The temporal and spatial intensity of large-scale, private technological processes means that such processes minutely intrude upon every aspect of people's lives, shaping the practices through which identity attributes are presented, negotiated and recognized, and thus the ways in which what is true or false about people's identities gets articulated and stabilized.³³ Private technological processes not only undermine the construction of human subjectivity. Given the absence of true structures of participation and accountability, and the heteronomous economic interests they pursue, such processes make this construction the work of *someone else*.

The irony, then, is that, whereas modernity entailed the recognition of a self it sought to emancipate with the help of technology, technology responded with a politics of recognition of its own—one founded on bias and selective reinforcement mechanisms of all kinds, on the misrepresentation and reconfiguration of people's attributes and narratives of self-identification. Technology responded, in other words, with a politics of *misrecognition*.

[[The question concerning a politics of recognition is a thorny one, to which we turn shortly. In summary, it involves doubts as to the appropriateness that the state come to make decisions concerning identity attributes of its citizens. The concerns raised by the SCS [...]

If technology is to remain the emancipatory force it had been at the outset of modernity, it must be redeployed to weaken the sway of private overlords over our knowledge processes in general and, more pertinently to our discussions here, over our narratives of self-identification. We must consider and address the ways such narratives operate as an anchor of our status in public life — something that ultimately also concerns the definition of the boundaries of the polity itself.

Preserving the modern project thus requires that the boundaries of human subjectivity and, with it, that of the polity be reshaped *in the light of public reason*. It should be the public institutional order of the law of the state, not the invisible algorithms of private platforms, what ultimately determines the legitimacy of criteria according to which identity attributes are articulated and recognized. The divergence, of course, lies in how to go about all of this.

III.4. Trust, Reputation and Modern Law

In China, where the State has taken on board the call to reimagine its institutional role, an ideal of *trust* has been laid out as the foundation for the new policies that underpin the Social Credit System. Such a reimagined role is, however, way less radical than it may appear at first sight — and, indeed, less radical than it has so appeared to scholarly voices critical and hospitable to the new policies alike.

³³ Role of technology in elections

Recent scholarly literature has, in effect, characterized the Social Credit System as something that either goes against the ideal of rule of law — that is, as a new model of “rule of trust” that contradicts the rule of law — or as something that reflects an entire new paradigm of existence of the State — that is, as a “Reputation State”, which thus has the necessary consequence of superseding the ideal of rule of law.

Yet, it might be noted that the engendering of mechanisms of trust is neither antithetical to the ideal of rule of law, nor constitutes a new paradigm of existence of the State. Rather, at the very origins of modernity, and of the emergence of the Nation-State, we will find the idea of trust.

As Giddens has extensively demonstrated, mechanisms of trust hold a reflexive relationship with processes of disembeddedness³⁴ from time and space at the origin of modern social systems — at once enabling such processes and binding us through them.³⁵

Consider the abstract, large-scale systems of expertise that form the backbone of contemporary societies — from global financial markets, to networks of knowledge and scientific discovery, to the infinite reconfigurations of the technological environments within which people’s lives are increasingly lived. For all the pervasiveness of such systems in their lives, only every now and then do people interact with the inner realms of such systems. They do so through the occasional encounter with what Giddens calls the “access points”, that is, the “individuals who in specific contexts “represent”” such systems. Think Mark Zuckerberg’s testimony before the US congress (or the one never taken before the British parliament).

Such opportunities of disclosure, although “peculiarly consequential”,³⁶ are episodic. For most of their ordinary, daily lives, people are detached from the depths, the inner working of abstract systems. The operation of such systems depends on a multitude of variables outside the bounds of individual knowledge and control. Yet everywhere people live under the normative grip of abstract systems.

This is so not necessarily because such system’s reasons are taken as binding. For the most part, they operate implicitly. Their content is neither known nor understood. When one performs a financial transaction, boards an airplane, consumes a simple soft drink bought from a vending machine, a phenomenal range of choices have been made which ultimately determine how one acts. They determine so because they enable one to decisively suspend concerns she would otherwise have. People “draw[...] assurance from the presumed reliability or integrity” of abstract systems. They have confidence in the “correctness of the abstract principles” on which they are based. In other words, people *trust* such systems — and trust provides us with a *good reason* for acting upon them.

³⁴ By disembedding I mean the “lifting out” of social relations from local contexts of interaction and their restructuring across indefinite spans of time-space

³⁵ “We should reformulate the question...”

³⁶ Giddens, COM

Trust, however, is not a purely private affair. Processes of time-space distanciation leading to the emergence of the modern nation-state and modern law were also, once in place, reflexively furthered *by* the state and the law, and by the interaction between both and modern technological processes. It was indeed a complex relationship between the emancipatory potentials of modern technology and the stability of expectations provided by modern law that led to the enlargement and densification of the legal, technological and cultural processes that formed the bonds and the bounds of modern nation-states.³⁷

The modern nation-state and modern law have, in effect, been at the core of processes of public reflexivity from where trust emerges, as both a repository and a multiplier of trust-based assurances. Expert systems that underpin complex financial transactions — ensuring that funds are transferred as agreed, that bonds and securities are recognized and honoured — could not have developed without the foundations of trust provided by the law of the state. Capitalism itself, the central driver of modern technological progress, would not have emerged without these same foundations. Nor would have complex technological systems enveloped the world without liability arrangements apportioned by the law of the state — or the *tout court* exclusion of liability in warranted circumstances.

Law provides trust-based assurances that normative expectations will be recognized and fulfilled. It settles and stabilizes such expectations. In doing so — and more to the point in this enquiry on Social Credit — law goes on to define how *people's identities themselves* get stabilized and settled.

Each new right that the law recognizes, that a court upholds becomes a small star in the constellation of attributes that give human subjectivity its normative contours — and on the grounds of which new attributes will be shaped and lived. One becomes a parent, husband, owes a certain amount, legitimately claims title to an academic degree. One cannot lawfully misrepresent the truths that concern himself, nor can he publicly besmirch other people's attributes. Law, in a way, *is* reputation — and a “reputation state”, thus, is as new an idea as a state based on a “rule of trust” is. Neither idea, in other words, is new at all.

Trust and reputation, simply put, are not mere add-ons to the ideal of rule of law. Nor are they something that contradicts such an ideal or that happens at its margins. Rather, both reflexively inhere at the heart of the notion of legality and are as much a condition as they are a corollary of it. In effect, while the relationship between *trust* and the law holds a reflexive connection with the rise of modernity — at the same time as a condition for the emergence of the modern nation-state *and* as a phenomenon that found profound reinforcement in

³⁷ “Modern societies (nation-states), in some respects at any rate, have a clearly defined boundedness. But all such societies are also interwoven with ties and connections which crosscut the sociopolitical system of the state and the cultural order of the “nation.” Virtually no pre-modern societies were as clearly bounded as modern nation-states”. Giddens. See also, Beteille (noting how “[i]n the West, the democratic and industrial revolutions emerged together, reinforcing each other and slowly and steadily transforming the whole of society”).

such an emergence—the relationship between *reputation* and the law appears as a particular dimension of that of trust — and a rather special one.

This reflexive connection between trust and the law holds in more ways than the one just noted — that is, that law, in stabilizing normative expectations, also stabilizes identity attributes. A *second* way such an interaction takes place is indirect. Law enables the development of abstract systems, which will themselves play a monumental role in how individual identity unfolds. As Giddens explains in *Modernity and Self-Identity*, “[t]he reflexive project of the self, which consists in the sustaining of coherent, yet continuously revised, biographical narratives, takes place in the context of multiple choice as filtered through abstract systems”.³⁸ Thus, as he later put in *The Consequences of Modernity*, “[p]ersonal life and the social ties it involves are deeply intertwined with the most far-reaching of abstract systems”.³⁹ One only needs to think of the profound ways relationships of friendship and sexual intimacy have been transformed by contemporary technological platforms to understand the role performed by abstract systems in the formation of the self.⁴⁰

At the core of these transformations, in turn, lie questions concerning the *propriety* of the different ways in which such platforms, as expressions of abstract systems, can shape and constrain the development of human subjectivity — in particular the decisions they make regarding people’s attributes. When, how, and at what levels such decisions should be of concern to State law are questions of profound importance with regard to China’s Social Credit System — and ones to which we turn again shortly.⁴¹

More immediately, these questions bring us to a *third* and hugely significant way in which law and reputation relate to each other. This is a reflexive way *par excellence*. On one hand, as just noted, law may need to step in to evaluate the propriety of decisions concerning people’s attributes, taken by technological platforms. The task performed by law here, since it concerns the recognition and stabilization of such attributes, falls within the first kind of relationships (between law and reputation) examined above. On the other hand — and this is the specific point here — in performing such a task, law raises questions about the legitimacy of constraints emerging from abstract systems. It prompts further enquiry into the origins of trust in such systems. And what in turn can be found is that, ultimately, trust in abstract systems ensues from attributes of their access points—as does, in certain cases, membership in them.

³⁸ Giddens, Anthony. *Modernity and Self-Identity: Self and Society in the Late Modern Age*. Wiley. Kindle Edition

³⁹ Giddens, Anthony. *The Consequences of Modernity*. Wiley. Kindle Edition.

⁴⁰ Giddens does not share the views above in this regard. The work he sees abstract systems doing here is one of disembedding people from their personal relationships — and friendship and sexual intimacy emerging as responses to abstract systems, that is, as mechanisms of re-embedding. *Ibid* (1612-1676, CoM). This might be the case if one interprets contemporary platforms as leading only to a shallowing of personal attachments, though that would be a rather simplistic understanding of such platforms.

⁴¹ Reference to sections below

This point is somewhat downplayed by Giddens. He does recognize, as we have briefly alluded to above,⁴² that contacts with “access points”, which represent the expertise of abstract systems, are “peculiarly consequential in modern societies” — and that they “carry a reminder that it is flesh-and-blood people ... who are [such system’s] operators”. Yet, for Giddens, the “*real* repository of trust is in the system itself”. Trust on a personal level becomes rather a project to be “worked at” through an “opening out of the individual to the other”, something to be “won” through “demonstrable warmth and openness” — but which is apparently guided by a different logic from the cold and detached one through which abstract systems command trust.

Giddens may not be entirely correct in this regard. The way individual attributes get recognized and articulated plays, in fact, an enormous role in how abstract systems unfold. A distinction can perhaps be made between *acting* within *material* instantiations of abstract systems, and truly *trusting* such systems qua *abstract* systems. The former may command provisional notions of trust, but not of the fully formed, reflexive kind Giddens has in mind. It is trust, one might say, which has not been probed, enquired into—or, if it has, has not resulted in modification of behavior accordingly. Other reasons may prevail over any form of reasons given by — or, more typically, presumed from — abstract systems. The consumption of a can of soft drink (to go back to the example at the beginning of this section) does not happen only because one trusts the system that produces the drink. Often, it happens *even where one does not*.

Sure, the person needs to trust at least that the drink will not kill her instantly! — but she is fully conscious of the threats cumulative consumption poses in the long run, by increasing chances of obesity, heart disease and cancer. Most importantly, she is aware the manufacturer has introduced the product into the market *notwithstanding* such risks — and, if the person is a bit more savvy, she will also know that, at many instances, the manufacturer might even have lobbied for the product to be introduced or kept in the market. In effect, a well-educated, reflexive person knows this pattern can be found across the board. From cigarette manufacturing to the design of technological platforms, products are not engineered just to be dependable. They are engineered, above all, for people to be *dependent* on them.

In all firmly entrenched communities of a certain size one finds forces of a similar kind at play. Whether instantiated on social networking platforms or in political units such as cities and States, such communities are marked by strong ‘switching costs’⁴³ — it is difficult, in other words, for people to exit those communities without missing important dimensions of their lives.⁴⁴ That people opt to stay, however, does not mean they *trust* the abstract systems that underpin such communities at a given time.

⁴² Refer + include footnotes above

⁴³ Explain power law +/vis Zipf’s law

⁴⁴ Allude to Sassen, on megacities.

For example, users may stay on Facebook while profoundly disagreeing with the values its officials and “privacy” experts reflect in the platform. Black-American and French-Muslim citizens may continue to live in the US and in France although profoundly mistrusting the values the political community embeds in the law enforcement system or more generally in the liberal legal culture of those countries.⁴⁵ In both examples, community membership will be accompanied by *mistrust* in abstract systems — those of *technology* and of *the law* — which people find oppressive, tyrannical even.

This leads us to two points of fundamental importance for our discussion on the Social Credit System. The first is the following. In cases where people live under the abstract systems of a community they mistrust, this mistrust ultimately stems from *attributes of people* — the people who form the governing or otherwise dominant culture in that community, and who set the standards under which others will lead their lives. As women who work in a chauvinistic corporate culture know too well, there is no chauvinistic culture without the chauvinist themselves.

The second point is the flipside of the first. Differently from ordinary cases of less reflexive action within material instantiations of abstract systems, where action may take place even under the shadow of mistrust — the soft drink example above —, central cases of community membership *are* marked by deeper, reflexive forms of trust in the abstract systems that define the community. This, in turn, not only requires trust in the *attributes of the access points* of such systems but also calls for mechanisms to enable the ongoing evaluation of such attributes. *Without such mechanisms* — which are of the very essence of the idea of Social Credit — *membership remains an illusion*.

To recap: in modern societies, reputation and the law of the State interact in three distinctive ways. First, law provides a normative framework for the recognition and stabilization of identity attributes, as part of law’s more general role in stabilizing people’s normative expectations. Second, law enables the development of complex, large-scale abstract systems; it provides the normative glue for processes of disembeddedness from time and space at the origin of modern social systems. These processes, in turn, fundamentally redefine people’s notions of the self — and thus the very bounds from within which abstract systems, and trust in them, will continue to emerge. Third, the shaping of human subjectivity by abstract systems does not always take place under conditions of trust. More often than not, law needs to settle cases where the material instantiation of abstract systems results in the improper articulation of people’s attributes. What the focus on such heteronomous sources of constraint reveals is how people often act under such systems *despite* their mistrust in them. It reveals how membership in communities defined by such

⁴⁵ Noting zipf’s laws in Europe / how economic integration make a difference / but also the role played by law in economic integration.

systems — including that of law itself — is often at best a peripheral case of membership, rather than membership in a central-case sense of the term.

It reveals, above all, how trust in abstract systems that constrain people's attributes depends, in turn, on the attributes of the very sources of such constraints — that is, ultimately, on people themselves. Or at least that will be the case while abstract systems have not fully dissolved the boundaries of human subjectivity as the ultimate repository of reason, knowledge and trust. As one of these authors has argued elsewhere, this task of preserving the boundaries of the self is, in fact, the central task of the law.

In modern societies, thus, the realm concerning the mobilizing of narratives of self-identification⁴⁶ is the very focal point from where all forms of reflexivity emerge. The idea of modernity holds sway in a spiral of meaning whereby people make sense of themselves in the light of the systems they make—a strange loop that all along emerges from within the boundaries of human subjectivity. From within such boundaries, yet circumscribing them, also emerge the institutions of law.⁴⁷ Without the law, no modern sense of self and no reliable, complex, identity-regarding system of technical expertise could have unfolded.

Given the fact of articulation, however, law no longer suffices as a regulatory modality. It is necessary, as noted before, to step down from law's formal structure, to regulate at more embedded, substantive levels. That is precisely what the Social Credit System seeks to accomplish, but which in turn raises questions of its own. Is this sort of engagement compatible with the role of the state in late-modern liberal societies? In other words: in the context of the prevalent political cultures of such societies, is the Social Credit System *just*?

IV. Justice & Social Credit

To answer the question concerning the justice of China's Social Credit System — and to do so within a *liberal* conception of justice — we must aim is to understand the role played by the state and the law in regulating how people's attributes get evaluated and articulated in contemporary liberal societies — assuming the SCS would or could be applied to such societies. Our enquiry thus starts by focusing on the foundations of a key liberal institution, namely: legal rights. More precisely, it starts with an idea at the foundations of the affirmation of dignity by legal rights, in general, and human rights, in particular—namely, *the idea of recognition*.⁴⁸ There is no better place to start if we are to take into account how *law* and *identity attributes* interact in the context liberal societies — including in the light of conceptual challenges posed by this interaction.

⁴⁶ Giddens

⁴⁷ “emergence of new mechanisms of self-identity which are shaped by – yet also shape – the institutions of modernity” Giddens, Anthony. *Modernity and Self-Identity: Self and Society in the Late Modern Age* (p. 2). Wiley. Kindle Edition.

⁴⁸ Douzinas

From the perspective of contemporary liberal politics, the idea of recognition, just like the Social Credit System that entails it, does not come without its own share of controversies — not least because of the rootedness of this idea in the Hegelian philosophical system.⁴⁹ Yet, also like the Social Credit System, given the tremendous pressures the constitution of the self faces in contemporary societies, it is an idea that no liberal political system can afford not to pay full heed to.

Understanding what recognition entails, what levels and forms of institutional assurance it requires in contemporary liberal societies vis the fact of articulation, and how such assurances invite us to reconsider the boundaries of liberal discourses is the aim of the pages that follow. Ideas on which such boundaries rest vary remarkably between different theories of justice of liberal orientation. But two such ideas — namely, those of *public reason* and of *political neutrality* — are particularly relevant, as they reflect the scope and define the permeability of liberal discourses. They are thus useful for considering when and at what levels individual attributes can enter the domain of liberal politics. We come back to them soon, but first let us turn to recognition.

IV.1. Recognition: Formal and Substantive

Recognition, Costas Douzinas explains, is what gives completeness to human subjectivity. A self that initially emerges as purely a creature of desire, and that develops in opposition to another self, can only overcome this dialectic of adversity by recognizing the other as a person — a relationship that needs to unfold in mutual terms,⁵⁰ which is premised in mutual self-understanding “through the understanding of the other”.⁵¹

Mutual recognition and identification, in turn, call for some measure of *institutional* articulation, which is the role the law performs (which it needs to do more and more under the pressure of what we have identified above as the fact of articulation). Institutional articulation happens most typically through the affirmation of rights. “The main function of rights”, Douzinas notes, “is to help establish one part of the recognition necessary for the constitution of a full self. The imperative of rights is to be a person and to respect others as persons”.

⁴⁹ Charles Taylor, *Hegel*, Chapter XIV, on the difficulty of classifying Hegel within the liberal-conservative spectrum.

⁵⁰ “Now the other is accepted both in her identity and her difference from self and, as a result, self discovers himself as integrally related to the other. The other’s recognition and desire allows self to see himself reflected in another self and create a nexus of links and dependencies that affect all aspects of both selves. Recognition works if it is mutual. I must be recognized by someone I recognize as human; I must reciprocally know myself in another. When full mutual recognition operates, the two selves stand in a relationship in which the self-understanding of each passes through the other and the relationship of each to the other depends on the self’s self-relation”.

⁵¹ Thus why Douzinas affirms that recognition “is both a phenomenology of identity and a theory of knowledge. I can only become a certain type of person, if I recognize in the other the characteristics of that type which are then reflected back onto me”.

Rights, in this sense, “form a repertory of acceptable and available forms of recognition in a particular society and age, *a collection of ways in which institutions are prepared to acknowledge publicly some and not other aspects of identity*”.

This public acknowledgement of individual attributes — and their relative stabilization in a series of practices and discourses — is precisely what we have been referring to as *reputation*.⁵²

From the perspective of modern, rights-based discourses, one may understand, with Douzinas, that such an acknowledgement happens in law’s usual terms — that is, those of generality and universality.⁵³ As it recognizes legal personality, law abstracts people from their individual circumstances and focuses on the elements of commonality between them.⁵⁴ In this sense, rights are no more than “gambits” in the dialogue of recognition. Incapable of reflecting thicker aspects of human subjectivity, they are destined to remain the “result of inadequate or defective recognition”.

Because recognition is destined to be always inadequate or defective, people continuously press further in their demands for being seen for who they are. More than purely as a dialogue, thus, recognition may be characterized, drawing on Axel Honneth, as a “struggle”. On one hand, there is an endless proliferation of rights in attention to ever wider aspects of individual and group attributes. On the other hand, all new rights that emerge, and the detached legal personalities they compose, find themselves condemned to drift perpetually in a separate plane, from which they are never truly able to escape: that of *legality*.

Rights are, thus, ever formal, never substantive. Yet there is value in that they be like this. Although recognition does entail appropriate levels of attention to the particularities of human subjectivity, it should not result in a fractal unfolding of normative institutions in the light of proliferating claims. It is only in keeping within *some* level of generality that law can engender *any* measure of stability and, with it, trust.

Focusing on elements of commonality might ultimately mean that, to some extent at least, unlike cases will be treated alike, joined up by what unites them, rather than by what separates them. But this is part of the division of responsibilities that characterizes modern legal systems based on the rule of law — where the discretion entailed by official action is constrained by the stable generalizations of the law.⁵⁵ As Frederick Schauer observes: “the idea of generality, *putting official action in larger categories* rather than relying on the

⁵² China’s draft proposals to amend the personality rights part of the Civil Code refers to reputation, similarly, as “the social assessment of civil entities’ character, prestige, talent, credit, and so forth”. Under the draft amendments, rights granted to civil entities extend to natural persons.

⁵³ “The law can only deal with universalities and generalities. ... Human rights and wrongs operate in the gap between the universal and the generalizable. But most elements of identity remain immersed in personal history and background”

⁵⁴ It is here, as well, that we can situate Hannah Arendt’s idea of a right to have rights—that right which ensues from the abstract nakedness of being human.

⁵⁵ Schauer, p.

individual discretion of individual officials, links closely with that understanding of law that generations of rule of law rhetoric have attempted to capture”.

It is important to bear these points in mind as we think of China’s Social Credit System. It is so since, in the SCS, recognition steps down from the general, institutional domain of the law and expresses itself also through the ascription of reputational categories and their articulation in technological systems.

The real threat the SCS faces, in this sense, is one of descending into the madness of minutely fragmented modes of ordering ensuing from the proliferation of categories and of reasons leading to their ascription. The state of anxiety and instability the materialization of such a threat could lead to would be the antithesis itself of the modern, bounded idea of trust traditionally enabled by modern law⁵⁶ — and which China now expects and hopes to achieve through the System.

The value of general, institutional categories, as guarantees of stability and official constraint, becomes particularly salient if we consider the more nuanced ways in which the idea of rule of law expresses itself in China — as a theoretically and constitutionally affirmed ideal,⁵⁷ though at the same time one marked by still maturing levels of practical implementation and by a complex coexistence with the overarching principle of ‘party leadership’.⁵⁸

Yet, perhaps such a coexistence does not need to be so challenging. As Schauer notes with uncanny pertinence, “the party of generality is also the party of community”.⁵⁹

Schauer’s point is that generality, in addition to promoting stability and rule-of law, plays a vital *community-building* role. Thus, another reason, and a rather powerful one, for striving towards general categories would be that the pursuit of an exhaustively articulated system of identity governance could undermine

⁵⁶ Though: “personal life becomes attenuated and bereft of firm reference points: there is a turning inward toward human subjectivity, and meaning and stability are sought in the inner self”; “Modern institutions are seen to have taken over large areas of social life and drained them of the meaningful content they once had. The private sphere is thus left weakened and amorphous, even though many of life’s prime satisfactions are to be found there because the world of “instrumental reason” is intrinsically limited in terms of the values it can realise”. Giddens, Anthony. *The Consequences of Modernity*. Wiley. Kindle Edition. Giddens, Anthony. *The Consequences of Modernity*. Wiley. Kindle Edition.

⁵⁷ See Albert Chen, 123-126 (noting, as characteristics of the Chinese legal system, the theoretical distinction between law and policy in Chinese scholarly literature, the constitutional instantiation of such a distinction in principles of ‘ruling the country according to law’ and ‘constructing a socialist rule-of-law state’, and the constitutional partition of law-making competences amongst a well-defined and hierarchically-arranged set of organs).

⁵⁸ Ibid, 62-63 (noting the central role played by ‘party leadership’ not only as the fundamental law of China’s constitutional convention but indeed as one of the ‘Four Basic Principles’ that form the ‘guiding ideology of the constitution’). + amendment, art. 1 of the Constitution

⁵⁹ Schauer’s ‘party of generality’ is the European Union, but the fit was just too perfect to avoid the wordplay.

not only the expression of human individuality, but the building of community itself.

IV.2. Harmony and Generality

To recognize the merits of articulating categories in general terms, however, is one thing. To affirm them as pre-emptive reasons for striving towards ever higher forms of generality—and to do so even where there are other, valid reasons for acting otherwise is another thing altogether.

What says such moral goals that depend on the law for their realization are always or necessarily better realized by rules that seek to articulate them, as reasons, in the most general terms? It might rather be that, in certain contexts, people would be better off complying with more *specific* reasons than with general ones.⁶⁰ In such cases, where law's task is more aptly realized through the employment of specific reasons, it is on such reasons that the authority of law will rest.⁶¹ As Joseph Raz explains,

“[a]uthorities are legitimate only *if they facilitate conformity with reason*. The law's task, put abstractly, is to *secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized*”.⁶²

What must dictate the form of a legal rule is thus the identification of such moral goals and the appropriateness of the rule to facilitate conformity with them — rather than any a priori “vagueness principle”.⁶³ That generality does serve important goals in certain respects does not mean it should always be pursued at its highest form.

In the context of the Social Credit System, it is easy to appreciate that excesses in generality in the framing of attribute categories could lead to the *tout court* elimination of forms of action that differed from the standard

⁶⁰ See Raz, speaking of low or medium level generalizations, and affirming their value for community building in the light of pluralism. (“More importantly, the practice allows the creation of a pluralistic culture. For it enables people to unite in support of some ‘low or medium level’ generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc. I am not suggesting that the differences in the foundations do not lead to differences in practice. The point is that an orderly community can exist only if it shares many practices, and that in all modern pluralistic societies a great measure of toleration of vastly differing outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct). Raz, Joseph. *The Morality of Freedom* (Clarendon Paperbacks) (p. 58)

⁶¹ In other words, it is authority itself, not generality or the reasons for it, which offers pre-emptive reasons for action—that is, reasons that “pre-empt [other,] background reasons that might militate against the authoritative directives”. Joseph Raz. *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (p. 141). Oxford University Press.

⁶² Raz, 136-137

⁶³ Note on vagueness

category, to the detriment of individual autonomy and liberal purposes in general, including ideas of equal dignity and self-respect.

Schauer is aware of such consequences, but strangely seems to condone them as natural collaterals of community-building general rules. He notes that communities exist once members “have relinquished their separate identities” and “variations among people, place, groups, and events” have been “flatten[ed]” or “dampen[ed]”, to the “discomfort” of some, “but to the benefit of the larger group”. Communities, in Schauer’s view, seem to be unavoidably marked by what he chillingly calls “*the suppression of local variation*”.

But isn’t that just the sort of criticism one would imagine being directed at the Social Credit System — namely, that it is an inexorable vehicle for the promotion of *uniformity* at the expense of human individuality?

Ironically, it is *harmony*, not *uniformity*, the value that underpins not only the SCS, but Chinese culture more broadly. And though harmony and uniformity are very different ideas, it is telling that Schauer conflates both in his defense of broad-brush categorization by legal rules.⁶⁴ We turn back to the idea of harmony in more detail in ... as we ..., in the light of Stephen Angle’s works. A simple conceptual point can be advanced here, however. The point is that, insofar as the articulation of reasons is concerned, harmony obtains “between the *circumstances* [under which a concept is appropriately applied] and the *consequences* of application of the concepts we ought to employ”.⁶⁵

In the case of people’s attributes, harmony is defeated when improper articulation of reasons concerning people’s attributes (the circumstances) end up in communication of a defective kind — and, thus, in misrecognition (the consequences). There is a failure, so to say, in the articulation of reasons concerning the circumstances of human subjectivity. And as the boundaries of such circumstances lie at the reflexive foundations of other abstract systems — since all such systems, in the forms of trust they entail, can only *make sense* from within the vantage point of human subjectivity — the consequences of such a failure could not be more remarkable.

If generality is to be affirmed as a value, a conception of it as an overarching drive towards uniformity and suppression of diversity must be abandoned. An entirely different proposition, however, and one we are happy to take further with Schauer, is that “[e]ach of us is a collection of attributes, but we become members of communities *when some of those attributes are shared and others suppressed*”. Such a proposition in turn raises the question of *what kinds* of individual attributes can be of *public concern* in modern liberal societies; what kinds of attributes can enter the public realm or, as it is often put, the *scope of public reason*.

There can be no doubts, though, that, even in liberal societies, *some* individual attributes *will* enter the scope of public reason. In fact, defining *what* attributes pass from the private into the public realm is one of the central questions of modern liberal politics. It is so as this passage may mean that, to some extent at

⁶⁴ 289

⁶⁵ Robert Brandom. *Articulating Reasons* (Kindle Location 835). Kindle Edition.

least, decisions on reasons and actions concerning such attributes will be subtracted from the individuals such attributes refer to and tendered to institutions that represent the public interest.

This happens, for example, when the criminal law seeks to deter *wrongdoers* or when tax law targets particular individuals (e.g. *smokers*) with disincentives of economic nature. In both such cases, the passage of attributes into the scope of public reason results in a negative sanction and signals limits to individual autonomy.

Yet, the passage of an attribute into the scope of public reason may result, rather, in *incentives* being granted for one's acting towards the development of an attribute — for example, the attribute of being an author, an inventor, in sum a *creator* of a certain kind. Or it may result simply in an institutional attempt to reverse the fact, already familiar to us, that private structures of dominance often articulated in the information environment may encroach upon people's attributes, hindering their possibilities of autonomously developing such attributes at all — for example, the attribute of having *knowledge* of a certain fact or a relationship of *friendship* of a certain kind. In both such cases, the passage of an attribute into the public domain does not restrict individual autonomy, but rather means that public institutions will act to further individual autonomy.

These two ways in which identity attributes enter the scope of public reason — one where attributes publicly held to be reprehensible are censored and the other where attributes publicly held to be desirable are fostered (or at least have their pursuit enabled⁶⁶); one of *discipline* and the other of *incentives* — are, as examined in Part ... above, present in China's Social Credit System. They are officially described in the System's policy documents, which, as also seen above, place an emphasis on the incentives dimension—even though existing research highlights how in practice the discipline dimension has so far prevailed in the system's implementation.

It may be, however, that the best way to understand the System does not tilt towards either dimension, but rather rests on a certain *normative* balance — or, as noted above, on *harmony* — flowing from appropriateness in the articulation of reasons concerning attribute categories. Of course, such a balance will change in attention to the re-articulation of one's attributes to account, say, for practices of corrective justice such as those in torts or in the criminal law. Or it may change for reasons of distributive justice, to adjust the evaluation of one's attributes in ways that account for inequalities of opportunity, reflecting on one's merits and shortcomings for what they truly are. Ultimately, though, the conception of justice the SCS can be seen as embodying is neither mainly

⁶⁶ This may be accomplished, for instance, by censoring the action of those who encroach upon the pursuit of such attributes held to be valuable — for instance, the ways certain technological platforms forge or affect the constitution of true relationships of friendship, or the ways they more generally shape the pursuit of truth itself, to further their particular economic or, increasingly, political goals.

corrective nor mainly distributive, but rather one that can perhaps best be described, more broadly, as a conception of *normative justice*.

IV.3. A Conception of Normative Justice

Under a conception of normative justice, the *central concern of justice* becomes the *articulation of reasons* in the information environment, or it becomes so at least in societies where such an articulation turns to be determinant of people's possibilities of living free, equal, and self-respecting lives. Can there be any doubts such is the case of contemporary high-modern societies, marked by the *fact of articulation*?

One may say the way reasons are articulated has *always* mattered for the pursuit of liberal values, that it has always mattered for justice in liberal societies. This much is true, yet time flowed differently in earlier stages of modernity. People had the privilege of leisure and hindsight. They could revisit states of affair and change them before consequences became too stark. Now, with the extreme accentuation of the consequences of modernity such reasons become the *program* of abstract systems that as much enable people's existence as they may consume it in a jiffy and in planetary scale.

Most importantly, the conditions of trust in such systems become themselves the product of the same reasons such systems produce — which makes such systems potentially self-creating and a challenge to forms of power that stand for the public interest, chiefly the power of the State. And even where abstract systems fail in commanding trust, their power may still be sustained, as seen above, through forms of lock-in ensuing from network effects, which are themselves based on the articulation of reasons in the information environment.

Thus, insofar as the ways such systems articulate reasons give them the power — the *normative power* — to significantly affect the 'horizon of reasons'⁶⁷ upon which people live their lives and, with this, the pursuit of liberal purposes, institutional guarantees need to be in place that can hold such systems accountable to the public interest and, where necessary, intervene to reestablish a normative balance.

If this dimension of normative justice carries corrective notes, it is so not in the traditional sense found, for instance, in tort law, of reestablishing a normative balance *between private parties* — an idea of correlativity that, as Ernest Weinrib so well described, lies at the heart of the foundations of private law. In that traditional sense, law is invited to remedy the private normative loss that a person's doing causes another to suffer. Such a loss is normative only in the sense that it concerns a balance articulated in the institutional normative order of the law — yet, it relates to a substantive upsetting of such a balance by actions concretely carried out, rather than by the way any sort of reason gets articulated.

⁶⁷ Klaus Gunther, 17 Cardozo L. Rev. 1035 (1995 - 1996); see also Foucault, *Discipline and Punish*, 256 (speaking of a 'general horizon of truth')

The imbalance institutional frameworks like the Social Credit System set out to correct thus differs from that addressed by typical institutions of corrective justice in this important way. What the SCS sets out to do, while having the normative order of the law (e.g. Resolutions by the State Council) as its foundation, is to reign in directly in the substantive articulation of *reasons* in the information environment. Accordingly, it can be said that a conception of normative justice, rather than merely seeking to reshape a space of private actions and positions in the image of the law, acts upon the public articulation of reasons that guide people's actions, seeing to it that processes of articulation and, in some instances, such reasons themselves reflect ideals of justice.

Of special concern in this regard are, as noted, the effects of forms of normative power invested in abstract systems — and, consequently, ideas about how public institutions should respond to significant exercise of such a power in violation of ideals of normative justice. The apparent challenge here is that no such a response is possible without the taking of a stance by public institutions as to *how* reasons should be articulated and, in some respects, regarding the *substance* of reasons themselves. This might seem to present a quandary from the perspective of traditional liberal views and, examined superficially, verge on a defense of totalitarian policies. Yet, nothing could be farther from the truth, for these are responses precisely to procedural and substantive challenges, posed by such forms of normative power, *to liberal purposes themselves*.

One must thus resist simplistic temptations to equate the view of normative justice defended here with an advocacy for “*censorship*”. The pervasiveness of the fact of articulation and the multiplicity of realms in which it indiscriminately holds sway fly in the face of much of liberal theory's traditional (and often arbitrary) divisions between reasons that should be of concern to State action and those that should not be.

It is no coincidence that, theoretically, such divisions are typically bound with extreme conceptions of free speech, which those who advance them take to be universal. Had John Rawls, for example, had to grapple with the fact of articulation in its entirety, had he seen how starkly different regulatory responses attempted in different jurisdictions to problems involving freedom of expression on the Internet would turn out to be — for instance those in the US and those in Europe —, would he have concluded, in *Political Liberalism*, that “political rights of freedom of speech”, as a matter of constitutional essentials, “can be specified in but one way, module relatively small variations” and thus that they are so “characterized in more or less the same manner in all free regimes”?⁶⁸ Most unlikely.

It is important to note here Rawls is writing from within a US tradition, where First Amendment jurisprudence reflects levels of deference to free speech not seen anywhere else.⁶⁹ And it is in the image of such levels of deference, of such an unbridled idea of free speech that Rawls also lays out another important

⁶⁸ Rawls, 1993/2005, p. 228).

⁶⁹ Wu and Goldsmith

view — namely, that the State has no business in picking between different conceptions of the good belonging in what he calls the ‘background culture of society’.⁷⁰

Such conceptions, for Rawls, are just not the kind of reasons that should be of concern to State action.⁷¹ Losses experienced in the background culture of a society may be the regrettable outcome of a world that cannot accommodate all social forms of life, but are not something to be necessarily ascribed to injustice considerations. That much is true. But it is *not* true, conversely, that, as Rawls also sustains, forms of power operating in the background culture of society are freely accepted and, thus, “nonpublic”.

The mistake here tracks Rawls’ mistaken views on free speech — and both are challenged by the fact of articulation. Even if it was true that different liberal societies do regulate speech in relatively similar ways, it would not follow that there is some universal approach that ought to be afforded to *all* forms of speech. Likewise, recognizing that a significant enough array of meaningful options must be available in a society, which enable people to author their lives in accordance with their own conceptions of the good, does not mean that *all options* should be so available.

Forms of expression or “conceptions of the good” whose pursuit significantly undermines the possibility that *others* may live meaningful lives are just *not* the kind of options that should be available,⁷² at least in their prevailing forms — and all the more so where their pursuit acts cumulatively to crystalize power asymmetries and, ultimately, undermine institutions on which *everyone’s* autonomy depends.

Such cumulative effects result from the fact of articulation, and an idea of normative justice must thus make a fundamental distinction: namely, a distinction between forms of speech which, viewed for their *exercise*, are predominantly the *expression* of one’s autonomy and other forms of speech that, in their *articulation*, come to significantly *constitute* and confine other people’s worlds. That the latter forms of speech can remarkably constrain the former contradicts any idea that the treatment of freedom of speech admits or ought to admit of little variation.

A similar point has been made by one of these authors in an earlier work, concerning the regulation of search engines. There it was noted that, whereas traditional approaches in competition law enquire into the existence of practices through which an actor unjustifiably seeks to further its position in a certain relevant market, those approaches lose great part of their significance in an Internet context. They do so since, on the Internet, the idea of a relevant market to a large extent recedes. The contours of dominant practices cease to be defined even by forms of vertical or horizontal integration across markets. For example, if one takes all areas in which Google focuses its activities — from Maps to Books to the Android operating system, some monetized via

⁷⁰ Here Rawls is in the company of Robert Nozick ... Cohen, How Patterns Preserve Liberty

⁷¹ Or at least not primarily

⁷²

advertisement, some not — what is striking in Google’s power is not any form of content-specific domination within — or integration between — particular markets that could not be more different or unrelated. Google’s power, in other words, does not stem from deeper forms of meaning associated with such markets, from what, after Noam Chomsky, we can call the ‘deep structure’ of information flows.

Rather, what is significant is a certain normatively functional and quantitative aspect — that is, the ways in which, through the articulation of reasons that here matter more for their ‘surface structure’, Google is able to *curb the horizon of reasons of the Internet as a whole* and make the constellations of truth gravitate around its activities.⁷³ The power Google acquires is, in other words, much less a power of any specifically economic quality associated with the meanings and boundaries of an individuated information market, and much more a power of a broader, general *normative* quality, which cuts across the whole information environment, reconfigures paths of information flows, and, ultimately, determines the availability of reasons based on which different forms of trust and power on the Internet are made possible.

What the examples above thus illustrate is that, in approaching this essential repository of reasons and normativity we call ‘*information*’, different perspectives can be taken. On one hand, information is a vehicle for human expression; in clear cases, it signals the boundaries of practices shaping competition markets. On the other hand, examined from the surface structure of its modes of *articulation*, information constitutes and constrains spaces for self-authorship. Most importantly: the second perspective carries, contains and “blackboxes” the whole range of possibilities of the first. The forms of power — of normative power — whose entrenchment it reveals provide *independent reasons* for approaching the regulation of the information environment, in addition to those traditionally provided by freedom of expression and competition law. Such reasons are of fundamental importance for justice concerns. They form the core of the conception of normative justice. At the same time, however, it would be a mistake to insulate them from reasons flowing from the first perspective. If anything, what the discussion here really reveals is that approaching the information environment as an object of justice entails a permanent shifting and recalibration of perspectives, and the abandoning of any prejudiced approach to the scope of reasons that can be admitted within liberal politics.⁷⁴

What precise expression should the Social Credit System take? What reasons should be publicly articulated within its framework? These are much more cogent questions. Surely more so than considerations that assume the sheer

⁷³ Heidegger / Holderlin

⁷⁴ See also Thompson ... and ... (explaining how approaches of ‘*functional equivalence*’ to informational goods ignore that, beyond their functions, informational goods can also be understood from the perspective of their language, architecture, and modes of development, and arguing, thus, that liberal theories that advocate for any such dimensions to be disregarded in the drafting of laws are fundamentally misguided).

existence of a framework for normative justice to be a totalitarian enterprise. Rather the opposite is the case.

IV.4. Articulation: Public and Private

As just examined, there is not much sense in dividing, in terms of substance, between reasons whose articulation is of public concern and those whose articulation is not. Insofar as the articulation of reasons by abstract systems may significantly encroach upon people's possibilities of individual and collective self-authorship, it can be said such reasons matter *publicly* — that is, that they enter the scope of public reason and become of concern to a conception of normative justice. Potentially, thus, with regard to their scope, *all* reasons matter — from the fleeting structure of the quantum to the lasting crowning of one's merits —, their ways of articulation thus raising justice concerns.

Does this then mean that the entering of reasons into a framework such as the Social Credit System must lead to the public articulation of all reasons concerning identity attributes? Not at all. To admit a potential for *public concern* is different from defending the maximization of a normative *public domain*. It would not be an expression of normative justice, but rather its violation, if private realms were unnecessarily encroached upon and delivered to public deliberation. In fact, wherever reasons of private nature are unwarrantedly introduced into public deliberation — should they be publicly articulated in any form beyond circumstances that make their disclosure legitimate —, avenues must be open for swiftly returning them to the private realm.

The concern in this regard, however, does not stem purely from norms concerning one or another private context.⁷⁵ Nor is it a concern with privacy as the vehicle for any atomistic understanding of autonomy.⁷⁶ Autonomy must be understood, here as elsewhere, as a socially embedded form of good. It requires the availability of a range of choices that, in number and variety, enable one to author a meaningful life — but, at the same time, it needs to be seen that reasons chosen by a person as grounds for her actions affect reasons available for everybody else.⁷⁷ And nowhere this is more so than in cases of choices made by large-scale abstract systems and the forms of dominance reflected in their technological instantiations.

Because problems of autonomy are also social problems, the concerns with the articulation of private reasons go beyond the autonomy of individuals “whose” information is disclosed. Whereas atomistic understandings of autonomy of the kinds we have just abandoned are grounded on ideas of self-ownership, the concerns of normative justice are not purely concerns of *property*. Above all, they are concerns of *propriety*.

⁷⁵ Nissenbaum

⁷⁶ Cohen

⁷⁷ Thus why Joseph Raz concludes that autonomy, as a value, must be used for the good. Elimination of repugnant options ...

One example enables us to visualize this in most striking way — that of processes of distributed online victimization by the courts of public opinion, which in China became known as ‘human flesh search engines’, and more universally are known as ‘doxing’. The main problem with doxing is not the unauthorized articulation of information that a person *owns* as a consequence of owning herself, and which she thus has an exclusive right to keep private. In fact, in most such cases the information being articulated is not even private in a proper sense. Calls for victimization typically involve the gathering of (otherwise disperse) *public* information, so as to enable the profile of a person to be built and thus, most importantly, *to influence collective action* in relation to that person.

The articulation of previously dispersed public information, in other words, provides others with an all-things-considered form of reasoning about the victimized person, enabling them to navigate the person’s character — or, more properly, to navigate *around* it.

Is this a problem from the perspective of the victimized person? Surely it is. The fact that information about her is now articulated in a cohesive way lends further publicity to attributes concerning that person, providing others with reasons for action they would not otherwise have. And the obvious injustice of such forms of “justice-making” carries consequences for the person’s possibilities of authoring a meaningful life of her own. But the problem at the same time transcends this individual dimension. What most significantly happens in such cases is a reconfiguration of the whole normative space between the individual and others — a ripple effect in the horizon of reasons, which will now enable *others* to author *their* lives based on reasons whose availability, albeit violating no one’s property, surely does violate the confines of propriety.

Nor is the problem here chiefly a problem of contextual integrity. What happens here is not the mere travelling of information between contexts, enabling information to become currency — and a tool of domination — in a context to which it did not originally belong, like gender-related reasons may become a tool of domination in corporations. What is violated here, rather than the integrity of context, is the integrity *of the normative order as a whole* — since reasons will be publicly available that should not be, and people’s lives will be authored upon such reasons (regarding others), to a greater or lesser extent, whereas they should not be so authored to any extent. Whereas concerns with normative propriety do encompass an individual rights-based concern with the “appropriateness of information flows” — heeding principles guiding the original context from which information springs — they are at the same time vaster than that.

One only needs, in this sense, to understand how the very idea of the *public interest* works as a normative lens that defines one’s expectation of privacy. As courts have reiterated on numerous occasions, the idea of a reasonable expectation of privacy is not a purely descriptive one, determined by present configurations of technological artefacts. Rather, reasonable expectation of privacy is a normative idea, which hinges, ultimately, on what *society accepts*

should remain out of the hands of the state and the public.⁷⁸ It concerns, thus, normative expectations that circumscribe people's actions in general in relation to each other's information.

Coming back to the question of privacy — as embedded in a conception of normative justice, and as reflected in the Social Credit System — what needs to be the object of enquiry here is not whether a framework such as the SCS is *in principle* compatible with privacy or not. The authors have little doubt it is — even as they recognize the importance of friction and accountability mechanisms introduced by data protection ideals such as legitimacy, data minimization, explainability, amongst others.

The real question is what the socially acceptable boundaries of the SCS are, in relation to the scope of reasons admitted as of possible of articulation in the system. And this is a question, most interestingly, which the very existence of frameworks like the SCS might help to answer — through their qualified, attributes-based social forms of participation and construction — as opposed to an alternative where people's attributes and the articulation of reasons in general are largely defined by dominant, unaccountable, large-scale abstract systems. Paradoxical though it may seem, at appropriate levels, publicity here serves privacy, as it serves liberal goals more broadly.

IV.5. Institutions and Levels of Articulation

At any rate, there are no grounds for assuming an ever-greater set of reasons should become part of the Social Credit System, nor for assuming that those reasons that do become part of the system should be made ever more *specific*, or ever more *public*.

Nor does the belongingness of a reason in the SCS mean that the State should be called on to become the ultimate arbiter of its truth. While there *are* reasons the System will engage with directly, in evaluating the attributes of individual and institutional actors, others might be approached indirectly. For example, in assessing whether judges and prosecutors abide by certain standards of procedural accountability courts do not need to engage with the private attributes of individual litigants.⁷⁹ The same applies to technological platforms as these are bound by requirements of commercial sincerity.⁸⁰ In assessing the social credit of *technological platforms themselves*, with regard to decisions they make about natural persons, the SCS does not need to incorporate reasons concerning the substance of such decisions. It may be enough that it addresses the appropriateness of decision-making procedures followed by platforms.

Not always this will be the case, however, and the SCS might indeed need to address the substance of some such reasons. Is this not its very purpose? It may be that the SCS may need to engage with such reasons precisely to remedy

⁷⁸ Codes of practice, Campbell, Human Rights Act

⁷⁹ Planning outline: right to know, right to participate, right of expression and right to supervision with regard to prosecutorial work

⁸⁰ Planning outline

forms abuse of the normative power exercise by technological platforms — from Facebook to the Wikipedia —, though it may also need to do so beyond this restricted range of cases. In any event, the claims in this paper do not extend beyond the substance of reasons concerning people’s attributes. But it does concern *these*, seeing as it was seen in Part II that it *is* indeed a role of the State — as the ultimate repository of *trust* in modern societies — to be an arbiter of truth regarding the evaluation of identity attributes. This has been precisely the role modern law emerged to play in stabilizing claims concerning rights-based attributes — and it is a role the state must now reclaim given how fundamentally the fact of articulation impinges upon the recognition and development of human subjectivity.

An apparent limitation of the argument here is that the perimeter of identity-related reasons is not airtight. The construction of human subjectivity takes place in the context of an interplay between choice-dependent and choice-independent reasons, which in turn lie along a spectrum of distance from an individual’s biographical core. Some lie closer to it or indeed within it; others lie at certain level of distance. All such reasons, however, ripple across the horizon of reasons, and wittingly or not have the potential to affect the development of human subjectivity. As a matter of principle, it would be a fiction for the State to pretend to be neutral about any of them.

It is against this background that one needs to approach contemporary discussions on misinformation and the role of the State in curbing it. How more or less comprehensive such a role will be, however, lies beyond the scope of this paper. Take, for example, recent controversies involving responses by the Chinese government and netizens to perceived biases in Western media coverage of the Anti-Extradition Bill protests in Hong Kong. Following counter-information practices undertaken by the government and its netizens, accounts were taken down on YouTube and Twitter on the grounds not only that those accounts violated those platforms’ terms of service, but mainly that the activities in question were coming from the state itself. Can the state resort to counter-misinformation strategies of such a sort?

To the extent that the articulation of the content being responded to impinges significantly upon possibilities of development of human subjectivity, the answer in this article is a resounding “yes”. Beyond that, however, the article takes no stance on whether it is a role of the State to directly correct misinformation on the Internet in general. It may be that it is — and indeed, such is a view shared by arguments of Confucian and Aristotelian traditions alike, which spoke for the role of politics in upholding truth. If true, such a view would form the backbone of a more comprehensive conception of normative justice. Yet, it needs not be part of the conception of normative justice *championed in this paper* for the argument advanced here to hold its ground. The claims here concern nothing more and nothing less than reasons belonging within the biographical core. Even though, in its current instantiation, the SCS — and “Cyberspace Administration” in general in China — may go way beyond such reasons, in no way does the argument in the paper hinge on the conclusion that it should (or that it should not).

In engaging with such reasons, and responding to challenges that attend them, the SCS works at two different institutional levels. In more traditional fashion, it works at the level of legal rules. In effect, in no way does the System seek to do away with a conception of normative justice founded on the ideal of legality. Rather, the Planning Outline affirms as one of the “main principles for social credit system construction” those of “[c]ompleting the legal system”, “progressively establish[ing] and complet[ing] credit law and regulation systems”, and, as seen above, “safeguard[ing] the rights and interests of [credit] information subjects”. With regard to the SCS’s application to and by the government, the Planning Outline holds as objectives that “[a]ll levels’ People’s Governments must consciously accept legal supervision”,⁸¹ it sets out to promote the education of civil servants on the value of “abiding by the law and morality” as well as to “strengthen the study of legal knowledge and credit knowledge” and “the legal and sincerity consciousness of civil servants”. All such principles and objectives must be understood in the context of the wider “social consciousness of sincerity” that the SCS seeks to instill. But this does not in itself entail a relinquishment of the rule of law as an ideal. What it entails is rather a deepening of the foundations of this ideal — seeing, as has been seen above, that the idea of sincerity, or trust, lies at the very origins of legal modernity.

Below the level of rules, lies the SCS’s more embedded, substantive level where people’s actions and attributes are in fact evaluated and reasons concerning them articulated, in accordance with the rules. Tasks at both levels, but particularly at the level of articulation, increasingly find support in the work of automated systems. In a way, such systems form part of a growing material universe⁸² that extends the grip of legal rules. Their normative outcome, namely, the articulation of reasons ascribing value to human conduct, may automatically feed into connected systems, thus changing the horizon of reasons directly affecting human action. Unlike automated forms of evaluation carried out by other abstract systems, those flowing from the SCS ought not only to reflect the public interest but also to see to it that other abstract systems will do the same — that the whole material universe such systems compose, insofar as reasons regarding human subjectivity are concerned, will be set in pursuit of an ideal of normative justice.

The pursuit of normative justice must be undertaken at both institutional levels, and that it must so raises the interesting question of how should both levels coordinate in the definition and revision of the principles that underpin an ideal of normative justice.

One principle may appear as readily discernible a requirement of frameworks like the SCS: that which commits such frameworks, and the abstract systems they hold accountable, to ideals of openness and explainability. But even that, as seen in the preceding section, is conceptually debatable, for while some parts

⁸¹ from that level’s People’s Congress and the democratic supervision of the Consultative Conference

⁸² McGee

of the System ought not to have their reasons openly articulated, others may need to pursue some measure of compromise between efficiency and explainability. At its most minute levels, explainability tends to the infinite, and its pursuit may come at the cost of delaying or rendering fruitless immense benefits automated systems may otherwise provide.

Fundamental in the interplay between both levels of the SCS is that some initial, if imperfect agreement be reached at the level of rules, which then be set in motion for future revision in the light of conclusions reached at the substantive level. More specifically, in conceptions of normative justice such as the one defended here, which focus on reasons more closely attached to human subjectivity, conclusions reached about such reasons must be considered in the very revision of the System. In effect, what sense would a public framework for recognizing attributes ensuing from socially desirable pursuits — and censoring those obtaining from undesirable ones — make were not the framework itself to draw on these same conclusions for its own development?

In short, in the SCS, the *level of rules* and the *level of attributes* interact in a thicker form of institutional normativity. Such a form is reflected in an institutional order where rules and attributes attached to human action at the same time provide people in general with reasons for further action and act in more embedded ways, to affect the articulation of reasons by abstract systems — be them those of State actors be them those of private technological platforms.

At its more embedded institutional level, the normative work of the SCS lends itself to less immediate forms of public cognition. One could be tempted, thus, to characterize the SCS's normative character, in this sense, as *indirect*. This would be inaccurate, however, for the institutional work carried out by the SCS is directly normative, in at least two different ways.

On one hand, it is always a set of *reasons* articulated in the SCS — whatever the kind of notation such reasons may be expressed in — what works in shaping people's possibilities of action. At their substantive level, such reasons, in part at least, will lay the grounds for the configuration of technological platforms. They may be more or less explicit, they may or may not be known. But they *are* a constitutive part of the horizon of reasons that directly affect people's possibilities of action. On the other hand, such reasons reflect the articulation of *normative choices* made by the officials of the system — choices, that is, concerning reasons, which stabilize the recognition of individual attributes in one way or another. Such choices, in turn, are at least in part made to remedy challenges of misrecognition of individual attributes flowing from other abstract systems.

But there is a final, deeper way in which both institutional levels of the SCS can be said to be normative beyond inviting merely indirect, deferred possibilities of cognition. They are so as they act in coordination to preserve, if not reinstate the conditions of *trust* at the roots of modern societies — those conditions which, in reciprocal reinforcement with modern law, enabled complex, large-scale abstract systems to develop, amongst which the modern

nation-state, but which must now be reimagined, given the fundamental challenges to trust in conditions of high modernity.

From the perspective of how a modern *liberal* society approaches the SCS, such an erosion matters for how, ultimately, it threatens to undermine institutional arrangements essential for the protection of human subjectivity and individual autonomy. More broadly, however, in societies that understand harmony between individuals, community and nature as an essential part not only of autonomy, but of subjectivity itself, the erosion of trust matters for how such institutional arrangements *also* work to preserve social and planetary values as well. Such is surely the case of Confucian societies, like China, but is it not the case of liberal societies in general?

That it *is* so shows how the fates of humanity and of the planet are intertwined not merely at the abstract level of rules and values, nor purely at the material level of natural resources, but rather at that fleeting reality that exists *between* both levels — the reality of reasons articulated in the information environment, reasons that at once traverse the whole world *and* bind it together, in a common normative enterprise.

Existential though such a reality is, however, also are the challenges that surround it — challenges that the whole world faces, given dynamics attending the fact of articulation. Whether or not to address such challenges is thus not any real dilemma for liberal societies. It is simply a question of whether *any* society — or the planet — will continue to exist or not. But while the threats here affect the world as a whole, the bucket does rest with liberal societies, since it is these that purport to take the moral high ground without reforming their political institutions to cope with the problems that are typical of this age.

But if political institutions *are* to be reformed, what should such a reform entail? Would attending to both institutional levels encompassed by the SCS — the *level of rules* and the *level of attributes* — entail a move towards what my colleague Hualing Fu, applying Ernst Fraenkel’s work to an assessment of China, has described as a *dual state* — that is, a prerogative state where “authoritarian leaders rule hands-on according to political expedience, but leave conventional matters to regular legal rules”? In this sense, it could be argued, the development of a substantive machinery for the assessment of individual attributes could be just another round, if not the most expressive one, of a movement towards authoritarianism. There are two challenges regarding such a view, however, which are important to be put into perspective — though we also point, at the end of the section, to a powerful conclusion the idea of a state of exception may, unwittingly, enable us to reach .

Fu’s argument draws on the undeniable fact that a movement of reassertion of state authority has been operating in China under Xi Jinping’s tenure, which has also meant an increasing assertion of Party leadership. At the same time, for Fu, this movement that he and others see as one of authoritarian revival,⁸³ has been masked by a “shifting [of] attention to routine legal practices and institution building”. Such practices and institutions enable and emphasize a domain of

⁸³ drawing on Minzner and Biddulph

normalcy, which is reserved for ordinary matters such as the ordinary criminal justice system, or the facilitating role played by private law in regulating market transactions and labour relationships. On the side of this domain of normalcy, however, but always threatening to colonize it, to crowd it out, a domain of prerogative — of *exception* — is said to exist which comes into being whenever matters more closely related to political authority are at stake.

Both domains exist in a symbiotic relationship, and to a large extent — if only to preserve its authoritativeness and credibility — the State must defer to and champion the development of normal legal practices and institutions. But, for Fu, much more is smuggled into the domain of normalcy. In increasingly stretching its muscles in the political realm, the State seeks to draw on the form and character of legal institutions to justify and give a thin varnish of legality to practices that otherwise amount to nothing more than an assertion of total, if not totalitarian forms of repression and control. The Social Credit System could thus be seen as the perfect embodiment of practices of such a kind.

As just noted, there are two challenges regarding this characterization. The first is of more practical order. To the extent that its punitive elements — rather than any ideal of appropriateness in the recognition of attributes — are what ultimately prevails in the SCS, discussions regarding the SCS's characterization as a framework for repression and exception might ring true at least in part. Even then, however, such a characterization would overlook that the reassertion of authority by the Chinese Nation-State does not take place in a normative vacuum. It must be understood in light of the need to uphold conditions of trust not only in the context of a developing China, but also of a global order increasingly dominated by private abstract systems that rule below — and beyond — the institutional possibilities of modern law. To the extent that the SCS affirms itself as form of resistance to the growing might of technological platforms and their forms of encroachment upon individual autonomy, it can be understood as a force of liberation rather than oppression.

The second problem is a conceptual one. It concerns the difficulty of disentangling the practices attributed to a “state of exception” in China from those undertaken by any modern liberal state. The question, at the end of the day, might be purely one of extent. This is so since the idea of two states existing in tandem — one of normalcy and one of exception — fails to appreciate how the normative authority of the state *always* exists against a background of exception, which, in turn, is ready to show itself in the political translucencies of the normal institutional order. Levels of translucence vary from one legal system to another. But any legal system *is* marked by its open textures, by some intertextual space where extra-legal considerations shine through.

It is for no other reason, thus, that Giorgio Agamben critically describes any such idea of a dual state as “acute”. On the face of it, as noted, the state of exception may appear as a set of voluntary practices, increasingly adopted by

contemporary states *on the side* of the normal institutional order;⁸⁴ it may appear to be a violation of the foundations and conditions of existence of the normal order. Yet, as Agamben also notes, the increasing adoption of exception as a technique of government “lets its own nature as the constitutive paradigm of the juridical order come to life” — “in truth”, he notes, “the state of exception is neither external nor internal to the juridical order”, but rather lies, *qua* exception *to*, at the blurred threshold that exists between the extra-legal and the legal, and where the legal comes into existence.

In medieval natural law traditions, the validity of law was open to, or indeed conditioned on facticity;⁸⁵ the legal order was seen as itself a part of the very common good it sets out to pursue — and which, in its central cases, it is at one with. In such circumstances, exceptions are adjustments of direction in pursuit of the central case; the pursuit of the common good never happens outside of the law. As Agamben notes, “[t]he idea that a suspension of law may be necessary for the common good is foreign to the medieval world”. Modern juridical orders, differently, seek to incorporate the exception, as just a possibility of such a suspension, *within* the confines of the law. They do so, says Agamben, by creating an opening, “a zone of indistinction in which fact and law coincide”. But what takes place in those zones is not just, like in medieval times, a *reorientation* of the legal itself towards the good; there is no change of an earlier legal configuration that, in turn, loses its legal validity. The translucencies of — or zones of anomie within — modern juridical orders are not institutional changes of course. They are openings through which the exception shines as, in Agamben’s words, “the ultimate ground and very source of the law”.⁸⁶ Thus, the state of exception is not just an arbitrary decision made by the sovereign, but rather something that antecedes this decision. It is the “concept of sovereignty [itself that] derive ... from the state of exception, and not vice versa”. Or, as Carl Schmitt notes, “the sovereign, who decides on the exception, is, in truth, logically defined *in his being* by the exception”.

Does the Chinese juridical order contain such forms of opening? Of course, it does, like any other juridical order. Party leadership does not play any greater role in China than, in the United States, ideals of unfettered liberty play in the

⁸⁴ Thus Agamben notes that the “voluntary creation of a permanent state of emergency has become one of the essential practices of contemporary states, including so-called democratic ones”; or that, since “democratic regimes were transformed by the gradual expansion of the executive’s power during the two world wars and, more generally, by the state of exception that had accompanied and followed those wars”, “today...the state of exception ... has become the rule”, appearing increasingly as a technique of government rather than an exceptional measure”.

⁸⁵ 373

⁸⁶ In fact, Agamben sees one specific instance of the state of exception — namely that of necessity — as the foundation of the juridical order. Thus he notes with scholars of the classical modern period that necessity is “the foundation of the validity of decrees having force of law issued by the executive in the state of exception” (Jellinek and Duguit), or that “not only is necessity not unrelated to the juridical order, but it is the first and originary source of law” (Santi Romano).

empowerment of private Leviathans. In fact, whereas the quasi-Constitutional work of such private actors is marked by profound invisibility and organized in the light of the economic interests such actors pursue, the doctrines that inform Party leadership are recognizable in “CCP documents, party practices, speeches of party leaders and empirical evidence”,⁸⁷ and exist in organic unity with other principles expressed in the PRC Constitution, including the principle of “governing the country according to Law” and the principle that “the people are masters of their own affairs”.⁸⁸

More conceptually, it is important to disentangle the exception from the necessarily oppressive or evil. To recognize that openings to extra-legal considerations exist is different from recognizing the existence of a Hobbesian state of nature always lurking behind the form of the juridical order. Rather the opposite is the case. Whereas it is from the good that a juridical order emerges, for the good are the exceptions such an order invites. If, in turn, a juridical order is itself already a system of pretense and make-belief to mask an otherwise punitive and repressive regime, the problem then becomes with the juridical order itself, not with the exceptions it recognizes.

In sum, as one travels through the institutional levels of the SCS, it would be a mistake to assume the level of attributes to amount necessarily to a violation of rule of law ideals. What is important is that, at both levels — *and between them* —, a balance be struck between generality and specificity, in *harmony* with the ideals that the System, in articulating its reasons, seeks to pursue. Such a balance is important in recognizing the values that, as seen above, generality tends to promote, but also the value flowing from more specific standards of recognition of individual identity.

In a way, however, Fu’s interesting point regarding a move towards the exception in China raises an equally interesting question. The SCS may not necessarily be the particular type of exception Fu’s argument is referring to. But can it nonetheless be characterized along Agamben’s broader lines? After all, it does create an opening in the general form of legal rules, which, although not formally suspending the juridical order, to all effects points to a lower, material level, remarkably extending the normative realm under the authority of the state in ways not typical (and thus exceptional) to how the rule-of-law operates — a form of “virtual” suspension, if one may say so.

All this is true, and indeed most interestingly so — as it is also the case, nevertheless, that what the SCS seeks to accomplish is the preservation of the juridical order itself, by reinstating one of the very foundations upon which legal modernity has been built: namely trust.

IV.6. Beyond the Prison: Surveillance, Discipline, and Modern Law

⁸⁷ He Xin, “The Party’s Leadership as a Living Constitution in China”, *Hong Kong Law Journal* 42 (2012)

⁸⁸ Ewan Smith, ‘The Rule of Law Doctrine of the Politburo’ (2018) 79 *China Journal* 40

In sparing people from the forms of control and alienation ensuing from other abstract systems, in reinstating the trust of modern institutions now liquifying amidst the “post-truth” predicament of technological networks, the Social Credit System might not be the repressive framework it is often made to seem. But there is one further point, usually also missed in criticisms of the system, which is worth visiting in this regard.

The point is that, even at its disciplinary moments, forms of penance induced by the SCS not only are much less harsh than those reflected in the criminal justice system in general, but they also seem more capable of achieving the communication goals that, in some views, are the ultimate desiderata of criminal punishment.

In effect, compared to traditional forms of punishment, from medieval dungeons to modern prison systems (themselves not very different, at times, from medieval dungeons...), even a disciplinary SCS is still a vast improvement upon the status quo. Most importantly, if communication is the ultimate goal of criminal punishment — thus inducing the forms of repentance, reform, and reconciliation necessary to rebalance the normative horizon of the criminal justice system — the SCS *is* such a goal in just its purest form.

Now, the image of discipline that surrounds the SCS is usually a Foucauldian or Benthamite one. In other words, the SCS is typically presented a perfect instantiation of “the panopticon” — Jeremy Bentham’s infamous architectural framework for a prison system marked by a centralized structure of surveillance. In such a system, prisoners have no idea as to whether they were, in fact, being watched, thus tending to surrender to pressures to behave in conformity. It is believed the SCS would be marked by just the same dynamics, since the fear of being rated in disregard would lead to individuals’ acting in accordance with mainstream practices. That is to say, the SCS would not be just an architecture of punishment. Rather, it would be part of a broader concern with new *disciplinary* powers that were at the heart of the emergence of modernity.

One should not readily assume any necessarily oppressive nature of such powers, however. As Giddens observes, there just would be no modern Nation-State without the emergence of complex surveillance systems lending enforceability to its law over a vast territory. In Giddens’s words:

“Surveillance, in turn, is fundamental to all the types of organisation associated with the rise of modernity, in particular the nation-state, which has historically been intertwined with capitalism in their mutual development” (...)

“The administrative system of the capitalist state, and of modern states in general, has to be interpreted in terms of the coordinated control over delimited territorial arenas which it achieves. ... Such administrative concentration depends in turn upon the development of surveillance capacities well beyond those characteristic of traditional civilisations, and the apparatuses of surveillance constitute a third institutional dimension associated, like capitalism and industrialism, with the rise of modernity”.

How can one indict, thus, the Social Credit System as a reputation-based apparatus of surveillance while coherently defending another, longstanding reputation-based apparatus of surveillance: that of modern Western liberal law?

In effect, whereas abuses in surveillance techniques are to be condemned, the fundamental role played by surveillance in the protection of individual rights cannot be overlooked.⁸⁹ If anything, abusive forms of surveillance have gone on to become the lifeblood of the economic domain⁹⁰ — and, paradoxically, there simply is no way the state can address such practices without resorting itself to surveillance techniques. Furthermore, if surveillance, as Lyon explains, refers to processes of note-taking involving human behavior,⁹¹ when human behavior *already* delivers itself in the form of such notes — which is an unavoidable consequence of the fact of articulation — there just isn't *any* form of regulation that will not be based on surveillance.

But might it be that both surveillance *and* the law are inherently repressive? The repressive character of both disciplinary power and legal power — which leaves one, indeed, in quite an impossible conundrum; what to do!? — stems from the traditional reading of Foucault's earlier work. In this reading, law is presented as a repressive form of power that, with the advent of modernity, goes on to be displaced by the new (and more insidious) forms of power of “the disciplines”.⁹² The modes of coding and normalization that characterize disciplinary power marginalize the law, rendering it increasingly irrelevant,⁹³ or subsume it within the techniques of what Foucault calls ‘governmentality’.⁹⁴

Yet, as forms of power, both the law and the disciplines, must be cleared from any image of inherent repressiveness. As Golder and Fitzpatrick note, Foucault himself recognizes power as “not negative and repressive but rather productive,

⁸⁹ See Stephen Angle, *Human Rights in Chinese Thought: A Cross-Cultural Inquiry* (noting as salient traits of modernity the development of techniques of control that made the modern state possible and changes operated by the international market economy in traditional social structures).

⁹⁰

⁹¹ David Lyon, *Surveillance Studies: An Overview*, at 13.

⁹² See Ben Golder and Peter Fitzpatrick, *Foucault's Law* (noting: “For Hunt and Wickham, and for many scholars in law who have taken their interpretation of Foucault as a point of reference, Foucault (most evidently in books such as *Discipline and Punish* and the first volume of *The History of Sexuality*) narrates the demise of law. In Foucault's modernity, law has been overtaken by the more insinuating and productive powers of discipline or bio-power”) at 2.

⁹³ *Ibid*, 22.

⁹⁴ *Ibid*, 35. By governmentality, a form of power operating along the disciplines, Foucault refers to those forms manifest in political technologies deriving from secularized forms of Christian pastoral power, a beneficent form of power that seeks to maximize the potential of the population itself, grasping its constants and regularities, inciting the use of ‘technologies of the self’ as a form of bio-political management of life. The focus, note Golder and Fitzpatrick, is no longer on the government itself, but rather in the functioning of the state in accordance with this new form of power (30-33). Foucault, *Security, Territory, Population*, at 74; Foucault, “Technologies of the Self”, in *Essential Works of Foucault, Vol. 1: Ethics*, pp. 223-251 (see G&F notes 103, 108).

or formative”.⁹⁵ For the authors, while in his earlier work Foucault indeed had failed to attend to the productive capacities of law itself,⁹⁶ it is possible to identify in his later work a view of the ‘essence’ of law as an uncontainable and illimitable force” — that is, a force marked by a certain “impelling dynamic”, by a “constant [formative] movement between determinacy and an illimitable responsiveness to alterity”.⁹⁷

Just as Giddens acknowledged the intrinsic relation between the formation of abstract systems and the law, so does Foucault acknowledge how disciplinary power, like any form of power, depends on the trust of the law for its constitution.⁹⁸ This also means that excesses, disputes and cases of recalcitrance,⁹⁹ — or, as we have noted regarding abstract systems, forms of mistrust — must ultimately be adjudicated by the law, since the discipline is unable to adjudicate itself and “constituently reliant upon law to rein in its excesses”.¹⁰⁰ Law thus must remain open to content exterior to itself. It has what Golder and Fitzpatrick call a labile existence.¹⁰¹ It is never fully determined by the disciplines, but rather responds to them — all the while existing at the heart of power networks which are experienced everywhere, as are their points of resistance.

And so it is in the dynamics of interaction between both institutional levels of China’s Social Credit System. Neither there is anything in the system itself which is inherently oppressive, nor there is any expulsion or subsumption of the level of rules by the materiality of the level of articulation. Whether the system is oppressive or not will depend on the dynamics of power it ends up, for the time being, stabilizing.

Yet, law’s lability may be less extreme than Foucault makes it seem. Here he is not alone, however. Non-immanentist views, which see no essence in the law, are the stuff of those who trade on denunciations of modernity. However, as one of us has argued in earlier work, no form of law makes sense which does not, at a minimum, set out to promote the recognition and development of human subjectivity.

Seen from this perspective, in a world dominated by various forms of abuse ensuing from the technological instantiations of abstract systems, the Social Credit System is not liberating just *in comparison with* the generally dehumanizing forms of punishment ensuing from the criminal justice system in general. Its liberating character derives from how, at its very essence, the SCS

⁹⁵ Ibid, 15. See Foucault, *Discipline and Punish* at 37, noting “We must cease once and for all to describe the effects of power in negative terms: it ‘excludes’, it ‘represses’, it ‘censors’, it ‘abstracts’, it ‘masks’, it ‘conceals’. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth”.

⁹⁶ Golder and Fitzpatrick, p. 17; Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, p. 60.

⁹⁷ Ibid, 2-3.

⁹⁸ Ibid, 61.

⁹⁹ Ibid, 68-70

¹⁰⁰ Ibid, 65.

¹⁰¹ Ibid, 77

reaffirms the paramount value of modern liberal legal orders — the emancipation of human subjectivity from private, feudal-like forms of subjugation and control.

IV.7. Beyond Neutrality: Choice, Attributes, and Technology

Contemplating the current state of human subjectivity in the information environment, one sees that the challenges attending its articulation stem less from choices actually *made* by Western societies — and which, as seen above, have enabled their flourishing in modern times — than for those Western societies have *refrained from making* — choices which, by omission that now comes to pass as astonishment (was it all so unpredictable?), Western societies have removed from the scope of public reason and surrendered to the technological deities they summoned.

Criticisms to how the Social Credit System regulates the boundaries of human subjectivity, we have also noted, overlook how generally *law* already regulates such boundaries. It does so by stabilizing the recognition of individual attributes in one way or another in the form of *legal rights*, by shaping access to and through such boundaries — which is the work of the laws of *privacy* —, as well by defining possibilities of public discourse regarding their contours — which, most typically, has been the work of fields like *defamation*, but is also, and increasingly so, the domain of *credit regulation*.

In the West, credit regulation has happened with differing — but always significant — levels of deference to economic actors. In China, conversely, it has taken place with a more encompassing presence of the State. In either case, however, the challenge has not been *whether*, but *to what extent* and *in what forms* reasons regarding the contours of human subjectivity turn out to be of legitimate public concern and thus to provide reasons for action by the state. Indeed, if mediating between people and the right reasons that apply to them is the function of the law, nowhere does such a function assume more essential a character than with regard to reasons concerning the recognition and development of human subjectivity.

That this is so is an indictment of a view, often held in contemporary political theory, according to which the state should be neutral regarding competing aspects of individual and social life. Such a view — that of political neutrality — has unwittingly traveled to the technological realm, becoming the cornerstone of a derived principle — that of technological neutrality — according to which it is not the role of the state to make choices regarding particular configurations of technological artefacts. Such a principle has been invoked in the context of international trade, in seeking to prevent China from regulating its territorial Internet, and has branched out into other related ideas regarding the regulation of the information environment (ideas such as network neutrality, search neutrality, amongst others). If sound theoretical ideas they were, political neutrality and technological neutrality would speak against concern by the State with the regulation of attributes at both institutional levels of the SCS. But *are* they sound?

We had briefly and indirectly engaged with political neutrality arguments above as we alluded to the problem of public reason. That public reason is limited in one way or another as to the scope of reasons it engages with is but a consequence of political neutrality's working methods, which Steven Wall has fittingly termed "the bracketing strategy". That is, political neutrality calls on the state to refrain from the making of decisions about reasons thought to be fraught with subjectivity—indeed, to bracket off such reasons. These, typically, are reasons beyond the limits of rights. Such an expectation of restraint ensues, on one hand, from a certain skepticism about the ability of the state to make appropriate decisions regarding the reasons excluded. On the other, it ensues from the conviction that such reasons are subjective in another sense — namely that they should be left to the unimpeded choice of individuals charting the course of their *own* lives according to their *own* conceptions of the good.

Translating such a view to a discussion on the stabilization of identity attributes in the context of the SCS, it emerges that a defining trait of life in liberal societies — and, indeed, a trait that enables one to tell such societies from non-liberal ones — is the following: liberal societies are those that avoid subjecting certain classes of personal attributes, and usually a wide range of them, to the domain of public reason. In other words: on those accounts, notably of Rawlsian and Kantian orientation, to engage in public reason is in part to appeal to a conception of the self as a bare reflection of abstract ideals of freedom and equality.¹⁰²

Such an appeal, in turn, is seen as requiring the abandonment of all situated aims and attachments that otherwise constitute a person's character—and thus of the values and conceptions of the *good* that underpin such aims and attachments.¹⁰³ To use Michael Sandel's fitting expression, the liberal self enters the domain of public reason as an "essentially unencumbered" self:¹⁰⁴ that is, as a self stripped of the aims and attachments entailed by thicker forms of self-understanding and self-constitution.

For liberals of a Rawlsian kind, to think otherwise would be to invite politics to represent people's boundaries as conterminous with the vagaries of private, unarticulated, and often publicly indefensible attributes¹⁰⁵—an invitation that the idea itself of *public* reason would be most unwilling to take up. It follows that, in entering the space of public reason, one must leave behind, for instance, her personal views on the worth of different forms of cultural and artistic

¹⁰² Idea of public reason, 776

¹⁰³ See Michael Sandel (criticizing the Rawlsian priority of the liberal *self* over its *ends* as a reflection of the broader priority accorded by Rawls to *rights* over the *good*. Sandel, LLJ, 19-20. See Rawls *The Priority of Right and Ideas of the Good* (+TJ/PL). Kant, *The Metaphysics of Morals* (CUP, 2nd ed.), p. 27.

¹⁰⁴ Sander, *The Procedural Republic* ...

¹⁰⁵ In Sandel's powerful allegory, "the subject they would be would be indistinguishable from the sea of undifferentiated attributes of an unarticulated situation, which is to say it would be no subject at all, at least no subject we could recognize or pick out as resembling a human person".

expression,¹⁰⁶ or on the validity of friendship relationships of various kinds.¹⁰⁷ The attributes one acquires in acting upon such views are typically not attributes that should enter the realm of public reason and justify the making of decisions by the state, with the consequent imposition of one's comprehensive views on others who do not share them.

The very first purpose of liberal politics, it is thought, is to guarantee that decisions on the values and conceptions of the good one ought to hold should be made by individuals themselves. As Sandel explains, "what matters above all [for liberalism] is not the ends we choose but our capacity to choose them".¹⁰⁸

Now, liberal accounts of the kind above have found remarkable opposition from different philosophical camps, with which we engage in a minute. For now, one simple question might help explain why, namely: how can a person whose aims and constitutive attachments are distorted, not by the state, not by institutions of the kind we would deem public, but in their articulation by the insidious forces of private abstract systems, be assumed to be choosing such ends on her own?

We find the standard account of political neutrality in the works of John Rawls, which we have visited in the introduction. In these works, Rawls puts forward a conception of justice that he believes citizens who are free, equal and moral would agree upon, in an ideal situation, to regulate what he calls the *basic structure of society*.¹⁰⁹ The problem Rawls's account seeks to address is that of explaining such an agreement given the *fact of reasonable pluralism*: that is, "the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of [a democracy's] culture of free institutions".¹¹⁰ How can citizens who differ so much in the comprehensive views they hold, and who value their freedom and equality, settle for a common understanding that does not violate these values

Rawls's answer, particularly as restated in *Political Liberalism*, is that the conception of justice that would reasonably adopted in a free and democratic society is a *political* conception of justice. That is, it is a conception that excludes any nonpolitical views from the scope of public reason.¹¹¹ In this sense, the principles people would agree upon would be, so to say, neutral regarding the particular comprehensive doctrines they hold, as well as the ends,

¹⁰⁶ ref

¹⁰⁷ ref

¹⁰⁸ Ibid, 6-7

¹⁰⁹ The basic structure, which for Rawls is the primary subject of justice, is defined as "the way the major institutions the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation" [PL: 258].

¹¹⁰ The Idea of Public Reason Revisited, pp. 765-766.

¹¹¹ By public reason we can understand the way a political society formulates its plans, puts its ends in order of priority, and makes decisions accordingly [PL: 212]

attachments and loyalties such doctrines enable them to make sense of. [PL: 19; 175]¹¹²

Such an understanding also constrains the conception of the person that inhabit Rawls's basic structure and from there engages in the exercise of public reason. Such a conception, like Rawls's conception of justice more broadly, is a political one. That is, Rawls's focus is on "public, or institutional, identity", on "identity as a matter of basic law" rather than on "identity [as] specified by reference to citizens' deeper aims and commitments" [PL: 30].

Rawls's somewhat formalistic,¹¹³ rule-based¹¹⁴ conception of justice, thus, dovetails with Douzinas's account of formal ideas of recognition, examined at the outset of Part III. In both, the rights that ground public reason are seen as a realm detached from more substantive attributes of human subjectivity of the kinds China's Social Credit System engages with.

Yet, this also means — which cannot be overlooked, and is, in fact, the whole point of our discussion — that State action becomes detached from the pervasive, large-scale systems of evaluation and articulation of individual and collective attributes *put in place by private actors*. For how can the State assess the reasonableness of such systems if not by stepping down from a formalistic account of its roles and of the very idea of recognition? The credit record of today is the gene editing of tomorrow. And there, as in here, boundaries might need to be drawn between the good and the bad, the healthy and the unhealthy.

There are many ways in which Rawls's argument breaks down, and it is not the point of this article to relate these in detail. We engage with one of such ways in the concluding Part, as we discuss the desirability of taking people's individual attributes into account in democratic processes. This is a possibility that the SCS might enable, and which Rawls's himself seemed to contemplate as he wrote of systems of plural voting. As we will note, such systems, while inconsistent with the assumptions above, appear to make better sense of Rawls's idea of self-respect — though, of course, they remain a controversial possibility.

¹¹² In this sense, the principles of justice do not determine what forms of cultural expression are worthy, what comprehensive moral convictions are true, what religious beliefs people are entitled to hold. They do not engage with "conceptions of what is of value in human life", nor with "ideals of personal virtue and character" that inform people's nonpolitical conduct [PL: 175].

¹¹³ It must be noted that Rawls was not fully comfortable with affirming his conception of justice as a conception of "formal justice" (TJ: 207), preferring instead to speak of an idea of "justice as regularity" (207)—that is, one marked by "regular and impartial, and in this sense fair, administration of law" (ibid). He also acknowledged that the strength of allegiance to institutions of formal justice would depend on the substantive justice of those institutions (52). But it is clear from his theory that the regulation of the basic structure of society was a matter of *right*, to be distinguished from the substance of individual *conceptions of the good* life.

¹¹⁴ Rawls conception of the institutions that compose the basic structure is that of a "public system of rules" to be distinguished from the behavior (the "strategies and tactics") of those who live under the rules.

But perhaps the way of most particular relevance for our argument has to do with the arbitrariness of Rawls's division between rights and conceptions of the good.¹¹⁵ The point here is not just that conceptions of the good of all sorts are often a pre-requisite for the exercise of rights and the authorship of an autonomous life (something Rawls himself would not deny). The point is that the ways social processes outside the Rawlsian basic structure constrain the pursue of such conceptions, by relating to them in substantive ways, matter tremendously for individual self-authorship in the information environment. We see this point very clearly in thinking of how technological platforms determine how forms of good like friendship and knowledge — truth itself — will be pursued.

Hence, as much as feminists recognized how reasons of all sort can get entrenched with gender-based prejudice (which the advent of AI has only made more profoundly evident), and as much as communitarians observed how reasons beyond the traditional liberal repertoire may affect possibilities of self-authorship by minority communities, so true liberals also need to acknowledge how individual autonomy, socially and reciprocally situated as it always is, can be undermined by different technological configurations that may need specific response by the State.

In short: in attending to the idea of recognition, it appears arbitrary that the scope of action by the State be restricted to a formal legal structure that does not take the individual particularity of people's attributes into account. Being recognized as a person, entails some measure of individuation in the light of one's attributes. It is the unfolding particularity of human subjectivity, in its infinitely varying forms, and in how the articulation of such forms gets constrained, manipulated and, indeed, distorted in the information environment that turns out to be especially important for the unfolding of *justice* in the information age.

¹¹⁵ This arbitrariness, which travels to Rawls ideas of primary goods, is powerfully noted by, amongst others, John Finnis: "[f]or the sake of a 'democratic' impartiality between differing conceptions of human good, Rawls insists that, in selecting principles of justice, one must treat as primary goods only liberty, opportunity, wealth, and self-respect, and that one must not attribute intrinsic value to such basic forms of good as truth, or play, or art, or friendship" (Finnis, 1980, p. 106). Yet, Finnis remarks, it is "unreasonable for anyone to deny that knowledge is (and is to be treated as) a form of excellence, and that error, illusion, muddle, superstition, and ignorance are evils that no one should wish for, or plan for, or encourage in himself or in others" (p. 106).

If political neutrality arguments have had their virtues, these have been that, on one hand, responses to such arguments have enriched the conceptual repertoire of contemporary liberal theory, by pointing to the many ways in which politics *does* engage and needs to engage with the contours of individual identity. On the hand, such arguments have had a virtue most rare amidst the universe of things implausible these days: the virtue of not becoming concrete!

In effect, *ideas* of political neutrality have not led to the adoption of any general *principle* of political neutrality.¹¹⁶ Actually, a principle along such lines would rather have been a violation of numerous Constitutions of the post-war, as well as of the International Covenant on Economic, Social, and Cultural Rights itself. Commitments in such instruments involve, for instance, the positive fulfillment of rights of cultural, religious, and ethnical minorities, and so authoritative they are that even States that did not formally vow to abide by them in practice observe them.

It was only in the information realm that an idea of neutrality would make itself present as a principle: that of technological neutrality. A detailed analysis of technological neutrality is beyond the scope of this paper. Two observations, however, are due here. One is about the place of technological neutrality in the social imaginary of technology law and politics; the other, about the content of such a principle. On the first, what can be noted is that technological neutrality reflects the deferral of public reason to markets. Albeit with significant variations, notably between the US and the EU, such a deferral has been the hallmark of Internet-related law and policy in Western societies for the past 25 years. Governments would not be well-suited to anticipate technological choices, which should be made, instead, by the market itself.

Such views have found wide adoption in Western technology law and politics. They have become a staple of European Union law, including in the privacy domain, and have been deployed by the US in different contexts, from early Policy Statements on Internet regulation to (more to the point here) more recent challenges before the WTO regarding China's policies in the Internet area, including on Internet filtering. And they have travelled into related concepts, such as those of network neutrality and network neutrality. These may seem like entirely different ideas, but in truth they reflect the application of the same ideals of liberal freedom that technological neutrality applies to the relations between markets and the state to the relations between individuals and a particular group of other abstract systems — namely, 'technological platforms'.

It was only very recently, more particularly since the Cambridge Analytica scandal, that the tone began to change, even if it is yet to translate theoretical discussions that seek to capture the role of actors in a position of authority with regard to the regulation of the information environment—discussions, that is, on Justice, with regard to the defining realm of our time.

The second observation to be made here concerns the content, or scope of technological neutrality. What technological neutrality means as a principle is

¹¹⁶ One finds it here and there in the form of more situated ideas of neutrality with regard to religious values in Germany

that it is not up to the State to pick winners and losers between different technological possibilities. More concretely, technological neutrality calls on the law to avoid specific description of foreseeable technological futures, to be neutral, so to say, between different configurations of technological artefacts. In other words — just like more general instances of political neutrality —, what technological neutrality does is to *bracket off* certain classes of reasons from the political realm, namely reasons concerning the specificities of technological artefacts.¹¹⁷

That such reasons are *technological* does not make them less *political*. Technologies pursue certain ends and are shaped in accordance with certain reasons, all of which are capable of taking up a political dimension. That the political may *attach* to reasons of any kind was, in fact, a significant observation by Carl Schmitt. And so it is that politics may also attach to reasons reflected in technological artefacts. In fact, so conspicuously it does so at times that one can barely notice its instantiation in specific technological forms. It may appear, rather, that the political is attaching itself to a business decision or to a commercial relationship purely, rather than to decisions and relationships of a technological kind. This, however, is not the case.

Take social media platforms, for instance. They are technological instantiations of large-scale abstract systems of the kinds discussed before. While their authorities — software engineers, marketing strategists, legal divisions, policy teams — do settle normative matters in one way or another, they do so as they engage in design that is, in essence, technological. The design of social media platforms reflects choices amongst different standards, algorithms, architecture and language possibilities — from seemingly objective privacy settings to intricate decisions about content prioritization and takedown —, all of which ultimately materialize in the form of specific technological configurations.

All this can be summarized by recognizing, with the philosophical literature, that technological artifacts have a dual dimension, being at the same time

¹¹⁷ At times this is done by bracketing off reasons other those concerning the *functions* of technological artefacts, so that law does not discriminate amongst technologies that accomplish equivalent functions. Functional equivalence, however — as this ideal is called — overlooks how often the undesirability of certain technologies concerns not their functions, but other dimensions of them. See, for instance, ongoing discussions about the use and design of instant messaging platforms in the context of elections. Those discussions concern not the functions of such platforms, but their *architectural* properties. For example, they concern the locus of application of encryption techniques — should encryption be end-to-end? — and the ensuing limitations to possibilities of controlling the spread of misinformation. Or, for the same reasons, they concern the possible paths followed by content: whether there are limitations applied to the number of people one can forward a message to, or whether there are specific channels followed by audiovisual content — i.e. whether this is stored in separation from text messages — so as to enable a more fine-grained control of its diffusion possibilities. To exclude reasons without being able to determine what set or dimension the exclude reasons should come from, one is engaging in an entirely arbitrary enterprise.

physical and teleological (or normative) entities. In the case of software such a duality might be obscured by a certain ethereal character, an appearance of disembodiment. But software, as information in general, *does* have its materiality. This, after all, is the essence of the fact of articulation. That the physical dimension of software appears to be less prominent than its normative, teleological dimension does not make software less of a technological artefact — as it does not make its stabilization in one way or another less technology-specific.

China's Social Credit System reflects the duality above. This, however, is a separate matter from that concerning the sheer existence of two institutional levels in the System. At the level of articulation itself one already finds embodied both dimensions of technological artifacts, though the same may also be said of the system as a whole. At both levels, and as they interact, choices will be at same time physical and normative, and they will naturally be *specific* choices, stabilizing technological configurations in one way or another. In turn, as the SCS interacts with other systems, it will also modify the ways such systems work, requiring specific design choices from them.

This, in fact, is the *raison d'être* of the SCS. If the System's purpose is to further levels of trust in society, at its core it must see to it that life under other abstract systems that increasingly and minutely control people's destinies unfolds in conditions of trust. This may happen by evaluating attributes of the authorities of such systems in light of their actions, or by procedural or substantive reappraisal of decisions made within such systems and the ways such decisions are then factored into technological design — most particularly when such decisions entail the misrecognition of individual attributes.

In short: the idea that the State should refrain from making regulatory choices involving specific technological reasons is not defensible — as not defensible is the view that reasons concerning specific individual attributes, in particular those belonging beyond a narrower domain of rights, should be excluded from the political realm. Turning to systems of evaluation and articulation of individual attributes — like the SCS and the range of systems that interact with it — one understands how questions concerning political neutrality and technological neutrality are just one and the same, approached from different directions.

Does that mean, again, that law and politics should get ever more specific, ever more minute with regard to the regulation of technology and individual attributes? Of course, not, and above we have seen good reasons why generality, to some extent, may be of value. Yet, this should not translate into a general *principle of vagueness*.

To the extent that technological artifacts assume a political expression — or to the extent that policy propositions require a specific technological expression — the scope of public reason becomes coextensive with the physico-normative properties of technological artifacts. Liberalism requires no bracketing off, no neutrality of political concern regarding reasons about technology, no principle commanding the exclusion of ideals *even where good reasons there are good for reflecting upon those*.

And surely such reasons abound in situations a system like China's Social Credit System seeks to address, where inappropriate forms of articulation of individual attributes work inexorably to the detriment of human subjectivity. Reclaiming our attributes — disentangling them from such distorted forms of articulation, recasting them under the light of reason — is the central task of Justice of our time.

And it is, at the same time, a task that transcends us. As informational resources get stabilized, so do not only the boundaries between us, but also those between ourselves and the universe that surrounds us — a universe that not only is ours to make, but above all is ours to *find*.

Like da Vinci's Vitruvian Man, we stand at the center of a grand scheme of things “we just might have the power of mind to figure out how we fit into”, notes Toby Lester, quoted by Walter Isaacson in his biography of the Florentine genius. “Inside the square and the circle”, Isaacson adds, “we can see ... the essence of ourselves, standing naked at the intersection of *the earthly* and *the cosmic*”.

We now stand at *this same intersection*, and we do so with a *duty*. Our planetary existence depends on the ways our power of mind will be exercised, but how it will so in turn depends on how it will be enabled or disabled by the information environment. Our duty is to find the best shape possible for the articulation of our common commitments. The squares and the circles of *our* Renaissance may be made of 1s and 0s. But the harmony in their measures is not up for grabs. Like the man of the renaissance, we too must find in *reason* the ways the contingent fabric of our information environment intersects with the “cosmic”, universal values law stands for.

Thus, in ways China has seen perhaps before others have, the *making* of *public* choices for the information environment is not something avoidable. Nor is it something inherently oppressive or antithetical to liberal ideals. Quite the contrary. It is in *refraining* from making such choices, in letting them be guided purely by the private interests of technological actors, that we may be losing our freedom to interests that are foreign to us.

At the same time, public decision making is not a voluntarist affair. In defining the scope of public reason, people seek to capture something greater. They publicly strive towards the universal, towards the reasonable — even as they can only grasp it limitedly, once at a time, from within the boundaries of their individual and collective identities.

Here lies the true exercise of reflexive equilibrium. The setting of such boundaries constrains what *can* be found, yet, it ought to be constrained back by what *has*, in effect, been found. Our shared duty is one of pursuing this exercise responsibly, in the light of all reasons that attend it. Anything else — any device of representation that veils us to the plethora of circumstances of the universe around and within — is not only an act of collective self-deception, but a fundamental contradiction of the dynamics of articulation that characterize our time.

V. Democracy, Meritocracy & Social Credit

V.1. The Problem of Informational Asymmetry

As the preceding section has sought to argue, there is nothing inherently oppressive in engagement by the State with structural and content-related elements of the information environment. This is particularly so when those elements most directly concern how the boundaries of human subjectivity get articulated and stabilized. Rather, seeing to it that such boundaries find the conditions to develop in reasonable ways — subjecting different forms of power that significantly impinge upon them to the empire of public reason — is the chief concern, indeed the point of any legal and constitutional order.

Processes of evaluation and filtration of individual and collective attributes — which China's Social Credit System sets out to regulate — are a key part of such concern.

The exponential multiplication of such processes is an unavoidable consequence of a normative life increasingly lived in digital means — a life where we not only judge actions and their actors, as we have always done, but where we articulate such judgements in an intricate and ever faster unfolding informational tapestry.

The institutional forms — and the levels of transparency — with which such processes are carried out vary dramatically. Some of such processes are the domain of courts, others of Internet vigilantism. Some of our attributes are made known to everyone. Others are made known to no one, but rather inferred by machines that make our lives up on the go. Whether such processes lead to a unified score or not is less material than it seems. Rather than *whether* our society is *quantified*, it matters more the *ways* in which it is *qualified* — and the institutional forms through which we decide on such ways.

Is it oppressive to institutionally subject such processes to some public form of ordering? Or oppression lies, rather, in not doing so — in keeping within tried and tired alternatives, in resisting to break the chains of institutional drudgery even as our futures call for something radically different?

We find still today, with little variation, institutional forms whose combination, as noted in preceding sections, was fundamental for the rise of modern Western societies: the *rule of law*, with the types of constitutional constraint — and possibility — imagined in the early modern period; the episodic rituals of suffrage through which public *trust* is bestowed — and which we most typically refer to as democracy; and, finally, often neglected as an institutional form, yet one such form nevertheless, the large-scale systems of *technological expertise* that found support in other state-based institutions for their rise.

While our conceptions about these institutional forms and how to combine them have not changed much, the practical instantiation of these in our social lives has varied dramatically — in ways that, unaddressed, threaten to erode the very foundations upon which our societies have been built.

The normative force of law finds itself increasingly displaced by inscrutable technological modalities of regulation — and so do the values law publicly stands for. Systems of technological expertise, which depended on trust lent by the state and the law for their rise, now reciprocate by rendering the governance of our societies dependent upon them. And in a world of ever greater complexity and fragmentation — and of extraordinary concentration of power, which the twin forces of technology and capital enabled some to amass — the bestowing of public trust becomes a rather problematic affair.

At the heart of all challenges lies a seemingly intractable one: *informational asymmetry*. People’s illusion of democracy is betrayed by the raw fact that only a remarkably few and ever more powerful set of actors will increasingly have the knowledge to decisively affect our social and political processes — knowledge about ourselves and the universe that surrounds us. Economic literature is familiar with how problems of informational asymmetry that affect markets in general also undermine the proper functioning of political institutions.¹¹⁸ The issue, now, is that such problems only promise to get more extreme as the private accumulation of algorithmically generated knowledge threatens to upend any possible rebalancing of forces in our societies.

To ponder, however, on the institutional merits of a system like the Social Credit System to address the problems identified in this paper is not to defend the unchecked accumulation of power by a technocratic elite — from Platonic ideas of a “Philosopher King” to Saint-Simon’s proposal of “elevat[ing] ... scientists to the summit of the social structure” on the grounds that, if that was to happen, “social conflicts would cease and men would attain terrestrial happiness”.¹¹⁹

Such technocratic forms of governance may actually be the ones Western societies are marching towards if nothing is done to constitutionally bottle the private genie of AI. Rather than in any form of public reason, authority will be invested in the ownership of private oracles, which, through different algorithmic mechanisms, will have the knowledge to define and redefine not only people’s political processes, but the very boundaries of who they are.

In itself, China’s Social Credit System is not an institutional response to all problems of informational asymmetry noted above — only a broader system of governance of AI can subject the forms and accumulation of algorithmically derived knowledge to some form of public governance. Yet, the SCS can be understood as an attempt to rearticulate the balance of modern institutions where perhaps they matter most, namely where they concern the recognition of human subjectivity and its contours.

Most immediately, this happens by making sure that mechanisms of evaluation and filtration of identity attributes follow — rather than the invisible

¹¹⁸ (Stiglitz, 2002: 487-488)

¹¹⁹ Frank E. Manuel, *The Prophets of Paris* (Cambridge, Massachusetts: Harvard University Press, 1962) 124-125. See, also, Frank E. Manuel, *The New world of Henri Saint-Simon* (Notre Dame: University of Notre Dame Press, 1963) (for a thorough analysis of the life of Saint-Simon and his time).

whim of powerful private actors — a set of collectively defined criteria, as well as by making sure that, through avenues available for redress, the SCS is made accountable to such criteria. All these, as the paper has discussed so far, are stated objectives of the SCS.

But there is another, equally important contribution the SCS can make towards addressing problems of informational asymmetry through the recalibration of modern institutions. This contribution concerns the proper ways of attending to differences, positive or negative, ensuing from people's individual circumstances — recognizing the merits of their different levels of effort and self-cultivation, but also the extent to which these differences may be determined by inequalities of opportunity in life.

The contribution, with which we would like to conclude the argument in this paper, is, thus, twofold. On one hand, we argue that China's SCS can be used as an institutional mechanism to recognize the merits of people's choices as they matter for public life. Most specifically, the argument here is that the development of political processes based on people's publicly recognized attributes is not antithetical to the values that underpin democratic processes in liberal societies. Rather, it can be understood as a powerful response to important deficiencies in such processes.

On the other hand, we argue that mechanisms of *distributive justice* reflected in the articulation of people's attributes by the SCS can attend to the ways in which inequalities of opportunity affect people's possibilities of self-development and rationality. In doing so, the SCS can disentangle *choice* and *merit* from structural forms of injustice that affect, respectively, the making and evaluation of those.

The interaction between the two dimensions above carries profound meaning for how social institutions enable the achievement of ideals of political and, more broadly, social justice.¹²⁰ Appropriately calibrated, this interaction liberates meritocracy from historical charges of injustice and oppression. Most importantly: by restoring the proper balance of forces between different actors — by making sure that people be seen for who they are — , it enables the re-articulation of social institutions, to address broader problems of asymmetry that affect social life in general.

Of course, it all depends on whether algorithms are publicly devised in ways that enable the achievement of such comprehensive ideals of justice. But so it happens currently, with the ways private algorithms carry out the distortion of these same ideals.

V.2. Taking Choice Seriously: Democracy, Meritocracy, and the SCS

Democratic theory, imbued as it is by an idea of formal equality, institutionally overlooks substantive differences between people. Typically, contemporary forms of democratic governance tend to be based on criteria of one person, one

¹²⁰ Rawls

vote. Merit, thus — or the complete lack of it — matters little for democratic processes.

Of course, merit will matter as an *expected* outcome. The expectation is that, in laying out institutions that are substantively neutral about people's attributes, politics will enable *all voices* to deliberate freely about those standing for public office and, eventually, select the ones more fit for it. As a result, there are virtually no quality-related constraints as to the merits — and thus the underlying actions and choices that merits relate to — of who can vote and who can stand for public office. The *will* reflected in democratic processes is, thus, an absolute will, formally detached from any substantive expectations that attend individual and social life in general.

This is a rather particular institutional position, which differs from liberal societies' legal and political institutions more broadly. The latter are generally based on a thicker understanding of free will — one characterized by at least *some* measure of attention to quality-related circumstances that attach to human action.

The intellectual property system rewards creativity — patent and copyright are infused with criteria of inventiveness and originality that, once fulfilled, lead to the award of exclusive rights. Immigration law often establishes merit-based requirements for admission of non-citizens for work and, in some instances, for the acquisition of citizenship. Labor law recognizes performance, since it contemplates some level of protection against not performance-based dismissals. Even the criminal law, often criticized for how its abstract assumptions of free will ignore the actual circumstances that lead offenders down the path of delinquency,¹²¹ takes these circumstances into account in processes of sentencing and in progression regimes, as it seeks to promote the repentance and rehabilitation of offenders.

Generally, thus, the institutions of law recognize and award the pursuit of certain standards that qualify the expression of one's free will. Once such standards are met (or not), the result is the recognition of certain attributes of those who have met them (or who have not), which in turn shape the contours of legal personhood.

We find a final and most important example in Tort Law, more specifically in the law of negligence and its requirement that people conduct themselves in accordance with standards of reasonable care appropriate to their action. Such standards determine the content of one's obligation to avert a wrong,¹²² and reflect a normative balance at the heart of private law: namely, the balance between *doing* and *suffering*, between the actions one undertakes and the consequences others incur — an ideal of normative reciprocity that Ernest Weinrib terms “correlativity”, and which, when violated, invites the

¹²¹ Murphy

¹²² “Negligence in law is a failure to try assiduously enough to avert (limit, reduce, control) the unwelcome side-effects of one's (otherwise valuable) endeavours. It follows that the obligation that one fails to perform when one acts negligently is indeed an obligation to try. The nonperformance of an obligation to try is what gives rise to fault”. (Gardner)

intervention of mechanisms of *corrective justice* to restore the balance that has been upset.

Hence, whereas justice in private law requires a normative balance between the parties, reflected in certain standards of reasonable action, the theory and practice of democracy — public law where it matters most — do away with any thicker ideal of egalitarian reciprocity. The foundations of reasonableness that law requires generally — and which it probes, challenging though this may be — are abandoned *entirely*, at the highest moment of a nation’s public life.

Surely, it would be technically problematic to conflate the morality of *duty* required by the institutions of law with the morality of *aspiration* reflected in political processes more generally. And it is not the suggestion here that they are one and the same thing. But neither need democratic institutions be such a barren normative realm. Is it compatible with their very foundations that they are so?

For democratic institutions, when one goes into a voting booth, it means nothing how virtuous or how derelict a life one lives. The vote of a citizen who, having had every opportunity in life, *chose* the path of ignorance, idleness, and vice will count in just the same way as that of a citizen who, having come out of nothing, strove and built a life of knowledge, endeavor, and rectitude.

For the institutions of democracy, it does not matter that vote of the former is likely to be tainted by the cumulative effects of all his previous choices; nor that, because of this, it is bound to affect the life that the latter — and others, in present and future generations — will be able to live is not a concern entertained by the institutions of democracy. Democracy, thus, searches for no balance of commitments, no measure of responsibility towards the common good. And since the life one *chooses* to live is bound to affect others, it can be said democracy does not truly take choice seriously.

Choice, however, *should* matter for all legal and political institutions. Choice is the expression of free will, and free will is the foundation of any contemporary understanding of democracy. People are left to choose precisely *because they can*, because they are rational beings,¹²³ and thus beings of dignity and self-respect. One cannot deny that, given the right opportunities, the pursuit of knowledge and self-cultivation *is* a choice — and one that matters profoundly for the future and the dignity of others — without denying the possibility of free will and, with it, the foundations of democracy itself.

Democracy, in addition, cannot be seen merely as a choice one makes at the ballot box. Democracy is a continuous commitment, through which people seek to improve the world around them, *including by improving themselves*. Precisely in this sense, Skorupski notes that one of the arguments classical liberalism puts forward in favor of democracy is that “[p]articipation in public affairs develops the individual”. That this is so, in his words,

¹²³ “[M]odern-day democratic politics is founded on the idea that people generally act rationally in pursuit of their interests and preferences”. Bell, Daniel A.. *The China Model* (p. 22). Princeton University Press. Kindle Edition.

“is a line of thought that goes back to Aristotle. Involvement in public affairs at any level brings responsibility, public spirit, independence, and thus self-actualization. Democratic participation does this in the fullest way: it develops the virtues of fearlessness and clarity in putting a public case and then of reasonable compromise. There are many ways of developing moral insight, self-confidence, and responsibility, but one very good way is through active participation in democratic affairs”.

There is, however, as Skorupski also notes, a flair of elitism — which one should avoid — in classical liberalism. Classical liberals were not proponents of political neutrality; they (rightly) saw the state as having a role in promoting “the *true good* of the citizens”. Thus, their theories were perfectly contented with meritocratic restrictions to ideals of democracy.

Stuart Mill, for instance, famously favored limiting voting to citizens with certain levels of education and giving plural votes to the most educated ones. “Equal voting”, he noted, is not “among the things which are in themselves good”. Mill saw it rather as a “wrong, because recognizing a wrong standard”, since “[i]t is not *useful*, but *hurtful*, that the constitution of the country should declare ignorance to be entitled to as much political power as knowledge”.

Mill’s meritocracy is not to be commended. There is an element of disenfranchisement it, for to reduce political membership to knowledge-based criteria is to ignore that inequalities of opportunity often stand in the way of access to knowledge; it is to condemn those who have no avenues for self-improvement to a life of exclusion, of indignity. It is — as the words italicized above denounce — a utilitarian idea, and, in this sense, one in line with Mill’s utilitarian views more broadly.

Yet, Mill might have been right in characterizing equal voting as something which is not a good in itself. Let’s take for granted the SCS’s assumption that the quality of one’s previous individual choices can be measured and that the merits that attach to them can be assessed. Let’s assume, further, that the effects of independent reasons, external to one’s choices can be discounted — reasons, thus, which one does not reflexively endorse but which, acted upon by others, affect one’s actions detrimentally in ways he cannot avoid. The result is, then,

should not the cumulative effects of such choices in the quality of one’s voting be taken into account in democratic processes?

Note that such effects matter not only for utilitarian reasons. They matter because they undermine the autonomy and self-respect of other citizens and of the political community as a whole. The irrational political decision they lead to violates the normative balance between the citizens by — if at least it has the virtue of consistency — subjecting a rational minority to the irrational policy choices embraced by the irrational majority, thus eliminating the availability of rational options the smaller group would have otherwise been able to pursue. Ultimately undermined are the rational foundations of democracy itself and, if elections and referendums in the past few years serve as an example, the rights of present and future generations.

The Social Credit System, thus, can work as mechanism to address certain undesirable consequences of democratic processes by adopting *meritocratic*

components — although meritocratic components compatible with ideals of *dignity* and *substantive equality of opportunity*. This is so as the SCS can at the same time encourage all citizens to pursue avenues of self-improvement *and* create institutional assurances that such avenues will be open to them.

It can do so by considering the effects of external, choice-independent elements in each person's actions, so that each person's Social Credit reflects the merits of her *actual* choices. The result are

That possibilities of political participation be then, in turn, based on one's Social Credit is not a violation of ideals of equality, since inequalities that remain will be the product of one's free will — and free will, as noted, is not something democracy can deny, on pains of undermining its own foundations.

As a policy, this is not entirely unprecedented. The Standard Admissions Test (SAT), which informs college admission in the US, now includes an *adversity score*. As an interesting recent article by Richard Kahlenberg in *The Atlantic* points out, research at Georgetown University “has found that the most disadvantaged students, on average, score a whopping 784 points lower on the SAT (out of a possible 1600) than the most advantaged”. The article observes:

Many decades into the controversy over affirmative action in college admissions — and with a conservative Supreme Court poised, many believe, to overturn the practice — an adversity score offers colleges some way to acknowledge what everyone knows: A student who scored 1200 on the SAT despite having grown up in a high-crime neighborhood and attending high-poverty schools has more long-run potential than a student who earned 1200 while having access to the best private schools and paid tutors.

In the end, as the article notes, “even rough measures of socioeconomic disadvantage are better than no measure at all”.