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Principal Investigator :

首席研究員 :

Dr Marcelo THOMPSON

Institution/Think Tank :

院校／智庫 :

The University of Hong Kong
香港大學

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Standards Setting, National Security, and the Responsibility of Technological Platforms in Hong Kong

Understanding Article 139 of the Hong Kong Basic Law

Marcelo Thompson, DPhil (Oxford)

Faculty of Law, The University of Hong Kong

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Chief Executive's Policy Unit, The Government of the Hong Kong SAR

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Note

Law and policy developments reflected in this Final Report are updated until December 2023. Further refinement and referencing of arguments contained in the report were completed subsequently, including the incorporation of a new Annex 1, outlining important areas of interplay between public-interest considerations and the regulation of technological platforms. The intervening time between the Report's conclusion and its publication saw, among other developments, the further advancement of common policies in the Greater Bay Area and the establishment of the Digital Policy Office. These developments are not discussed in the Report and do not, to date, substantially alter its findings and recommendations. They are received optimistically, however, as significant steps toward the implementation of Article 139 of the Hong Kong Basic Law.

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A. Executive Summary

Abstract

Article 139(2) of the Hong Kong Basic Law grants to the Government of Hong Kong the power to, on its own, decide on the technological standards and specifications applicable in the Region. The present Report explores the distinctive contours of this provision, in the light of its historical, political, constitutional, and technological foundations. In doing so, it suggests ways for mobilising the provision in promoting the public interest and responding to online risks and harms in Hong Kong's information environment. Among these, the Report focuses on those enabled by the activities of technological platforms. Despite its importance and the vastness of its scope, it is remarkable that Article 139(2) has received close to no substantive attention in commentaries on the Hong Kong Basic Law and, indeed, in the entirety of constitutional law scholarship in Hong Kong. By endeavouring to provide a thorough overview of the foundations and limits of the power conferred by this provision, this Report seeks to contribute to the bridging of such a gap. Ultimately, it puts forward a framework for the making of proportionate decisions concerning technological standards in Hong Kong—and one that moves normative considerations concerning the information environment, beyond the domain of national security, toward larger questions regarding the public interest. Finally, it considers questions of data privacy / governance and the responsibility of technological platforms as domains from which to approach the power to decide on standards in the first place.

Summary of Findings / Recommendations

Introduction

1. Article 139(2) of the Hong Kong Basic Law grants to the Government of Hong Kong the power to, on its own, decide on the technological standards and specifications applicable in the Region. The present Report explores the distinctive contours of this provision, in the light of its historical, political, constitutional, and technological foundations. In doing so, the Report suggests ways for mobilising the provision in promoting the public interest and responding to online risks and harms in Hong Kong's information environment. Among these, the Report focuses particularly on those enabled by the activities of technological platforms.

2. Despite its importance and the vastness of its scope, it is remarkable that Article 139(2) has received virtually no substantive attention in commentaries on the Hong Kong Basic Law and, indeed, in the entirety of constitutional law scholarship in Hong Kong. By endeavouring to provide a thorough overview of the foundations and the limits of the power conferred by this provision, this Report seeks to contribute to the bridging of such a gap.

3. Seeing in the power to decide on standards the goal of furthering the public interest in Hong Kong's information environment is to dignify this power with a certain standing. It is to recognise its centrality in addressing the profound transformations that Hong Kong, like every community, is undergoing, as algorithmic forms of governance redefine all domains of social life in the 21st century. Seen under this light, the power to decide on standards emerges not only as a necessary response to such processes, but indeed as a cornerstone of the whole architecture of governance of the Hong Kong SAR. It can become the basis for a novel, more agile, where necessary

more embedded, yet also open and participatory regulatory approach in the Region.

4. While the Report highlights the importance of approaching the power to decide on standards from the perspective of ordinary instances of its exercise, it is undeniably the case that, over these ordinary instances, the shadow of *existential* instances always loom—quintessentially, as a response to challenges to national security. Without denying the indeed existential character of such challenges, and the imperative of responding accordingly to them, no political community wishes to remain under their shadow. The task, thus, is always to endeavour to step out of the shadow. It is to proceed in lighter, piecemeal fashion to address challenges in their different degrees of seriousness before seriousness overruns.

5. More specifically, the task is to focus on challenges of *public interest* before they evolve into challenges of *national security*—as well as to recognise the instances where, even though values of the same kind are mobilised, such an evolution needs not take place. The power to decide on standards offers, in this sense, a form of *granularity* that goes beyond the rare but stringent ways in which, as the Report will explain, the law has recently evolved in Hong Kong to tackle technological challenges.

6. Yet, while the goal of this Report is to focus on the ordinary, in a risk society, the ever-growing imminence of existential moments unavoidably imposes itself and cannot be neglected or underestimated. In what concerns the subject of discussions in this Report, the looming presence of such moments is highlighted by the ways in which the authority of states and the public interest of political communities around the world are being impressively challenged by the rising dominance of technological platforms. Hence, it must be seen that, whatever else the power to decide on standards

might entail, it is first and foremost a power inherently connected with the affirmation of *sovereignty* in the light of such challenges.

Standards and Sovereignty

7. Seeing Article 139(2) from a sovereignty perspective readily invites an important conclusion about its scope and the scope of similar provisions in the Hong Kong Basic Law. This conclusion is that the sovereign power expressed through Article 139(2) must necessarily be seen as anchored in the legal and political system of the People's Republic of China, and thus that the sovereignty the provision affirms is thus necessarily the sovereignty of the Chinese nation.

8. Such a conclusion, obvious though it might seem, runs against a reading occasionally found in the literature, which sees the granting of a range of other similar powers by the Basic Law to the Hong Kong Government—all typically stamped by the expression 'on its own'—as conferring a status of 'semi-sovereignty' to the Region. An inquiry into the power to decide, nevertheless, shows how such a reading, and the adversarial view that ensues from it—where 'on its own' is reduced to an idea of opposition, to Hong Kong 'instead of' or 'as opposed to' the Mainland—cannot be made compatible with the idea itself of sovereignty. Indeed, Article 139(2) provides paradigmatic evidence that neither its text nor that of any provision in the Basic Law should be read along such lines.

9. In effect, the power to decide on standards, through the complex set of variables it mobilises and responds to, entails the making of choices that take the national interest into account. Under the idea of 'One Country, Two Systems', the protection of Hong Kong's local interests, including its interests in engagement at the global level, is itself a fundamental dimension of the interests of a Chinese nation that roots for a cosmopolitan Hong Kong

and for a Hong Kong with a ‘high degree of autonomy’. Ultimately, whether an adopted standard should be sought at the national, international, or local level is a decision based on a reasoning of proportionality encompassing several variables and dimensions that the Report outlines.

10. On the other hand, while the power to decide on standards is an expression of sovereign power, what should be understood as entailed by the idea of sovereignty is itself a very important consideration. As the Report explains, when applied to the power to decide on technological standards, the idea of sovereignty cannot be reduced to purely utilitarian—commercial, technological, power-based—considerations. Rather, it must encompass the affirmation of the values and ideals that underpin the Hong Kong Basic Law more generally and, as matters of national significance are concerned, values and ideals that underpin the legal and political system of the PRC.

11. For the same reasons, the idea of sovereignty to be recommended here cannot be one that reduces sovereignty—and thus the power to decide on standards as an expression of it—to a matter of *exception* from legal rules. Rather, sovereignty must be seen as a matter of decisional regularity, entailing the making of *ordinary* decisions in the public interest. What makes sovereignty distinctive as an ultimate power is its representation of the unity and universality of the general will of the people. Sovereignty, in this sense, emerges as an *ethical* ideal, which provides an authoritative connection between the shifting materiality of *facts* and the domain of *legal norms*. It is as a *necessary* expression of such an ethical ideal that the power to decide on standards must be understood—as a power, that is, which at the same time inhabits and weaves together the continuum between the materiality of *technology* and the normativity of *law*.

Drafting History and Legislative Intent

12. Several important conclusions can be reached by examining the legislative history of Article 139(2). The first is twofold. On one hand, processes taking place at the time—including Hong Kong's interconnection with a then emerging Internet—show that the reality of standards setting as a phenomenon related to advanced and globally entangled technological processes could not have been unknown to the drafters of the Hong Kong Basic Law. Rather, parliamentary proceedings from the time provide evidence of acquaintance with such technological matters. On the other hand, and most strikingly, not only the drafters of the Basic Law could not be unaware of this vast technological universe, but they chose a remarkably different path from the one embraced in other jurisdictions, where the power to decide on standards has long been recognised, in unequivocal terms, as a **legislative power**. In Hong Kong, instead, the power to decide on standards was conferred on **the Government**. The unavoidable conclusion here is then that, not only the drafters of the Hong Kong Basic Law intended to confer on the HKSAR Government an attribution encompassing contemporary information and communication technologies, but also the attribution they intended to confer on the Government was one of a clearly **normative** character.

13. Such a conclusion does not mean that standards must always be articulated by the Government in the form of explicit legal rules—though an also clear implication here is that they can be so. As the Report explains with support in the literature and comparative law, standards setting has a hybrid character, extending along a continuum between the technological/material and the legal/normative. The practical implication is that the power to decide on standards can be exercised at different levels along this continuum—from materially embedded standards where law takes the form of 'code', to normatively abstract standards where the code of technological artifacts

becomes law. It is thus of remarkable consequence that a power of such reach was granted to the Government—and it was so not through the National Security Law or any instrument of exceptional character, but through the Basic Law of the Hong Kong SAR.

14. A second finding follows directly from the one above. This is that the powers conferred by Article 139(2) are so conferred not generically on ‘the Hong Kong SAR’, as is the case with other provisions in the Basic Law, but indeed specifically on ‘the Government of the HKSAR’. As such, the provision affirms the relative autonomy not of the HKSAR in abstract, but of the Government itself in relation to other actors.

15. Third, in examining the internal structure of Article 139 in combination with the legislative history of the provision, it becomes clear that the power to decide on technological standards exists in addition to the power to formulate policies on technology (Article 139(1)), not being thus a mere instantiation of the latter. In fact, the power to formulate policies was only introduced at later stages of the Basic Law’s drafting process. In contrast with the mere formulation of policies, the power to decide on standards is a power of clearly normative character that enables the Government to decide on what is applicable and thus to exclude what is not.

16. Fourth, while important recent scholarship on the Basic Law tells the story of a Basic Law chiefly committed to free-market protections, the drafting history of Article 139 points to the pursuit of a broader balance between economic-oriented aspects of technological development and broader concerns involving technology policy and beyond. Of note, for example, is the fact that what is now Article 118 of the Basic Law evolved from an original Article 139(2) that would task the Government with the attribution of ‘develop[ing] science and technology undertakings.’ This

reflects a conscious effort by the drafters to separate matters concerning the 'Economy' (Chapter V of the Basic Law), where Article 118 focuses on the promotion of technological progress, from those related to broader policy considerations concerning technology—a balance that helps ensure that technological progress in Hong Kong is both economically beneficial and socially responsible.

17. Fifth, and finally, an examination of Article 139(2)'s drafting history indicates that, rather than worrying about Hong Kong following Mainland standards, legislators were primarily concerned that Hong Kong might create standards conflicting with international ones. Earlier versions of the provision merely spoke of Hong Kong 'selecting' which international standards would apply in the region. The version ultimately adopted for Article 139(2) recognises the HKSAR Government's broader authority to both create its own unique standards and reject other standards entirely. The avenues are open, and it is an ideal of proportionality that must then guide the Government in choosing its course.

The Content of Decisions on Standards

18. This ideal of proportionality in exercising the power to decide must be pursued across various axes. The first axis described in the Report concerns the content of decisions on standards, that is, it concerns what the Government decides on. On one hand, it concerns the decision about what *form* standards will take, at what level standards will be articulated within the continuum between the material/technological and the normative/legal domains. On the other hand, it concerns the substance of technology-related matters that decisions on standards engage with. Article 139(2) places no restraints on either aspect. It grants a wide-ranging power to the HKSAR Government—which can be embedded in technology, exercised high up at the normative level, or anything in between—to decide what is normatively

applicable in a given technological context and what isn't. The power to decide, in other words, also necessarily encompasses the power to create new obligations in a technological context.

19. The exercise of such a power by the Government, however—like state sovereignty generally—finds itself centrally challenged by the growing normative might of technological platforms. This happens not only through platforms' influence in international standards-setting fora, but also in how platforms directly articulate standards as hidden, self-executing expectations in their algorithms and protocols. Strikingly, these expectations increasingly involve the employment of subliminal techniques that raise a wide range of concerns at the individual and societal levels. Such concerns become ever more pressing with the rise of AI and are at the heart of emerging frameworks in Europe—such as the 'Digital Services Act' and the 'Artificial Intelligence Act', in the European Union, and the 'Online Safety Act 2023', in the United Kingdom—which have developed precisely to tackle them. The Report invites the Government to consider these frameworks as important paradigms—including due to the flexible, standards-based approaches they put into place—for regulating technological platforms in Hong Kong.

20. This represents the first way in which the power reflected in Article 139(2) can be decisively yet proportionately exercised by the HKSAR Government. Following the model of the frameworks just noted above, the Report recommends that while regulatory interventions by the Government should be comprehensive in scope, covering the full range of public interest concerns, they should at the same time take a graduated approach. This means, insofar as possible, favouring lighter-touch regulatory measures, such as voluntary standards, over more stringent ones like those typically reserved for national security matters. Such a balanced approach would help prevent the accumulation of unaddressed issues and the need for the sudden adoption of

more severe regulatory responses. That interventions adopted in the US and in Hong Kong, which the Report discusses, have had a more stringent, national security-oriented focus from the outset does not necessarily contribute to their effectiveness in addressing public interest concerns.

21. An approach where the Government leaves the technology sector largely unregulated and ordinarily defers to tech platforms' own standards is not a proportionate approach—for it leaves public interest considerations largely uncatered for. Nor is it proportionate to approach the regulation of platforms mostly from a criminal law (as in recent amendments to the PD(P)O to combat doxing) or national security perspectives. A proportionate approach is, instead, one that occupies the space between technology and the law with standards developed through participatory mechanisms and targeted at broad public-interest considerations. That is an approach that lives up to the ethical view of sovereignty presented in this Report.

22. Proportionality considerations take up particular relevance given the fact that, in Hong Kong, atypically, it is the Executive branch that is empowered to make decisions on standards. However, a proportionality assessment must also consider the remarkable normative power acquired by technological platforms—the pervasive ways, that is, in which technological platforms embed their normative choices in the infrastructure of the information environment. The pursuit of proportionality, thus, must not entail neutrality by the Government or deference to ongoing processes of technological change. That the Government has been granted the power to decide on standards speaks clearly against the recognition of an ideal of technological neutrality in Hong Kong.

23. In other words, though an open standards-setting process is to be welcomed as part of the graduated approach noted at paragraph 20 above, the

granting of the power to decide on standards means that there is no obligation by the Government to aspire to always higher degrees of abstraction in the continuum between materially embedded and rule-based forms of technological intervention. In the continuum between technology and legal rules, proportionality does not command the Government to, by default, opt for the latter. Quite the opposite, the power to decide on standards, emerges as a recognition, by the Basic Law itself, of the necessity of responding in kind to the challenges presented within the information environment. Whereas embedded choices are made on a daily basis by technological platforms, refraining from responding through specific technological forms can itself result in a violation of proportionality—through the surrender of individual rights and the public interest to individual forms of restriction imposed to these.

Between Voluntary and Mandatory Standards

24. A second axis to be considered in a proportionality reasoning is that of whether standards should be *voluntary* or *mandatory*. As the Report explains drawing on the institutional frameworks in the US, Europe, and the Mainland, approaches vary in the three places as to the character of expectations articulated through technological standards. As research throughout the project has identified, and the report outlines in more detail (see methodology), Hong Kong presently lacks a sufficiently articulated institutional framework to deal with technological standards.

25. The Report recommends that the development of a standardisation system for Hong Kong take the following four factors into account:

- i) the interplay between the common law and the PRC legal systems as a singular characteristic of the Hong Kong legal system.

- ii) the role played by technological standards in technological development and in the advancement of a free and globally integrated market economy in the Region, and in turn, the need to engage the private sector in standards-setting processes.
- iii) the need, nevertheless, to avoid the entrenchment of private interests into publicly applicable standards, and, finally,
- iv) the need to continuously and realistically appraise the current state of legal development in Hong Kong (in the context of this project, in areas concerning the regulation of technological platforms—chiefly platform responsibility, data privacy, and consumer protection), to determine where standards cannot or are not likely to satisfactorily protect the public interest.

26. In relation to the fourth factor above, it cannot be understated how severely behind the Hong Kong legal system is falling in this regard—a gap that becomes particularly noticeable given the speed with which the Mainland legal system is itself developing in all these areas. The extremely significant size of this gap makes it unrealistic to assume that a legal framework of the required proportion will develop in suitable time and that standards will merely play a role in supplementing it. The development of a standardisation system in Hong Kong is thus important not as a supplement to Hong Kong legal system. The relationship works, instead, the other way round. A standardisation system is important to promote the existence of a legal system at all in the technological domain in Hong Kong, without which the very future of ‘One Country, Two Systems’ will be at stake.

27. Private actors, technological platforms in particular, can and should be encouraged to play a supplementary role—e.g. through the development of codes of practice—, and this itself is part of the participatory, ethically-aligned vision of sovereignty put forward in this Report. This was, in fact, the

approach taken originally in the European Union in relation to the regulation of misinformation, where a ‘Code of Practice on Disinformation’ was first adopted by private actors—including various technological platforms, fact-checking organisations, journalistic associations, among others—later being improved upon through Guidance issued by the European Commission, and eventually becoming part of the approach outlined in the Digital Services Act.

28. It would be unrealistic, however, to expect that such codes could fill a gap of the magnitude presently attending technology regulation in Hong Kong. Government leadership is thus fundamental in outlining a vision, identifying areas of priority, setting up a local standardisation authority, and, unavoidably, articulating and adopting concrete guidelines in its exercise of the power contained in Article 139(2). As themselves the reflection of a balanced approach, such guidelines would ideally first emerge as non-mandatory but recommended standards, based on whose compliance or lack thereof further avenues for regulatory development could be considered by the Government.

29. Now grounded on a more discernible power to decide on standards, standards recommended by the Government will form an authoritative repository which courts themselves shall naturally take into account when deciding on appropriate standards of care. The inventory should include from national and international standards decided as applicable in Hong Kong, to standards adopted by various governmental and statutory bodies in the SAR, to those adopted by civil society organisations generally recognised as authoritative in the Region. Drawing on examples in Hong Kong and in Europe, the Report outlines areas and institutional frameworks where standards have been adopted in the form, for example, of Codes of Conduct / Practice or Guidelines. Hence, while the Government might consider, based on Article 139(2), establishing a process whereby private actors, such as

technological platforms operating in Hong Kong, may draw up and propose their own Codes of Practice, a general framework must be in place to evaluate and make sense of such codes.

Relationship Between Executive and Legislative Powers

30. A **third dimension** to be considered in terms of proportionality concerns the relations between the Executive and Legislative Powers. This dimension centres on the important question of whether, even in the absence of implementing provisions for Article 139(2), the Government has the power to adopt compulsory standards, beyond purely recommended ones.

31. This question must be answered affirmatively—after all, the choice of assigning the power to decide on standards to the Executive branch was one deliberately exercised through the Basic Law. As a result, in a technology-intensive Hong Kong, the power to decide on standards emerges as a paradigmatic expression of the Executive-led model of governance adopted by the Basic Law. Most importantly: it is a power not to be exercised only in exceptional situations, but one concerned with ordinary decisions on matters that affect the public interest. Typically, it is the power to recognise, in ordinary situations, what materially and normatively applies and what does not—and thus, unavoidably, to constitute obligations that represent the general will.

32. Such a model of Executive-led governance, central though it is to Hong Kong's legal system, coexists with another equally central proposition: in the HKSAR, the general power to legislate is vested in the Legislative Council. This creates an inherent tension, one that is particularly notable given Hong Kong's pride in its continued adherence to the common law tradition—a tradition from which, at least in this important respect, Hong Kong's legal

system diverges. Proportionality thus emerges here as a remedy, recommending comity in the relationship between both powers.

33. More specifically, just as much as the Basic Law precludes the Legislative Council from initiating the legislative process without consent by the Chief Executive on matters relating to governmental policy, so it recommends that the decision by the Government to adopt a technological standard must itself be seen as an element to be justified in the light of proportionality requirements also flowing from the Basic Law. In the absence of enabling legal provisions—and, thus, in lieu of such provisions—proportionality at the very least requires the Government to be mindful of the atypical character of the power it exercises vis-à-vis human rights expectations recognised within the Hong Kong legal system.

34. Part of the balance to be struck, however, also entails understanding that the Basic Law does empower the Executive to adopt standards, and that to see the Basic Law as a 'living instrument' is to call for a 'generous interpretation' of its provisions to 'give to Hong Kong residents the full measure' of their rights and freedoms (*Ng Ka Ling and Another v Director of Immigration*, 1999). This, in turn, may require positive Governmental action precisely to provide Hong Kong residents the 'protection of the law against interferences or attacks', including by private actors—as recently recognised by the Court of Final Appeal in *Sham Tsz Kit v Secretary for Justice* (2023), where the Court extended the obligation to respect the right to private life to private actors themselves.

35. Critically, the obligation to enact laws to protect individual rights, as affirmed by Chief Justice Cheung in *Sham Tsz Kit*, extends to the power—indeed, the mandate—contained in Article 139(2). And while *Sham Tsz Kit* concerned the right to private life specifically, this understanding must apply

equally to similarly worded rights protected by the Bill of Rights Ordinance, such as the right to freedom of expression. The protection of this latter right increasingly requires the undoing of technological impediments and circumventions of the human will put in place by technological platforms.

36. If what is known as the ‘theme of continuity’ means that questions of more general and exclusionary character must be seen as typically reserved to Hong Kong’s legislative branch—and thus that the Government’s power to decide on standards cannot be exercised in violation of laws approved by the Legislative Council—, the normative power recognised in Article 139(2) preserves nevertheless its competence for being used in other respects.

Local, National, and Global Interests

37. **Fourth**, and finally, a proportionate approach to standards setting must consider the appropriate balance between Hong Kong’s local interests—including its interests in conducting foreign commercial relations—and other national interests of the PRC. In matters not reserved by the Basic Law to Hong Kong’s high degree of autonomy, the national interest should be deferred to. However, this clearly does not mean that the national interest cannot be considered in other contexts. As the Report explains from a legal perspective, an adversarial interpretation of Article 139(2) is not defensible.

38. There is thus no reason why the Government of Hong Kong, in exercising its power to decide on standards, cannot incorporate standards adopted in the Mainland. That this is possible, and may even be required for interoperability—for example, in the context of data flows in the Greater Bay Area—represents, given the clearly normative character of the power to decide on standards, one of the main pressure points for the Hong Kong legal system in the long run. The challenge will be to open avenues for technological integration while preserving the autonomy of the HKSAR's

legal system. This challenge becomes even more acute without an appropriately conceived standards-setting strategy."

39. The remaining findings and policy implications, which are partly reflected in the recommendations below, propose a series of measures grounded in the same idea of proportionality. Applied to the present context, these measures suggest extending the power to decide on standards beyond national security to matters of broader public interest. This approach aims to prevent the existentialisation of public interest concerns into the kind of challenges that national security provisions generally seek to address. In particular, the recommendations argue and provide suggestions for the adoption of more granular and balanced data protection and platform responsibility regimes than the ones presently in place in Hong Kong.

Recommendations

40. For the reasons summarised above, and taking into account the remit reflected in Article 139(2) of the Hong Kong Basic Law, the significance of the development, appropriate access to, and certainty as to the application of technological standards in Hong Kong for the development of the HKSAR, its integration with the Greater Bay Area and the Nation as a whole, its participation in the international arena, the protection of the local and national public interests, including as to National security, and the recognition and affirmation of individual and collective rights in the Region, the present Report recommends that the Government of the HKSAR:

- a) in view of the distinctively normative character of information and communication technologies (including Internet-related technologies and, ever more pressingly, artificial intelligence), consider establishing a high-level centralised authority responsible for the coordination of

standards-setting policies and, effectively, for the decision on the technological standards and specifications applicable in Hong Kong in relation to them.

- b) consider assigning to such an authority, or to a body under its purview, the responsibility for: i) developing and maintaining custody of technological standards in their institutional form, as well as for defining their levels of authority ('obligatoriness') and implementation ('embeddedness'), the actors they apply to, and the legal instruments and authorities with which they interface; ii) as part of its custodian role, consolidating standards presently adopted by different governmental or statutory bodies in Hong Kong (for example, 'Guidelines' and 'Codes of Practice' issued by the Privacy Commissioner for Personal Data, as well as standards adopted by the Office of the Government's Chief Information Officer) that can be extended to private actors on a compulsory or recommended/voluntary basis—for example, the thorough Ethical Artificial Intelligence Framework; iii) initiating and monitoring legislative processes towards integrating standards into legal rules, including assessing the necessity (proportionality) of initiating such processes, in light of the objectives they are intended to achieve; iv) establishing interfaces with other governmental bodies of the HKSAR for the implementation of policies under their purview; and v) liaising with national and international treaty bodies and standards-setting organisations, in striving for compatibility and interoperability between local, national, and international standards, wherever possible.
- c) taking into account the hybrid character of technological standards—their existence, that is, on a continuum between the material/technological and normative/legal domains—and thus the importance of ensuring the interdisciplinary character of the high-level

authority to be established, consider combining within the authority attributions currently belonging to or interfacing with those of the ‘Innovation and Technology Commission’ and the ‘Office of the Government Chief Information Officer’ (more generally, the ‘Innovation, Technology, and Industry Bureau’), as well as the ‘Department of Justice’, the ‘Constitutional and Mainland Affairs Bureau’, the ‘Committee for Safeguarding National Security of the Hong Kong SAR’, and the ‘Law Reform Commission of Hong Kong’, with involvement, additionally, on an *ad hoc* basis, where matters of national significance are concerned, of the ‘Liaison Office of the Central People’s Government’ as well as, through the Liaison Office, of the ‘Standardization Administration of China’.

- d) also taking into account, however, that standardisation aspects do not begin or finish in the articulation of standards qua formal instruments by institutional standardisation bodies, but rather also encompass the large-scale definition of expectations through direct (‘embedded’) forms of implementation by technological platforms, and that such forms of implementation very concretely challenge and, at the limit, displace the power to decide on standards as recognised in Article 139(2), consider the establishment of rules of transparency and reporting by technological platforms in relation to practices of decision-making and design in key areas of tension between their activities and the public interests furthered by Article 139(2)—as one finds, for example, in the European Union’s Digital Services Act and in the General Data Protection Regulation.
- e) likewise, taking into account: i) how jurisdictions such as the European Union have been tackling systemic risks and harms potentially ensuing from the activities of technological platforms; and ii) that such risks and harms equally affect the public interest and the fundamental rights of

residents of the HKSAR; but iii) that no developed and comprehensive mechanisms of protection of such rights and interests presently exist under the laws of the HKSAR in relation to the activities of platforms, and that courts in the Region recognise the positive obligations of the Government to create a legal environment conducive to such a protection, consider establishing, *in the medium term*, a fully-fledged system of platform responsibility such as the one found in the Digital Services Act.

- f) at the same time, consider establishing, *in the short term*, an initial process through which, after an open and welcoming consultation in which Hong Kong Residents are informed of evolving policies in other jurisdictions and invited to identify key areas of concern to be addressed with priority in Hong Kong, platforms are then encouraged to draw up a 'Codes of Practice' outlining their commitments in relation to the protection of the public interest and fundamental rights of Hong Kong residents in the areas identified, including as to design, transparency, and reporting practices concerning the fulfilment of their commitments, which will in turn provide the grounds for how a more fully fledged system of platform responsibility could develop in Hong Kong that strikes an appropriate balance between protecting the rights and interests of Hong Kong Residents and maintaining the openness and attractiveness of Hong Kong as an international economic and financial centre.
- g) taking into account that: i) existing models of platform responsibility either fully exempt platforms from liability in relation to third-party content they host or establish strict-like systems of liability where platforms are encouraged to take such content down expeditiously upon a notice, or present some hybrid form between both; and ii) that none of such models provides appropriate incentives and protection for platforms to develop and implement a system of reasonable decision-making

practices that strikes an appropriate balance between the protection of freedom of expression and that of other rights and interests, individual or collective, which must be weighed together with it; iii) consider establishing an efforts-based and scalable system of platform liability, which, requiring reasonable efforts by platforms in proportion to their economic and technological possibilities, provides them nevertheless with a cushioning system for honest mistakes.

- h) consider, in relation to all recommendations put forward in this Report, and for the reasons detailed herein: i) the significance of utilizing the authority granted in Article 139(2) to address a wide spectrum of public interest issues, extending beyond the confines of national security considerations; ii) the fact that even when public interest issues intersect with national security affairs, they may not necessarily exceed certain seriousness thresholds, including potential systemic harms or risks; and iii) the idea that, in instances where public interest issues do not cross such thresholds, these issues can be more appropriately managed through less stringent mechanisms that fall outside the national security domain.
- i) and, finally, consider: i) that the balancing exercise outlined in paragraph g) above forms part of a broader set of proportionality considerations detailed in this Report, which recognise the complexity of these intersecting concerns while also paying heed to the necessity of measured responses; and ii) that proportionality considerations take on particular significance given the unique situation in Hong Kong where the power to decide on standards is allocated to the Government, contrasting with other jurisdictions, such as the United States and the European Union, where such a power is typically recognised as a legislative power.

B. Project Report

Introduction

1. Article 139(2) of the Hong Kong Basic Law¹ grants the Government of Hong Kong the power to, on its own, decide on the technological standards and specifications applicable in the Region. The present Report explores the distinctive contours of this provision, in the light of its constitutional and technological foundations. In doing so, the Report suggests ways for mobilising the provision in promoting the public interest and responding to online risks and harms in Hong Kong's information environment. Among such risks and harms, the Report focuses on those enabled or introduced by the activities of technological platforms.

2. Despite its importance and the vastness of its scope, it is remarkable that Article 139(2) has received virtually no substantive attention in commentaries on the Hong Kong Basic Law and, indeed, in the entirety of constitutional law scholarship in Hong Kong. By endeavouring to provide a thorough overview of the foundations and the limits of the power conferred by this provision, this Report seeks to contribute to the bridging of such a gap.

3. Seeing in the power to decide on standards the goal of furthering the public interest in Hong Kong's information environment is to dignify it with a certain standing. It is to recognise its centrality in addressing the profound transformations that Hong Kong, like every community, is undergoing, as algorithmic forms of governance redefine all domains of social life in the 21st Century. Seen under this light, the power to decide on standards emerges not only as necessary response to such processes, but indeed as a cornerstone of the whole architecture of governance of the Hong Kong SAR. It can become

¹ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 139(2) (promulgated by Presidential Decree, Apr. 4, 1990, effective July 1, 1997) (H.K.).

the basis for a novel, more agile, more embedded where necessary, yet also more open and participatory regulatory approach in the Region.

4. While a typical report exploring public policy implications of some discrete area of knowledge—say on proposals of policy interventions to address visual pollution in the built environment or the hidden environmental impacts of compact fluorescent lamps—will contain first a description of findings concerning particular problems ensuing from a non-policy area to then discuss their policy implications in terms policy solutions needed to address them—or, conversely, discuss how new findings in a particular non-policy area can contribute insights for improving policy-making in relation to that area, the relation between law and politics is a much more symbiotic one. At all stages, law and policy are inseparable—both are, at the same time, part of the problems described and of the solutions to them.

5. The structure of the present Report follows, thus, a more articulate and discussive form in which the power to decide on standards will first be introduced, in Part I, taking into account its nature and significance as an unsuspected foundation for the governance of 21st century Hong Kong, at the same time that challenges posed by technological platforms to the exercise of such a power—and the public interest it represents –will be identified. Part II then provides a more cohesive understanding of the genealogy of the power to decide on standards in light of the drafting history of the Basic Law, which enables a more concrete understanding of its contours as intended by the drafters of the Basic Law, as well as a more precise understanding of what, in concept and in practice, ‘to decide on standards’ entails.

6. Part III, finally, puts forward a framework for the exercise of the power to decide on standards, taking into account the various axes or dimensions of an idea of proportionality that acquires particular importance in this exercise,

proposing a reorientation of the present focus from matters of national security to questions concerning the public interest more broadly, as well as describes two areas of central importance for standards-setting policies in Hong Kong to address challenges posed by the rise of technological platforms: namely, data privacy / governance and, more directly, the establishment of broader and more cohesive system of responsibility for technological platforms.

Objectives

7. Based on the goals set out in the original proposal, the project aimed to:

- Examine the contours of the HKSAR Government's competence to decide on technological standards applicable in Hong Kong (Article 139(2) of the Basic Law), in the light of its historical and conceptual underpinnings.
- Evaluate in what ways do challenges brought about by global Internet processes—from the informality of multi-stakeholder mechanisms to the platformisation of contemporary societies—invite a reappraisal of such contours.
- Understand the national security field as a central case of the presentation of such challenges, but examine whether and how national security concerns also traverse other realms, as ideals of national sovereignty find themselves increasingly eroded by the massively growing power of technological platforms; and
- Map the central domains of concern in relation to the regulation of technological platforms in the national security field, identifying relevant legal frameworks as well as technological standards and the bodies responsible for these, understanding in what ways the HKSAR government interfaces with these bodies at the national and global levels,

and contrasting the responsibilities recognised under the national security framework in Hong Kong with those of other jurisdictions.

8. Historical origins and contexts development of Article 139(2) have been explained in detail, as well as why challenges posed by technological platforms invite a deepening of the provision's understanding. The proposed mapping of responsibilities of platforms has been pursued in the context of discussions concerning different fields of regulation, as well as in the highlighting of different dynamics of content takedown in Europe, one related to terrorist activities, and another, public interest-related, under the Digital Service Act more broadly. The interplay between national security and other fields, likewise, has been instantiated in the idea of the public interest as a less severe expression of national security interests.

9. On standards, as discussed shortly in the methodology, research identified the absence of an inventory of standards applicable in Hong Kong from which relations with international standards could be identified. A non-exhaustive mapping of standards has been prepared in table form, identifying standards in Internet-related fields in the Mainland, the EU, and internationally (ISO), though further research is needed to unpack discussions and implications concerning the interplay between specific standards and the law—for instance in the determination of dynamics of responsibility.

Methodology

10. Methods consisted of desk research, access to library records on the Basic Law's drafting process, and consultation to official bodies. Excellent student research assistance was provided, aiding in the identification of scholarly and policy sources, in Hong Kong and abroad. Although there were not

contemplated with funding, the project's original methodology also foresaw the holding of interviews with major technological platforms to gain industry perspectives on the issues explored in the report, as well with governmental and statutory bodies. While in relation to the platforms this level of engagement proved challenging, the project nevertheless benefited from participation in its workshop by a representative of Microsoft, who provided valuable insights. Further direct engagement with industry stakeholders remains an important objective for future research aiming to build on the ideas put forward in this Report.

11. Among governmental and statutory bodies, the ‘Office of the General Chief Information Officer’ and the ‘Innovation and Technology Commission’ participated, respectively, by proposing an alternative set of questions to the originally approved questionnaire or by providing general explanations about their standards-related services. These are discussed in the body of the project. Among them, answers by the Information Technology Commission (ITC) added context to the project’s methodological starting point from the perspective of local standards-setting mechanisms. As the ITC observed,

“[t]here is no central standards body developing and issuing domestic standards in Hong Kong. As a small and externally oriented economy, it is essential that our goods meet the standards of our major overseas markets.”

12. While these statements articulate different assumptions all of which are individually pertinent, more remains to be noted in the following pages about the internal relationship between them, as well as about their external relationship with the competence assigned to the Government via Article 139(2). The statements were further complemented by the observation that ‘[a]ll standard-related services and information for public are disclosed at ITC’s website with links provided earlier’—which entails that no further

standards-related services are provided by the ITC other than those listed on the website.

13. As far as the project could identify, in consulting the ITC's website one will not find an inventory of standards applicable in Hong Kong, in the fields concerned here or any other. One finds links to national and international standards-setting bodies, to sales of standards services offered through the ITC's Quality Services Division, and to official bodies responsible for technical regulation in different areas in Hong Kong. Expectations that the project originally had of being able to identify and document Hong Kong's activities of production of standards and national and international cooperation in the standards-setting domain, and from there to pursue further research, returned thus, unfortunately, unfulfilled.

14. Other avenues, however, both conceptual and practical, were pursued and, in light of the landscape just described, questions pursued in this Report acquire renewed importance. On their answer, in fact, as the Report will demonstrate, depend not only the directions of further developments and decisions in the technological domain but, in different ways, the very future of the HKSAR and of the principle of 'One Country, Two Systems'. Addressing such questions right points to formidable challenges but also to fantastic opportunities open to the Government in making use of the power to decide on standards.

15. This Report offers a modest contribution in the way of answering such questions. Ideas presented here benefitted from comments and exchanges in an experts Workshop held by the project, at HKU, in August, among other dissemination activities in conferences held in Hong Kong and abroad, all of which are mentioned at the end of the Report. I am most pleased to introduce them in the pages that follow.

Findings / Policy Implications

Part I.

**Contextualising Article 139(2):
Platforms, Standards, and Sovereignty**

I.1. Introduction: Hong Kong's Platforms Dilemma

1. Hong Kong's political and technological futures are intrinsically intertwined. While that is true of every political community, Hong Kong faces a unique dilemma as it strives to balance local, national, and global expectations in forging a technological path of its own. Although Hong Kong is a highly developed economy and an important global financial centre, it is also a compact territory with a relatively small population. As such, its endeavours to regulate the information environment always come at the risk of a specific threat—that of exit by Internet actors. Moreover, being Hong Kong a Special Administrative Region of the People's Republic of China, such a risk is coupled by yet another—namely, that of intense public exploration in the light of global geopolitical factors. Unsurprisingly, both risks tend to present themselves in close articulation. All this, in turn, naturally always places Hong Kong in a clear dilemma as to whether to intervene or not, or how, as it turns its attention to the information environment.

2. A recent incident provides a clear illustration of such a dilemma. On various occasions between 2022 and 2023, a song central to the 2019 protests in Hong Kong was mistakenly played in international sports events as being Hong Kong's "National Anthem".² The song, as is well known, contains a slogan held by courts in Hong Kong to be capable of inciting others to commit secession.³ At some point, it surfaced that a possible reason leading to the events mix ups was that Google, the globally dominant search engine, had been returning the protests song as its top result, together with YouTube videos containing it, when queried for 'Hong Kong National Anthem'. Asked to rectify the situation, Google declined, reportedly on grounds of both the

² See, e.g., *HKSAR Government Strongly Deplores and Opposes Playing of Wrong National Anthem at the Asian Rugby Seven Series*, GovHK, <https://www.info.gov.hk/gia/general/202211/14/P2022111400073.htm>.

³ *HKSAR v. Tong Ying Kit*, [2021] HKCFI 2200, at 141.

technical infeasibility of altering its search results and the uncertainty as to the illegal character of the song.⁴ The Government’s predicament was thus clearly established: were the Government to act directly on national security grounds or bring matters to courts on related criminal provisions,⁵ it would risk precisely an outcome of the sort mentioned above.

3. That the Government found it desirable to eventually address the courts through the application for a *contra mundum* injunction—⁶that is, without singling any specific party out—reveals the levels of caution demanded by the situation. While courts have for the time being denied the application, it has nevertheless been observed that technological platforms conducting themselves as described in the application would be acting in full awareness of their duties to act within the law, including, “[i]n particular”, awareness that “they should not act in such a way to aid and abet the commission of offences by others”.⁷ The case is now under appeal but, if nothing changes, the ball will be back in the Government’s court—the court, that is, of decisions that the Government must make *on its own*.

⁴ See Stacy Shi, *HK to Continue Pressing Anthem Case with Google*, THE STANDARD (Dec. 14, 2022), [https://www.thestandard.com.hk/section-news/section/47403226/248207/HK-to-continue-pressing-anth](https://www.thestandard.com.hk/section-news/section/47403226/248207/HK-to-continue-pressing-anthem-case-with-Google)
[em-case-with-Google](https://www.thestandard.com.hk/section-news/section/47403226/248207/HK-to-continue-pressing-anthem-case-with-Google)

⁵ See, e.g., *HKSAR v. Lai Chee Ying* [2021] HKCFA 3, at 29 and *HKSAR v. Ng Hau Yi Sidney* [2021] HKCFA 42, at 21 (applying sedition provisions in the Crimes Ordinance and noting that the “legislative intention is for the NSL to operate in tandem with the laws of the HKSAR, seeking ‘convergence, compatibility and complementarity’ with local laws”).

⁶ See *Application by HKSAR Government to Court for Injunction Order to Prohibit Unlawful Acts Relating to a Song*, GovHK, <https://www.info.gov.hk/gia/general/202306/06/P2023060600301.htm>

⁷ *Secretary for Justice v. Persons Conducting Themselves in Any of the Acts Prohibited Under Paragraph 1(a), (b), (b) OR (d) of the Indorsement Claim* [2023] HKCFI 1950, at 64.

4. What, then, must the Government do? While responding specifically to the case above lies beyond the scope of this Report, the range of issues the case mobilises is at the heart of our inquiry in the pages that follow. Such issues concern the scope of a power that, precisely because it is so vast and so important, it is impressive to note has been left for the most part unexamined in scholarly incursions on the Hong Kong Basic Law.⁸ This is the power the Basic Law assigns the Government to, on its own, decide on technological standards and specifications applicable in Hong Kong.

5. The character and possibilities of such a power—what this power entails—will be examined throughout this Report. Yet, the paradoxical, Midas-like fragility that marks its exercise also will. Such a paradox is part and parcel of the dilemma noted at the outset. It underscores the importance of a prudent and balanced approach expressed through various dimensions that will here be considered. In other words, *precisely* because the power to decide on standards encompasses so much, it also risks accomplishing little if its constraints are not appropriately identified and articulated. Were the domain of national security, in particular through its criminal modes of enforcement, to remain the chief domain through which expectations directed at platforms come to be articulated, the very feasibility of such expectations would come into question.

6. The gist, thus, of what will be argued in these pages is that the solution to how Hong Kong should regulate its information environment—and indeed to how Hong Kong should tackle its tech platforms' dilemma—lies in a decisive yet nuanced approach that, while embracing a range of modalities of regulatory action to protect the *public interest*, nevertheless views challenges

⁸ Among local commentaries on the Hong Kong Basic Law, only PY LO, *THE HONG KONG BASIC LAW* (2011) approaches Article 139 with some level context regarding its standards setting dimensions.

posed by large online platforms as matters extending *beyond* the criminal law, and certainly beyond the in any country strict, stern, and sombre realm of *national security*.

7. To note so is not to underplay the importance of national security questions and the fact that many concerns raised by technological platforms can, at the limit, be understood as concerns of national security. Yet, there is an axis along which public interest concerns travel until they become matters of national security in a strict sense—and before which they can perhaps more effectively be addressed through less stringent mechanisms. Identifying the threshold where that so happens is part of a balancing exercise, but one in fact composed of various axes and in which concerns of different kinds are intertwined to determine the right modality of regulatory intervention.

8. This Report examines such dimensions, the kinds of concern they require be considered, and the different modes of intervention available to the Government for addressing such concerns.

1.2. The Power to Decide on Standards: Sovereignty and Context Within ‘One Country, Two Systems’

9. As the very breadth of the contentions above indicate, there is no easy answer as to what Hong Kong should do in making its own technological choices. In a way, the views that will be proposed here might seem to demand a significant reorientation of assumptions about Hong Kong’s legal system. They do so, however, not in the sense of abandoning or modifying long standing principles and traditions, but of bringing to the fore a relatively unexplored yet highly consequential provision in the Hong Kong Basic Law and understanding its implications for the whole architecture of Hong Kong’s legal system. This provision, as just noted, is the second paragraph of Article 139 of the Hong Kong Basic Law, which as a whole reads:

Article 139

The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology and protect by law achievements in scientific and technological research, patents, discoveries and inventions.

The Government of the Hong Kong Special Administrative Region shall, on its own, decide on the scientific and technological standards and specifications applicable in Hong Kong.

10. Much can be discussed about the precise contours of this provision. ‘The Government’, ‘on its own’, ‘standards’, ‘decide’, ‘applicable’, each expression or term of art points to a whole constellation of profoundly intriguing questions. One, however, must be acknowledged first, which provides the very drive for addressing the others, and this is that the Government ‘shall’ decide, which necessarily entails that the Government has the ‘power’ to do so. In fact, the National People’s Congress has itself decided that a similarly-worded provision in the Hong Kong Basic Law created a ‘responsibility’ to act—⁹ a ‘must’, that is.

11. ‘Power’, however, is enough for our purposes so far, and it is in the context of the Government’s power that the Google incident needs to be considered.¹⁰

⁹ See National People’s Congress, *Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*, <https://www.legco.gov.hk/yr19-20/english/panels/se/papers/ajlscase20200707-ln135-e.pdf>, par. 3.

¹⁰ For stylistic and flow purposes, the term ‘power’ will be used in this Report when referring to the competence described in Article 139(2) of the Basic Law. ‘Authority’, however, would be a more precise term. Whereas power denotes a factual capability, authority entails a normative basis. See Robert Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957). See,

It needs so not because of seemingly prosaic concerns that the incident immediately raises, but because of the larger cluster of questions it mobilises. This cluster of questions involves the exercise of political power in its highest form. It concerns how *sovereignty* itself, an idea that modern societies have anchored in states, is being reconfigured, as the domain of what is the ultimate or untrammelled power in terms of its exercise is increasingly being shifted from states and concentrated on a handful of technological platforms and established corporations.

12. Will states survive the new arrangements? Will Modernity, as an era of individual emancipation, come at last to an end? Will the protection of human individuality, let alone the public interest, itself both a product and a reflection of modernity, be once again delivered to the arbitrary exercise of power by feudal overlords, only now in informational, algorithmic form?¹¹ Or have modern times, in fact, *already* come to an end and humanity should then be left to watch as silicon beings walk the earth?

13. China's endeavour to at the same time rein in technological platforms and foster their development could well be the final thread holding together the twin pillars of regulation and emancipation—these now trembling edifices that sociologist Boaventura de Sousa Santos described as the pillars of modernity.¹² Alternatives emerging in Europe that have been praised for their

also, MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 158 (2010) (connecting authority to rationality, as a matter of 'political right', for it concerns "the conviction that there is a mode of right-ordering of public life that free and equal individuals would rationally adopt"—a theme to which we turn shortly as we understanding the ethical dimensions of another, related term, namely 'sovereignty').

¹¹ See PETER DRAHOS AND JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY* (2003).

¹² BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (3rd ed. 2020).

imagined restraint—even if, as will be noted here, they stride much beyond the liberal repertoire they appear to uphold—are yet to lead to the levels of innovation arising from China’s model. Seen in this light, Google’s charge is not against Hong Kong. It is against China’s endeavour.

14. Questions concerning technological platforms are thus not purely commercial or economic questions. They are *political* questions though and through, and no political community can address them from a commercial or economic perspective alone.¹³ Even the choice not to approach these questions from a political perspective is still a political choice, for it entails the sheer deference to whatever political arrangements end up articulated in the algorithms designed by technological platforms. The “dilemma” of whether or not to regulate technological platforms is, in fact, a Hobson’s choice. From misinformation to artificial intelligence to data governance more broadly, a whole range of issues of vast political significance in Hong Kong, and possibly the fate of Hong Kong’s legal system itself, rests on how challenges raised by the growing might of technological platforms are addressed in the SAR.

15. Addressing such challenges *well*, in turn, depends on Hong Kong finding the right balance between expectations reflected in an ever-unfolding patchwork of different normative orderings. In most, perhaps all technology-related fields, there is no single, unified international paradigm

¹³ The limits of ideas such as that of a ‘relevant market’ or of different forms of concentration to tackle what is no longer a matter of economic, but *political power* are evident. Even if from an economic perspective there would be nothing inherently wrong or abusive with the power of platforms, the unchecked *political* power they are left free exercise is a much different matter addressed in contemporary debates on *digital* forms of constitutionalism. See, e.g., EDOARDO CELESTE, *DIGITAL CONSTITUTIONALISM: THE ROLE OF INTERNET BILLS OF RIGHTS* (2023). See, also, GIOVANI DI GREGORIO, *DIGITAL CONSTITUTIONALISM IN EUROPE REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY* (2022).

that Hong Kong can simply defer to, and no simple answer as to how existing paradigms intertwine with the national paradigm either.

16. Take Hong Kong's data privacy regime, for example, which has long (perhaps always) been due for a good update. In updating this regime, Hong Kong will need to juggle between the two most developed global data protection frameworks today—the EU General Data Protection Regulation and the Mainland's Personal Information Protection Law. Each of these frameworks has its own distinctive characteristics. Both, however, are light years ahead of Hong Kong's data privacy ordinance, which contains no provision on automated decision-making, no information obligation concerning inferred or derived data, no legitimacy requirement for the processing of personal data, no data-breach notification obligations, and no enforceable provision on transborder data flows either, to stay in just a few shortcomings. Remarkably, consent itself is not a general requirement for the collection of personal data in Hong Kong. A Memorandum of Understanding has recently been signed to enable data to flow within the Greater Bay Area that would not otherwise be able to flow given the growing disparities between the legal regimes.

17. Global narratives in relation to 'One Country, Two Systems' (OCTS), where a supposedly less protective Mainland system seeks to trample upon the more liberal and rights-based Hong Kong system, start to look more than ever out of place. What can be seen, instead, are Hong Kong's laws applicable to technological platforms growing by the day less up-to-date and less protective in comparison to those of an impressively fast-paced and ever more granular Mainland system—with which, incidentally, the European

Union seems to be developing multiple areas of convergence, even as it imagines itself ever more distant from it.¹⁴

18. Faced with aspects so central to its social and political constitution, the real question for Hong Kong is thus not *whether* it should make regulatory choices concerning the information environment. The real question is *what scope and modalities* of regulatory intervention must be put in place to respond to the challenges ahead. In the shaping and mobilisation of such responses, the power of the Government to decide on standards emerges as a leading and organising force.

19. Furthermore, given Hong Kong's position within China—including in a strategic and fast-developing Greater Bay Area—, the questions concerning Hong Kong's future are questions concerning the nation's future. They are part of a struggle for the affirmation of sovereignty that it is as important to understand for its actual traits as it is to avoid getting caught in through imaginary ones. Readings of the power to decide on standards—or, more particularly, of the expression 'on its own' contained in Article 139—as entailing an *adversarial* mandate for Hong Kong to oppose China are precisely of the order of things to be avoided, as is the seemingly innocuous view that such a power reflects an attribution of "semi-sovereign" status to the SAR.¹⁵

20. Such readings belong to a longer-running and counter-productive narrative that, as Loh and Cullen ably identify, has had it that "for 'one country, two systems' to work, Hong Kong needed to be able to stand apart

¹⁴ See Marcelo Thompson, *Digital Sovereignty and the Normativity of Data Governance*, in GLOBAL GOVERNANCE FOR THE DIGITAL ECOSYSTEMS (Pascal Lamy & Bruno Liebhäberg eds., 2023).

¹⁵ On this view, see, e.g., Yash Ghai, *The Imperatives of Autonomy: Contradictions of the Basic Law*, in HONG KONG'S CONSTITUTIONAL DEBATES 29, 30 (Johannes Chan & Lison Harris eds., 2005) at 30. See, also, DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 60 (2013).

from the mainland or even resist it”.¹⁶ Also anchored in such a narrative, however, is the view, noted by Gittings, that the power to decide on standards is part of an “*extraordinary range of substantive powers*” wielded by Hong Kong under the Basic Law. What is extraordinary in this view, however, is not merely the *quantitative* aspect—that is, the fact that the powers granted to the HKSAR are said to be numerically vaster than the powers afforded to other autonomous political units around the world. What is extraordinary is the *qualitative* jump through which this view reads in the Basic Law the design to ascribe a status of “semi-sovereignty” to the Region.¹⁷

21. Semi-sovereignty is a challenging idea, be it in the context of China or be it in political thinking more broadly. It is challenging in the context of China because the PRC is a unitary state, with ‘plenary power’ (or ‘overall jurisdiction’) of the central authorities over the HKSAR.¹⁸ This means that

¹⁶ CHRISTINE LOH & RICHARD CULLEN, *NO THIRD PERSON: REWRITING THE HONG KONG STORY* (2018) (noting: “the problem with that line of thinking for Hong Kong— as it was destined to be reunified with the People’s Republic of China— is that it essentially pitched what Hong Kong represented against what mainland China represented. Communism would never, or at least could not been seen to, succeed. The West was “free” and “rich” and China was “oppressive” and “poor”. (...) The British Hong Kong narrative concluded that for “one country, two systems” to work, Hong Kong needed to be able to stand apart from the mainland or even resist it”).

¹⁷ See Ghai, *supra* note 14. But see Zhu Guobin, *The High Degree of Autonomy and the Unity of the Sovereignty*, in GUOBIN ZHU AND PRISCILA LEUNG, *THE BASIC LAW OF THE HKSAR: FROM THEORY TO PRACTICE* 129 (1998) (noting that only in a “blurred or vague idea” can some of the provisions in the *Basic Law* be read as entailing that Hong Kong is “a kind of quasi-independent political entity”).

¹⁸ See, e.g., ALBERT HUNG-YEE CHENG & PO JEN YAP, *THE CONSTITUTIONAL SYSTEM OF THE HONG KONG SAR: A CONTEXTUAL ANALYSIS* 37–39 (2023). See, also, Shigong Jian, *Textualism, Structuralism and Originalism: the Art of the NPC Standing Committee's Interpretations of the Basic Law*, 29 *SOCIAL SCIENCES IN CHINA* 76, 85 (2008) (employing the expression ‘dominant power’: “The

power exercised by the different offices of the HKSAR is so exercised as a matter of *delegation* through the Basic Law or, as its Article 20 contemplates, through other means. It is challenging in political thinking more broadly because, even in the context of a federation, sovereignty is not an idea that admits of division.¹⁹ As Martin Loughlin sums up, “sovereignty divided is sovereignty destroyed”; “the constitutional framework instituted for the exercise of governmental power of the state must be understood as an explication”—or “*a measure of internal coherence*”—“, rather than a division, of sovereignty”.²⁰

22. The practical result is that Hong Kong’s ‘high degree of autonomy’ is enjoyed as a measure of the internal coherence of the principle of ‘One

following principles can be derived from the Chinese constitutional framework: Firstly, the principle that sovereignty resides in the Central Authorities. The sovereignty of Hong Kong resides in the Central Authorities, which enjoy dominant power and decision-making power over Hong Kong issues.”).

¹⁹ Writing in the context of a 1927 Weimar Republic, Hermann Heller observed: “if we are serious about the concepts of state and sovereignty, we cannot ascribe the features of a state to the sub-state units” (HERMAN HELLER, *SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF PUBLIC AND INTERNATIONAL LAW* 138-139 (David Dyzenhaus ed., Belinda Cooper trans., Oxford University Press 2019)). In the present, supranational institutions like the European Union have raised complex conceptual questions about ideas of sovereignty, while new forms of power emerging in the information environment have come to seriously defy these ideas in practice. If such new forms of power have also vastly expanded possibilities of democratic participation, they have likewise introduced profound tensions that call for new public channels of arbitration or resolution. In the context of European Union law, Germany’s Federal Constitutional Court has responded by *affirming* the nation’s sovereignty and noting the EU’s character as an association of sovereign states (see BVerfGE 123, 267 (2009)—Lisbon Treaty; BVerfGE 89, 155 (1993)—Maastricht Treaty. See DIETER GRIMM, *SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT* 111 (Belinda Cooper trans., Columbia University Press 2019), for discussion.

²⁰ Martin Loughlin, *Ten Tenets of Sovereignty*, in NEIL WALKER, *RELOCATING SOVEREIGNTY* 55, 70 (2006).

Country, two systems' (OCTS)—which, as noted recently, must be understood as “*a complete system*”.²¹ Simply put, Hong Kong's high degree of autonomy is not an “add-on”,²² to be balanced *with* the OCTS principle. Rather, it is an ideal whose expression flows from a particular balance expressed *through* the principle.²³

23. Neither national nor local dimension alone can provide a full measure of the system's balance. It might rightly be understood that the idea that the Government decide ‘on its own’ cannot entail the exclusion of fundamental national ideals—such as national interest, unity, and security—in questions concerning standards. But then the unchanged character of Hong Kong's capitalist system and way of life (BL, Article 5)—which require the preservation of a liberal and open economic outlook for the Region—²⁴ are *also* a question of national interest, and one highlighted in official discourse.²⁵ Part of approaching the local from the capitalist outlook that

²¹ *Full text of Xi Speech Marking 25 Years Since Hong Kong's Return to China*, NIKKEIASIA, <https://asia.nikkei.com/Politics/Full-text-of-Xi-speech-marking-25-years-since-Hong-Kong-s-return-to-China> (Jul. 2, 2022) (noting that the principle of ‘one country, two systems’ “embodies a complete system. Its top priority is to safeguard national sovereignty, security, and development interests.”).

²² Just as Jeremy Waldron noted that the idea of rule of law must be seen as intrinsic to what we understand by law itself, rather than as a procedural ‘add-on’ to the concept of law, so must not the idea of a ‘high degree of autonomy’ be seen as *modifier* of the principle of ‘one country, two systems.’ See Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA LAW REVIEW 1 (2008).

²³ It is thus within OCTS that, as Albert Chen and Po Jen Yap note, the “two most fundamental principles embodied in the Basic Law” are affirmed: namely, “the principle that the HKSAR is authorised by the central authorities of the PRC to enjoy a high degree of autonomy” and “the principle of PRC sovereignty over Hong Kong”. See *supra* note 17, 35.

²⁴ GONZALO VILLALTA PUIG & ERIC C. IP, *THE FREEST MARKET IN THE WORLD THE CONSTITUTIONAL LOGIC OF ECONOMIC LIBERTY IN CHINA'S HONG KONG* (2023).

²⁵ See *supra* note 20.

characterises it passes, in turn, through understanding the embeddedness of standards-related questions in international trade agreements such as the World Trade Organization’s Agreement on Technical Barriers to Trade—and the expectations that ensue from these agreements. Inquiries directed to actors responsible for standards-related affairs in Hong Kong indicate that this is the general direction through which the topic has been approached so far.

24. As noted in the Methodology section above, when queried, in the context of this project, about its Standards-Related Services, the Innovation and Technology Commission, which is the body responsible for representing Hong Kong before international standards-setting bodies, responded that, in line with the TBT, ‘Hong Kong’s policy is to use international standards insofar as possible,’ thus why ‘there is no central standards body developing and issuing standards in Hong Kong’. While the adoption of international standards is surely a laudable goal, the difficulty that it emerges—and which introduces its own transaction costs—is to identify when this is *not* possible, and thus where National or local/Regional standards apply.

25. In the absence of an inventory of applicable standards—including to help market participants in Hong Kong determine what the relevant international standards themselves in a given area are—it is presumable that no more prevalent pursuit of the service that the ITC does offer in relation to standards, namely the sales of standards, would ensue. Official numbers appear to corroborate this impression, with the total number of standards sold by the ITC in 2021 and 2022 being of ‘72’ and ‘80’ standards, respectively, in total.²⁶

²⁶ Government of the HKSAR, The 2023–34 Budget | Head 155 – Government Secretariat: Innovation and Technology Commission, <https://www.budget.gov.hk/2023/eng/pdf/head155.pdf>, at 494.

26. Be that as it may, even when discussions here are originally approached from the perspective of trade-related aspects, the pursuit of a balance between global and national interconnections emerges as an inevitable task of the power to decide on standards. There are two reasons why this is so, to which we turn again shortly. The first is that trade agreements themselves contemplate exceptions for matters of public interest (for instance of public order ('ordre public'), or public morals), which, in turn, unavoidably lead to questions of national significance—the question of data governance in the context of the Greater Bay Area being an important example just mentioned.

27. The second reason is even larger. It is the importance of growing and persuasive calls in the scholarly literature for turning these that are typically presented in trade-related instruments as exceptions into core concerns in their own right—notably within the field of international human rights law. Such calls, in turn, also point to the difficulty of approaching disputes in these domains from the perspective of positive law alone. Rather, there are deep *political* and overall *moral* dimensions that become all the clearer in contemporary efforts to regulate platforms. The same difficulty, however, points to yet another: that of circumscribing the examination of such disputes to the—for this very reason—at this point dysfunctional dispute resolution mechanisms within the system of international trade.²⁷

²⁷ See Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to From Here?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Mar. 2, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> (noting that “[m]any disputes between WTO members are in a state of limbo as the U.S. continues to block appointments to the body responsible for reviewing appeals.”). See also Jorge Miranda & Manuel Sánchez Miranda, *Chronicle of a Crisis Foretold: How the WTO Appellate Body Drove Itself Into a Corner*, 26 JOURNAL OF ECONOMIC LAW 435 (2023).

28. That all such avenues send the inquiry back to questions of national interest demonstrates the unifying character of the country dimension in OCTS; it highlights the unviability of reading the expression ‘on its own’ from an adversarial perspective—and it also shows how fundamental it is to place the power to decide on standards in the context of a constitutional framework that provides coherence to it and guides its exercise.

29. Hong Kong and, more broadly, China are surely not alone in this call for questions concerning the information environment—from privacy and freedom of expression to misinformation and data security—to take the national interest into account. Such a call is at the heart of contemporary efforts to uphold *sovereignty* in its information-related forms, as it is, in negative form, of moves to disavow what such efforts stand for. Underpinning efforts to uphold *sovereignty* are concerns with the affirmation of rights—above all the *collective right to self-determination* and possibilities, ensuing from this, to fashion the protection of other rights and interests in attention to local cultural particularities. In different fields, however, the affirmation of *sovereignty* is represented precisely as an attempt to curtail rights. In the international trade scholarship, for example, defences of *sovereignty* have been represented as efforts to undermine the foundations of an open Internet. In constitutional discussions concerning Hong Kong, in turn, these defences have been portrayed as providing the grounds for a process of encroachment upon the autonomy of the HKSAR.

30. We turn to trade later, but discussions of the second kind are of a more essential character, since the power to decide on standards, and its limits, are the expression of an idea of Executive leadership whose authority descends directly from the *sovereignty* of the constitutional order of the PRC. A conception of *sovereignty*—and what conception one adopts—, thus, matters profoundly for the result of this inquiry. They are not merely a

conceptual question, but a practical one as well, and criticisms of the second kind matter for they strike at the heart of how the conception of sovereignty has been developed in recent Chinese scholarship.

1.3. Between Neutrality and Exception

31. The most important example of discussions of the second kind is, in my view, found in recent work by Ryan Mitchell—both more generally²⁸ and, of more interest here, as he focuses on theories of sovereignty in the origins and implementation of Hong Kong’s National Security Law (NSL).²⁹ In his work, Mitchell weaves together ideas in prominent Mainland constitutional law scholarship that have played a clear role in the approach to contemporary developments in the HKSAR as well. These ideas, Mitchell argues, draw common inspiration from doctrines emerging in Germany’s Weimar Republic era—notably from works by Carl Schmitt, Hans Kelsen, among others—, adapted to 21st-century China, and Mitchell points to instances where circumstances or explicit reference by the central authorities do appear to validate this literature’s propositions,³⁰ which in turn evidences their clearly practical implications for our discussion here.

²⁸ Ryan Mitchell, *Chinese Receptions of Carl Schmitt Since 1929*, 8 JOURNAL OF LAW AND INTERNATIONAL AFFAIRS 1 (2020)

²⁹ Ryan Mitchell, *Theories of Sovereignty in the Origins and Implementation of Hong Kong’s National Security Law*, in THE NATIONAL SECURITY LAW OF HONG KONG: RESTORATION AND TRANSFORMATION 72 (Hualing Fu & Michael Hor eds., 2022).

³⁰ An example of the former being invited addresses given by Peking University Law School’s Professor Chen Duanhong on different occasions, one of them by the Hong Kong Government, Liaison Office, and Hong Kong and Macau Affairs Office to give the 4 December 2020 Constitutional Day Seminar, focusing specifically on National Security aspects.

32. The limits of this Report do not allow for a nuanced appraisal of Mitchell's views.³¹ I take the overall thrust of his criticisms, however, to be a familiar one—namely, Schmitt's overstatement of the role of exceptions in politics, to which we turn as well shortly—even if some of the points Mitchell raises appear directed to the idea of sovereignty itself more broadly and to the entirety of the scholarly tradition Schmitt was operating in, and thus not to Schmitt's thoughts alone. Although I share Mitchell's views that it is important to avoid some of the implications of Schmitt's thoughts, I do not think this is enough to draw assumptions about scholarship that engages with his work, about Weimar constitutional scholarship more broadly, and surely not about the position of values of national significance within 'One Country, Two Systems'.

³¹ Doctrines described by Mitchell involve, first, that of a 'State will' (*guojia yizhi*) or 'State consciousness', which unifies state authority in the Central Government, making of China a unitary constitutional system to whose norms both the SAR order (the notion of 'plenary power', discussed above, ensues from here) and, as it applies to China, the international order are subordinated. Second, there is the doctrine of 'State form' (*guoti*), which refers to the 'unchangeable' characteristics of the state, granting 'absolute' or fundamental character to the core norms of the national Constitution (146). Chief among these norms is that of leadership by the Chinese Communist Party as an "embodiment of the people's will" and constituent power. It is indeed through the written *and* unwritten constitution of the Chinese Communist Party that the very *existence* of China's whole constitutional order comes to pass. The third point Mitchell raises is less of a doctrine and more a reflection on themes emerging in the context of contemporary affairs in Hong Kong—including Schmitt's views on the ultimately absolute character of Executive authority and the applicability of his friend-enemy dichotomy as a result of evaluations of patriotism. (noting that such core norms have been identified by Peking University Professor Chen Duanhong, in terms later endorsed by President Xi Jinping himself). see Chen Duanhong, *Lun Gang Ao Jibenfa De Xianfa Xingzhi* [On the Constitutional Character of the Hong Kong and Macau Basic Laws], 32 PEKING UNIVERSITY LAW JOURNAL 41, 58 (2020).

33. Two points explain at least in part the growing attention to Schmitt in contemporary constitutional scholarship, which in turn invites us to briefly consider some practical implications of Schmitt's thoughts for questions explored here. The first point is that also in Western scholarship—from Loughlin to Mouffe to Dyzenhaus—constitutional theory from the Weimar Republic has been a domain of much interest and (varyingly restrained) reflection. Such an interest in Schmitt, although surely having taken a sharp turn in the Mainland, is thus not exclusive to it.

34. The second, more important, point is that Schmitt's work was in part responding to two interrelated processes that are not altogether unfamiliar to us. On the one hand, Schmitt was responding to a historical process of neutralisation of political spaces as societies formally and gradually sought to retreat towards seemingly less politicised paradigms, ultimately taking refuge in technology (or 'technicity', as Schmitt would call it)—which, although appearing to be neutral, is anything but so.³² On the other hand, and as an expression of the first process, Schmitt was responding to a move in legal and political theory scholarship towards formal spaces of Kantian rationality, where, in Loughlin's description, "the complexities of material political struggles at the level of historical communities are entirely marginalized"—Hans Kelsen's work being the quintessential expression of such a move.³³

35. It is no surprise that, with similar processes fostered by the legal detachment of the now global networks of trade, technology, and capital from the same material struggles that define global communities, and with

³² See Carl Schmitt, *The Age of Neutralizations and Depoliticization* in CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 80, 90–91 (George Schwab trans., The University of Chicago Press, 2007).

³³ See Loughlin, *supra* note 9, 127.

technological platforms for a long time left free to occupy political spaces that states aimed to retreat from—with the undeniable, *political* consequences of all that—, there would be a resurgence in interest in the diagnosis offered by Schmitt. As Dayzenhaus explains, much of 20th century liberalism was driven by Rawlsian ideals of political neutrality that sought to remove from the domain of the political all comprehensive forms of value.³⁴ These, he notes, were ideals of the same inspiration as Kelsen's, to which Schmitt's work was responding—and these are ideals to which we too must respond. In fact, and as Part II demonstrates, much of what is now emerging in global frameworks to regulate technological platforms comes precisely to fill in the political and moral gaps left by these ideals. A conceptual response, however, remains to be articulated,³⁵ and thus the temptation, in the light of

³⁴ See David Dyzenhaus, *Introduction: Why Carl Schmitt?*, in *LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM* (David Dyzenhaus ed., 1998). Rawls's liberalism would instead leave in only those of more negative orientation that would meet Rawls's understanding of "right". As Dayzenhaus notes, this kind of neutrality—which was similar to the one professed by Kelsen, to whom Schmitt was responding— "is a sham because in effect it privileges a partial liberal understanding of the good." *Ibid.* 'Partial' is the key word here, because other versions of liberalism are possible—including versions possible to reconcile with a philosophical project of Confucian orientation. In this sense, see, e.g., JOSEPH CHAN, *CONFUCIAN PERFECTIONISM: A POLITICAL PHILOSOPHY FOR MODERN TIMES* (2015).

³⁵ It remains to be seen, for example, how calls for new, digital types of constitutionalism, now still in nascent conceptual form, will evolve to address these demands. For the time being the frame remains the traditional liberal one. While some such calls face difficulties in articulating a view that concretely reconciles the demand for the reaffirmation of the sovereign power of the state with the recognition of the endurance of spaces of private ordering—see de Gregorio, *supra* note 12—, for others the challenge is reconciling sovereignty with utopias emerging from diffuse and fragmented conceptions of global citizenship. See Celeste, *ibid.*, for a description of such a challenge. For a compelling criticism of views of democratic ideals springing from a global.com civilization, see SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 182 (2002) (noting: In this "global.com civilization", persons will shrink into e-mail addresses in space, and their

monumental challenges posed by a platformised Internet, of resorting to the forceful expression of work like Carl Schmitt's.

36. As Hong Kong addresses its platforms challenges, however, it is important both to recognise what has been learned from history in relation to work of this kind, and to pursue a trajectory compatible with China's own design of reforming and opening up, which in turn shapes Hong Kong's possibilities of opening up too. While accepting, thus, Schmitt's diagnosis, it is important to move beyond the fundamentals of *his* Staatslehre. This is particularly important as the power to decide on standards is conceived, given the clear breadth of its definition in the Basic Law. Yet, it is also a tremendously significant task, for, if Mitchell is correct that the "political grundnorm" of the Chinese constitutional system is increasingly conceived to be found in the thought of Carl Schmitt, an alternative foundation for the power to decide on standards cannot depart too much from this tradition—if only because it needs to transform it from within.

37. The problem is then not just theoretical, but a formidably practical one. It concerns not only affirming a view of sovereignty on which the very focus of the present project—the power to decide on standards—will be grounded, but also affirming such a view in a way that departs (if not too much) from domains within a theoretical tradition whose implications could raise rather serious concerns regarding the justification and exercise of this power. To

political and cultural lives will proliferate extensively into the electronic universe, while their temporal attachments will be short-lived, shifting and superficial. Democratic citizenship, internet utopias of global democracy notwithstanding, is incompatible with these trends. Democratic citizenship requires commitment; commitment requires accountability and a deepening of attachments").

this end, the Report suggests that ideas of German political theorist Hermann Heller be considered.³⁶

38. Also writing during the Weimar Republic, Heller sought nevertheless to offer a counterpoint bridging Schmitt and Kelsen in a way that speaks to the heart of the objectives in this Report. In short: **Heller's works present a vision of sovereignty that is also based on a power to decide, yet a power to decide that is neither normatively unbound nor paradigmatically realised through exceptional forms, but rather through the regularity of its exercise.** Furthermore, this is a power whose political and legal dimensions are connected by an *ethical* one that is at the same time immanent and open to democratic practice as instantiated in the particular moment experienced by a given society—just like the idea of democracy reflected in the Hong Kong Basic Law is one to be gradually realised in light of the actual situation in the Region (Article 45).

39. On the other hand, for all in which Heller differs from Schmitt, he also draws on elements of Schmitt that Mitchell outlines in his description of Mainland constitutional scholarship, and which lend us to the conclusion that the reasons why Mainland constitutional scholarship is drawing on Schmitt is not necessarily the authoritarian character of his thoughts. Yet, to the extent that such implications can be avoided while keeping with the same traditions, all the better. Just as in the example with which this Report began,

³⁶ See, above all, HERMANN HELLER, *SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF PUBLIC AND INTERNATIONAL LAW* (David Dyzenhaus ed., Oxford University Press, 2019) and David Dyzenhaus and Hermann Heller, *Hermann Heller*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* (Arthur J. Jacobson & Bernhard Schlink eds., 2000) (editing, translating Heller's *Political Democracy and Social Homogeneity* and *The Essence and Structure of the State*, originally printed, respectively, in his collective writings on 'Law, State, Power' ('Gesammelte Schriften, II: Recht, Staat, Macht') and 'State Theory as Political Science' ('Gesammelte Schriften, III: Staatslehre als politische Wissenschaft').

on how the power to decide standards is justified will ultimately depend not only its contours—but also its *acceptability*.

1.4. Beyond the Exception: Recasting the Power to Decide

40. To understand both the usefulness and the lack thereof of Schmitt's work in our justification of the power to decide on standards, we need to understand where Schmitt was coming from. Schmitt drew central aspects of his work from Georg Jellinek's idea of the state having a dual nature—³⁷ that is, on the one hand a *normative* or legal nature, and on the other hand a *factual* nature, based on the power to rule. Like Schmitt, so did Kelsen, but whereas Kelsen saw as his mission to highlight the normative side of the state—indeed, to develop a 'pure normative theory of law'—, Schmitt responded by affirming the factual, political, indeed *existential* character of the constitution. The constitution, he noted, is something existentially connected with the sovereign will of the people.³⁸ There was a clear sense to Schmitt in which the idea of 'Rechtsstaat' prevalent in his days, in seeking to place formal *normative* limits to the exercise of the sovereign will, reflected a self-interested liberal-bourgeois endeavour.³⁹ For Schmitt, that did not correspond to the 'actual power relationships' at the heart of German society—which, in Ferdinand Lasalle's terms, are the essence of a constitution.

³⁷ GEORG JELLINEK, ALLGEMEINE STAATSLHRE [General Theory of the State] (1905).

³⁸ "The will of the German people, therefore something existential, establishes the unity in political and public law terms beyond all systematic contradictions, disconnectedness, and lack of clarity of the individual constitutional laws. The Weimar Constitution is valid because the German people "gave itself this constitution."". CARL SCHMITT, CONSTITUTIONAL THEORY 65 (Jeffrey Seitzer ed., trans., Duke University Press, 2008).

³⁹ "The bourgeoisie attempted to protect itself against intrusions into personal freedom and private property, and, as something characteristic of the Rechtsstaat, it raised the demand that such intrusions may be undertaken taken only on the "basis of a statute."". *Id.*, at 189.

41. Schmitt's response was to develop a political concept of the constitution and a political conception of law.⁴⁰ These conceptions were political in the again existential sense that they were the expression of a pre-existing will that underpins the constitution's formal-legal character⁴¹ and from which the constitution extracts its validity.⁴² It is through the 'fundamental political decisions' of this pre-existing, sovereign will,⁴³ he observed, that the substance of a constitution as a "complete condition of political unity and order"⁴⁴ is defined. That this is so, however, also means that only this sovereign will can change the substance of the constitution⁴⁵ and, likewise, that it retains a substantive power that Schmitt is most famous for having identified—namely, that of determining what constitutes the *exception* to the

⁴⁰ *Id.*, at 187 (noting: "'political' means a concept of law that, in contrast to the Rechtsstaat, results from the political form of existence of the state and out of the concrete manner of the formation of the organization of rule.").

⁴¹ "Constitution is the equivalent of state form. In this regard, the word 'form' also denotes something *already existing*, a status, not something of the nature of a legal principle, rule, or normative command". *Id.*, at 60.

⁴² "The fact is a constitution is valid because it derives from a constitution-making making capacity (power or authority) and is established by the will of this constitution-making power. In contrast to mere norms, the word 'will' denotes notes an actually existing power as the origin of a command. The will is existentially present". *Id.*, at 64.

⁴³ "The unity of the German Reich does not rest on these 181 articles and their validity, but rather on the political existence of the German people. people. The will of the German people, therefore something existential, establishes the unity in political and public law terms beyond all systematic contradictions, disconnectedness, and lack of clarity of the individual constitutional laws. The Weimar Constitution is valid because the German people "gave itself this constitution." *Id.*, at 65.

⁴⁴ *Id.*, at 59.

⁴⁵ That "the constitution" can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision." *Id.*, at 79.

constitutional order. “Sovereign”, in Schmitt’s chilling formulation, “is he who *decides on the exception*”.⁴⁶

42. Now that is a view that we do not wish as a justification for the power to decide on standards. Yet, Schmitt is basing his thoughts on a conceptual repertoire that will nevertheless be of very practical utility for us in Part II. As Loughlin explains, “provisions that authorize the suspension of constitutional laws during a state exception” seek to “preserve *the materiality of the constitution*”.⁴⁷ Here Loughlin draws on Jellineck’s insight, and this is a point for us to take note of, about *normativity ensuing from facts themselves*—the “normative power of the factual”, as Jellineck called it.⁴⁸ Specifically for Schmitt (for us this will be different), what was significant in Jellineck’s insight was the understanding that facts as they come to present themselves at some point can be so far removed from original expectations ensuing from the material constitution that the normative order retreats—including in relation to its structure of rights—leaving only power to operate. The *material* constitution, that which underpins the formal order, thus irradiates its own normativity towards the future, and this normativity—which is *the normativity of power itself, as originally, factually established*—is all that remains in circumstances where the normative order retreats, leaving outside of it the pariah, the enemy, those who inhabit the limbo of forms, divorced from the formal circumstances that determine the applicable norms, and against which power can then, unadornedly, be unleashed.

43. Here, then, we arrive at the real Gordian knot of this discussion as it relates to the power to decide on standards. Schmitt’s sovereign, in deciding

⁴⁶ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., The University of Chicago Press, 1985).

⁴⁷ Loughlin, *supra* note 9, 215.

⁴⁸ *Id.*, at 216–221.

on the *exception*, is deciding on the *disconnect* between the *material* and the *normative*; he is deciding that the materiality of circumstances as they present themselves at a given moment are so removed from the formal constitution that the normative order at that given moment should, then, *retreat*.

44. Now notice that the opposite movement is at play when, under the Hong Kong Basic Law, the power to decide on standards operates. Here the Government is saying that material circumstances presented at a given moment are such that the tensions they introduce—tensions in relation to values of importance to the Basic Law—require the *normative* order, rather than retreat, to be *extended* to them. For our enterprise, however, this cannot be just the other of a Schmittian formulation. The power to decide on standards cannot, in this sense, reflect a mandate for the sovereign to go about extending the normative order in a loose and arbitrary way, in attention to the values of a material constitution that he determines by fiat. The explanatory power of Schmitt's idea of sovereignty clearly reaches its limits in the present case. The view that the decision on standards could be made on the grounds of an absolute, sovereign power alone would be a rather indigest one.

45. The relations between the normative and the material in the context of the power to decide on standards will be specifically explored later as we consider the nature of this power and the specific legal disciplines that apply to it—from trade to privacy. In short, what will be seen is how varied the power to decide on standards is as to the modalities of intervention it enables. These extend from the most highly normative, to the codes and algorithms of technological systems. What must be addressed at this point, however, is the central challenge with Schmitt's conception of sovereignty—that is, the arbitrariness of allowing the threshold between the material and the

normative to be crossed *purely as an expression of political power*. As is well known, the problem that Schmitt finds in Kelsen—that is, that of subjecting the hard material relationships of power at the roots of the constitution to the fluid formal arrangement at the normative superstructure, so that what must not be changed so unceremoniously is—is also found, from the opposite perspective, in Schmitt’s idea of the exception. Here, instead of power to norm, the arbitrary subjection is of norm to power.

46. It is Hermann Heller who, also writing in the context of the Weimar Republic, helps us address the dilemma at the heart of the power to decide. Indeed, just as Schmitt’s account of sovereignty, Heller’s account sought to emphasise how sovereignty is the attribute of an ‘ultimate decider’.⁴⁹ Unlike Schmitt, however, Heller saw this decider as entirely *constituted by the law*—rather than as a political manifestation standing outside of the law.⁵⁰ This, then, is the very character of the power to decide on standards as it finds its grounds and its limits in the architecture put in place by the Hong Kong Basic Law.

47. This is not to say that, for Heller, sovereignty was not, at the same time, an *inherently political* phenomenon. The problem with Kelsen was approaching sovereignty from a purely normative perspective. The problem with Schmitt, in turn, was approaching sovereignty from a purely political perspective. For Heller, sovereignty is about *both de facto* (the political as a fact) *and de jure* dimensions of the state—but it is also, and here lies the great innovation, about what allows for the gap between both dimensions to be crossed. This is *ethics*, enabling normative work to be carried out within and between both dimensions, and both dimensions to converse with each

⁴⁹ David Dyzenhaus, *Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought*, 16 THEORETICAL INQUIRIES IN LAW 337, 342 (2015).

⁵⁰ *Id.*

other.⁵¹ As David Dyzenhaus observes, “ethics, more precisely what Heller called “ethical fundamental principles” of law (...) provide a basis for a juridical assumption that legal order should be conceived as a *dialectical unity of law, power, and ethics*.”⁵²

48. One readily notes the seemingly disturbing element of imagining a power to decide on standards that mobilises the ethical domain. Yet, just think of how the same domain is mobilised, for example, by Large Language Models or by a Social Networking Site. Does misinformation mobilise the ethical domain? Do manipulative black patterns in human-computer interfaces mobilise the ethical domain? In turn, do codes, algorithms, and protocols that underpin the functioning of all such systems mobilise the ethical domain? If Heller was already correct back then, that the information environment now *articulates our normative commitments* in ways that find no precedent in human history makes his observation undeniable. Whereas Max Weber noted how the formal-rational logics of law and the state were at the origins of modernity, the paradox is that we need now to move *beyond* the formal-rational logics of law and the state to *remain* in modernity.

49. Beyond the immediate boundaries of the power to decide on standards, but nevertheless being part of such boundaries at their highest level, the implications of Heller’s views for Chinese constitutional thought cannot be underestimated and deserve much wider exploration than the attention they appear to have received so far. For example, Professors Larry Catá-Backer and Jiang Shigong have engaged on a nuanced and most erudite discussion

⁵¹ See DAVID DYZENHAUS, *THE LONG ARC OF LEGALITY: HOBBS, Kelsen, HART* 349 (2022) (noting: “Herman Heller, one of the leading public lawyers and legal theorists of Weimar, argued that Jellinek’s insight into the normative force of the factual must be matched with another, that there is a factual force to the normative – the ‘power formative character of law.’”).

⁵² Dyzenhaus, *supra* note 48, at 345.

about the need for Chinese thought to be seen “as a positive resource for developing a Chinese-style constitutional tradition”, with the Chinese Communist Party (CCP) “as an organic component of a party-state constitutional framework”.⁵³ In intertwining its roles of interpreting the (written and unwritten) material constitution as an exercise of its political power *and* exercising its ideological leadership over the regular administrative/normative functions performed by the State, the Party plays a clear role—missing in Western constitutionalism—in the bridging of the normative and the material *through the ethical*. That, for Heller, ethics also requires social practice and, thus, a striving for legitimacy⁵⁴ adds yet another interesting layer for the constitutional conceptualisation of party leadership—and it will have concrete implication for our practical discussions in Part II.

50. Examining Heller’s ideas in all their granularity would be too vast an enterprise to be carried out in the report. Yet, insofar, as the power to decide on standards is ultimately an expression, within the HKSAR, of the sovereignty of the constitutional order of the PRC—which the Chief Executive of the HKSAR both represents and responds to—, Heller’s understanding of what sovereignty entails is of utmost interest in understanding the boundaries of the power to decide on standards beyond what a Schmittian reading of it would entail.

51. In *Sovereignty: A Contribution to the Theory of Public and International Law*, Heller defines sovereignty in the following way:

⁵³ Shigong Jiang, *Chinese-Style Constitutionalism: On Backer's Chinese Party-State Constitutionalism*, 40 *Modern China* 133, 136 (2014).

⁵⁴ Dyzenhaus, *supra* note 48, at 344.

“Sovereignty (...) is the *conceptual symbol for the unity (...) of an act of will* that constitutes the *law* and the *power* of a *territorially universal decision*.”⁵⁵

52. The definition is somewhat cryptical, and it finds more descriptive articulation in other works by Heller. But its synthetic formulation allows us to briefly identify central themes of his argument. The first is that, in contrast with Schmitt, and it is never enough to highlight this, Heller’s sovereign is not one who decides on the exception, but “whoever has decided *on the normal situation* through a written or unwritten constitution and, because he intentionally maintains its validity, continues permanently to decide”.⁵⁶ Sovereignty, thus, is the expression of a *decisional regularity*, or normality—and it is so precisely because, rather than a factual symbol of division, as in Schmitt, sovereignty is a conceptual symbol of unity.⁵⁷ Unity, in turn, as Heller explains elsewhere, requires a universality of decisions in relation to acts that pertain to it. In his words:

“Like any other system of political domination, the democratic is also in essence a territorial decision of *potentially universal extent*. One rules politically when one makes the *final decisions in regard to those acts that pertain to the unity of cooperation* or when one engages significantly in the unity of territorial decision”.⁵⁸

⁵⁵ Heller, *Sovereignty...*, *supra* note 35, 130.

⁵⁶ *Id.*, 129

⁵⁷ An interesting contrast can also be made here between Hobbes’s graphical symbol of force—the Leviathan—and Heller’s conceptual symbol of unity. Indeed, speaking of Hobbes’s, Heller notes “[t]he idea of a state of sovereignty that devours every personality is so incorrect, however, that its absolute opposite is the necessary requirement for a clarified concept of sovereignty”. *Id.*, 126.

⁵⁸ Dyzenhaus and Heller, *supra* note 35, at 256.

53. What modalities of action and value are included in the definition of the political is thus not that Rawlsian neutralist enterprise of which we spoke above, but rather one that encompasses all forms of action pertaining to the unity of the people—or, put another way, to the general *will*. While Heller is not oblivious to human individuality, he sees that some measure of homogeneity is inherent to the unity he is speaking of, which also makes of his conception of the will at the same time an immanent⁵⁹ and a democratic one.⁶⁰ As Heller notes, every democratic representative, “despite his power as representative to make autonomous decisions, (...) remains legally bound to the will of the people by means of a rationally posited order”. How deep-down democracy will travel is, in turn, a socially situated affair. Whereas democracy is about a bottom-up approach to representation, Heller notes, “[t]he contingencies of history determine how far down the bottom reaches”.

54. Most importantly, however, it is precisely in how this *unity of will* enables the legal and political dimensions in Heller’s definition to be bridged, and to be so in *ordinary*, not exceptional situations, that lies his main contribution to how we can understand sovereignty in general and the power to decide on standards specifically—as a power based on normative, material, and ethical presuppositions. The power to decide on standards works within the domain of the normal, not the exceptional. Standards provide paradigms, stabilise expectations, define horizons of allegiance, and in everything enable the creation of conditions precisely for circumstances of exception *not* to emerge—or not to do so more often.

⁵⁹ This act of will, in turn, together with the universal character of the decision, draws clear inspiration from Rousseau and Hegel, with Heller referring to the state as a “ideality”, or an “immanent act of will”—, which highlights that even at its power moments there is more to the decision that is made than the exercise of an arbitrary act of will.¹³⁰

⁶⁰ “Despite his power as representative to make autonomous decisions, he remains legally bound to the will of the people by means of a rationally posited order”.

Part II.

Defining the Power to Decide on Standards: Genealogy, Scope, and Application

55. Before pursuing the interfaces and boundaries of the power to decide on standards—which will start with an examination of the idea itself of standards—, this discussion turns now to a brief genealogy of this power in the light of its historical development as a provision in the Basic Law and the remarkably scarce examinations it has received in the scholarly literature.

II.1. A Genealogy of Article 139(2): Technological and Global Contexts

56. It is tempting to think that, when the power to decide on technological standards came into being, Britain and China were entangled in a heated debate about the format of electricity plugs or the driving side of automobiles. A brief historical examination, however, points to a much richer history than what we find in commentaries to the Hong Kong Basic Law.

57. By the time the Basic Law of the Hong Kong SAR was promulgated, on 4 April 1990, a little bit had happened in the world of technological standards. The concept of an ‘Intergalactic Computer Network’ was born at the U.S. Department of Defence’s Advanced Research Project’s Agency (ARPA) in 1960. The first packet-switching computer network, the ARPANET, went live on 29 October 1969.⁶¹ This was one of many networks that proliferated during the 1970s. Some were based on alternative packet-switching protocols like the X.25, whose first draft standard was released by the International Telecommunications Union in 1976. Standardisation work that would later be incorporated under the Internet Engineering Task Force began in 1969, through Request for Comments (RFC) 1.⁶² The standard for a common language between all networks, the TCP/IP, was adopted in 1974. It was RFC

⁶¹ For concise a history of this process, see Malte Ziewitz & Ian Brown, *A Prehistory of Internet Governance*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 3 (Ian Brown ed., 2013).

⁶² Steve Crocker, Host Software, RFC 1, Internet Engineering Task Force (1969), <https://www.rfc-editor.org/rfc/rfc1.txt>.

675,⁶³ which established the term internet and would go on to be adopted as ARPANET's protocol in 1983. By 1990, the World Wide Web had already been invented (as a standard proposed by a British Scientist working at CERN, Sir Tim Berners-Lee) and the Internet had become its own thing, growing from 4 to 300,000 hosts.⁶⁴

58. In Hong Kong, the now Joint Universities Computer Centre (JUCC) was established in 1970, then as the University and Polytechnic Computer Centre (UPCC), to provide support to The University of Hong Kong and The Chinese University of Hong Kong.⁶⁵ In late 1985, work led by Dr Nam Ng at the UPCC, together with Dr Kam-Pui Chow at the Computer Science Department at HKU, was responsible for the introduction of the Hong Kong Academic and Research NETwork (HARNET), running on an Unix-based protocol first released by AT&T Bell Labs in 1979—the UUCP (Unix-to-Unix Copy). HARNET connected the five academic institutions in Hong Kong at the time, supporting electronic email and file transfers and providing gateways to international networks in other parts of the world—including the ARPANET.

59. Records from consultations carried out during the drafting process of the Hong Kong Basic Law point to numerous visits to academic and research institutions in Hong Kong, as do the records of Legislative Council debates show acquaintance with technological matters by the Councillors and by the

⁶³ Vinton Cerf, Yogen Dalal, and Carl Sunshine, Specification of Internet Transmission Control Program, RFC 675, Internet Engineering Task Force (1974), <https://www.rfc-editor.org/rfc/rfc675.txt>.

⁶⁴ Ziewitz & Brown, *supra* note 61.

⁶⁵ See Joint Universities Computer Centre Ltd, About JUCC, <https://jucc.edu.hk>. See also Ng Nam, Hong Kong: Snapshot of the Internet Around 1990, in *Asia Internet History Projects*, <https://sites.google.com/site/internethistoryasia/book1/snapshot-of-internet-in-hongkong-draft>

Governors of Hong Kong at the time, Sir Edward Youde and Baron David Clive Wilson, in speeches delivered to LegCo.

60. While surely it would not have been reasonable to foresee the dimensions the Internet would take as an intertextual fabric connecting the entirety of global societies, hardly can one claim, thus, that matters concerning Internet-related technologies would not have been within the purview of the drafters of the Basic Law.

61. Nor could one deny how mindful drafters were of the international, indeed *global* dimension of standards-setting processes—of which Internet standards themselves were just a fragment for most of the Internet’s earlier life. By the time the Basic Law was adopted, all standardisation organisations mentioned in the Report had already been created. The National Institute of Standards and Technology (NIST), in the United States, for example, was founded in 1901.⁶⁶ In fact, the first constitutional reference to standards setting in the United States was made in the 1781 Articles of Confederation, travelling into the United States Constitution as ratified in 1789.

62. Most significantly, not only the drafters of the Basic Law could not be unaware of this vast universe, but they clearly chose a path much different from the one reflected in the US Constitution, whose Article I, Section 8, Clause 5 reads:

“*The Congress shall have power ... To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.*” (emphasis added).

⁶⁶ See Organic Act of March 3, 1901 (ch. 872). Originally titled the National Bureau of Standards, NIST took up its new name in 1988, through the National Institute of Standards and Technology Act (15 U.S.C. 271).

63. As it can be seen, under the US Constitution the power to fix standards lies with the United States Congress—which stands in remarkable contrast with Article 139(2) of the Hong Kong Basic Law, where the power to decide on standards is vested in the Government.

64. In other words, it could not have been an oversight that the drafters of the Basic Law would ascribe what in the US had *for almost two centuries* been defined as a *legislative power*—⁶⁷ and one of remarkable generality—, not to the Legislative Council, not to any independent statutory body in Hong Kong, but to the **Government** of the HKSAR.

II.2. A Genealogy of Article 139(2): Drafting Process & Legislative Intent

65. In fact, throughout the Basic Law, attention was paid to how provisions of similar wording to Article 139(2) would empower different authorities within Hong Kong’s political structure. Interestingly, it is often assumed that in all instances where the expression ‘on its own’ appears in the Basic Law, it does so *merely* to demarcate the HKSAR’s autonomy in relation to the Central Authorities, thus inviting the application of Article 22(1).⁶⁸ As drafting documents and the explanations themselves by the Drafting Committee’s

⁶⁷ See United States Constitution, Article I, Section I (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives”).

⁶⁸ Basic Law, Article 22(1) (“No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”).

Chairman to the NPC indicate,⁶⁹ it is of course the case that such provisions have the intention to affirm the HKSAR's autonomy. They do not, however, stop at that, and it is not a meaningless fact that, whereas some provisions ascribe powers to more *generally the HKSAR*—as is the case, for example, with all provisions in the chapter on the relations between the Central Authorities and the HKSAR (Chapter II)—,⁷⁰ most provisions on policy under Chapter VI, where Article 139 is located, ascribe powers *specifically to the Government*. In doing so they define competences that, as will be discussed later, reflect the Government's autonomy not only in relation to the Central Authorities, but in relation to other actors as well. Thus, for example, legislative processes in any area reserved to governmental policy cannot be initiated if not with consent by the Chief Executive himself (Article 74, BL).

66. Even more interesting than to contrast Article 139(2) with other provisions in the Basic Law, however, is to establish a contrast between both

⁶⁹ Ji Pengfei, Explanation on “The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)” and its Related Documents (Addressing the Third Session of the Seventh National People's Congress on 28 March 1990), online: https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc6.pdf (noting: “Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region's autonomy in areas such as finance, economy, industry and commerce, trade, transport and communications, development and management of land and natural resources, education, science and technology, culture, sports, public order and control of entry and exit activities”).

⁷⁰ See e.g. Basic Law, Article 23 (“The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies”).

paragraphs of Article 139 itself, which, copied here again for ease of reference, read:

Article 139

The Government of the Hong Kong Special Administrative Region shall, on its own, *formulate policies on science and technology* and *protect by law* achievements in scientific and technological research, patents, discoveries and inventions.

The Government of the Hong Kong Special Administrative Region shall, on its own, *decide on* the scientific and *technological standards* and specifications *applicable* in Hong Kong.

67. What can be inferred from the exercise? First, like they did in so many provisions under Chapter VI, the drafters of the Basic Law could have ascribed to the Government merely the power found in Article 139(1)—that is, the power to *formulate policies* on technology. However, unlike in other policy areas covered by the Basic Law, the power to formulate policies is complemented by *a second power*—namely, that to *decide on standards*—, expressed through a separate provision (Article 139(2)), with no indication of the second power being just an instantiation of the first. In fact, Basic Law drafting documents indicate that, while Article 139(2) was included in close to its current form early in the drafting process, *what is now Article 139(1) was only added later*.

68. From the beginning of the drafting process there was a sense that policies under Chapter VI of the Basic Law should be left to the Government.⁷¹ In effect,

⁷¹ See Basic Law Drafting Committee | Education, Science, Technology, Culture, Sports, and Religion, Work Report—Third Plenary Session (Hong Kong, 29 November, 1986) 48 (agreeing on common understandings for Chapters 6 and 8 of the Basic Law). See Basic Law

a closer look into the range of topics under that Chapter denotes that concerns expressed in it do not aim merely or mostly at enabling economic development. Rather, provisions in Chapter VI mobilise a diverse range of policy interests concerning Education, Science, Culture, Sports, Religion, Labour, and Social Services. Wittingly or not, they function as a counterbalance for provisions in Chapter V, which concerns the Economy.

69. The Hong Kong Basic Law, in this sense, does contain free-market protections of the kind Puig and Ip describe in their recent work.⁷² However, such protections are, in turn, tempered by the granting of attributions that enable the Government to set broader policy directions in issues concerning the public interest.

70. Puig and Ip seem to recognise this when they note, critically, that provisions in Chapter VI of the Basic Law “risk the adoption of top-down industrial policy, which is apt to proliferate inefficiency if it reallocates production to specific industries so as to stifle meaningful competition”.⁷³ This is vital advice as recommendations in this report are considered. It rests far, however, from settling the matter. Questions of public interest concerning technological policy and standards, after all, do not entail mere consequentialist calculations, let alone an exercise of ‘compassion’.⁷⁴ They

Consultative Committee | Special Group on Culture, Education, Technology, and Religion, Final Report on Professional Qualifications and Policy Regarding Science and Technology (Hong Kong, 12 June 1987) 9 (putting forward proposals for a Policy on Science and Technology attributing to the government a role in adopting a positive, flexible and effective policy to support and encourage the development of science and technology)

⁷² See Gonzalo Villalta Puig and Eric Ip, *supra* note 23.

⁷³ *Id.*, at 47.

⁷⁴ *Id.*, at 48 (noting: “a better interpretation is to understand them as consequentialist expressions of classical liberal economic thought. The good of society legitimates the

must be approached within a broader *deontological* balance, instead of one merely focused on consequences. That is, they are questions concerning a much wider range of rights and values at the service of which development in the Region must be understood, and not the other way round. For example, there would be no common law tradition that, in a rights-based society, could condemn such a society to continue to sustain high levels of social inequality of the sorts that have historically affected Hong Kong. There could be no ‘theme of continuity’⁷⁵ that could rightly command Hong Kong to ‘continue’ in such a trajectory and transform the protection of social, economic, and cultural rights—which are also part of the Basic Law’s framework—into a matter of *exception*, indeed an *externality* to Hong Kong’s constitutional order. To the extent that challenges posed by platforms concern this wider universe of rights and values, market-oriented approaches such as those of trade and competition law can only offer a partial response.⁷⁶

71. Trade and competition are not a satisfactory response, however, even in the narrow, freedom-focused universe of values entertained by Puig and Ip.

regulation of economic activity to correct monopolies, frauds and other anti-competitive market failures and, through taxation, the compassionate provision of public goods – education, health and social welfare – to protect basic human dignity”).

⁷⁵ See *Secretary for Justice v Lau Kwok Fai and Another* (2005) 8 HKCFAR 304, [35, 65] (speaking of a “theme of continuity” in the Basic Law, generally recognized by courts in Hong Kong—originally in *HKSAR v. Ma Wai Kwan, David* [1997] 1 HKLRD 761—as entailing the continuity of the common law system).

⁷⁶ See VILI LEHDONVIRTA, *CLOUD EMPIRES: HOW DIGITAL PLATFORMS ARE OVERTAKING THE STATE AND HOW WE CAN REGAIN CONTROL* 8–9 (2022) (Noting: “Even as our economies have moved online, competition has not been able to ensure that platform companies would treat people and business fairly. Why do platforms differ from ordinary companies in this regard? (...) For now it suffices to say that like states, platforms are institutional frameworks, and the choice between alternative institutional frameworks is not an individual choice that can be resolved in a market, but a collective choice. Political institutions for collective decision making are missing from the platform economy, so users find themselves stuck at the princes’ mercies”).

Choices articulated in the architecture of the information environment may affect our individual rights and possibilities of self-expression even where no trade and competition-related norms are engaged or violated. The limitations of constraints in competition law to tackle the challenges posed by technological platforms is indeed a problem widely discussed in the literature.⁷⁷ Such limitations are a reason why new regulatory frameworks such as the Digital Services Act⁷⁸ and the Digital Markets Act⁷⁹ in the European Union have come into being.⁸⁰ Regulating how choices of architecture and content are made by platforms in such contexts transcending competition law is not against capitalism and it surely is not against freedom—rather, it is *required* by these. As Yochai Benkler argued in

⁷⁷ See e.g. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 564 (2016); Pablo Íbañez Colomo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 12 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 561; and Ariel Ezraki, *EU Competition Law Goals and the Digital Economy*, Oxford Legal Studies Research Paper No. 17/2018 (2018), <https://ssrn.com/abstract=3191766>.

⁷⁸ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1 [hereinafter *Digital Services Act*].

⁷⁹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1. [hereinafter *Digital Markets Act*].

⁸⁰ See e.g. Pablo Íbañez Colomo, *supra* note 76 (noting how the Digital Markets Act, for example, avoids typical ex-post constraints of competition law in the regulation of technological platforms—and the limited applicability of competition law in two-sided, platform markets—and focuses instead of establishing a range of ex-ante fairness-related commitments). See also Friso Bostoen, *Understanding the Digital Markets Act* 68(2) *The Antitrust Bulletin* 263 (2023).

The Wealth of Networks, “[h]ow a society produces its information environment goes to the very core of freedom”.⁸¹

72. However, just as negative ideals of freedom do not pose an obstacle to the regulation of technological platforms beyond the limits of competition law, neither do these ideals represent the whole range of considerations of constitutional quality that must ground Hong Kong’s approach to the topic. Challenges posed by platforms—and corresponding calls to action to address these—vastly transcend the universe of negative freedoms that energise Puig and Ip. For example, while acknowledging potential risks indeed posed by foreign platforms to freedom of expression and other individual rights—such as through the possibility of manipulation of content online—, Ganesh Sitaram nevertheless suggests for their regulation a broader rationale. This rationale links the regulation of technological platforms with that of *public utilities*. The reason why public utilities are regulated, Sitaram notes, is that such industries “are considered essential to political, economic, and social life”.⁸² In his words: the “fact that regulated industries were of public consequence justified greater regulation (to ensure that the industries achieved public purposes)”.⁸³ There was also a sovereignty component, notes Sitaram. As significant as political, economic, and social challenges were in calls for the regulation of public utilities, so was “the danger that these industries would give private actors excessive power”.⁸⁴ These are all concerns that, going back to Benkler’s words, relate to how Hong Kong’s information environment is produced—and to the role played by technological platforms in this production.

⁸¹ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 129 (2006).

⁸² Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073, 1102 (2002)

⁸³ *Id.*

⁸⁴ *Id.*

73. Now, although the legislative history of Article 139 is concise, it enables one to clearly observe that, as the draft text was conceived and evolved, a range of considerations were mobilised extending much beyond the negative freedoms and market interests Puig and Ip speak of. Indeed, the drafters of the Basic Law were clear in their intention to *balance economic-oriented aspects* of technological development with *broader concerns* involving technology policy and beyond.

74. Before the first Collection of Draft Provisions of the Basic Law was compiled for the Sixth Plenary Meeting of the Basic Law Drafting Committee (BLDC), on 12 December 1987, preparatory documents by the BLDC's Sub-group on Education, Science, Technology, Culture, Sports and Religion contained, for Article 139(1), not the text currently found in the provision, but a more interventionist version of what is now Article 118 of the Basic Law. That text committed the Government to “develop[...] science and technology undertakings”.⁸⁵

75. During the BLDC's Fifth Plenary Meeting, however, comments by Members were reported noting that it would be inappropriate to affirm those as areas of ‘government development’, and that ‘encourage and support’ or “create the conditions and environment” would be more fitting

⁸⁵ Basic Law Drafting Committee, *Progress report of the Sub-group on Education, Science, Technology, Culture, Sports and Religion* (教育、科學、技術、文化、體育和宗教專題小組工作報告) (22 August, 1987), online: <http://147.8.31.160/bldho/articles/BL0045.pdf#page=4> (“The Government of the Hong Kong Special Administrative Region develops science and technology undertakings and rewards and protects scientific and technological research results and inventions. The Government of the Hong Kong Special Administrative Region determines various scientific and technological standards and specifications on its own.” / “第五條 香港特別行政區政府發展科學、技術事業，獎勵和保護科學、技術的研究成果和發明創造。香港特別行政區政府自行決定科學、技術的各類型標準和規格。”).

expressions.⁸⁶ When in the first official Draft of the Basic Law the original Article 139(1) became what is now Article 118, it stipulated that the “Government of the HKSAR shall create the necessary environment conditions for encouraging industrial investment, technological progress, and the development of new industries”.⁸⁷ This would evolve through different versions in reflection of deliberations in the Basic Law Consultative Committee and, later, in the Legislative Council,⁸⁸ until taking its present shape,⁸⁹ as a provision inserted in Chapter V of the Basic Law, which focuses on the *economy*.

76. In short: whereas the original Article 139(1), focusing on *encouraging technological progress*, would go on to become part of a chapter concerned with the *economy*, the new Article 139(1), focusing on the *formulation of policies on technology*, came to offer it a broader counterpoint. As a result, in the grand scheme of the Hong Kong Basic Law, there are two related provisions establishing a system of checks and balances of sorts as they

⁸⁶ Basic Law Drafting Committee, Fifth Plenary Meeting, Members' Opinions on the Preamble of the Basic Law and the Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7, and 9 (委員們對基本法序言和第一、二、三、四、五、六、七、九章), online: <https://sunzi1.lib.hku.hk/bldho/014.pdf#page=381>.

⁸⁷ Basic Law Drafting Committee, Sixth Plenary Meeting, *Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee*, online: <https://sunzi1.lib.hku.hk/bldho/L003.pdf#page=66>.

⁸⁸ See e.g. Legislative Council, Comments by The Honourable Ngai Shiu-Kit, (14 July, 1988) (noting: “Again, this is a policy article. The intention is good, but this is vague and unclear. It is open to dispute, and a lot of people can use this article to allege that the Government is violating the constitution, and people may also suspect the Government would like to use administrative means to interfere with industrial and commercial activities, and the result may not be good for investment. So I think we should consider amending this”).

⁸⁹ See Basic Law, Article 118 (“The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries”).

ascribe a power to the Government in relation to technology. While one of these provisions directs the government to encourage technological development, the other directs the government to pay heed to a broader realm of policy considerations concerning the rights, interests, and values upheld by the Basic Law as a whole. This dual approach helps to ensure that technological progress in Hong Kong is both economically beneficial and socially responsible.

77. But then there is yet a *third* provision ascribing a power to the Government in relation to technology—and it is the one at the heart of our considerations in this report, namely, Article 139(2) of the Basic Law, which ascribes to the Government of the HKSAR the power to, on its own, decide on the scientific and technological standards applicable in the region. To state the obvious: Article 139(2) is neither Article 139(1) nor Article 118 of the Hong Kong Basic Law. As such, it ought to be read as something distinctive from the other two provisions. While some measure of coherence is, of course, to be expected between the provisions—in particular within Article 139 itself—, it is evident from their wording and drafting history that they are intended as distinctive mandates.

78. Interestingly, beyond what Article 139 clearly says, we learn equally from inquiring into what it does *not* say. And the first thing it does not say is this: that policies formulated according to paragraph (1) will be implemented through technological standards and specifications determined by the Government of the HKSAR according to paragraph (2). Quite to the contrary, the wording of the provisions points to two parallel and distinctive mandates. Of course, there would be a contradiction in terms were we to believe that standards issued by the Government should be able to go against the policies adopted by the Government itself. But neither is Article 139(2) an inactive provision depending on being activated by a policy, which in turn would

depend on a law being passed by the Legislative Council, so that one day a matter concerning technological standards could be decided on by the Government. That this is not the case flows not only from the parallel arrangement of the provisions, both containing a rather similar structure, but also from another fact already considered above: namely, that, in the drafting history of the Hong Kong Basic Law, what is now Article 139(2) came first, when Article 139(1) was not even in the game.

79. The following section examines what should be understood by ‘standards.’ Even before taking the inquiry further, it is easy to observe that Article 139(2) entails something more concrete than Article 139(1). Whereas the *formulation of policy* typically refers to planning exercises and articulations of intentions that, to be made actionable, depend on further normative specification or transformation through decisions by various actors—⁹⁰ such those ensuing from parliamentary proceedings or at least from the results of public consultation—, the power the Basic Law ascribes to the Government via Article 139(2) is very clearly a power to settle, to decide on what is applicable and consequently to exclude what is not. As such, the power to decide is an expression of the very idea of sovereignty discussed in Part I.

80. This concrete decisional character of Article 139(2) results impressively clear as one considers one last point about the Basic Law’s drafting process.

⁹⁰ MICHAEL HOWLETT, M RAMESH, ANTHONY PEARL, AND ELISA HXY FERREIRA, DICTIONARY OF PUBLIC POLICY 196-197 (2022) (defining Public Policy as: "[a] complex phenomenon consisting of numerous decisions made by many individuals and organizations inside government, while these decisions are influenced by others operating within and outside of the state. (...) Public policy arises from the activity and decisions of many actors operating under the influence of an amorphous, yet inescapable, context of ideas and institutions, employing a variety of diverse and multifaceted policy instruments to try to achieve the goals of government. This intricacy poses real challenges to those seeking to build a comprehensive and cumulative understanding of the policy-making endeavour").

One of the issues raised during BLDC discussions was precisely whether it would make sense for Hong Kong to adopt its own standards, given how unified global standards were said to be. Note that the concern expressed then, as the provision emerged, was not with a differentiation between Hong Kong and the Mainland, although that can also be encompassed by the expression ‘on its own’ vis-à-vis the general context of the Basic Law. The main concern was with the interplay between decision making in Hong Kong and internationally. In effect, one of the suggestions raised then was of changing the provision to restrict the Government’s power to the ‘selection’ of standards or to decide ‘which’ standards apply, rather than enabling the Government to adopt its own standards.⁹¹ That the current wording would be kept thus enables the legislative intent to be inferred as expressing not only a power for the Government to defer to existing standards, but rather a power for the Government to even exclude other standards, in deciding, that is, to adopt standards of its own.

II.3. The Nature of Technological Standards: What the Government Decides On

81. Part II.4 below will consider the *balance* between variables that the Government must have in mind as it exercises the power to decide on standards. What explains that, on certain matters the Government must defer to *national* concerns, whereas on other matters it must so to *international* or *local* ones? What determines the *stringency* of standards-based interventions, including as to their *mandatory* or *voluntary* character, and whether these should be set at a *higher normative level* or a *more specific*,

⁹¹ Basic Law Drafting Committee, Fifth Plenary Meeting, Members' Opinions on the Preamble of the Basic Law and the Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7, and 9 (委員們對基本法序言和第一、二、三、四、五、六、七、九章), online: <https://sunzi1.lib.hku.hk/bldho/014.pdf#page=381>.

technologically embedded one? All such questions, ultimately, point to discussions concerning *proportionality*—which, in interesting ways, as will be seen, bring us back to the ethically situated understanding of *sovereignty* recommended in Part I.

82. While this balance or proportionality assessment unfolds along different, intersecting axes, one of these axes is *constitutive* of all others—namely, that which determines whether standards should be set at a higher *normative* level or a more specific, *technologically embedded* one. This is so since the domains traversed by this axis are of the very nature of what we understand by technological standards. Such domains are on one hand the *technological* and on the other hand that of the institutional normative practices that make up the law—or the *legal*. Technological standards connect both such domains. More precisely, technological standards inhabit the continuum that exists between technology and the law, so that when the Government decides on technological standards it is on elements inhabiting such a continuum that it is deciding.

83. The intuition that standards lie in a continuum between both domains can be clearly visualised by defining what is meant here by ‘the technological’. While definitions of technology abound,⁹² the more interesting ones see technology as part of an interplay between the *materiality* of nature and its mastery through *intentional* forms of intervention. In a sociological account, Ralph Schroeder defines technology as the “adventure” through which, by “refining and manipulating” the physical or natural environment, society

⁹² They extend from the more existential—such as Heidegger’s insight on the essence of technology as the ‘enframing’ of reality itself (see MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* (1977))—to those that dilute the technological into an entirely socially constructed phenomenon (for arecent, paradigmatic exposition of this view, see BRUNO LATOUR, *AN ENQUIRY INTO MODES OF EXISTENCE: AN ANTHROPOLOGY OF THE MODERNS* (Catherine Porter trans., Harvard University Press, 2018)).

seeks to “extend or enhance its mastery of the world”.⁹³ Philosophical studies on the *functions* of technological artefacts, likewise, highlight how functions work as a bridge between the *material* and *intentional*—or *normative*—dimensions of technological artefacts. On this account, the question of whether an artefact *properly* functions is to be determined from the perspective both of whether, *as a matter of fact*, an artefact works or does not work as well as of whether, from a *normative* perspective, the *aims* for which an artefact works are *justifiable*.⁹⁴

84. Technological artefacts, in this sense, are hybrid constructs, traversing the material and the normative domains. Interestingly, this same way of seeing technologies can be extended to our understanding of *law itself* as an artefact. Law, after all, besides its clear intentional dimension, also has a *material* existence, which can be observed from the script of its texts and codes to the very tangible institutions that enforce these. The difference, in the end, is a matter of salience. If for technology the salient aspect is in the material domain, what is specifically salient for the law is its intentional or normative domain. Points of salience notwithstanding, it is undeniable that technology and the law exist along a continuum of both materiality and intentionality, or normativity.

⁹³ See RALPH SCHROEDER, *RETHINKING SCIENCE, TECHNOLOGY, AND SOCIAL CHANGE* (defining technology as an “adventure” through which, by “refining and manipulating” the physical or natural environment “by means of physical instruments or tools”, society seeks to “extend or enhance [its] mastery of the world”).

⁹⁴ See Pieter E. Vermaas and Wybo Houkes, *Technical Functions: A Drawbridge Between the Intentional and Structural Natures of Technical Artefacts*, 37 *STUD. HIST. PHIL. SCI.* 5 (2006). See, also, (2006) Peter Kroes and Anthonie Meijers, *The Dual Nature of Technical Artefacts*, 37 *STUD. HIST. PHIL. SCI.* 1 (2006). See, also, Wybo Houkes, *Knowledge of Artefact Functions* 37 *STUD. HIST. PHIL. SCI.* 102 (2006).

85. It is precisely this vast continuum the domain inhabited by technological standards. Understanding that this is so, in turn, enables us to grasp how vast is the power of the Government to decide on the technological standards applicable in the HKSAR. Just like technology, law, and the continuum between both, the power to decide on standards is itself a power of a hybrid nature, encompassing from more embedded technological choices to more broadly normative ones.

86. What distinguishes a standard from a guideline, from a code of practice, or from a technical specification? Not much, if anything at all except the binding powers or presumptions that may be attached to one or another. Standards there are that are highly technical documents, while others contain more general normative formulations—and this has nothing to do with them having been issued by the state or not. Technological standards issued by non-state bodies like the Institute for Electrical and Electronic Engineers (IEEE)—for example, the IEEE Standard for Data Privacy Processes ⁹⁵ —may have conceptual and normative implications that explicitly interface with state-backed instruments, such as the Organization for Economic Cooperation and Development’s Privacy Guidelines. ⁹⁶ Technological standards issued by state-endorsed standardisation bodies, like the European Committee for Standardization (CEN), may be more technical documents.

⁹⁵ IEEE, Standard 7002-2022 – IEEE Standard for Data Privacy Process (2022)

⁹⁶ OECD, Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (2013), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0188>

87. Most tellingly, the European Union’s Regulation on European Standardisation⁹⁷ both defines ‘standard’ as a kind of *technical* specification⁹⁸ and ‘technical specification’, in turn, as a ‘*document*’ that prescribes requirements of quality, performance, among others, some of which have a clearly *legal* dimension, such as levels of environmental protection, health, and safety.⁹⁹ But then, in turn, documents may also present themselves in a *technically embedded* form, not only under EU Law, but under Hong Kong law as well. So it is that, under the EU Regulation on Electronic Identification and Trust Services, ‘electronic documents’ are defined as “any content stored in electronic form”,¹⁰⁰ whereas under Hong Kong’s PDPO, ‘document’ includes, in addition to a document in writing, the ‘embodied’ representation of information in ‘any device’.¹⁰¹

88. That a continuum exists between the technical and the legal is thus not a mere philosophical conjecture, but something affirmed in European Union Law itself. In effect, in its judgment in *James Elliott Construction* (Case C-613/14), the Court of Justice of the European Union recognised that “a harmonised standard such as that at issue in the main proceedings ... forms part of EU law” since it is by virtue of compliance with a harmonised standard that the presumption of conformity with EU Law is inferred.¹⁰² For the Court,

⁹⁷ Regulation (EU) No 1025/2012, of the European Parliament and of the Council of 25 October 2012 on European standardisation, 2012 O.J. (L 316) 12. [hereinafter *Regulation on European Standardisation*].

⁹⁸ *Id.*, art. 2(1).

⁹⁹ *Id.*, art. 2(4).

¹⁰⁰ Regulation (EU) No 910/2014, of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, 2014 O.J. (L 257) 73, art. 3(35).

¹⁰¹ Personal Data (Privacy) Ordinance, (2021) Cap. 486, § 2 (H.K.).

¹⁰² Case C-613/14, *James Elliott Constr. Ltd v. Irish Asphalt Ltd*, ECLI:EU:C:2016:821, ¶140 (Oct. 27, 2016).

the arguably voluntary character of such a compliance did not preclude the recognition of the legal character of technological standards. Indeed, harmonised standards are one of the kinds of instruments that compose what, under Regulation (EU) 2019/1020¹⁰³ (together with Regulation (EC) 765/2008,¹⁰⁴ Decision 768/2008¹⁰⁵), is called the EU's New Legislative Framework.¹⁰⁶

89. This same understanding about the hybrid character of technological standards can be found in the European Commission's recent Communication titled "An EU Strategy for Standardisation".¹⁰⁷ There the Commission observed that standards "do not only ... deal with technical components, but also incorporate core EU democratic values and interests, as well as green and social principles".¹⁰⁸ It is precisely because harmonised standards are part of EU Law, that the Commission vowed to "take measures ... to ensure that [the European standardisation system] promotes EU interests and values".¹⁰⁹ This was observed by Attorney General Medina in his recent Opinion in *Public.Resource.Org*—where he went further to note that,

¹⁰³ Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, 2019 O.J. (L 169) 1.

¹⁰⁴ Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, 2008 O.J. (L 218) 30.

¹⁰⁵ Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, 2008 O.J. (L 218) 82.

¹⁰⁶ European Commission, New Legislative Framework, https://single-market-economy.ec.europa.eu/single-market/goods/new-legislative-framework_en

¹⁰⁷ European Commission, An EU Strategy on Standardisation – Setting Global Standards in Support of a Resilient, Green and Digital EU Single Market, COM(2022) 31 final (Feb. 2, 2022).

¹⁰⁸ *Id.*, at 4.

¹⁰⁹ *Id.*

because harmonised technical standards are ultimately “to be considered as having been adopted by the Commission”,¹¹⁰ and because their effects are such that conformity with the law is determined with reference to them (making them *de facto* mandatory),¹¹¹ it is a requirement *of the rule of law itself* that people should have access to harmonised standards.¹¹²

90. The stark reality, however, is that not only EU standards are often merely made available behind a paywall, but that the Commission itself observes the problem of capture by private interests that affects its own standardisation bodies. Indeed, in its strategy for standardisation, just mentioned above, the Commission noted how “decision-making processes within the European standardisation organisations ... allow an uneven voting power to certain corporate interests” through which “some multinationals have acquired more votes than the bodies that represent the entire stakeholder community.”¹¹³

91. But if this is the problem in the realm of standards formally adopted, it must be noted that the world of standards stands much beyond the formal domain of institutional standards setting bodies. To speak of standards, in other words, is not necessarily to speak of a numbered, stamped, formalised creature, produced under the open scrutiny of international fora. Dominant technological platforms set standards as much by working to frame their

¹¹⁰ Case C-588/21 P, *European Commission v. Public.Resource.Org, Inc. & Right to Know CLG*, ECLI:EU:C:2023:509, Opinion of AG Medina, ¶ 20 (June 22, 2023). “Indeed,”—noted AG Medina—“the whole architecture of the EU standardisation system presupposes that, in principle, all actors use HTS”. See Mélanie Gornet, “The European Approach to Regulating AI Through Technical Standards”, Working Paper (2003), <https://theses.hal.science/SES/hal-04254949v1> (for excellent discussion).

¹¹¹ *Id.*, ¶¶ 45-49.

¹¹² *Id.*, ¶¶ 60-65.

¹¹³ EC, *supra* note 104, at 4.

definition in different standards setting bodies, as they do by de facto embedding standards as *self-executing expectations* in their algorithms and protocols. Content moderation by technological platforms is, unavoidably, *moderation between standards*, which get chosen and stabilised by the platform in a certain technological setting, and then in turn go on to shape our ways of acting, thinking, and being in the world. Increasingly little is unplanned, be it by designers or, increasingly, by their artificial intelligence operatives.

92. As the ‘Facebook Files’ have shown, even people’s moods are purposefully shaped through material and normative choices exercised by dominant platforms.¹¹⁴ While much of this happens in non-public ways, beyond the oversight of the institutions of public law, interfaces between the technological and the legal nevertheless emerge where they are least expected—or, in fact, welcomed. Recent research by João Carlos Magalhães and Holly Avella¹¹⁵ demonstrate how technologies of mood control find their ways into the patents system. Indeed, a quick search shows patents having been granted or applied for in relation to inventions like:

- ‘Method and Apparatus for Processing Sentiment-Bearing Text’¹¹⁶

¹¹⁴ Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 13, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739>.

¹¹⁵ João C. Magalhães & Holly Avella, *Moderating (through) Emotions: Technologies of Content Mood-eration and the Shifting Foundations of Speech Governance* (Oct. 2023) (paper presented at AoIR2023: The 24th Annual Conference of the Association of Internet Researchers, Philadelphia, Pa.), <http://spir.aoir.org>.

¹¹⁶ Microsoft Corp., *Method and Apparatus for Processing Sentiment-Bearing Text*, U.S. Patent No. 7,788,086 B2 (issued Aug. 31, 2010).

- ‘Emotion-Based User Identification for Online Experiences’¹¹⁷
- ‘Sentiment-Based Content Aggregation and Presentation’¹¹⁸
- ‘Visualization of Participant Relationships and Sentiment for Electronic Messaging’¹¹⁹
- ‘Measuring Media Attention Over Time Based on Long Term Heterogeneous Archive Data’¹²⁰
- ‘Generating a Reputation Score Based on User Interactions’¹²¹
- ‘Biometric-Based Sentiment Management in a Social Networking Environment’¹²²
- ‘Time-Based Sentiment Analysis for Product and Service Features’¹²³
- ‘Social Media Toxicity Analysis’¹²⁴
- ‘Ideograms Based on Sentiment Analysis’¹²⁵

¹¹⁷ Microsoft Corp., Emotion-Based User Identification for Online Experiences, U.S. Patent Application No. 2012/0311032 A1 (published Dec. 6, 2012).

¹¹⁸ Microsoft Corp., Sentiment-Based Content Aggregation and Presentation, U.S. Patent Application No. 2012/0304072 A1 (published Nov. 29, 2012).

¹¹⁹ Microsoft Corp., Visualization of Participant Relationships and Sentiment for Electronic Messaging, U.S. Patent No. 9,076,125 B2 (issued July 7, 2015).

¹²⁰ 5. Google LLC, Measuring Media Attention Over Time Based on Long Term Heterogeneous Archive Data, U.S. Patent No. 10,560,057 B1 (issued Feb. 11, 2020).

¹²¹ Google LLC, Generating a Reputation Score Based on User Interactions, U.S. Patent No. 9,223,849 B1 (issued Dec. 29, 2015).

¹²² IBM Corp., Biometric-Based Sentiment Management in a Social Networking Environment, U.S. Patent No. 11,240,189 B2 (issued Feb. 1, 2022).

¹²³ IBM Corp., Time-Based Sentiment Analysis for Product and Service Features, U.S. Patent No. 9,177,554 B2 (issued Nov. 3, 2015).

¹²⁴ IBM Corp., Social Media Toxicity Analysis, U.S. Patent Application No. 2020/0065417 A1 (published Feb. 27, 2020).

¹²⁵ Meta Platforms, Inc., Ideograms Based on Sentiment Analysis, Australian Patent No. AU 2014/381692 B2 (issued Oct. 15, 2015).

- ‘Inferring User Profile Attributes from Social Information’¹²⁶
- ‘Method and Apparatus for Identifying Common Interest Between Social Network Users’.¹²⁷

93. Various among the emotion-based forms of technological intervening above unavoidably result in some form of normative ordering. However beneficial these resulting forms might be intended to be, they unavoidably involve changes in the balance of reasons available for individuals to act upon. These changes, in turn, accumulate over time. Thus, what at a certain moment may appear beneficial or at the very least harmless may cumulatively lead to harmful effects—¹²⁸a problem further complicated by the diversity of perspectives about what can understood to be harmful.¹²⁹ Some such forms may concern individuals, while others may concern society more broadly. The latest amendments recently adopted by the European Parliament to the proposed Artificial Intelligence Act, for example, speak, in line with the Digital Services Act already in force in the EU, of ‘physical, psychological, societal or economic harms.’¹³⁰ Among societal harms, particular concern is noted to relate to the ‘shaping of public opinion and

¹²⁶ Meta Platforms, Inc., *Inferring User Profile Attributes from Social Information*, U.S. Patent No. 8,856,235 B2 (issued Oct. 7, 2014).

¹²⁷ Meta Platforms, Inc., *Method and Apparatus for Identifying Common Interest Between Social Network Users*, U.S. Patent No. 9,225,788 B2 (issued Jan. 5, 2016).

¹²⁸ See e.g. ROSTAM J. NEUWIRTH, *THE EU ARTIFICIAL INTELLIGENCE ACT: REGULATING SUBLIMINAL AI SYSTEMS* 23 (2023). See also Michael Veale and Frederik Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act*, 22(4) *COMPUTER LAW REVIEW INTERNATIONAL* 97, 99 (2021).

¹²⁹ *Id.*

¹³⁰ Artificial Intelligence Act Amendments Adopted by the European Parliament on 14 June 2023 on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, P9_TA(2023)0236, COM(2021)0206 – C9-0146/2021 – 2021/0106(COD) (June 14, 2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html, Amendment 14.

discourse’,¹³¹ with the corresponding expectation that codes of conduct for trustworthy AI systems ‘give careful consideration to whether [AI] systems can have a negative societal impact, notably concerning political institutions.’¹³²

94. In short: even in their subliminal forms—or maybe *especially* in their subliminal forms—, practices put in place by technological platforms have a normative dimension. They mobilise the whole spectrum traversing the technological and the legal, setting standards that, openly or not, compete with the standards decided on by the state and the law.

95. We find in the excellent works of Mireille Hildebrandt¹³³ and Roger Brownsword¹³⁴ a distinction between ‘normative’ and ‘non-normative’ forms of technology. The first are technologies whose regulative possibilities are correlated to signalling mechanisms of some sort—for example, technologies that seek to reduce energy consumption by enabling users to visualise consumption patterns and to program their smart homes in certain ways. The second are technologies that, beyond regulating, *constitute* human behaviour without the production of antecedently discernible cues—for example, a car that stops at the red traffic light automatically and by default or a large language model that, in accordance with predetermined parameters, steers conversations in one direction or another. What seems to

¹³¹ *Id.*, Amendment 73.

¹³² *Id.*, Amendment 634.

¹³³ Mireille Hildebrandt, *A Vision of Ambient Law*, in *REGULATING TECHNOLOGIES: LEGAL FUTURES, REGULATORY FRAMES AND TECHNOLOGICAL FIXES* 175 (Roger Brownsword & Karen Yeung eds., 2008).

¹³⁴ ROGER BROWNSWORD, *LAW, TECHNOLOGY, AND SOCIETY: RE-IMAGINING THE REGULATORY ENVIRONMENT* 6 (2019) (developing: “a concept of the regulatory environment that accommodates both rules and technological management—that is to say, that facilitates inquiry into both the normative and the non-normative dimensions of the environment”).

be distinctive, however, between both kinds of technologies noted by Brownsword and Hildebrandt, is whether or not normative standards openly direct themselves *to their addressees*. For those who program the technology, and at least in the case of explainable technologies, choices between standards are always normative. To the extent that suchs choices are made reflectively, whether or not programmers seek to abide by standards they ought to abide, standards are something that programmers *decide on*. They are something that technological platforms decide on. Thus the supreme importance of Brownsword's enjoinder:

“[W]hether we are considering smart cars, smart homes, or smart regulatory styles, we need to be sensitive to the way in which the regulatory environment engages with regulatees, whether it directs normative signals at regulatees enjoining them to act in particular ways, or whether the technology of regulation simply imposes (non-normatively) a pattern of conduct upon regulatees irrespective of whether they would otherwise choose to act in the way that the technology now dictates.” (emphasis added)¹³⁵

96. One of the goals of affirming official standards must be precisely that of bringing standardisation choices made by private actors into the open, preventing them from becoming purely material forms of intervention. I would mildly differ from Brownsword here in noting, in line with what we have seen above, that technological interventions *always* have a normative dimension in them. In a way, the examples presented by Brownsword and Hildebrandt as non-normative are even more normative, in the sense that they leave regulatees entirely subject to the operation of norms that they have no means of knowing or controlling.¹³⁶ One of the very goals that the power to decide on standards needs to reflect is precisely that of averting a future where the normativity of law is dissolved into a system of pure technological

¹³⁵ *Id.*, at 53

¹³⁶ *Id.*, at 55.

management—all the more so if such is a system put in place by private actors acting out of, in different ways, non-public considerations.

97. In seeking to achieve its goals, however, all possible regulatory levels, from the more embedded to the more highly normative, are open to the Government in its exercise of the power to decide on standards. On the one hand, Brownsword's enjoinder above works as much for private actors as it works for the Government. In private *as well as in public domains*, a future must be averted where the integrity and rationality of normative justification are abandoned in favour of unreasoned forms of material intervention. On the other hand, however, such a goal can be achieved by seeing to it that even regulation in its more embedded forms is followed by the open articulation of the goals and contours of such forms. This is a dimension of openness that the power to decide on standards must reflect even where governmental action is considered. How more or less embedded governmental intervention will be is a separate question and one followed by a judgement of proportionality involving different considerations that we pursue in the following section.

98. That the power to decide on standards involves the whole spectrum between more material and more highly normative forms of intervention can also be seen in the context of the patents example just discussed. Traditionally, the regulation of technology has concerned not the conception stages of a certain technology, but rather those of its uses and exploitation. Thus, the granting of patents such as the ones above does not typically signify an endorsement of the standards adopted in technological development. Rather, whether a certain technology complies with relevant norms beyond usual patentability requirements is something to be probed at later stages, when the technology is deployed. The embedding of legal compliance requirements in patent evaluation processes is something generally seen as

potentially stifling innovation. The rule that the granting of a patent is not preceded by normative scrutiny, however, does not come without exceptions. In fact, the exceptions might soon become the rule. As technological development introduces ever more pressing existential risks, a correspondingly risk-based approach to the regulation of technology also emerges. This is particularly the case in the domain of critical and emerging technologies¹³⁷ such as artificial intelligence—where a standards-based approach focusing on all stages of a system’s lifecycle is reflected in most recent regulatory developments.¹³⁸

99. While such expectations have yet not more generally travelled into patent examination processes, Article 27(2) of World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights does allow Member States to exclude from patentability inventions whose commercial exploitation would be contrary to ‘*ordre public*’ or morality. Patent law in Europe (as, in fact, in Hong Kong and the Mainland as well) provides for such an exclusion. Now being contrary to public order or morality is not a matter of pure illegality. As the European Patent Office’s own Guidelines for Examination clarify, only ‘in rare and extreme cases’, where ‘the invention [would be regarded] as so abhorrent that the grant of patent

¹³⁷ European Commission & High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication on a European Economic Security Strategy, JOIN(2023) 20 final (June 20, 2023). (outlining as criteria for identifying new critical technologies in relation to ... the following: ‘the enabling and transformative nature of a technology, the risk of civil military fusion, and the risk of their misuse for human rights violations.’). See also European Commission, *Commission Recommendation on Critical Technology Areas for the EU’s Economic Security for Further Risk Assessment with Member States*, C(2023) 6689 final (Oct. 3, 2023) (identifying critical technology areas in relation to the Joint Communication

¹³⁸ Artificial Intelligence Act (‘proposal defines common mandatory requirements applicable to the design and development of certain AI systems before they are placed on the market that will be further operationalised through harmonised technical standards’).

rights would be inconceivable' will patentability be excluded on such grounds. Nevertheless, there is in Europe at least the understanding that these exceptions are 'intended to prevent an invention ... being given an appearance of approval through a patent issued by an international authority'.¹³⁹ Examining EPO Board of Appeal's case law, Justina Pila concludes that in cases concerning public policy objections (i.e., *ordre public*) the method adopted by the EPO 'typically involves identifying and weighing the likely risks and benefits to society of granting a patent for the technology'.¹⁴⁰ And while cases concerning morality objections have less clear cut directions, Pila notes that recent decisions point to the rejection of an application in cases where human dignity is concerned without risk assessment 'in recognition of the importance of human dignity as a moral value to European culture and civilization.'

100. The reach and significance of these transformations cannot be underestimated, nor should they be seen as an aside to discussions in this report. Rather, these transformations invite a particular reflective attitude that is of the very essence of how the power to decide on standards will be mobilised and of the grounding of such power on the conception of sovereignty examined in Part I of this report. As Pila most consequentially notes, the move to step in to avert risks in the early stages of emerging technologies' lifecycle 'necessitates an epistemic and deliberative process aimed at recognizing and confronting the uncertain consequences of new

¹³⁹ Case T0866/01, *Euthanasia Compositions/Michigan State Univ.*, ECLI:EP:BA:2005:T086601.20050511, ¶9.7 (May. 11, 2005), para. 9.7.

¹⁴⁰ Justine Pila, "Adapting the *Ordre Public* and Morality Exclusion of European Patent Law to Accommodate Emerging Technologies", 38 NATURE BIOTECHNOLOGY 555, 556 (2020).

technologies and their implications for society'.¹⁴¹ Such a process must be put into place for two reasons, one of material reach and the other of normative scope.

101. The first reason is the technologically existential character of this reorientation of focus toward the early stages of a technology's lifecycle, *even* within a system whose *raison d'être* is to reward innovation—that is, the patents' system. Instead of the substantive withdrawal that a purely innovation and economy-based approach to technology would invite—think Article 118 of the Basic Law—, we have here a policy-based counterpoint that requires more pressing considerations to be protected by the Government through decisions of a particularly consequential kind. Note that these are decisions that foreclose—or at least vastly reduce incentives for—the very possibility that a certain material configuration be unleashed onto the world. It is precisely to prevent risks to particularly significant policy values that regulation here averts the rise of an unwelcome standard before a standard it becomes. There can be no more embedded a form of decision than one that produces an existential disembedding of such a sort, for it transforms what could otherwise be a potential technological standard into a stillborn.

¹⁴¹ Id. In the EU, these directions are further reflected in a 2020 Resolution on intellectual property and AI by the Parliament. See European Parliament, *Resolution of 20 Oct. 2020 on Intellectual Property Rights for the Development of Artificial Intelligence Technologies* (2020/2015(INI)), 2021 O.J. (C 404) 129 (stressing e.g. “that that the development, deployment and use of AI technologies and the growth of the global data economy make it necessary to address significant technical, social, economic, ethical and legal issues in a variety of policy areas, including IPRs and their impact on these policy areas”, and that “creating an environment conducive to creativity and innovation by encouraging the use of AI technologies by creators must not come at the expense of the interests of human creators, nor the Union's ethical principles.”).

102. The second reason recommending a reflective attitude of the kind noted by Pila is the intensity of the values themselves mobilised through such forms of intervention. In other words, the technologically existential character of potential interventions corresponds here to the likewise existential character of the values seen as potentially displaced by technology if interventions were not to accrue. Values at stake here are, in effect, *those that can be as foundational to a given society*—in Pila’s example, the values of the European Union. This is precisely the realm that, as we discuss in more detail in the upcoming section, makes up the domain of ‘national security’.

103. Now what kind of ‘epistemic and deliberative’¹⁴² process must be in place when we speak of matters of national security is surely a challenging question. It is typically the case that the existential character of such matters is seen as requiring exactly their centralisation in the hands of the highest political authorities. The challenge, however, to which we return in the coming section, is that national security involves values concerning everyday life, such as values belonging to culture, or the economy, and only in a more extreme range of cases can it rightly be said that national security concerns are mobilised. That the imperative in extreme, existential cases might be the withdrawal of ongoing reflection from the wider public domain cannot signify that in ordinary cases, where existential challenges are not entailed, such a withdrawal also takes place.

104. Publicly articulated standards enable society to traverse—on an ongoing basis—not only the normative space between the material and the legal, but also the space through which non-existential questions become existential ones. The result is that the very definition of what counts as existential becomes part of an ongoing normative conversation. Standards are such

¹⁴² *Id.*

conversations. Be they compulsory or voluntary, expressed at a higher normative level or a more embedded one, the public articulation of standards opens a space for public participation. Conversely, the private, non-public articulation of standards—for instance in the algorithms of technological platforms acting in self-interested or unverifiable ways—forecloses this same space.

105. The role of the power to decide on standards is precisely to open such spaces for public participation and to clarify normative expectations in relation to matters of public significance. There is no empty space between the private and the public, and not only in the already significant sense that standards that are not publicly defined get privately so. There is no empty space because as soon as one leaves the private domain, one enters the domain of what needs to be justified, explained with reference to some public, universal¹⁴³ criteria of normative rationality. All public space is a space of public reason.¹⁴⁴ In the absence of reasons of such a kind, the public either descends into arbitrariness or anomy or is colonised by private interests.

106. Overlooking this grounding of public power in public reason or normativity is the fundamental mistake of theories that see sovereignty as a

¹⁴³ Thus GWF Hegel, similar, spoke of sovereignty as the ‘fundamental determination’ of the ‘substantial unity’ of the public—that is, the ‘ideality of its moments’. Such an ideality is present at each moment of the life of the organic body of the state. ‘Life’, Hegel notes, ‘is present at every point’. The is no expression of the public, in other words, that is not itself an expression of such an ideality. Hegel, G. W. F.; T. M. Knox; Stephen Houlgate. *Outlines of the Philosophy of Right* (Oxford World's Classics) (p. 264). OUP Oxford.

¹⁴⁴ JOHN RAWLS, *POLITICAL LIBERALISM. EXPANDED EDITION* 484 (2005) (noting the need that the political conceptions that inform public reason be complete—that is, not distorted by comprehensive doctrines that belong in the private space or background culture, but otherwise specifying public values so that “those values alone give a reasonable answer to all, or nearly all, questions involving constitutional essentials and matters of basic justice”).

matter of deciding on the exception—of deciding, that is, on what gets removed from the space of normativity. The mistake is that there is no domain where the normative order retreats to leave in place the mere materiality of power. Power is always founded on reasons, and thus on normative considerations, of either a public or a private kind. Acting without reason is a sure way to lose control over the facts or circumstances one seeks to regulate; it weakens one's power instead of strengthening it.¹⁴⁵ Yet, at the platformisation of contemporary societies pervasively demonstrates, power can be furthered based on private reasons.

107. Here, the genius of Hermann Heller, which we examined in Part I, was noticing the role of ethics in sustaining the connection between the material reality of power, as instantiated in the world around us, and the institutions of public law. As it holds power and public law together, ethics prevents the slippage of public reason—and thus of sovereignty itself—into the domain of private reasons. It also prevents the erosion of the public altogether, its descent into a state of normlessness. What is fascinating to realise in relation to the information environment is that technological standards here perform the exact same role. Technological standards are but ethics from another perspective.

108. Thus why, as we conclude this session, we come to understand not only how Article 139(2) of the Basic Law is concerned with the articulation of this vast continuum between technology and the law that technological standards occupy. We also come to understand how, despite its extensive character, the power to decide on standards is not a mechanism of exception and authoritarianism but rather one of liberation and affirmation of public reason

¹⁴⁵ See ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 247 (2d ed. 1761) (for a discussion of on the rationality of self-interest when a 'sense of [moral] duty' is not the sole principle of human conduct).

under ordinary circumstances. Standards ensure the grip of public considerations over technological matters, at the same time that they open such considerations for public participation extending to different levels—from higher to more embedded—through which normative expectations get articulated.

109. It is rather from the abdication of the exercise of the power to decide on standards under ordinary circumstances that, when standards are at last articulated—and are so through more forceful means, in the face of matters of fundamental nature that have made their adoption at last inevitable—the authoritarian character of decisions that adopt them emerges apparent. This is a problem that Hong Kong can and must avoid by putting forward an open, consistent, proportionate, and piecemeal standardisation strategy—and endeavouring as well as it can to mobilise public opinion around it.

110. We can observe in this regard that, in jurisdictions such as the European Union, where public decisions on technological standards have long been a widespread and ordinary aspect of social life, the denial of a patent for an emerging technology that encroaches upon matters of public order or morality—even if not a common occurrence, given the high threshold required—does not come across as a particularly authoritarian enterprise.

111. The situation in the US, however, is different, and it points to a diverging picture that, were it being put in place by Hong Kong, would surely be met with widespread criticism by the international community of states. Let us briefly consider this in closing this section.

112. As the patent examples above illustrate, it has up to this point been the case that even technologies known to encroach upon human dignity (for example, those clearly understood as able to manipulate their users) have

openly been held to be patentable in the US.¹⁴⁶ This lack of consideration for individual rights in the early stages of a technology's lifecycle, which follows from the absence of specific patentability exceptions in US patent law, does not unfortunately terminate there. Rather, it extends to a whole range of other important areas, from data protection law to the protection against unfair terms in consumer boilerplate agreements¹⁴⁷ to the virtually unqualified exemption of liability of technological platforms for content they host,¹⁴⁸ all of which is diametrically the opposite to what happens in the European Union.

113. Likewise, whereas standards adopted by EU standardisation bodies, even where not explicitly mandatory have been recognised by the Court of Justice as being de facto so, in the United States the very constitutional architecture underpinning the delegation of the power to decide on standards by the US Congress to the National Institute of Standards and Technology—NIST means that the standards NIST adopts can only be binding when incorporated by specific legislation that provides an ‘intelligible principle’¹⁴⁹ to guide NIST's discretion. Otherwise, the general principle is that ‘[t]he

¹⁴⁶ *Juicy Whip Inc. v. Orange Bang Inc.*, 185 F.3d 1364, 1367–68, 51 USPQ2d 1700, 1702–03 (Fed. Cir. 1999) (holding that: ‘Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted...we find no basis in section 101 to hold that inventions can be ruled unpatentable for lack of utility *simply because they have the capacity to fool some members of the public.*’) (emphasis added). At most, the fact that a granted patent has been granted to an offensive subject matter will lead to the offensive parts of the application being omitted from publication by the USPTO.

¹⁴⁷ See e.g. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

¹⁴⁸ See e.g. Marcelo Thompson, *Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries*, 18 VAND. J. ENT. & TECH. L. 783 (2016).

¹⁴⁹ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government,¹⁵⁰ as would be the case of delegating a general power to decide on standards. That means that, in the US, the power to decide on standards depends on the existence of a complex legislative framework that is simply just not there.

114. In the face, however, of perceived national security challenges posed by artificial intelligence and other ‘critical and emerging technologies,’¹⁵¹—in particular due to competitive threats assumed as being posed by foreign actors—recent policy initiatives in the US are pointing to new directions. To be sure, such a move is yet to be consolidated in any more concrete form, but it does point to a difference in kind and intensity in relation to what had been in place so far. Of significance for our discussions here is, first, that these initiatives are being adopted amidst what, until now, was a barren normative realm. Second, it is significant that the connections drawn by the initiatives between the technological and the legal—the domain, therefore, of the power to decide on standards—are being laid out chiefly from the perspective of national security considerations.

115. This can clearly be seen in the US White House’s 2022 ‘National Security Strategy,’¹⁵² which vows to shape ‘institutions, norms, and standards to govern trade and investment, economic policy, and technology’¹⁵³ bearing in mind precisely national security concerns presented by critical and emerging technologies. In fact, the whole endeavour to ‘Shape the Rules of the Road’,

¹⁵⁰ See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

¹⁵¹ National Science and Technology Council, Fast Track Action Subcommittee on Critical and Emerging Technologies, *Critical and Emerging Technologies List Update* (Feb. 2022). See also USPTO (Section 1120.II of the MPEP).

¹⁵² The White House, *National Security Strategy* (Oct. 2022).

¹⁵³ *Id.*, at 32.

as the Strategy puts it, emerges as a clear indictment of contemporary multi-lateral institutions for their perceived failure to appropriately ‘cover the frontiers of the modern economy, including digital trade’.¹⁵⁴ If part of this endeavour also avowedly entails a commitment to supporting technological standards and standardisation processes leading to positive technological outcomes,¹⁵⁵ that a national security strategy was the channel chosen to articulate such a commitment makes the order of priorities abundantly clear.

116. Along the same lines, the White House’s recently released ‘Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,’¹⁵⁶ expresses a range of security concerns with artificial intelligence as a critical and emerging technology. So pronounced are the concerns, in fact, that, whereas the word ‘security’ appears 126 times in the document, the word ‘liberties’ appears 7 and the word freedom appears none. To put it fairly, the Order does express a strong commitment towards the promotion of rights, liberties, equity, and justice.¹⁵⁷ At its core, the Order articulates a range of standards-based expectations—for instance, concerning AI testing, labelling of AI creations, and evaluation of critical infrastructure AI risks—and affirms the role of the National Institute of Standards and Technology-NIST in promoting the development of such standards. Yet, the Order’s commitments to these broader ideals is vague, comparatively scarce, and is ultimately being put in place only in the face of existential risks posed by critical and emerging technologies. Moreover,

¹⁵⁴ *Id.*, at 34.

¹⁵⁵ *Id.*

¹⁵⁶ Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Oct. 30, 2023).

¹⁵⁷ The document even borrows more socially minded language from recent developments in Europe, as it speaks of tackling ‘societal risks’ and ‘societal harms’—which, conceptually, are challenging (if possible, with further elaboration) to reconcile with liberal commitments affirmed in the same document to ideas of rights and the rule of law. *Id.*, at 75,191, 75,193.

commitments reflected in the Executive Order emerge as expectations directed to different governmental bodies, which, in particular since they involve the power to fix standards, depend on legislation being passed by Congress ascribing concrete powers for the application of such standards to the public.

117. If history is of any advice, it has been more than 10 years now since the Obama Administration unveiled its ‘Blueprint for a Consumer Privacy Bill of Rights’,¹⁵⁸ which is yet to see the light of day. Thus, if the Executive Order does bear fruit, it will bear so clearly given its ultimate, national security desiderata. This underpins even the Order’s aim to strengthen American leadership in AI innovation, since the focus is on maintaining competitiveness on the critical and emerging technologies that are themselves a matter of national security.¹⁵⁹ As the Order affirms a commitment to look into questions concerning eligibility for patents in an AI context, it would again be based on the same existential character of matters at stake that issues of public order and morality would suddenly be considered, as they traditionally have not.

118. The picture emerging overall is thus a striking one, where all acts until now unwelcome are then suddenly expected to be put in place at once—as if their nature had suddenly been transformed by the aggravation of challenges that, however, have been around all along. Whereas AI does couple these challenges, technological platforms had already been, for quite while, fundamentally reanchoring the connections between the material and the normative in the domains of their own self-interested, private reasons.

¹⁵⁸ White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (2012), <https://obamawhitehouse.archives.gov/sites/default/files/privacy-final.pdf>.

¹⁵⁹ Exec. Order No. 14,110, § 5.

119. As Hong Kong grapples with the same challenges, it is essential that it avoid making the same mistakes. Reasons of proportionality, which we now turn to in Section 4, mean, among other things, that measures to deal with national security concerns, given the all-encompassing character of such concerns, must be mobilised only in relation to those exceptional circumstances where matters of ordinary public interest change their configurations given the crossing of a certain threshold.

120. There is a *consequentialist* dimension to proportionality considerations. This was examined at the outset in the light of the ‘National Anthem’ incident—namely, the fact that relying on national security as the sole ground for justifying governmental action makes it, paradoxically, less likely that objectives intended by governmental action will be attained. But even more significant is the *deontological* richness of what is lost. To rely only on the extreme, existential manifestations of the public interest is to fail to attend to the importance of the ordinary decisions that make up public life—of decisions that, in our case, sustain the connection between the public normative commitments that bind citizens together and the substance of their common interests in the materiality of the technological world around them. What is lost is the diffuse character of standards as a realm of ongoing reflection and deliberation on matters in the public interest and which, by mooring technological development on the public interest, can prevent the private dislocations that increasingly give rise to national security concerns.

Part III.

How Shall the Government Decide? A Proportionate Approach to Standards Setting in Hong Kong

III.1. Choosing Between General/Abstract and Specific/Embedded Standards

121. As examined in the Section 3, it is undeniable that new forms of normative intelligence embedded in the information environment have come to fundamentally ‘change the mélange of positive and negative freedom that forms the backbone of constitutional democracy’.¹⁶⁰ They have done so by inviting more direct—correspondingly embedded—forms of regulatory intervention by the state. The problem we face today, however, has roots that go beyond the recent advancements in AI technology. It relates to the emergence of the actors themselves who have ushered these systems into being—technological platforms, who, in shaping the processes and infrastructures through and in which people's attributes and expectations get to be articulated and stabilised, have become the foundation of much of individual and social life in the 21st century.

122. The devastating autonomy implications of such processes simultaneously call for and make it less likely that the ethical avenues necessary for sustaining the connections between technology and the public interest will emerge organically. Julie Cohen's precise diagnosis in this regard merits more detailed transcription:

“As the volume of information available online has mushroomed, the quest for data-intensive surplus extraction (...) has spurred development of a fast-evolving collection of techniques designed to undercut the exercise of informed reason by users of networked information services. Contemporary, platform-based information infrastructures and ecosystems are being optimized to detect behavioral cues and to appeal to motivation and emotion on a subconscious level. That gradual but seemingly inexorable shift has begun to produce object lessons in the law of unintended consequences. Widespread harvesting of personal data has engendered new patterns of reputational anxiety, manipulation, and insecurity. Algorithmically

¹⁶⁰ Hildebrandt, *supra* note 98, at 176.

mediated processes designed to create tight stimulus-response feedback loops have exposed and deepened social divides on a variety of cultural and political issues, reinforced the power of conspiracy theories and junk science, and amplified toxic currents of bigotry, nationalism, and ideological extremism. Debates about how law should respond to the emergence of massively intermediated media environments have generated more heat than light. Many accomplished and well-meaning observers misread contemporary media ecologies, applying time-tested syllogisms about media freedom, reasoned public discourse, and rational self-determination to situations for which they are no longer well suited. Meanwhile, powerful information-economy actors have mobilised new kinds of arguments about freedom of expression to stave off protective regulation and deflect accountability for both old and new kinds of harm.”¹⁶¹ (emphasis added)

123. Astounding though the cumulative effects of the process described by Cohen are, the undercutting of individual autonomy is a progressive occurrence rather than something that presents itself all at once at a national security moment. The power to decide on standards should be about responding to this process bit by bit—a measured and continuous articulation of ethical requirements through various areas necessary to protect the public interest. In other words, protecting autonomy—individual and collective—is a goal that must be shaped following what is *proportionate*, a judgement made from various perspectives, as a response to the *narrowing of options* that the violation of autonomy consists of takes place.¹⁶²

124. Indeed, that a wide range of modalities of regulatory intervention is in principle available to the Government does not mean that all such forms of intervention would be proportionate in all contexts. For example, filtering mechanisms at the network level, though appropriate a measure for

¹⁶¹ JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 75–76 (2021).

¹⁶² See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369–399 (1986) (noting how autonomy is conditioned on the availability of an adequate range of options for one to author their lives).

regulating Internet content in certain contexts, raise concerns if applied indiscriminately in all contexts. In an important recent incident, law enforcement authorities in Hong Kong reportedly relied on a provision in the National Security Law's Implementation Rules to determine that network access providers block a website that was resorting to widespread doxing of perceived political foes, including of public authorities.¹⁶³ While the measure does emerge as justifiable in the case, it might appear less so if applied in a broader context. But then, in turn, the measure's appropriateness is also ultimately sensitive to time and technological change. Far from immutable, the Internet is a plastic infrastructure; it is amenable to change.¹⁶⁴ Changes that a liberal society at the turn of the century did not see as justifiable as a response to existing challenges might result as a necessary, even welcome form of friction as challenges evolve in breadth, depth, and kind.

125. The point also applies to the upper layers of the Internet.¹⁶⁵ While just a few decades ago widely celebratory views abounded in relation to technological platforms and the exclusion of their liability for content they host, an increasingly more nuanced understanding of contemporary transformations has been emerging, through which expectations of an active kind are now directed to technological platforms.¹⁶⁶ Beyond liability, these expectations call on platforms to adopt positive measures to mitigate risk and avert harm, including through specific forms of technological design. But

¹⁶³ Cannix Yau & Christy Leung, Hong Kong Police Use National Security Law for First Time to Block Access to Website Recording Anti-government Protests, Officers' Details, S. China Morning Post (Jan. 9, 2021, 8:12 PM), <https://www.scmp.com/news/hong-kong/law-and-crime/article/3117072/hong-kong-police-use-national-security-law-block>.

¹⁶⁴ See LAWRENCE LESSIG, CODE: VERSION 2.0, 32 (2006).

¹⁶⁵ See e.g. Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562-63 (2000) (explaining the division of the Internet in layers).

¹⁶⁶ See Thompson, *supra* note ...

even then, there are limits, as the case study with which we began this analysis enables us to understand—limits that are also readily mobilised and exploited in international political discourse.

126. Four dimensions intersect in enabling us to understand these limits, in enabling us to understand the question of proportionality. Through the points just made in the preceding paragraphs, we were alluding to the first such dimension, which we also discussed in Section III. We will thus not be turning our attention to it in greater detail here. This dimension, to recall it briefly, is that of the position of a standard along the spectrum between the material and the normative—how more general and abstract or, conversely, more specific and embedded a standard must be. This is a judgement even more important for us to understand as a question than its resolution. There are, nevertheless, two points to be observed in relation to this first dimension.

127. On the one hand, whereas a principle of technological neutrality exists as a rule of thumb in much of technological law and policy in Europe¹⁶⁷—determining that public laws and policies should not describe technological artefacts by attributes other than their functions, since to describe such attributes would be to make decisions that favour or disfavour a particular technological kind—, the international status of such a rule (for example, in the domain of international trade) is uncertain, to say the least.¹⁶⁸ In substance, there is nothing that recommends interventions by the state to aspire to ever greater levels of neutrality or generality in relation to

¹⁶⁷ Marcelo Thompson, *THE NEUTRALIZATION OF HARMONY: THE PROBLEM OF TECHNOLOGICAL NEUTRALITY, EAST AND WEST*, 18 B.U. J. SCI. & TECH. L. 303 (2012). See also Marcelo Thompson, *Evaluating Neutrality in the Information Age: On the Value of Persons and Access* (2013) (D.Phil. thesis, University of Oxford) (on file with the Bodleian Library, University of Oxford).

¹⁶⁸ See e.g. Gabriele Gagliani, *Cybersecurity, Technological Neutrality, and International Trade Law*, 23 J. INT'L ECON. L. 723 (2020). See also Thompson, *supra* note

technology. There is no vagueness principle that commands the law to avoid describing properties beyond the functions of technological artefacts,¹⁶⁹ if only because such other properties might also matter for public reason—and might matter intensely so.

128. On the other hand, the understanding that a standard may be situated at different levels of intervention—from the more general/legal to the more embedded/technological—is itself clear evidence that the power ascribed by Article 139(2) is not constrained by aprioristic calculations as to levels of specificity. Otherwise, what the principle would mean is that standards at some level along the spectrum should just not exist or should not be the domain of the state—even when they relate to a matter of public quality, which is precisely when public institutions are invited to act.

III.2. Choosing Between Voluntary and Mandatory Standards

129. The problem of technological neutrality is too large to be pursued in detail here, but a question connected to such a debate concerns the second dimension from which to approach the problem of proportionality in deciding on standards—namely, the question of whether standards adopted under Article 139(2) should be *voluntary* or *mandatory*, and in relation to this, what bodies should be responsible for their adoption. In both the European Union and the United States what we have been referring to more broadly as standards is by-and-large reduced to documents approved by non-state bodies who receive some measure of endorsement by state authorities, but whose standards remain to a greater or lesser extent voluntary.

130. Whereas in the US, for reasons examined above, they remain entirely so, in the EU, as also discussed above, so-called Harmonised Technical

¹⁶⁹ See Thompson, *supra* note 164.

Standards, ‘adopted on the basis of [[a] directive] and the references to which have been published in the Official Journal of the European Union’¹⁷⁰ have been noted by Attorney General Medina in *PublicResource.Org* to ‘form[...] part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption [of conformity] laid down in [that directive] applies to a given product’.¹⁷¹ As Attorney General Medina concludes in the case, technical standards can be understood as ‘sui generis EU legal acts (EU standardisation acts) in so far as they are strictly regulated implementing measures of EU secondary legislation’.¹⁷² The Digital Services Act and the forthcoming AI Act, for example, while not making standards compulsory, have approaches largely reliant on standards whose private development by CEN and CENELEC is encouraged by the Acts, in addition to private Codes of Conduct whose drawing up is to be encouraged and facilitated by the EU bodies, like the European Commission and the European Board for Digital Services. Both approaches, in turn, are to be contrasted with the approach in the Mainland, where many standards adopted under the Standardisation Administration of China—the GB (guobiao) standards—are mandatory and standards are generally developed under a public framework established by the Standardization Law of the PRC.¹⁷³

131. This balance between the public and the private is a fine one, and a challenge for Hong Kong is evidenced in how, as discussed in the introductory chapters of this Report, public (and private) bodies are yet to have the chance to put in place a more fully-fledged standardisation system

¹⁷⁰ Regulation on European Standardisation, *supra* note 96, art. 2(1)(c).

¹⁷¹ Opinion of AG Medina, *supra* note 109, at [9].

¹⁷² *Id.*, at [15].

¹⁷³ Zhonghua Renmin Gongheguo Biaozhunhua Fa (中华人民共和国标准化法) [Standardization Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 2017, effective Jan. 1, 2018) (China).

or outline an approach for deciding between international and Mainland standards or identifying points of confluence between both. Whereas naturally the development of such a system will depend on the identification of a *coordinating body* within the Hong Kong Government—and, in all cases, on *actual decisions* by the Government under Article 139(2) as to whether a particular standard belongs within the Hong Kong system or not—the question remains of whether the drawing up of standards, or at least their referencing, cataloguing, and incorporation, will take place within the Government or outside of it.

132. Purely from these perspectives, the development of a standardisation system for Hong Kong needs to consider a range of factors. First, it needs to consider the singular character of Hong Kong's legal system as one that combines the principles and practices of the common law with their necessary anchoring in the PRC legal system where matters of national significance are concerned. Second, it needs to consider Hong Kong's interest in the development of a free and globally integrated market economy and, as far as possible, the encouragement of participation by the private sector in the development of the very norms that will guide technological entrepreneurship in Hong Kong. However, in pursuing a balanced, proportionate approach, the development of a standardisation system for Hong Kong also needs to consider, in the third place, how in other markets it is often the case that pronounced *private* influences are felt in the development of technological standards¹⁷⁴ and how the *public* impacts of this

¹⁷⁴ In the context of Internet standards, see LAURA DENARDIS, *PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE* (2009). Discussing challenges with multi-stakeholder processes in the context of Internet Governance, see e.g. Jeanette Hofmann, *Multi-Stakeholderism in Internet Governance: Putting a Fiction into Practice*, 1 J. CYBER POL'Y 29 (2016) and Monika Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by*

are something to be avoided or at least taken into account in considering what standards should be followed in Hong Kong.

133. Fourth, and most importantly, Hong Kong needs to realistically and comparatively appraise the current state of development of its legal framework in areas concerning the activities of technological platforms. As Part III.5 explains noting aspects of priority, this framework is in most significant need for development in various different areas—from the responsibilities of technological platforms to consumer protection to, perhaps above all, the rules and principles underpinning its data protection system. It cannot be understated how severely falling behind Hong Kong is in this regard, and the gap becomes particularly noticeable given the speed with which the Mainland legal system is itself developing in all these areas.

134. Given these factors above, in particular the dimensions of the legal gap currently being considered, it is not realistic to assume that a legal framework of such a proportion will develop in record time and that standards will play a role in supplementing it. Nor it is realistic to expect that the private sector will, without provocation, take the lead to itself put forward codes of conduct to fill a space of this magnitude. The importance of the development of a standardisation system in Hong Kong takes place not to supplement the legal system, but rather the other way round—to promote its development, without which the very future of ‘One Country, Two Systems’ in Hong Kong will be at stake. It is fundamental that the Hong Kong Government takes the lead in putting forward a vision, outlining areas of priority, setting up a local standardisation authority, and, unavoidably, articulating and adopting concrete guidelines in its exercise of the power contained in Article 139(2).

Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN, 21 YALE J.L. & TECH. 278 (2019).

135. As themselves the reflection of a balanced approach, such guidelines must first emerge as non-mandatory but recommended standards based on whose compliance or lack thereof further avenues for regulatory development will be considered by the Government. Most importantly, based on a now more discernible power to decide on standards, standards recommended by the Government will form an authoritative repository which courts themselves shall naturally take into account when themselves deciding on appropriate standards of care.

136. The authority of standards and codes of conduct is often recognised in the law. For example, in the UK, the Human Rights Act 1998, in its Article 12, directs courts to consider “any relevant privacy code” in deciding whether to grant any relief to the right to freedom of expression.¹⁷⁵ This provision, incidentally, was relied on in an important privacy case—the *Campbell* case—that redefined the boundaries of privacy protection in the UK by creating a new privacy-related tort, namely that of ‘misuse of private information’. As will be examined in Part III, data governance frameworks in the EU, from the General Data Protection Regulation to the Digital Services Act, rely extensively on Codes of Conduct and Guidelines as interpretive sources of provisions in those instruments. Codes of Conduct are proposed by private actors themselves and approved by relevant bodies within the Member States.

137. In Hong Kong, the Personal Data (Privacy) Ordinance, recognises the powers of the Privacy Commissioner for Personal Data to approve and issues code of practice to provide practical guidance in respect to requirements of the Ordinance.¹⁷⁶ Code of Practice and documents have been issued by the

¹⁷⁵ Human Rights Act 1998, c. 42 (U.K.), §12(4)(b).

¹⁷⁶ Personal Data (Privacy) Ordinance, (1995) Cap. 486, §12 (H.K.) [hereinafter *PD(P)O*].

Privacy Commissioner on several matters, including in relation to an important legal provision of the PDPO that has up to this moment not been implemented in Hong Kong—namely, Section 33 of the PD(P)O, on transborder data flows.¹⁷⁷ . Whether or not the PD(P)O so empowered the Privacy Commissioner for Personal Data (PCPD) to issue standards and guidelines, courts would most likely recognise the PCPD’s interpretations as an authority in disputes concerning the Ordinance’s requirements.

138. The Government’s power to decide on standards is, however, formally recognised under the Basic Law of the HKSAR. In its exercise of this power, in systematically compiling and determining the applicability of standards in Hong Kong, whether these are mandated or not, they will clearly be a source of interpretative authority that courts shall take into account in determining the boundaries of existing rights and obligations in Hong Kong.

139. Hong Kong Standards, when compiled and publicised by the Government, might include, in addition to standards issued by national and international standardisation bodies that the Government decides as applicable in Hong Kong, the standards adopted by various governmental and statutory bodies in the SAR—from the PCPD to the Communications Authority to, as mentioned in early chapters of this Report, the Office of the Government’s Chief Information Officer—to civil society organisations generally

¹⁷⁷ Office of the Privacy Commissioner for Personal Data, *Guidance on Personal Data Protection in Cross-border Data Transfer* (2014) (H.K.), https://www.pcpd.org.hk/english/resources_centre/publications/files/GN_crossborder_e.pdf Less officially, comments have also been offered by the PCPD on another matter where legal developments in Hong Kong appeared to be lagging behind those in the European Union—namely the recognition of a right to be forgotten. Privacy Commissioner for Personal Data, *The 'Right to be Forgotten' (II)*, THE COMMISSIONER'S BLOG (Dec. 30, 2014), https://www.pcpd.org.hk/english/news_events/commissioners_message/blog_30122014.htm—, calling on the local community for the keeping of an open mind in relation to such a right.

recognised as authoritative in the Region, such as the Hong Kong Press Council.

140. Significantly, the Government might consider the adoption of a process for the drawing up and proposition of Codes of Conduct by private actors themselves, such as technological platforms operating in the Hong Kong. This was the approach taken originally in the European Union in relation to the regulation of misinformation, where a Code of Practice on Disinformation¹⁷⁸ was first adopted by private actors—which included various technological platforms, fact-checking organisations, journalistic associations, among others—, later improved in a new edition upon Guidance issued by the Commission,¹⁷⁹ and eventually became part of an approach outlined in the Digital Services Act, in the following terms:

‘The Commission and the Board shall encourage and facilitate the drawing up of voluntary codes of conduct at Union level to contribute to the proper application of this Regulation, taking into account in particular the specific challenges of tackling different types of illegal content and systemic risks, in accordance with Union law in particular on competition and the protection of personal data’.¹⁸⁰

141. Such a participatory approach, becomes particularly significant in circumstances involving the emergence of systemic risk, where very large online search engines and very large online platforms may be *invited* by the Commission, together with other actors, to participate in the drawing up of

¹⁷⁸ European Commission, *2018 Code of Practice on Disinformation* (2018), <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>.

¹⁷⁹ European Commission, *2022 Strengthened Code of Practice on Disinformation* (2022), <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

¹⁸⁰ Digital Services Act, art. 45.

Codes of Conduct¹⁸¹ that will then have their application monitored and given effect by the European Commission and the Board for Digital Services, seeing to it that the codes live up to their objectives and furthers the interests of all interested parties, in particular those of citizens, at the EU level.¹⁸²

142. While a similar approach can be, similarly, legislatively outlined in Hong Kong, there would be no obstacles for the Government, in directly applying Article 139, including its paragraph (1), to articulate such an approach independently, as part of a broader policy on standards along the lines recommended in this Report, to be further consolidated legislatively at a future moment. At that future moment, a broader instrument such as European Standardisation Regulation¹⁸³—or the Standardization Law of the PRC, can define the general principles to be achieved by the standardisation system and the particular mechanisms it should put into place to achieve such objectives. One question that Hong Kong will need to bear in mind, in particular, and to which we turn shortly, is whether it should defer to local, national, or international standards—and the answer will benefit greatly from practice and experience in a previous consolidation exercise, which it would be ideal to pursue administratively before a more systematic and definite process, intended to guide further development, is introduced for deliberation by the Legislative Council.

III.3. Relations Between the Executive and Legislative Powers

143. Another question is whether, in addition to the broader adoption of initially voluntary standards—which, as we have just noted, proportionality would advise at least at a first moment—the Government can, besides

¹⁸¹ *Id.*, art. 45(2).

¹⁸² *Id.*, art. 45(3), (4).

¹⁸³ *See supra* note ...

recommended standards, adopt compulsory standards as well, in the absence of enabling provisions supplementing Article 139(2). As extensively discussed in the preceding parts of this Report, the power to decide on standards is, by deliberate choice exercised through the Basic Law, an Executive power—standing, thus, in contrast to other jurisdictions that have made it a legislative power. Given the centrality of questions concerning technological standards in the information age, it can be said with no uncertainty that the power to decide on standards is the quintessential expression of the Executive-Led model of governance adopted by the Basic Law.

144. The power to decide on standards is also, as we have noted before, a power to *decide* on the standards that *apply* in Hong Kong. This encompasses, by implication, as much the power to decide on the standards that do not apply as it does the power to define the scope of obligations constituted by those standards that do. As an exercise of the ethical idea of sovereignty explored throughout the report, the power to decide on standards enables the Government to instantiate, in relation to technological matters, the contours of the public interest—of the ‘general will’.¹⁸⁴

145. That instantiation, however, does not happen in a legislative vacuum. Rather it takes place in the context of an established legal and political order, whose tensions and particularities the power to decide on standards also reflects—here, in particular, represented by the coexistence between an idea of Executive-led governance that is central to Hong Kong’s legal system, and the also central proposition that, in the HKSAR, the general power to legislate is invested in the Legislative Council. Such a tension is all the more so a

¹⁸⁴ See Heller, *supra* note 35 and accompanying discussions. See also JEAN-JACQUES ROUSSEAU, THE MAJOR POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU: THE TWO DISCOURSES AND THE SOCIAL CONTRACT (John T. Scott ed. & trans., 2012).

tension because it takes place in the context of a common law legal tradition from which, at least in this important respect, Hong Kong's legal system differs.

146. Yet, because Hong Kong is—and wills to remain—part of the common law tradition, Hong Kong needs to endeavour to strike the best balance possible between deviation and similarity, difference and repetition. This includes the pursuit of a reasonable balance between the roles and attributions of executive and legislative powers even where a provision of the Basic Law—here Article 139(2)—appears to wish to go it alone. To put it differently, it is particularly because of the atypical way through which the balance between Executive and Legislative is ordinarily defined in the Basic Law—as it is the Government, and not the Legislative Council, who is empowered to decide on criteria of clear normative generality in relation to technological matters—that proportionality needs to be seen as well as an expectation concerning the relationship between both powers.

147. This balance goes, thus, beyond stating that standards the Hong Kong Government decides as applicable must not contradict the laws adopted by Legislative Council. Rather, it recommends that the decision itself by the Government to adopt a technological standard—*in the absence of enabling legal provisions* and, thus, *in lieu of such provisions*—must itself be seen as an element to be justified in the light of proportionality requirements also flowing from the Basic Law.¹⁸⁵ This is no different from other circumstances where executive authorities are authorised by Constitutions to legislate, all of which must be approached as an atypical instance of exercise of a power that is typically reserved to another branch of power, and thus one to be justifiable as a measure whose *very existence qua measure, when it limits*

¹⁸⁵ Hong Kong's proportionality test is defined in *Hysan Development Co Ltd and Others v. Town Planning Board*, [2016] HKCFA 66.

residents' individual rights, must be seen as a *restriction*, to be explained by answering why more general enabling measures have not, instead, been tabled before and adopted by the Legislative Council. To have laws adopted by the legislature on significant matters that demand normative intervention by the state is a desire of societies that live by the rule of law.

148. This being said, Part of this balance also entails understanding that the Basic Law does so empower Executive—indeed, the idea that the Hong Kong's political structure is Executive Led emerges invigorated when considered under the impressive reach of the power to decide on technological standards—and all the more so when the contours of such a power are examined in the light of both the challenges posed by technological platforms and the view, long-since maintained by courts in Hong Kong, that the Basic Law must be interpreted as a 'living instrument', indeed a 'living constitution'. To see the Basic Law as a living constitution is to call for a 'generous interpretation' of its provisions in the light of 'changing needs and circumstances' (*Ng Ka Ling and Another v Director of Immigration*, 1999).¹⁸⁶ It is also to see the Basic Law as an endeavour 'give to Hong Kong residents the full measure' of their rights and freedoms.

149. Fundamentally, however, to give Hong Kong residents the full measure of their rights must not be equalled to the necessary imposition of a mandate of governmental restraint. Constitutionalism cannot be seen as an endeavour to contain or make governments ever weaker or less relevant,¹⁸⁷ else this overlooks that chief end of governments in liberal societies is to further, not to restrain, citizen's rights.

¹⁸⁶ See Eric C. IP, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT'L L.J. 565 (2016) (for discussion).

¹⁸⁷ See e.g. MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* (2022). Cf ADRIAN VERMEULLEN, *COMMON GOOD CONSTITUTIONALISM* (2022).

150. In fact, as an important case decided recently by the Court of Final Appeal illustrates, Hong Kong courts came to recognise that the need to ensure respect for fundamental rights results in positive obligations by the state—obligations, that is, to do something, rather than just to abstain from doing something. As observed by Chief Justice Cheung in *Sham Tsz Kit v Secretary for Justice*, remarkably different wordings in provisions concerning the protection of the right to privacy under the *Bill of Rights Ordinance*¹⁸⁸ (internalising the *International Covenant on Civil and Political Rights*)¹⁸⁹ and under the *European Convention on Human Rights*¹⁹⁰ meant precisely that, whereas under the ECHR the focus is on the ‘right to respect’ for private life,¹⁹¹ under the ICCPR (and thus under the BORO) the focus is on non-interference, which comes into ways. It comes as an assurance that no one shall be subjected to arbitrary or unlawful interference with his privacy, and it comes as well a recognition that everyone has right to the ‘*protection of the law against such interference*’.¹⁹²

151. Two conclusions follow from this that are critical for the policies discussed here. The first is that there was thus by the Court a recognition that where there is no law satisfactorily protecting individuals against interferences or attacks to their right to privacy, the Government has then the duty to bring such a law into being. As Cheung CJ unequivocally put it: ‘[w]here the relevant law of protection does not exist, there is plainly a

¹⁸⁸ Hong Kong Bill of Rights Ordinance, (1991) Cap. 383 (H.K.) [hereinafter ‘BORO’].

¹⁸⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ‘ICCPR’].

¹⁹⁰ European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ‘ECHR’].

¹⁹¹ ECHR, Article 8.

¹⁹² *Sham Tsz Kit v Secretary for Justice* [2020] HKCFA 33, [25].

positive duty on the part of the government and the legislature to enact it.’¹⁹³ That, as we will see shortly in Part III.5, remains a problem of great centrality in how to deal with the challenges discussed in this report. The second, critical conclusion is that Article 14 of the BOR does not afford individuals a protection merely against the state, since it does not speak of ‘interference by a public authority’, as Article 8 of the ECHR does, but of interferences or attacks *by anyone*.¹⁹⁴ Reverberating a General Comment (GC16) by the Human Rights Committee on the matter, which noted:

‘In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.’¹⁹⁵

152. Such a view effectively casts light on the counter-sensical idea, expressed in Section 7 of the BORO,¹⁹⁶ that the Ordinance binds only the Government and persons acting on its behalf, all the while conveying that public authorities have a duty, in enforcing the same Ordinance, to see to it that private actors as well are bound not to violate the rights recognised in the ordinance. How can both enjoinders be true at the same time? Section 7 echoes René Magritte’s famous painting of a pipe saying it is not a pipe, for it is very clear that the understanding by the Court, in line with the UN Human Rights Committee, is that not only normative enactments should be in place that afford individuals adequate protection—which is already at the heart of what we have been arguing—but that, beyond, the state is justified, based on

¹⁹³ *Id.*

¹⁹⁴ BORO, Bill of Rights [hereinafter ‘BOR’], art. 14.

¹⁹⁵ U.N. Human Rights Comm., General Comment No. 16: Article 17 (Right to Privacy), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 8, 1988), ¶ 1.

¹⁹⁶ BORO, §7.

Article 14, to act to prevent attacks and interferences by private parties with the privacy rights of others.

153. The same situation can be observed in relation to another right of importance to our discussions—namely, the right to freedom of expression, whose possibilities of restriction are reflected in Article 16 of the BOR¹⁹⁷ and encompass the respect of the rights and reputations of others, as well as the protection of national security or of public order (*ordre public*), or of public health or morals, all of which likewise establish a duty for the Government to act in the upholding of such rights.

154. Both these provisions, among others, provide concrete substantive grounds for the Government to act under Article 139 (2) of the Basic Law, and doing so by creating conditions, in the continuum that connects the technological and the legal, for the protection of important collective values, such as that of national security, and for the affirmation of individual rights.

155. What ensues from an idea of proportionality here is thus that, while the power to decide on standards must not result in disguised attempts to unjustifiably restrict freedom of speech, it is equally important to understand that the protection itself of human expression, in the full diversity of its valuable forms, increasingly passes through the undoing of technological impediments and circumventions of the human will put in place by technological platforms. That is the irony of free speech, so well explored by Owen Fiss in his book of same title—¹⁹⁸ namely, that freedom of speech also, and ever more so, emerges in the positive form of an expectation of enabling action by the state, rather than in the expectation of an abstention by the state from tampering with it.

¹⁹⁷ BOR, art. 16.

¹⁹⁸ OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996).

156. For a long time in Hong Kong, as indeed in other liberal societies, attempts to regulate the information environment have been met with the concern that the underlying intention would be one of curtailing fundamental rights and freedoms. In Hong Kong, however, this has taken a more extreme expression. Not even a simple set of amendments to the copyright law could pass without these being dubbed the ‘Article 23 of Cyberspace’,¹⁹⁹ in reference to the national security provision in the Hong Kong Basic Law. The filibustering that ensued and the ways it managed to capture the agenda and incense the public imaginary in relation to the intentions of the government in introducing legal reform are part and parcel of the desert that remains the legal domain in Hong Kong in virtually all questions potentially affecting technological platforms. It is in relation to this desert and the urgent questions it raises that the power to decide on standards deserves to be considered.

157. Ultimately, what proportionality must mean, in the context of the relations between the Government and the Legislative Council is that the power to decide on standards must be approached in the light of what as noted above, has typically been called the ‘theme of continuity’—the continuity, that is, of Hong Kong’s common-law based legal system after the resumption of sovereignty by China. Within this theme, we are invited to understand normative questions of more general and exclusionary character as reserved to Hong Kong’s legislative branch—the Legislative Council—and, in turn, that the Government must act with restraint in relation to such questions, even as it exercises a power explicitly granted to it by the Basic Law. The theme of continuity also entails, certainly, that the Government’s power

¹⁹⁹ WENWEI GUAN, WHEN COPYRIGHTS MEET HUMAN RIGHTS: "CYBERSPACE ARTICLE 23" AND HONG KONG'S COPYRIGHT PROTECTION IN THE DIGITAL ERA, 42 H.K. L.J. 785 (2012).

to decide on standards cannot be exercised in violation of laws approved by Hong Kong's legislative branch—the Legislative Council. Nor can this power be exercised in violation of choices made in the Basic Law itself, including in its provisions on fundamental rights and duties of Hong Kong residents. And it means, finally, that the judgement as to whether these laws and constitutional choices have been violated is to be made by an independent judicial power of the kind that Hong Kong continues to enjoy.

158. All this having been said, it must also be seen that, whatever else the provision that grants the Government the power to decide on standards may mean, it *does* grant the Government the power to so decide—a power, that is, of a conspicuously normative and general kind. And, most importantly, a power from which larger lessons can be extracted about the character of Hong Kong's Executive-Led Government. Such lessons allow us to see under new light the function of the Government to conduct administrative affairs in the region and the nature of Hong Kong's Chief Executive's dual role as both the head of the Government *and* the head of the Hong Kong Special Administrative Region.

III.4. Relations Between the Local, the National, and the Global

159. We finally come to the fourth point concerning what an idea of proportionality should entail in relation to the power to decide on standards—and this is the point of how we should see such a power in the context of Hong Kong's position within the Nation and within the world. Starting from where we stopped in the preceding section, we see that, being the Chief Executive the Head of the HKSAR,²⁰⁰ he is also the HKSAR point of contact with and responsibility toward the legal system of the People's

²⁰⁰ Basic Law, art. 43.

Republic of China,²⁰¹ in charge of seeing that policies put in place in Hong Kong at the same time fall in line with Hong Kong's position within the Nation *and* preserve the principle of 'One Country, Two Systems' and Hong Kong's 'high degree of autonomy' as recognised under the Basic Law. The balance that, as we have seen above, must be struck in weighing between residents' rights and interests and navigating the relationship between different branches of power is thus also to inform the pursuit of the right mix between values and concerns of local and, unavoidably, of national significance.

160. Whatever the point at which such a balance may be appropriately struck, however, one thing about it needs to be abundantly clear: in the context of a profoundly interconnected world—and in the context of a profoundly interconnected China—we must revisit the important point we pursued at the outset of this Report, that the idea of the relationship between Hong Kong and the Mainland that informs the exercise of the power to decide on standards cannot be one of an *adversarial* kind. Hong Kong cannot reasonably be expected, as it often seems to emerge from global conversations, to seek to frame its own path in opposition to the nation's.

161. That the question is indeed more granular than often assumed in such conversations can be seen in another important decision by Chief Justice Andrew Cheung, then a Judge at the Court of First Instance. The case, which opposed the Catholic Diocese of Hong Kong to the Government,²⁰² concerned a provision in the Hong Kong Basic Law that similarly empowers the Government to, on its own, formulate policies on education in Hong Kong. As Justice Cheung went to note, what 'on its own' meant in the provision is that

²⁰¹ *Id.*, art. 43(1).

²⁰² *Catholic Diocese of Hong Kong v Secretary for Justice* [2006] HKCFI 1339.

it is for the Government of Hong Kong and ‘no one else’ to make a call as to the substance of such policies.²⁰³ It is not thus, nor could it be, a mandate to oppose the national. The case, in fact, did not concern any imposition of policies by the central authorities, but rather an opposition by the Catholic Diocese to changes in policies put forward by the Hong Kong Government itself, in relation to others that had been in place since before Hong Kong’s handover from Britain to China in 1997. ‘No one else’ in the case meant the Catholic Church—and ultimately the changes in policy went on to be upheld by Hong Kong’s Court of Final Appeal.²⁰⁴

162. In the end, high though Hong Kong’s degree of autonomy might be, the question of whether to defer to the national or the global—or neither—is, as all the questions discussed so far, one of finding the right balance. There is no reason recommending that the Government engages in necessary normative competition where no clear advantages would accrue from it. In the absence of demonstrable advantages in the adoption of different standards, including as to the costs of producing these, and, as importantly, in the absence of normative aptitude to indeed produce such standards in a timely and suitable manner in a world of ever-greater complexity and speed, what is to be made of the power to decide on standards? For all the reasons discussed so far however, neither should it be assumed that there is not a decision to be made by the Government, which may at times recommend that more specific standards be adopted in Hong Kong.

163. Ultimately, that the Government does have the power to decide on standards depends as much on the Government exercising such a power as it does on exercising it *effectively*. In Robert Dahl’s famous intuition, power is a relation through which one is effectively able to modifies another’s

²⁰³ *Id.*, [161].

²⁰⁴ Catholic Diocese of Hong Kong v Secretary for Justice [2016] HKCFA 71.

behaviour.²⁰⁵ Power is, thus, a matter of fact. And on this fundamental fact that is the power to decide on standards depends the broader administrative and political power invested in the Hong Kong Government and, ultimately, in the Chief Executive himself. Will such a power endure amid the formidable pull of currents we have here been examining? An accurate understanding and articulation of the interplay between two perspectives we now turn to, in conclusion, will determine the outcome.

164. The first of these perspectives, to which we turn in Part III.V, concerns *reach*—that is, the vast *normative reach* of the power to decide on standards. The second concerns *scope*. It concerns the need to appropriately understand and represent the wide *range of interests* that the power to set standards mobilises. Whether these factors interact productively or not may determine not only the fate of the power to decide on standards, but the fate of Hong Kong's political system itself. That is the magnitude of the task ahead.

165. More specifically, precisely because the power to decide on standards is so vast as to its reach and scope, if its exercise is left predominantly to the strictest forms, such as those of the criminal law and national security restrictions alone, the power results unnecessarily restrictive, giving rise to just the sort of concerns this essay began with. In other words, what was envisioned as a power under the Hong Kong Basic Law emerges instead as a weakness.

166. And then there is the question of *scope*, to which we turn in Part III.VI, recommending specific substantive areas in the regulation of aspects concerning the information environment in general, and technological platforms in particular, taking into account how these areas interact with

²⁰⁵ Robert A. Dahl, The Concept of Power, 2 Behavioural Science 201, 202–203 (1957).

different domains of standards setting and, ultimately, putting forward a view that, all the while taking the utmost importance of national security into account also moves us beyond national security. In doing so, a contrast will be established between how platforms are regulated in Hong Kong in matters of national security and how they are so regulated in other jurisdictions. This, in turn, will enable us to understand the imperative of opening the spectrum of regulatory domains where the power to set standards is to be exercised and how liberating, in so many ways, this exercise can paradoxically be.

III.5. Rescuing the Political: Between National Security and the Public Interest

167. Judgements of proportionality that inform the mobilisation of variables along the axes explored in Part III.4 must also inform the decision as to whether to approach a certain question from the perspective of national security or from the perspective of its less existential expression—that is, the public interest. This, of course, is easier said than done. Telling whether a certain threshold has been crossed that elevates public interest issues into the national security level is a task of extraordinary difficulty. Yet, it is also an essential one in any political community that does not wish to transform the political domain in its entirety into an existential affair.

168. This point sends our analysis back to the kind of constitutional reasoning explored in Part I, or more precisely to Schmittian ideas whose more stringent implications we understood prudent to avoid. Schmitt's politics of extremes, which sees sovereignty as a matter of deciding on the exception, also sees the 'political' as a building up that achieves its essence as differences in viewpoint resolve into an existential friend-enemy dichotomy. Such a building-up can concern any domain, as disagreements in any domain might acquire political—existential—dimensions. As Paul Kahn observes, it

is a feature of the political for Schmitt that it might attach to practices and processes from all other domains. In Kahn's words:

"Carl Schmitt makes an important point here about politics. We cannot say in the abstract what the content of political belief will be. Politics can attach to any cultural production or set of distinctions, including such "natural" categories as territory, race, or ethnicity. Political understandings, for example, can attach to science and art, even if we say that, considered in themselves, they are not political. They can also attach to moral ideals: justice or equality, for example. (...) According to Schmitt, politics adds a dimension of intensity to other beliefs. It places those beliefs – from whatever source – at the cent[re] of a world of ultimate meanings to be defended through the medium of violence and sacrifice".²⁰⁶ (emphasis added)

169. Of all domains, there is none more prone to politicisation of such an existential kind in the 21st century—no domain to which this conception of the political might more decisively attach—than the technological. This is so since the technological shapes all aspects of contemporary life; its effects irradiate through all other domains. But here also lies the challenge of approaching the technological exclusively from such existential political lenses. It is as problematic that the state may intervene always by mobilising such forceful political imaginaries, as it is for the state to deliver existential choices to the algorithms of technological platforms.

170. This is evident in approaches such as the one described in Part II.3, that turn questions concerning artificial intelligence, for example, first and foremost into questions of national security. What such approaches do is to, seeing how national security horizontally involves issues in all social domains—insofar as these issues are issues of fundamental importance for a given society—reduce all political questions to national security ones.

²⁰⁶ PAUL KAHN, OUT OF EDEN 203 (2007).

171. Writing in an American context, Harold Lasswell noted that ‘policies of defense are to safeguard the fundamental values of America’,²⁰⁷ and thus that ‘the requirements of national security must be clearly related to the over-all goals of the commonwealth’.²⁰⁸ Featuring prominently among such goals, which Laswell saw as ultimately connected to the dignity of man, were the protection of civil liberty, in general, and freedom of information, in particular.²⁰⁹ Most significantly, these are goals that, from an American perspective, entail an abstention by the State from interference with the private realm. They reflect the priority placed by the US constitutional system in the protection of negative freedoms.

172. National security, thus, is not reducible to the protection of physical and territorial integrity within a jurisdiction, such as in the fight against terrorism, but rather relates to the protection of values of fundamental quality for a given society. Paradoxically, in societies that frame their understanding of dignity and liberty from a negative perspective—a perspective, that is, of state restraint—the growing might of jurisdictions that adopt a positive perspective in relation to the framing of those ideals results in a threat. As Laswell also noted, ‘[t]he distinctive meaning of national security is freedom from foreign dictation’, which ‘implies a state of readiness to use force if necessary to maintain national independence’.²¹⁰ As a result, for a society that adopts a negative understanding of liberty and dignity, positive forms of intervention to shape structure and content of the information environment—or at least those that do so in fundamental ways—may amount to potential national security threats.

²⁰⁷ HAROLD LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 50 (1950).

²⁰⁸ *Id.*

²⁰⁹ *Id.*, 63, 65.

²¹⁰ *Id.*, at 51.

173. Conversely, for societies whose political ideals encompass a more positive outlook regarding the role of the state in furthering public forms of good—that is, the public interest—it emerges as natural that national security will concern a broader range of values that such societies see as belonging within the scope of the political. Thus, the National Security Law of the PRC positively defines national security in an encompassing way, by noting that:

“Article 2. National security refers to the relative absence of danger and freedom from internal and external threats to state power, sovereignty, unity and territorial integrity, people's well-being, sustainable economic and social development and other vital interests of the country, as well as the ability to guarantee a state of sustained security”.²¹¹

174. The challenge is not to uncritically deploy the horizontality of such a scope in a vertical form that, by doing away with any thresholds, assimilates the entirety of public interest questions into the national security domain. Jurisdictions that openly adopt a positive approach to ideas of liberty and dignity, seeing these as part of a larger project of upholding values fundamental to their societies—in the case of China, ‘Core Socialist Values’—have little problem with other jurisdictions pursuing the same approach (the problem is typically the other way round). Yet, such a realistic take on national security considerations must likewise realistically and proportionately—or harmoniously—appraise the vertical boundaries between forms of action that offer genuine national security concerns and other forms that, while mobilising interests within the same broad range, *nevertheless do so in non-existential fashion*.

²¹¹ National Security Law of the People's Republic of China (中华人民共和国国家安全法) [National Security Law] (promulgated by the Standing Committee of the National People's Congress, July 1, 2015, effective July 1, 2015), art. 2, 2015 STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS GAZETTE 4 (China).

175. In the United States and in the European Union, one finds no definition of national security in the law. In the EU, according to Article 4(2) of the Treaty of the European Union, the national security of member states falls outside of the scope of Union law. Central thus to understanding the boundaries between Union law and national law would be to understand what national security amounts to. Yet, as Kristina Irion observes, while there is in practice the recognition that a wider range of domains, such as “state’s independence, sovereignty, territorial integrity, constitutional order” fall within such a domain, “[t]here is no unified definition of national security”.²¹² The boundaries of such domains are remarkably vague. Hence, if, from the perspective of liberal policy, national security frameworks such as China’s and Hong Kong’s are often indicted on the ground of their vagueness, the irony is that such frameworks are there, conceptually and descriptively articulated in the open, for their contours to be evaluated and evolve through practice and interpretation.

176. That the boundaries of national security are not openly conceptualised in EU or US law does not mean national security concerns have not been mobilised in a wide diversity of domains—foreign technological policy in the US being a case in point, with embargos to the export of computer chips and legally articulated attempts during the Trump administration to suspend the

²¹² Kristina Irion, Public Security Exception in the Area of non-personal Data in the European Union, Eur. Parl. Doc. PE 618.986 (2018), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/618986/IPOL_BRI%282018%29618986_EN.pdf. See also Research Division, European Court of Human Rights, National Security and European Case-Law (2013), <https://rm.coe.int/168067d214> (noting the absence of a clear definition of national security in the law, with the European Commission of Human Rights observing the term cannot indeed be comprehensively defined).

availability of foreign technological platforms such as TikTok, all of which have been framed in national security terms.²¹³

177. Whereas Lasswell, as noted above, spoke of the fundamental values of a nation, other definitions are not any less encompassing in horizontal terms. Jordan et al, likewise, define national security as the “safeguarding of a people, territory, and way of life”, including, beyond physical security, the protection of “a broad array of interests and values”, as well as the “institutions established to protect them”.²¹⁴ Nye, writing on the national interest, notes that “[m]any experts argue that vital strategic concerns are more widely shared than other interests”,²¹⁵ but goes on to define it more broadly as “the set of shared priorities regarding relations with the rest of the world”.²¹⁶ These include values “so important to [the public’s] identity that [the public] is willing to pay a price to promote them”, but with leaders and experts nevertheless recognizing the importance of softer strategies, which operate through persuasion of public opinion, to pursue those. Indeed, notes Nye, soft power, in effect, becomes a central means of pursuing the national interest in the deregulated spaces of the information age, where “global markets and nongovernmental actors play a larger role”, and “[s]tates are more easily penetrated (...) and less like the classic realist model of soft billiard balls bouncing of each other”.²¹⁷

²¹³ The breadth of such forms of intervention is corroborated by the equally encompassing of definitions of national security in the literature.

²¹⁴ AMOS A. JORDAN ET AL, *AMERICAN NATIONAL SECURITY* 4 (6th ed. 2009).

²¹⁵ Joseph S. Nye, Jr., *Redefining the National Interest*, FOREIGN AFFS., July/Aug. 1999, at 22, 23.

²¹⁶ *Id.*

²¹⁷ *Id.*, 25. See also Jordan et al, *supra* note 215, *id.*, noting the shift in attention to a broader security agenda transcending threats posed by state actors.

178. The broad definition of national security one finds in China's National Security Law (and generally in Chinese scholarship)²¹⁸ does not appear, thus, to be in dissonance with the broad approaches to the topic one finds in the legal and political literature in the West. A particularly influential account is found in the work of Buzan, Wæver, and de Wilde, who put forward a view of security extending through military, political, economic, environmental, and societal sectors, "rejecting the traditionalists' case for restricting security to one sector"—namely, military issues and the use of force—, and rather seeing security "as a particular type of politics applicable to a wide range of issues".²¹⁹ Most significantly, as much as in Nye we find the development of

²¹⁸ See e.g. Dai Changzheng (戴长征), 从安全困境、发展安全到整体国家安全观 [From security dilemma, development security to national security concept], 6 吉林大学社会科学学报 [6 JILIN UNIVERSITY JOURNAL SOCIAL SCIENCES EDITION] 1 (2022) (explaining the "holistic view of national security" as a comprehensive approach adopted in the Sixth Plenary Session of the 19th CPC Central Committee, encompassing political, economic, military, cultural, social, and technological security.); Gu Chunzhu (顾春竹), 中国法律中"国家安全"概念研究 [Research on the Concept of "National Security" in Chinese Law] (2015) (M.A. thesis, Shanghai Jiao Tong University) (highlighting the expansion of national security concepts in Chinese law to include non-traditional security areas); Yu Zhigang (于志刚), 网络安全对公共安全和国家安全的影响 [The situation of cyber security on public security and national security], 6 中国法学论坛 [6 CHINA LEGAL FORUM] 5 (2014) (noting the relations between cyber security, public security, and national security); and Feng Shuai (冯帅) & Lu Fuying (陆福营), 人工智能时代的国家安全: 风险与治理 [National security in the age of artificial intelligence: risk and governance], 5 国际展望 [5 Global Review] 90 (2018).

²¹⁹ BARRY BUZAN, OLE WÆVER & JAAP DE WILDE, SECURITY: A NEW FRAMEWORK FOR ANALYSIS (1998). Also viewing security from a multifaceted perspective, see David A. Baldwin, *The Concept of Security*, 23 REVIEW OF INTERNATIONAL STUDIES 5 (1997) (arguing, nevertheless, for an approach where, rather than considered in relation to core values, security is defined in relative terms, as a policy objective distinguishable from others, pursued in competition with these given the scarcity of resources, and better identifiable by contextually answering questions like "security for whom?" and "security from what threats?").

the idea of *soft power*,²²⁰ in Buzan, Wæver, and de Wilde we find an idea of “*securitisation*”, entailing a move at the political level beyond the structure of established rules—“outside”, thus, “the normal bounds of political procedure”—to address issues “presented as an existential threat.” Such is a move whose definition and criteria—whose process of legitimation—are *discursively* established, through a “specific rhetorical structure” based, more fundamentally, on a “speech act”.²²¹

179. Such soft, speech-based forms of power lie within a domain that Florian Schneider, drawing on Lewis Mumford, sees as belonging within a universe of a specific technological kind—namely, that which constitutes the modern nation state.²²² Technologies—or technics—, for Mumford as for Schneider, extend beyond toolmaking, to domains “modified by linguistic symbols, aesthetic designs, and socially transmitted knowledge”,²²³ with the nation state, notes Schneider, being one of modernity’s core technologies—a technology imagined and maintained “through discursive and symbolic practices, which imbue members with a sense of community”,²²⁴ and one that promises social affirmation and group belonging and, with this, ultimately, security.²²⁵

180. While Schneider is correct in recognizing a technological dimension in the modern state, that appears, however, to slightly simplify a more complex

²²⁰ See also Joseph S. Nye, Jr., *Soft Power*, 80 FOREIGN POLICY 153 (1990) and JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

²²¹ BARRY BUZAN, OLE WÆVER & JAAP DE WILDE, *supra* note 219, at 23–26.

²²² FLORIAN SCHNEIDER, *CHINA’S DIGITAL NATIONALISM* 27 (2018). For Mumford’s ideas, see LEWIS MUMFORD, *THE MYTH OF THE MACHINE* (VOL. 1)—*TECHNICS AND HUMAN DEVELOPMENT* (1966).

²²³ SCHNEIDER, *id.*

²²⁴ *Id.*, at 27.

²²⁵ *Id.*, at 49.

account. This account, which we have sought to present in Part II.3 *supra*, would understand the modern state—and, within it, modern law—as made up by *technological* and, *at the same time*, by *normative* elements, with the intensity with which either dimension is present varying in proportion to the kind of activity performed by state. When activities concerning the law are considered, within the continuum we examined clearly the paradigm falls more intensely toward the normative—even if the law, as Schneider recognises, *also* has a technological dimension. What is this prevalence or the normative owed to? It is owed to the fact that it is the human element that prevails here, to the fact that the point of the law, ultimately, is to provide *people with reasons for action*.²²⁶

181. Now to highlight this is not to strike a theoretical point bereft of practical application. It is to recognise that, as we have also noted above, between and connecting the technological and legal—the material and the normative—lies the notion of sovereignty we in turn examined in Part I; it lies the *ethical* domain that sees to it that the exercise of sovereignty, even at its most testing moments, is determined not by exceptions where the legal withdraws to reveal the sheer materiality of power, but by the generality of the ethical. This is also, as we have discussed throughout this report, that same continuum along which technological standards, as an expression of this ethical version of sovereignty, also lie.

182. As the breadth of the concept of national security is considered, what the glue provided by this ethical view of sovereignty provides is, if not a horizontal constraint in relation to themes possible to be encompassed by national security questions, a vertical limit for a move toward the otherwise unbound political domain that Buzan, Wæver, and de Wilde were speaking of.

²²⁶ See, for all, H.L.A. Hart, *The Concept of Law* (2d ed. 1994). See also John Finnis, “The Priority of Persons”, in *INTENTION AND IDENTITY: COLLECTED ESSAYS VOLUME II* 19 (2011).

This view reminds us that the universality of human ethics provides friction, constraint in the hoisting of categories from a non-existential plane into an existential one. In other words, the lesson here is that, even if the concept of national security may admit of horizontal extension to a broad range of values of fundamental quality in a given society, not all forms of conduct are equally able to risk or hinder such values, and there should be a presumption against moving lightly to assume they are. Among us, while it is understandable that the lived experience of recent events in Hong Kong might offer good reasons to approach the protection of national security in more encompassing terms, ethics—including the universality of the ethics of human rights—²²⁷ requires that a proportionate balance must be struck between the affirmation of national interests and the protection of individual rights, a balance itself enshrined in the National Security Law of the Hong Kong SAR.²²⁸

183. Within this balance, and as noted at several points in the report, a presumption must operate against transforming all matters of public interest in matters of national security. Rather, regulation in the public interest offers an avenue exactly to avoid cumulative effects that lead to the concretisation of national security concerns. We will turn to specific domains where a standards-based approach offers avenues to address questions concerning the public interest as matters of an ordinary, non-existential political dimension—and to seek to ensure they remain so. Such an approach presents Hong Kong with an opportunity to thread a lighter, more open, and promising path ahead, catering for the protection of the interests it needs to cater but in a piecemeal, less stringent way.

²²⁷ See De Sousa Santos, *supra* note 12.

²²⁸ Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 4 (promulgated by the Standing Committee of the National People's Congress, June 30, 2020, effective June 30, 2020).

184. Consider for now two different approaches to the regulation of technological platforms—one of these more stringent, the other less so—, which exist in parallel the European Union in matters that could all, with little effort, be subsumed under the concept of national security, yet only some of which are. These approaches are found in Regulation (EU) 2021/784, addressing the dissemination of terrorist content online,²²⁹ and Regulation (EU) 2022/2065, on a Single Market for Digital Services—the Digital Services Act.²³⁰ While the DSA reaffirms existing liability provisions and establishes a series of procedural and transparency obligations for platforms to deal with content that is illegal or otherwise harmful or risk-prone, the Regulation on terrorist content also establishes a stringent system through which competent authorities within Member States are empowered to issue removal orders that must be complied with by platforms within one hour of being served. And while the DSA also empowers Digital Service Coordinators within each Member State and, at the limit, the European Commission itself to step in to deal with instances of infringement of obligations under the Act, the focus is really on the establishment of a thorough system of procedural obligations concerning the making and reporting of decisions in relation to content online—including, as noted above, through the drawing up of codes of conduct conceived of by platforms themselves. All of this lies in stark contrast with the provisions adopted in Hong Kong under the Implementing Rules to Article 43 of Hong Kong’s National Security Law, which, insofar as technological platforms are considered, are basically the only system of

²²⁹ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, 2021 O.J. (L 172) 79.

²³⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

responsibilities of a general kind in place in Hong Kong concerning questions of public interest.

185. The problem with the current approach in relation to technological platforms in Hong Kong is, in other words, the absence of a regime outlining expectations toward platforms in a civil context, where general obligations towards matters of public interest are engaged. An interesting parallel can be traced in this regard in relation to the context in which the first ‘Internet Bill of Rights’ globally—namely, the Brazilian ‘Marco Civil da Internet’ (‘Civil Rights Framework for the Internet’)—was adopted. Although not without its problems,²³¹ ‘Marco Civil’ is widely revered internationally as a framework. One of the reasons why it is so can be traced to its emergence as a response to legislative movements then in course in Brazil to establish criminal rules *before civil expectations had been established* to regulate Internet conduct in the country. The reverence in this regard for the framework is not misplaced. It is well established in a long chain of authorities that not only the adoption of criminal obligations should be preceded by the existence of civil rules, but that, in effect, the criminal law should be the last resort—the *ultima ratio*—in the regulation of social conduct. As Nils Jareborg explains

“Criminalization should be used as a last resort, as ‘uttermost means in uttermost cases’ (...) [T]here must be a basic presumption that the State should not interfere at all. If interference is necessary, then aid, support, care, insurance and license arrangements should take precedence over coercive measures. If coercive measures are necessary, they need not consist in sanctions. If sanctions are necessary, private law sanctions might be preferable to administrative sanctions.”²³²

²³¹ Marcelo Thompson, *The Twilight of Neutrality on the Internet: ‘Marco Civil’ as Memorial*, in DAVID MANGAN, ANGELA DAILY & GIJS VAN DIJCK, *THE PHILOSOPHICAL FOUNDATIONS OF INFORMATION TECHNOLOGY LAW* (forthcoming 2025).

²³² Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO STATE JOURNAL OF CRIMINAL LAW 521, 523-424 (2005).

186. Both points just discussed—the interplay between security and the public interest and the idea of the criminal law as *ultima ratio*—found their way into the decision by the Hong Kong Court of Final Appeal in *Leung Kwok Hung and Others v. HKSAR*.²³³ There, the Court, in examining the powers of the Commissioner in relation to the authorisation of public processions, found these to be in contravention of proportionality requirements—and thus unconstitutional—in relation to the protection afforded by Article 27 of the Basic Law to the rights of freedom of speech, association, procession, and demonstration, as well as by Article 39 of the Basic Law to the right of peaceful assembly rights guaranteed by Article 17 of the Bill of Rights Ordinance (BORO). Most significantly for our discussions, this was so since, by merely relying on the idea of ‘public order (*ordre public*)’, as expressed in the BORO, as a ‘legitimate purpose’ for restriction of the right to freedom of peaceful assembly, but without specifying what was meant by public order, the Public Order Ordinance was understood to be in violation of one of the prongs of the proportionality test, namely the requirement that restrictions be ‘prescribed by law’.

187. The challenge here is that, while it is clear that “the concept of ‘public order (*ordre public*)’ includes public order in the law and order sense that is, the maintenance of public order and prevention of public disorder”, the concept is also much wider, and whatever else it means is not clear. Quoting the ‘Siracusa Principles’,²³⁴ as well as observations by Alexandre Kiss,²³⁵

²³³ *Leung Kwok Hung and Others v. HKSAR* [2005] HKCFA 40 [hereinafter *Leung*].

²³⁴ U.N. Econ. & Soc. Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) [hereinafter *Siracusa Principles*].

²³⁵ Alexandre Kiss, *Permissible Limitations on Rights* in LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS 290 (1981).

former Rapporteur on the Limitation Provisions, and Manfred Nowak,²³⁶ former Rapporteur on Torture, the Court put forward a definition of public order in everything synonymous with the broad and overlapping understanding, noted above, of both national security *and* public interest considerations—that is, noting public order to be as broad as to encompass:

- ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded’;²³⁷
- ‘a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity’—including, for example, the upholding of ‘peace and good order; safety; public health; [aesthetic] and moral considerations; and economic order (consumer protection, etc)’;²³⁸ and
- The ‘universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based’.²³⁹

188. Significantly, and in line with scholarly definitions of national security discussed above the Siracusa Principles hold that national security itself ‘may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat or force’.²⁴⁰(emphasis added) Thus, if there is something that distinguishes public order—or the public interest more generally—from matters of national security, this is exactly the *existential character* of national security considerations, which is something

²³⁶ MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993).

²³⁷ Siracusa Principles, ¶ 22

²³⁸ Kiss, *supra* note 236.

²³⁹ Nowak, *supra* note 237.

²⁴⁰ Siracusa Principles, ¶ 29.

that can only be appreciated *in a concrete sense*. It is, after all, this concreteness, material imminence, the unequivocal risk of expulsion of the values that fundamentally define a political community what national security mobilises. Thus, the Siracusa Principles also note that national security “cannot be used as a pretext for imposing vague or arbitrary limitations”²⁴¹ nor “invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order”.²⁴²

189. In the *Leung* case, the Court ultimately severed from the scope of the Public Order Ordinance all components of public order in a broad, *ordre public* sense not inherently concerned with issues of public order in a strict, law and order sense.²⁴³ In doing so, the Court noted it to be an unusual legislative technique that an abstract idea at the constitutional level would be incorporated at the statutory level without further definition, to give the Commissioner of Police a broad and unchecked discretion, which meant any restriction based on indeterminate parts of the idea of public order (*ordre public*) ‘falls foul of the constitutional requirement of ‘prescribed by law’.²⁴⁴

190. In what was otherwise a lengthy dissenting opinion, Justice Kemal Bokhari corroborated the points above, but went further to, pertinently, draw on Germany’s Federal Constitutional Court’s precedent, in observing that, even as the law and order component alone is considered, ‘mere endangering of public order’ is not a sufficient condition for bans on the exercise of fundamental rights²⁴⁵—in the case, the right of assembly—, from whose violation criminal sanctions may ensue, as eventually they did in the case.

²⁴¹ *Leung*, ¶ 31.

²⁴² *Id.*, ¶ 30.

²⁴³ *Id.*, ¶¶ 82–85.

²⁴⁴ *Id.*, ¶ 77.

²⁴⁵ *Id.*, ¶ 147.

Rather, proportionality required that forceful impositions such as a ban on the right to peaceful assembly not be adopted if not after less severe methods, such as ‘imposing conditions’ have been exhausted and, most importantly, that such a ban only take place where there is, concretely, a “‘direct endangering’” of public safety or order.’²⁴⁶

191. What Bokhari J’s opinion and the German ruling cogently show is that there is nothing that is particularly more objective in law-and-order considerations that make them directly more amenable to subsumption under public order or national security concerns than other kinds of consideration are so amenable. Such an assumption of objectivity is, in fact, but a facet of liberal neutrality of a Rawlsian kind, that excludes values and conceptions of the good from the scope of the political exactly because of the view that there is something inherently more objective with rights-based categories than there is with evaluative ones. However, as extensively demonstrated by scholarship of most diverse orientations—from feminism, to multi-culturalism, to communitarianism, and to perfectionist forms of liberalism itself—such a form of scepticism takes its evaluative perspectives as a point of departure as it ascribes priority to the right over values and conceptions of the good.

192. The liberal neutralist idea of the rule-of-law, which excludes value categories from consideration by courts—if only that was possible—is an expression of what Steven Wall has aptly termed ‘the bracketing strategy’ —²⁴⁷that is, the assumption held by neutrality proponents that only particular conceptual categories belong within the scope of the political, here

²⁴⁶ *Id.*, ¶ 149.

²⁴⁷ STEVEN WALL, LIBERALISM, PERFECTIONISM, AND RESTRAINT 44 (1998).

represented by the possibility of engagement by the state with what the Court in *Leung* understood to fall within the domain of public order.

193. What the majority erred in not seeing, in sum, was that all such conceptual categories belong within the scope of the political and that what makes of specific matters public order or national security ones is, rather than their sheer scope, the more or less existential character concretely assumed by the imminence of violation of interests of a fundamental kind. That, in turn, speaks in favour of intermediate, ordinary approaches that consider the regulation of such domains through less stringent forms. This is the precise domain of the power to decide on standards.

III.6. Areas of Priority: Data Governance and Platform Responsibility

194. The most significant legal reforms in quite some time in the law and technology field in Hong Kong have been the adoption at last of the amendments to the Copyright Ordinance,²⁴⁸ the ‘doxing amendments’²⁴⁹ to the Personal Data (Privacy) Ordinance (PDPO),²⁵⁰ as well as the Implementation Rules for Article 43 of the National Security Law²⁵¹ to establish obligations for various actors in connection with the enforcement of the Law.

195. The last two relate to concerns explored in the present Report—including for how they demonstrate the reasons for recommendations put forward here that the focus of regulatory concerns in Hong Kong be expanded

²⁴⁸ Copyright (Amendment) Ordinance, (2022) Cap. 528 (H.K.).

²⁴⁹ Personal Data (Privacy) (Amendment) Ordinance, (2021) Cap. 486 (H.K.).

²⁵⁰ Personal Data (Privacy) Ordinance, (1995) Cap. 486 [hereinafter *PDPO*].

²⁵¹ Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, L.N. 139 of 2020 (H.K.).

from purely a *security* perspective to one that contemplates the *public interest* more broadly, including as a way of preventing the emergence itself of national security concerns or the degeneration of public interest ones into these.

196. To say so is not to downplay the gravity of the 2019 incidents and the ‘black violence’ that characterised them which have, with every reason, giving rise to these developments.²⁵² The point is rather that this cannot be the only focus of law reform in the field in Hong Kong and that, as the example pointed to at the outset indicates, such a focus is not even the most efficacious when its very strength disadvantages its exercise—for instance since it might appear to reflect a lack of concern for numerous other realms where public interest challenges merit consideration and response by the law.

197. Contrast, for example, the 2021 doxing amendments with the 2012 amendments,²⁵³ which took place in response to the 2010 Octopus incident, when it emerged that personal data of Hong Kong residents was being commercialised without their consent.²⁵⁴ The legal response at that time was the adoption of Section 64 of the PDPO, which establishes an offence of disclosing “any personal data of a data subject which was obtained from a data user without the data user’s consent”.²⁵⁵ Strikingly, while there was this

²⁵² Albert H.Y. Chen, Preface to Christine Loh & Richard Cullen, *Hong Kong in China—Rethinking the Hong Kong–Mainland Relationship* [香港在中國—重新思考內地與香港關係] (魏磊傑 trans., City University of Hong Kong Press 2021), <https://researchblog.law.hku.hk/2021/09/albert-chen-on-post-national-security.html>.

²⁵³ Personal Data (Privacy) (Amendment) Ordinance, (2012) Cap. 486 (H.K.).

²⁵⁴ SCMP Reporter, Octopus sold personal data of customers for HK\$44m, *S. China Morning Post* (Jul. 27, 2010, 12:00 AM), <https://www.scmp.com/article/720620/octopus-sold-personal-data-customers-hk44m>.

²⁵⁵ PD(P)O 2012 Amendments

rare opportunity for updating the Ordinance (which, as can be seen in this report, is an exceedingly rare occurrence in Hong Kong), only a narrow set of amendments was adopted with the purpose of preventing new situations like the Octopus incident from emerging. The most interesting part? The amendments did not, in fact, address the Octopus incident. They did not do so because, instead of requiring consent *by the data subject* for the disclosure of data related to them, what the 2012 amendments came to require, was consent *by the data user* themselves!

198. Worse, however, was what was left outside of legal reform and remains outside of the PDPO to this date. The PDPO, as observed above, not only does not contain a requirement of consent for the collection of personal data about or even from a data subject,²⁵⁶ but it does not contemplate in detail other conditions for the lawful processing either. There is no requirement of legitimacy of the reasons for which the data is to be processed,²⁵⁷ no data minimisation requirement,²⁵⁸ no right not to be subject to a decision made solely through automated decision making,²⁵⁹ no data breach notifications requirement,²⁶⁰ no right to data portability²⁶¹ —indeed, not even the provision concerning the export of personal data (Article 33), which is reflected in the text of the PDPO, has been put into force.

²⁵⁶ See PDPO, sched. 1, Data Protection Principle 1(3)(a), merely requiring that the data subject be *informed*, and only when data is collected from them, of whether the provision of data is obligatory and of the consequences of the denial. Contrast with the GDPR, where under art. 6(1)(a) consent is not only the main ground for the lawfulness of processing of personal data, but has its conditions defined in detail by art. 7 of the same regulation.

²⁵⁷ Under DPP1, only lawfulness of means is required. Cf. GDPT, art. 5(1)(b) establishing a requirement of legitimacy of purposes (among many others).

²⁵⁸ Cf. GDPR, art. 5(1)(c).

²⁵⁹ *Id.*, art. 22.

²⁶⁰ *Id.*, arts. 33, 34.

²⁶¹ *Id.*, art. 20.

199. That means that the PDPO was already seriously less protective in relation to what was the paradigm by the time it was adopted, namely the EU Data Protection Directive itself—let alone in relation to what is now the General Data Protection Regulation. The new doxing provisions, which came to grant a remarkably broad set of powers to the Privacy Commissioner for Personal Data (PCPD), emerge as disproportionately stringent when compared to the rest of an Ordinance where so much remains unaddressed—and, indeed, where so much went for so long unaddressed until doxing became a challenge to react to, however deservingly so.

200. The problem, thus, is not with the doxing amendments themselves. The problem is with the largely reactive and security-focused pattern of responses, which gives an authoritarian appearance to what are otherwise legitimate and necessary measures to address concrete problems facing Hong Kong. Yet, that the blanket of security is pulled up leaving the much larger share of public interest considerations uncovered, that is the significant problem that needs to be grappled with, and all the more so now that artificial intelligence poses even greater challenges to the protection of personal data.

201. It is also a problem that needs to be grappled with in comparative terms. In this sense, it can be seen that the Personal Information Protection Law, in the Mainland, even if the development of its enforcement mechanisms is still a work in process, offers, through its provisions, significantly stronger levels of protection than those offered by the PDPO, coming close, or even going beyond in some respects, levels of protection afforded by the GDPR itself in the EU.

202. Efforts are now in place, in the context of the Greater Bay Area, to establish a common framework for the cross-border flow of personal data between Hong Kong and other GBA cities. In response to inquiries formulated in the context of this project, the Office of the Government's Chief Information Officer thoughtfully explains the underpinnings of the project:

“To jointly promote cross-boundary data flow in the Guangdong-Hong Kong-Macao Greater Bay Area (GBA), Innovation, Technology and Industry Bureau (ITIB) and the Cyberspace Administration of China (CAC) signed the “Memorandum of Understanding on Facilitating Cross-boundary Data Flow Within the Guangdong-Hong Kong-Macao Greater Bay Area” 《促進粵港澳大灣區數據跨境流動的合作備忘錄》 (MoU) in Beijing in June 2023. Under the MoU, ITIB and the Office of the Government Chief Information Officer will work closely with the CAC and explore effective management measures with a view to fostering cross-boundary data flow within the GBA. The National 14th Five-Year Plan indicates clear support for Hong Kong's development into an international I&T hub. Facilitating data flow in the GBA is an important initiative for promoting the integrated and high-quality development of the GBA, lowering the compliance costs of enterprises and driving the development of Hong Kong's digital economy and proactively integrate Hong Kong into national development. The MoU also contributes to the convenient and orderly flow of cross-boundary data from the Mainland to Hong Kong, which is beneficial to building Hong Kong into a global data hub. The MoU and the facilitating measures will be rolled out on a pilot basis as and when ready. Adopting an “early and pilot implementation” approach, we are actively discussing with the Guangdong Province on details of the facilitating measures in consultation with industry experts and the Privacy Commissioner for Personal Data.”²⁶²

203. While the MoU's was yet to be made available at the time of completion of this Report, and the OGCIO in other parts of its answer explains that levels of protection will be compatible at least with those offered in Hong Kong,²⁶³

²⁶² Office of the Government Chief Information Office (24 October 2023), correspondence on file with the PI.

²⁶³ “In Hong Kong, regulations that govern the protection of personal data are included in the Personal Data (Privacy) Ordinance, which ensures data protection and safeguards the

it is safe to assume that Hong Kong—or, through the adoption of specific model contractual clauses, economic actors operating in the SAR—will adopt or encourage the adoption of more stringent levels of protection than those found in the PDPO. Reference by the OGCIIO to Guidelines and model contractual clauses adopted by the PCPD, even in relation to provisions of the PDPO not in force, indicate that voluntary standards adopted by the PCPD will play a role in the development of data protection in the Region.

204. As part of such a process, it is imperative that new standards of protection eventually come to be reflected in an evolved PDPO, as a requirement of constitutional forms of protection of such rights and the levels of stability and foreseeability that such forms of protection demand—for instance, as part of proportionality assessments that justify or not the restriction of such rights.

205. At the same time, intermediate stages of development reflected in forms of encouragement for voluntary adoption of more stringent criteria of protection—such as the ones being pursued by the ITIB/OGCIO, and promoted from among Guidelines adopted by the PCPD—are of the essence of what is being proposed in this Report, and merit being replicated in other areas where aspects concerning the public interest are concerned.

free flow of personal data to Hong Kong from countries that have already implemented data protection laws without restrictions. It provides stringent and comprehensive regulation of transfer of data to outside Hong Kong. It expressly prohibits the transfer of personal data to places outside Hong Kong except in circumstances specified in the Ordinance. This ensures that the standard of protection afforded by the Ordinance to the data under transfer will not be reduced as a result of the transfer. The Office of the Privacy Commissioner for Personal Data promulgated the Guidance on Personal Data Protection in Cross-border Data Transfer in 2014²⁶³, which was updated last year²⁶³. The Guidance will continue to play an important role in the protection of personal data in Hong Kong.” OGCIIO, *id*.

206. These intermediate stages allow for some level of experimentation, including through the voluntary character of recommended standards. As far as aspects of consequentialist nature are concerned, these enable the observation of what standards will eventually succeed and gain traction and what standards will not—that is, what standards will be more beneficial / work from a technological perspective and what standards do not. Even if such consequentialist domains do not ultimately represent the essence of what the public interest consists in—and the balance pursued by the state must ultimately be one of a deontological quality—a good level of market consideration regarding what is possible or desirable needs, of course, to be present in governance calculations as well.

207. Most importantly: the participatory ethical view of sovereignty embraced in this project means that, even regarding deontological considerations, a good level of deference is to be given to social / market actors in pursuing the right avenues through which their technological choices will promote individual and social interests more broadly. The encouragement for Codes of Practice to be drawn, as mentioned from EU experience, for example under the DSA and the original approach to tackling disinformation, would be a welcome first step as part of a broader strategy concerning standards setting in Hong Kong.

208. In order to ensure that the public interest is ultimately protected, however, a centralised body should be established with responsibility for the coordination of standards-setting policies concerning information and communication technologies in Hong Kong. At a minimum, this body must be responsible for inventorying and maintaining custody of formally adopted instruments, including their versions, levels of authority (obligatoriness) and implementation (embeddedness), actors they apply to, legal provisions with which they interact and legislative progress towards their incorporation

in legal rules in the light of broader policy strategies defined by the Government.

209. As alluded to in the methodology, the maintenance of a limited system of information and brokerage concerning international standards—as is presently maintained by the Innovation and Technology Commission in Hong Kong—is far from enough for the exercise of the power to decide on standards in all its complexity. On the other hand, the model maintained by the OGCIO, although so far applicable chiefly to the Government and its contractors, and thus falling outside the scope of the present project, reflects a much more interesting proposition and appears to be an ideal point of departure for reflection upon and, hopefully, implementation of ideas put forward in the present project.

210. Beyond, however, it is also necessary to consider, as the very drive behind all ideas reflected in this Report, that not always the most prominent technological standards—those that go on to have the greatest impact in society—are explicitly articulated ones, but rather those that operate tacitly through the codes and algorithms of technological platforms. Part of the power to decide on standards must then also entail being able to, within bounds of proportionality, obtain access to this underlying infrastructure, so as to determine its interfaces with and effects upon the normative order more widely.

211. Frameworks such as the DSA, again, reflect a model of transparency along such lines, together with norms of responsibility towards the mitigation of systemic risk.²⁶⁴ This, reaffirming a point already made above, is a model that Hong Kong would do well to consider in order to establish a

²⁶⁴ DSA, art. 35.

proportionate system of responsibility for technological platforms—
focusing on a broader range of public interests not presently catered for by
legal rules in place.

212. At the same time, Hong Kong must address an enduring problem of the Digital Services Act, which is the coexistence between an efforts- or process-based model of risk mitigation and transparency and a strict-like liability system that does not reflect the decisional, normative complexity of questions tackled by technological platforms. Such a system is one whose rules have travelled from the previous E-Commerce Directive into the DSA, and which demand platforms to act expeditiously to take illegal content down upon receipt of a notice. The dynamics is virtually the same that obtains in Hong Kong in relation to the liability of platforms, for example, in defamation cases.²⁶⁵

213. The problem with such regimes, as I have described with detail in previous work,²⁶⁶ is not very different from what is found in the diametrically opposite model—namely that in place in the United States, where platforms are unqualifiedly exempted from liability.²⁶⁷ Both regimes discourage responsible practices of content moderation from emerging. One because it prompts platforms to, instead of applying resources to examine the legal or illegal character of content they host, simply take content down—out of concern that courts could, in disagreeing with their assessment, eventually hold them responsible for their misjudgement. The regime that exempts

²⁶⁵ See *e.g.* *Oriental Press Grp. Ltd. v. Fevaworks Solutions Ltd.*, [2013] 16 HKCFA 47 (holding that knowledge of offending content and, in the presence of control, absence of reasonable care *to take the content down* foreclose the possibility that the defendant may benefit from an innocent disseminator defence).

²⁶⁶ See Marcelo Thompson, *supra* note 149.

²⁶⁷ 47 U.S.C. § 230 (1996).

platforms from liability, in turn, discourages the emergence of responsible content moderation practices because it grants to technological platforms an immense power with no corresponding responsibility.

214. Avoiding the challenges of both models currently in place, an efforts-based approach that establishes parameters for platforms to conduct the evaluation of content they host, all the while requiring responsibility from them in carrying out such an assessment in accordance with their economic and technological possibilities—and creating a cushioning system for honest mistakes—, strikes the best balance between the protection of freedom of expression and other rights and interests at stake. It does so by seeing to it that platforms are expected to weigh all rights and interests in an assessment that platforms may even get wrong, as long as they responsibly endeavour to get it right. A model like this thus ensures that platforms will neither simply take content down without regard to freedom of expression, nor neglect forms of harm ensuing from content they host to other rights with which freedom of expression happens to conflict.

215. Importantly, while the general traits of such a regime—chiefly the exemptions that an efforts-based approach will require—need to be laid out in law, the parameters based on which an efforts-based approach will be carried out may instead, at least at a first moment, be based on Codes of Practice that platforms could be encouraged to draw up. Openness, transparency, reporting, however, all of these should be overall requirements of the proposed model—requirements, thus, through which the standards based on which the system operates are laid out in the open.

216. Put together, the elements above could form the basis of a more friendly, agile, participatory, standards-based model of governance of the kind that this Report has suggested. This would still, surely, be a model that the

Government would be responsible for steering based on the power to decide on standards, but which could be put in place in less demanding ways, with wide public mobilisation and engagement by technological actors, and evolve in accordance with what the public interest requires.

217. While Cybersecurity and Critical Infrastructure projects outlined in the 2023 Policy Address²⁶⁸ are of unquestionable importance and priority, the present Report has hopefully demonstrated as well how vital it is that a wider range of public interest considerations be taken into account in the building of a more comprehensive framework for the protection of the public interest in Hong Kong's Internet—and how the wider protection of the public interest might itself prevent the evolution of public interest challenges into national security ones.

218. Finally, research throughout the project (see Annex I for an overview) has shown that while in the US platforms bear no responsibility for content online, including in national security contexts, in the EU different dynamics exist, as noted above, for content identified with terrorism, and content that reflects wider forms of violation of the public interest considerations, with different frameworks in place to address both dynamics. In contrast, the present regime in Hong Kong, where few rules and expectations exist regarding technological platforms outside of what one finds in the Implementation Rules for Article 43 of the National Security Law and in relative fluid data protection obligations now supplemented by comparatively stronger mechanisms put in place to deal with the challenges of 'doxxing', means that there is a wide range of public interest considerations involving societal risks and harms waiting to be addressed. It also means, however, that, in the absence of such lacunas being addressed,

²⁶⁸ The Hon John Lee, *The 2023 Policy Address: Charting a Brighter Tomorrow for Hong Kong* (Oct. 25, 2023), <https://www.policyaddress.gov.hk/2023/en/policy.html>.

Hong Kong faces the risk that standards invisibly embedded in the systems put into place by dominant technological platforms may ultimately prevail.

219. The present Report has sought to outline practical and conceptual avenues for the addressing of such demands. It sought as well to present them, more than as a challenge, as an *opportunity* for renewed forms of governance to emerge that enable Hong Kong to continue to chart its own course for legal and technological development, at the same time that it furthers its unique role within both the global order and the frame of ‘One Country, Two systems’.

Dissemination

Ideas in this Report were presented in a project Workshop held at The University of Hong Kong in late August, and in the following international conferences: the ‘International AI + Society Conference: Shaping AI for Just Futures’ (University of Ottawa); the Annual Conference of the International Society of Public Law – ICON.S (Victoria University of New Zealand); and the 2023 Workshops of the Manchester Centre for Political Theory (University of Manchester).

Recommendations

- a) For the reasons summarised above, and taking into account the remit reflected in Article 139(2) of the Hong Kong Basic Law, the significance of the development, appropriate access to, and certainty as to the application of technological standards in Hong Kong for the development of the HKSAR, its integration with the Greater Bay Area and the Nation as a whole, its participation in the international arena, the protection of the

local and national public interests, including as to National security, and the recognition and affirmation of individual and collective rights in the Region, the present Report recommends that the Government of the HKSAR:

- b) in view of the distinctively normative character of information and communication technologies (including Internet-related technologies and, ever more pressingly, artificial intelligence), consider establishing a high-level centralised authority responsible for the coordination of standards-setting policies and, effectively, for the decision on the technological standards and specifications applicable in Hong Kong in relation to them.
- c) consider assigning to such an authority, or to a body under its purview, the responsibility for: i) developing and maintaining custody of technological standards in their institutional form, as well as for defining their levels of authority ('obligatoriness') and implementation ('embeddedness'), the actors they apply to, and the legal instruments and authorities with which they interface; ii) as part of its custodian role, consolidating standards presently adopted by different governmental or statutory bodies in Hong Kong (for example, 'Guidelines' and 'Codes of Practice' issued by the Privacy Commissioner for Personal Data, as well as standards adopted by the Office of the Government's Chief Information Officer that can be extended to private actors on a compulsory or recommended/voluntary basis—for example, the thorough Ethical Artificial Intelligence Framework); iii) initiating and monitoring legislative processes towards integrating standards into legal rules, including assessing the necessity (proportionality) of initiating such processes, in light of the objectives they are intended to achieve; iv) establishing interfaces with other governmental bodies of the HKSAR for

the implementation of policies under their purview; and v) liaising with national and international treaty bodies and standards-setting organisations, in striving for compatibility and interoperability between local, national, and international standards, wherever possible.

- d) taking into account the hybrid character of technological standards—their existence, that is, on a continuum between the material/technological and normative/legal domains—and thus the importance of ensuring the interdisciplinary character of the high-level authority to be established, consider combining within the authority attributions currently belonging to or interfacing with those of the ‘Innovation and Technology Commission’ and the ‘Office of the Government Chief Information Officer’ (more generally, the ‘Innovation, Technology, and Industry Bureau’), as well as the ‘Department of Justice’, the ‘Constitutional and Mainland Affairs Bureau’, the ‘Committee for Safeguarding National Security of the Hong Kong SAR’, and the ‘Law Reform Commission of Hong Kong’, with involvement, additionally, on an ad hoc basis, where matters of national significance are concerned, of the ‘Liaison Office of the Central People’s Government’ as well as, through the Liaison Office, of the Standardization Administration of China.
- e) also taking into account, however, that standardisation aspects do not begin or finish in the articulation of standards qua formal instruments by institutional standardisation bodies, but rather also encompass the large-scale definition of expectations through direct (‘embedded’) forms of implementation by technological platforms, and that such forms of implementation very concretely challenge and, at the limit, displace the power to decide on standards as recognised in Article 139(2), consider the establishment of rules of transparency and reporting by technological

platforms in relation to practices of decision-making and design in key areas of tension between their activities and the public interests furthered by Article 139(2)—as one finds, for example, in the European Union’s Digital Services Act and in the General Data Protection Regulation.

- f) likewise, taking into account: i) how jurisdictions such as the European Union have been tackling systemic risks and harms potentially ensuing from the activities of technological platforms; and ii) that such risks and harms equally affect the public interest and the fundamental rights of residents of the HKSAR; but iii) that no developed and comprehensive mechanisms of protection of such rights and interests presently exist under the laws of the HKSAR in relation to the activities of platforms, and that courts in the Region recognise the positive obligations of the Government to create a legal environment conducive to such a protection, consider establishing, in the medium term, a fully-fledged system of platform responsibility such as the one found in the Digital Services Act;
- g) at the same time, consider establishing an initial process through which, after an open and welcoming consultation process in which Hong Kong Residents are informed of evolving policies in other jurisdictions and invited to identify key areas of concern to be addressed with priority in Hong Kong, platforms are then encouraged to draw up a ‘Codes of Practice’ outlining their commitments in relation to the protection of the public interest and fundamental rights of Hong Kong residents in the areas identified, including as to design, transparency, and reporting practices concerning the fulfilment of their commitments, which will in turn provide the grounds for how a more fully fledged system of platform responsibility could develop in Hong Kong that strikes an appropriate balance between protecting the rights and interests of Hong Kong

Residents and maintaining the openness and attractiveness of Hong Kong as an international economic and financial centre.

- h) taking into account that: i) existing models of platform responsibility either fully except platforms from liability in relation to third-party content they host or establish strict-like systems of liability where platforms are encouraged to take such content down expeditiously upon a notice, or present some hybrid form between both; and ii) that none of such models provides appropriate incentives and protection for platforms to develop and implement a system of reasonable decision-making practices that strikes an appropriate balance between the protection of freedom of expression and that of other rights and interests, individual or collective, which must be weighed together with it; iii) consider establishing an efforts-based and scalable system of platform liability, which, requiring reasonable efforts by platforms in proportion to their economic and technological possibilities, provides them nevertheless with a cushioning system for honest mistakes;
- i) consider, in relation to all recommendations put forward in this Report, and for the reasons detailed herein: i) the significance of utilizing the authority granted in Article 139(2) to address a wide spectrum of public interest issues, extending beyond the confines of national security considerations; ii) the fact that even when public interest issues intersect with national security affairs, they may not necessarily exceed certain seriousness thresholds, including potential systemic harms or risks; and iii) the idea that, in instances where public interest issues do not cross such thresholds, these issues can be more appropriately managed through less stringent mechanisms that fall outside the national security domain.

j) and, finally, consider: i) that the balancing exercise outlined in paragraph g) above forms part of a broader set of proportionality considerations detailed in this Report, which recognise the complexity of these intersecting concerns while also paying heed to the necessity of measured responses; and ii) that proportionality considerations take on particular significance given the unique situation in Hong Kong where the power to decide on standards is allocated to the Government, contrasting with other jurisdictions, such as the United States and the European Union, where such a power is typically recognised as a legislative power.

Conclusion

This report has examined the scope and implications of Article 139(2) of the Hong Kong Basic Law, which grants the HKSAR Government the power to decide on technological standards and specifications applicable in Hong Kong. Despite its importance and expansive reach, this provision has received scarce scholarly attention. By analyzing the political, legal, technological and historical foundations of Article 139(2), this report aimed to elucidate the contours and limits of the Government's authority under this clause.

The report began by situating Article 139(2) within the unique context of 'One Country, Two Systems' and Hong Kong's complex balancing act between local, national and global interests in regulating technology. It was argued that the expression 'on its own' in Article 139(2) cannot be read in an adversarial sense, as granting Hong Kong 'semi-sovereignty' in relation to the PRC. Rather, both Hong Kong's autonomy and its integration with the nation are fundamental national interests protected under the Basic Law's vision of 'One Country, Two Systems'.

Delving into the nature of sovereignty, the report cautioned against the grounding of the power to decide on standards on views that equate sovereignty with unlimited power or the ability to 'decide on the exception'. Drawing on the work of Hermann Heller, an alternative understanding was put forward that sees sovereignty as rooted in the unity and universality of the people's will, as represented by the state in its ordinary activity of promoting the public interest. This ethically grounded view of sovereignty was presented as a principled basis for the Government's authority under Article 139(2).

The report's historical analysis revealed that the drafters of Article 139(2) were undoubtedly aware of the complex technological and global dynamics involved in standards-setting. Unlike the U.S. Constitution, the Basic Law consciously granted standards-setting powers to the Government rather than the legislature. This legislative intent points to the Government's legitimate authority to determine technological norms, bounded though this authority remains by ideals of proportionality that in the present context assume special importance and contours.

As to the scope of the power to decide on standards, the Report argued that technological standards traverse the realms of the technical and the legal, allowing the state to consider responses at multiple levels regarding challenges stemming from data privacy / governance and platform liability more generally. At the same time, attention was directed to how private platforms also create tacit standards through their technical architectures, eroding public oversight. Article 139(2) offers tools to bring embedded norms set by platforms into the open, facilitating participation and debate—but also, likewise, where necessary to respond through embedded means.

Overall, the report contended that standards-setting must be seen as a function of public reason. By openly articulating expectations through standards, the Government can uphold sovereignty while avoiding the creation of ‘grey spaces’ that allow arbitrary exercises of power. A proportionate approach was outlined that attends to the complex interplay between the local, national, and global dimensions involved in technological governance.

The report's analysis demonstrated that Article 139(2) is neither neutrally open-textured nor unbounded power. Rather, it grants the Government

purposive, principled authority to secure public interests through flexible, transparent and thoughtful technological governance. This authority must be exercised judiciously, with due regard for legality, rights, and ethical imperatives.

Policy recommendations focused on strengthening coordination, transparency, and platform responsibility through more open and flexible avenues where standards-setting plays an important role. At the same time, the Report sought to demonstrate the importance of moving beyond national security frameworks, through lighter-touch forms of governance that, precisely by focusing on the public interest, can preempt inordinate existentialisation of challenges. Overall, the report argued that Article 139(2), despite its expansiveness, opens possibilities for measured, participatory and ethically aligned technological decision-making essential to Hong Kong's future as a global city.

Annex I

Platform Takedown / Responsibility

	Mainland China	Hong Kong	Europe	US
General Takedown Obligations	Yes	Yes	Yes	No
	[Civil Code / Tort Liability]: in an approach that provides an interesting model for future legal development in Hong Kong, Articles 1195(2) and 1996 of the Chinese Civil Code of 2020 establish the liability of platforms (network service providers) who, knowingly or having reason to know, fail to, in a timely manner, take the necessary measures in relation to content. These provisions bring up to date the previous regime reflected in Article 43 of the E-Commerce Law and Article 46 of the Tort Liability Law, which had been interpreted by the Supreme People's Court as entailing an efforts-based liability regime, where platforms are not expected to automatically take content down but rather to examine complaints in accordance with principles of prudence and reasonableness, taking a range of factors into account [see Guiding Case 83 and Regulations on Handling Civil Disputes Involving Information Networks]. [Regulations on the Administration of Internet Information Services] Information service providers are obliged to immediately halt the knowing transmission of content that clearly:	[Common Law of Defamation] <i>Oriental Press Group Ltd. v. Fevaworks Solutions Ltd</i> [2013] HKCFA 47: An ISP (Internet service provider) has a duty to remove defamatory remarks within a reasonable time when it has received notification from a complainant. See comments below on liability. [Personal Data (Privacy) Ordinance] On top of ordinary obligations of data users under the PDPO, SS.50 and 66M of the Ordinance grant the Privacy Commissioner the power to serve <i>enforcement notices</i> determining that data user remedies or prevents recurrence of contravention of a requirement under the ordinance, as well as <i>cessation notices</i> for persons able to cease or restrict the subject disclosure made by means of a message, including the removal of the message from an electronic platform or the discontinuing of the hosting of the part of the platform in which a message is hosted	EU [The Digital Services Act (DSA)]: Provisions in the Digital Services Act proceed in two diametrically opposite directions. On the one hand, the DSA innovates in establishing a diligence-based approach to content evaluation by platforms, where platforms and other Internet intermediaries are expected to abide by procedural standards that vary in accordance with intermediaries' nature and economic and technological possibilities (e.g. with more stringent obligations prescribed for 'Very Large Online Platforms' (VLOPs) and 'Very Large Online Search Engines' (VLOSEs)). Besides transparency commitments (e.g. publication of statements of reasons in content moderation; annual reports containing detailing content moderation practices), such an approach requires from platforms a weighing exercise between freedom of expression and other rights (in line, thus, with the Chinese tort liability regime), instead of recognizing a duty of expeditiously taking content down. Prominent within this diligence-based regime established by the DSA is the figure of independent Trusted Flaggers, selected by platforms from within a pool approved by Digital Service Coordinators in each Member State, which assist platforms in the identification and removal of illegal content. Most significant, and as noted extensively throughout this Report, is the role played by voluntary standards under the DSA, including Codes of Conduct drawn up by platforms themselves under the encouragement of the	US law does not impose takedown obligations to online platforms in relation to illegal or harmful content. To the contrary, platforms enjoy broad civil immunity under section 230 of Communications Decency Act (CDA), extending to concerns related to individual rights (such as privacy and reputation) and public-interest considerations. In the economic domain, however, the Digital Millennium Copyright Act's safe-harbour provisions condition the exemption of liability for copyright infringement to expeditious content takedown. Section 230 does not apply to in a criminal context (s. 230(e)(1)), including in relation sexual exploitation of children, using communications devices and facilities for communication that is, inter alia, obscene, threatening, or harassing (s. 223), sex trafficking (s. 230(e)(5)(A)), though have generally avoided imposing liability to platforms even in such contexts.

	• Opposes basic constitutional principles. • Jeopardises national security, unity, honor, and interests. • Incites ethnic hatred, discrimination, or undermines ethnic unity. • Contravenes the state's religious policies or promotes cults and superstitions. • Spreads rumors, disturbs social order, or undermines stability. • Disseminates obscenity, pornography, gambling, violence, or promotes criminal activities. • Insults, slanders, or infringes upon others' lawful rights and interests. • Contains any content otherwise prohibited by laws and administrative regulations. On Artificial Intelligence / Algorithmic Recommendation: see also Interim Measures on Generative AI and Provisions on the Management of Algorithmic Recommendations in Internet Information Services	(or the platform as a whole).	European Commission and the European Board for Digital Services. On the other hand, however, the DSA incorporates in its body the safe-harbour provisions of the regime previously in force—namely, that of the Electronic Commerce Directive (ECD)—, which requires that platforms, in order to benefit from an exemption of liability, act expeditiously to take down illegal content they acquire actual knowledge to be hosting. Such an approach, which has been said to result in chilling effects and unnecessary restrictions to freedom of expression, is also presently reflected in Hong Kong's defamation regime, for example, and is one that this Report advocates be abandoned in favour of a more proportionate, process-oriented approach of the kind now found within the DSA's broader diligence requirements. Contexts: in relation to VLOPs/VLOSEs, the DSA applies horizontally to circumstances of systemic risk involving illegal content / exercise of fundamental rights but also, and most significantly, the public interest more broadly—e.g. negative effects of design, use, functioning, manipulation on democratic processes and civic discourse, public health (including mental well-being), children's moral development, and other emerging forms of societal harm—, including in public security. Matters related to stricter forms of public security concern--e.g. national security, are left to a separate Regulation (namely, Regulation (EU) 2021/784 of the European Parliament and of the Council, of 29 April 2021 on addressing the dissemination of terrorist content online). Note: while the Digital Services Act, together with Regulation (EU) 2021/784 and the General Data Protection Regulation, all discussed above, cover aspects more closely related to this report, platform governance in the European Union is a vast	
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			domain. Other instruments exist, such as the Digital Markets Act (focusing on digital economy concerns), the Data Act and the Data Governance act (focusing on fair access and of data, the former, as well as on the establishment of a framework for data sharing, the latter), and the future Artificial Intelligence Act. All of them, in different ways, address aspects related to the public interest going beyond national security concerns.	
			UK: The Online Safety Act 2023 Scope: similarly to the DSA, besides transparency duties, the Online Safety Act 2023 (OSA) recognises new duties of care for technological platforms (providers of user-to-user services and search services) that require platforms to strike a balance between protecting adults and children from illegal content (adults) and harmful content (children) and the protection of users' rights to freedom of expression and privacy. The dynamic for content takedown in the OSA, however, differs in relation to that of the DSA in a significant way. Rather than an outright duty to swiftly take illegal content down,⁽⁷⁾ the OSA rather speaks of a service putting in place proportionate systems and processes to do so (Section 10(3)). There is no liability or loss of immunity attached to the failure to take content down. Instead, the enforcement powers and penalties in the Act, such as confirmation decisions and penalty notices, seem to be primarily focused on addressing broader, systemic non-compliance with the various duties of care, rather than attaching liability to each individual instance of illegal content not being rapidly removed. Most importantly, Section 192 establishes different criteria for providers of regulated services to follow in ascertaining the nature of content online, taking into	

			account information that is “reasonably available” to the provider, while Section 193 assigns to OFCOM (the UK’s communications regulator) the power to produce guidance about illegal content judgements. This is part of OFCOM’s broad normative powers under the OSA, which include the power to issue codes of practice that platforms must comply with in fulfilling their duties of care. <u>‘Legal but harmful’ content:</u> during consultations leading to the OSA concerns were expressed by different segments of society regarding possible overreach in the regulation of content that, while being legal, was nevertheless harmful. To cater to such concerns, the final Act has excluded ‘legal but harmful’ as a term of art. In practice, however, the OSA continues to embody a wide range of public-interest-related considerations that much transcend the domain of illegal content simpliciter. These can be found, for example, in provisions relating to user empowerment, including in domains of pronouncedly moral concern or political concern (such as in relation to pornographic content, misinformation, content related to national security, or in relation to a duty to take the importance of the free expression of content of democratic importance is taken into account when making decisions about how to treat such content). Thus, like the EU regulations, albeit in a single instrument, the OSA pursues a wholistic approach of the kind advocated in this report, addressing in its own body both national security concerns and broader public interest considerations. <u>Interpretation and Enforcement:</u> the breadth of concerns covered by the OSA—beyond, that is, the domain of strict illegality—also extends to significant powers the OSA affords OFCOM and the Secretary of State in relation to both national security and public-interest-related harms	
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			more broadly. For example, in addition to its power to set standards (Codes of Practice), require risk assessments and transparency reports, and impose penalties for non-compliance with the Act, OFCOM may be provoked by eligible entities through “super-complaints” concerning material risks of significant harm to users of regulated services or members of the public. The Secretary of State, in turn, can beyond the power to provide general guidance to OFCOM in relation to its functions under the Act (including to give directions to OFCOM to modify its codes of practice), give specific directions in relation to national security concerns or concerns related to the health or safety of the public (for example, to demand from providers of regulated services public statements in relation to steps taken in relation to such a threat) if the Secretary has reasonable ground for believing that circumstances exist that present a threat of such of natures. The definition itself of the threshold that a service must meet to be classified as a Category 1^(*) (user-to-user services of the highest risk and highest reach), 2A or 2B tier services is to be defined in defined in regulations by the Secretary of State. (*) See, below, on interim access restriction orders and use of accredited technology. (**) Providers of Category 1 services have additional duties to those that apply to all regulated services, for example duties to protect content of democratic importance and journalistic content, to provide users with tools to increase their control over harmful content, to publish transparency reports, to produce impact assessments on how their systems and processes may impact freedom of expression and user privacy, as well as duties about fraudulent advertising.	
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	Yes	Yes	Yes	No
Takedown and other Obligations in a National Security Context	[Internet Information Service Management Measures (2000)] Under Articles 15 and 16, information service providers are required to immediately halt the transmission of the content that jeopardises national security, unity, honor, and interests. [Cybersecurity Law (2017)] Article 12(2) recognises the general obligation of any person to “abide by the Constitution and laws, observe public order, and respect social morality”; “not endanger cybersecurity”, and “not use the Internet to engage in activities endangering national security, national honor, and national interests”; “not incite subversion of national sovereignty, overturn the socialist system, incite separatism, break national unity, advocate terrorism or extremism, advocate ethnic hatred and ethnic discrimination, disseminate violent, obscene, or sexual information, create or disseminate false information to disrupt the economic or social order, or information that infringes on the reputation, privacy, intellectual property or other lawful rights and interests of others, and other such acts”. Article 47 recognises the duty of network operators to “strengthen management of information published by users, and upon discovering information that the law or administrative regulations prohibit the publication or	[National Security Law and Implementation Rules for Article 43] When handling cases concerning offence endangering national security, the department for safeguarding national security of the Police Force of the Hong Kong Special Administrative Region may require a person who published information or the relevant service provider to delete the information or provide assistance.	EU [Regulation (EU) 2021/784 of The European Parliament and of the Council on addressing the dissemination of terrorist content online (TCO Regulation)] While Article 4(2) of the Treaty on the European Union recognises national security is solely the responsibility of each Member States, the TCO Regulation deals specifically with the dissemination of terrorist content online. Article 3 regulates the issuing of removal orders in each Member State, whereas Article 4 establishes a procedure in which Member States can issue removal orders to hosting providers established in other Member States. While the Regulation does not directly deal with encryption, some of the duties it recognises could potentially create tensions with the use of encryption by hosting service providers (such as the duty to remove content within one hour of receipt of an order). The TCO Regulation does not, however, apply to interpersonal communication services (which, with exceptions, would encompass individual and group chats), and any measures that interfere with encryption would need to be balanced against fundamental rights and could be subject to legal challenges. UK Online Safety Act 2023 In addition to their The OSA grants the Secretary of State and OFCOM specific powers to take action in relation to terrorism content or content that violates national security, in addition to those mentioned above. Under Section 175, the Secretary of State can give OFCOM directions to prioritise action in relation to circumstances that present a threat to health or safety of the public, or to national security, including, as mentioned above, by requiring the provider of a	In the specific context of terrorism, Section 2333(d)(2) of the Anti-Terrorism Act (ATA) establishes the liability of “any person who aids and abets, by knowingly providing substantial assistance” to a foreign terrorist organisation, creating a corresponding expectation of content takedown. Courts, however, have been hesitant to recognise the liability of platforms on such grounds, with the Supreme Court having recently noted in <i>Twitter v Taamneh</i> the lack of a concrete nexus between platforms’ actions and terrorist attacks carried out by ISIS. Greater difficulty still would apply to provisions relating to ‘seditious conspiracy’ (s. 2384) and ‘advocating the overthrow of government’, where the incitation of ‘imminent lawless action’ is required (<i>Brandenburg v Ohio</i>). Likewise, attempts to apply National Security provisions—namely those reflected in the ‘International Emergency Economic Powers Act (IEEPA)’—to block TikTok and WeChat in the US have been met with resistance by the Supreme Court, which relied in particular on the ‘information materials exception’ (which excludes from the authority of the President under the act the regulation or prohibition of importation or exportation of any information or informational materials) to quash Executive

	transmission of, (...) stop transmission of that information, take measures such as elimination, prevent the information from spreading, save relevant records, and report to the relevant competent departments”. [National Intelligence Law (2017)] Articles 7 and 4 recognise the duties of any organisation and citizen to provide support, assistance, and cooperation with state intelligence work, and recognise the authority of state intelligence work organs to demand such support, assistance, and cooperation. [Counter-Terrorism Law (2015)] Article 18 establish a duty of assistance by telecommunications operation regarding decryption and other technical support assistance to public security organs and state security organs conducting prevention and investigation of terrorist activities. [Provisions on the Governance of the Online Information Content Ecosystem (2020)] Articles 6 and 7 establish an extensive list of illegal information that a network information content producer shall not make, copy or publish, among which is information that: violates the fundamental principles of the Constitution; jeopardises national security, discloses state secrets, subverts state power, or undermine national unity; damages the reputation or interests of the state;		regulated service to make a publicly available statement about steps being taken in response to such a threat. Importantly, Section 121 grants OFCOM the power to require regulated services to use accredited technology to identify and remove terrorism content. While the possibility that such a power, among others (e.g. to request information), be exercised in an encryption context remains—chiefly to prevent the use to end-to-end-encrypted messaging applications—, proportionality and freedom of expression considerations, together with strong opposition by privacy advocates, makes this an unlikely move, and all the more so because an explicit provision along such lines in the original Bill did not find its way into the final Act. Sections 144 to 146 of the Act, in turn, deal with service and access restriction orders, which can be applied for by OFCOM in cases of failure of regulated services to comply with their obligations under the Act.	Orders issued by the Trump administration. It is fair to observe, thus, that, in the US, encompassing First Amendment protections mean that the broad lack of protection for public-interest considerations encompasses even national security concerns.
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	advocates terrorism and extremism, or instigates related activities; information that spreads rumors to disturb economic and social other Article 8 establishes duties of a network information content platform to fulfill its primary responsibility for managing content, strengthen the network's ecological governance and promoting the formation of a positive cyberculture towards kindness, whereas Article 9 details the systems and processes the platform must put in place in fulfilling such a responsibility, whereas Article 10 require platforms not to disseminate content listed in Articles 6 and 7 and, upon acquiring knowledge of these, immediately take measures to dispose of it, keep relevant records and report to relevant authorities. Article 11 establishes a duty that platforms adhere to mainstream values in optimizing their recommendation systems.			
General Liability / Responsibility	Yes (with appropriate exemptions) [Criminal Law of the PRC] In addition to responsibility provisions mentioned above, Article 286 of the Criminal Law provides that "[a]ny network service provider that fails to perform the information network security management obligations as prescribed in any law or administrative regulation and refuses to make corrections after being ordered by the regulatory authority	Yes (with circumscribed exemptions) Liability for defamation accrues from "knowledge of the content", of the "gist of the words" (for instance because the platform has been notified that it is so hosting it) + failure to take it down expeditiously. (<i>Oriental Press Group Ltd. v. Feaworks Solutions Ltd</i> [2013] HKCFA 47) Thus, in one of the few domains where	Yes (with more developed exemptions) EU The Digital Services Act (DSA): As noted above, the Digital Services Act reproduces the liability exemptions of the Electronic Commerce Directive for providers of hosting services. Those exemptions are applicable to platforms in the sense discussed throughout this report and follow a dynamic similar in kind to general liability approaches under Hong Kong law (e.g. under the common law of defamation). It must be noted, nevertheless, that recent developments in EU law endeavour to some extent	No Except for the copyright domain and (virtually non-existent) instances of criminal liability, there is no general system of platform liability or responsibility in the US.

	to take correction measures shall be sentenced to imprisonment of not more than three years, limited incarceration or surveillance in addition to a fine or be sentenced to a fine only under any of circumstances listed in the provision.	the liability of platforms is delineated in the laws of the HKSAR, the regime is one where the kind of <i>reflective</i> attitude employed by the platform—the diligence the platform applies in <i>ascertaining the nature</i> of the content (rather than its diligence in simply taking it down)—does not matter for decisions to be reached by the Court.	to address indeterminacies of the original approach transposed from the Electronic Commerce Directive—in ways not yet taken into account in Hong Kong law. In effect, wording of the DSA's recitals now reflects EU Court of Justice decisions (in cases such as <i>L'Óreal v eBay</i> and <i>Youtube v Cyando</i>) that clarify the ECD's dynamics of exemption of liability. As Recital 22 to DSA notes, to benefit from the DSA's liability exemptions, a hosting service provider must, on acquiring actual knowledge of content that a 'diligent economic operator' would reasonably be able to identify as illegal, act expeditiously to disable access to such a content. In other words, it is only when the <i>illegality</i> of a certain content is apparent to a 'diligent economic operator' that the platform is then obliged to take the content down. Sheer knowledge of the existence of the content is thus, in theory, not enough to constitute the obligation to take it down. Be that as it may, the evolution just described falls short from more substantially addressing the concerns raised by the ECD's original dynamic of exemption of liability. The approach remains one based on objective reasonableness standards such as those generally found in tort liability regimes. It does not account, in other words, for subjective differences between actors of a given kind, such as differences in economic and technological possibilities between platforms. Nor is it an approach that brings sufficient certainty for platforms, as the approach advocated in this Report would bring—that is, an efforts-based regime that could cushion platforms against the making of honest mistakes. It remains, in other words, an approach that, like the one in place in Hong Kong, continues to encourage the automatic	
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			takedown of content online to avoid liability.	
			UK [Defamation Act 2013] In the domain of defamation, in a provision surprisingly still in force, platforms are exempted from liability in a very similar way to Section 230's approach in the US—on the condition that they enable the identification of the author of the original post and maintain a system of communications and dispute resolution. [Online Safety Act 2023] The Online Safety Act establishes a regulatory regime rather than a proper general regime of responsibility / liability. As noted above, expectations are directed at platforms at a procedural and systematic level, rather than related to individual instances of content takedown. This being said, under Schedule 13, if a platform is found to be failing in its duties systematically, then Ofcom may take enforcement measures including issuing fines up to GBP 18 million or 10% of the platform's annual turnover, whichever is greater.	