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# The Transparent Self under Big Data Profiling:

## Privacy and Chinese Legislation on the Social Credit System

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Big data is one of the buzz phrases of the 21st century, concerning not only the digitalisation of data on billions of individuals, but also what those in power are able to do with that data. The defining characteristic of big data is the capacity to search, aggregate and cross-reference large datasets for analysis to identify previously undetectable patterns,<sup>1</sup> as well as the power to profile individuals, calculate risks, and monitor and even predict behaviour.<sup>2</sup> When big data is harvested by governments, the worry is that the totality of individuals' lives will be captured, that citizens will be monitored and that the Orwellian state will become a reality.

In China, such a worry seems far from unfounded given the Chinese Communist Party's (CCP) roll-out of its powerful Social Credit System (SCS). Launched at the national level in 2014, the system's aim is to assess the trustworthiness of Chinese citizens in keeping their promises and complying with legal rules, moral norms, and professional and ethical standards.<sup>3</sup> It is essentially an

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<sup>1</sup> Danah Boyd and Kate Crawford, "Critical Questions for Big Data," *Information, Communication & Society* 15, no. 5 (2012): 662–79.

<sup>2</sup> "Big Data: Big Power Shifts?," *Alexander von Humboldt Institut Für Internet Und Gesellschaft*, accessed January 18, 2017, <http://www.hiig.de/big-data-big-power-shifts/>.

<sup>3</sup> See Planning Outline for the Construction of the Social Credit System (2014–2020) [社会信用体系建设规划纲要（2014—2020年）] (adopted by St. Council and effective on June 14, 2014) (SCS Outline hereafter). For the public concerns related to the social credit system, see Charles Clover, "China: When Big Data Meets Big Brother," *Financial Times*, 20 January 2016 at

all-encompassing, penetrative system of personal data processing, manifested by the comprehensive collection and expansive use of personal data with the explicit intention on the Chinese government's part of harnessing the ambition and power of big data technology.<sup>4</sup> The SCS rates both business entities and individuals. According to its blueprint, the records that are collected can be extensively used by the authorities and business entities alike for a variety of purposes broadly related to 'encouraging trustworthiness and punishing untrustworthiness'.<sup>5</sup>

Whilst the use of big data analytics in the context of credit scoring and the rating of individuals is not unique to China, in other jurisdictions it is usually confined to the financial arena and regulated by law.<sup>6</sup> What differentiates China is the scale of the data collected, the scope of its use and, particularly important for the purposes of this article, the apparent lack of a comprehensive legal system to protect personal data. Despite the introduction of the Cyber Security Law in 2016 in relation to online data,<sup>7</sup> the extension of civil law protection to consumer data in 2013, and the criminalisation of the unlawful gathering, receipt and sale of personal data in 2009, personal data as a general subject has yet to be clearly defined and effectively protected under Chinese

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<https://next.ft.com/content/b5b13a5e-b847-11e5-b151-8e15c9a029fb>.

<sup>4</sup> One year following the issuance of SCS Outline, the State Council adopted an outline for big data development in which the Social Credit System is a stressed field for the application of big data technology. See Action Outline for Big Data Development [促进大数据发展行动纲要] (adopted by St. Council and effective on Aug. 31, 2015) (Big Data Outline hereafter).

<sup>5</sup> Guidelines of the State Council on Establishing and Improving the System of Joint Rewarding for Trustworthiness and Joint Punishment for Untrustworthiness and Accelerating the Construction of Trustworthiness in the Society [国务院关于建立完善守信联合激励和失信联合惩戒制度加快推进社会诚信建设的指导意见] (issued by the St. Council on May 30, 2016). "Notice of the National Development and Reform Commission, the Supreme People's Court, the People's Bank of China, and Other Departments on Issuing the Memorandum of Understanding on Taking Joint Disciplinary Actions against Untrustworthy Persons Subject to Enforcement," January 20, 2016.

<sup>6</sup> See for example the case of the US and the EU: US Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, (2016); US White House, "Big Data: A Report on Algorithmic Systems, Opportunity and Civil Rights," 2016. Article 4 of the EU General Data Protection Regulation (2018) regulates the use of automated processing of personal data for profiling.

<sup>7</sup> Cyber Security Law [网络安全法] (adopted by Nat'l People's Cong., Nov. 7, 2016, effective June 1, 2017).

law.<sup>8</sup> The rights that data subjects are entitled to under a personal data protection regime are rarely mentioned in China and are, at best, provided for under scattered sector-specific laws.<sup>9</sup>

Given the inadequate protection afforded personal data in China, the country is an ideal social laboratory for big data experimentation, data intelligence and mass surveillance. Individuals risk being reduced to transparent selves before the state in this uneven battle.<sup>10</sup> They are uncertain about what contributes to their social credit scores, how those scores are combined with the state system, and how their data is interpreted and used. In short, the big data-driven SCS is confronting Chinese citizens with major challenges to their privacy and personal data.

Although the State Council's Planning Outline for the Construction of the Social Credit System (SCS Outline hereafter) sketches out an ambitious blueprint, it is the pilot legislation implemented at the local level since 2014 that has institutionalised the collection and use of social credit-related data. To analyse China's emerging SCS under existing international legal principles concerning personal data protection,<sup>11</sup> this article identifies and compares typical examples of relevant legislation at the local level and discusses their implications for personal data protection. It argues that

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<sup>8</sup> Article 253, Criminal Law [刑法] (adopted by Nat'l People's Cong. on July 1, 1979, amended March 14, 1997, effective July 1, 1997), amended by Amendment to the Criminal Law (VII) [刑法修正案(七)] (adopted by Standing Comm. Nat'l People's Cong. and effective on February 28, 2009). Art. 29, Consumer Rights and Interests Protection Law [消费者权益保护法] (promulgated on Oct. 31, 1993, amended Oct. 15, 2013, effective March 15, 2014). Neither of the laws define personal data.

<sup>9</sup> The personal data principles in the OECD guideline. "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data - OECD," accessed May 26, 2016, <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm#theproblems>.

<sup>10</sup> David Brin, *The Transparent Society: Will Technology Force Us To Choose Between Privacy And Freedom?* (Basic Books, 1999). Brin mentions in his book that technology will bring towards a transparent society. Here we argue that only the powerless individuals have become transparent but the state and commercial conglomerates have remained opaque.

<sup>11</sup> OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm>.

existing legislation and proposed regulations require substantial revisions to mitigate the impacts of the SCS on data privacy and other interests critical to individual citizens.

The article begins by mapping out the background to the construction of China's big data social laboratory and the SCS. Section 1 examines the system's social management aim and comprehensive sanction system, as well as its nature as a collaborative project between the authorities and the business sector. Section 2 then summarises the legislative history and evolving concept of social credit and analyses the nature of individuals' rights to personal data protection under China's uncoordinated legal framework. The third section of the article reviews local social credit legislation with reference to the three cardinal principles of personal data protection most closely related to data subjects' control over the processing of their data: (1) the data collection principle,<sup>12</sup> (2) the data usage principle,<sup>13</sup> and (3) data subjects' right to access and correct their own data.<sup>14</sup> The final section concludes that although local legislation provides nominal rights of access to and a few restrictions on the collection and use of data, it has largely failed to secure meaningful control over personal data for individuals. These legislative defects relate to the very purpose of the SCS and to extra-legal restrictions inherited from the pre-reform party-state regime. As the term 'personal information' is used in Chinese legislative enactments and policy documents, 'data' and 'information' are used interchangeably throughout the article.

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<sup>12</sup> OECD Guideline, Collection Limitation Principle stipulates that "the collection of personal data should be by lawful and fair means and, where appropriate, with the knowledge or consent of the data subjects."

<sup>13</sup> OECD Guideline, Use Limitation Principle stipulates that "personal data should not be disclosed, made available or otherwise used for purposes other than those specified [at the time of collection] except with the consent of the data subject; or by the authority of law."

<sup>14</sup> This is governed under OECD Guideline, Individual Participation Principle.

## THE UNFOLDING SOCIAL CREDIT SYSTEM

The stated vision of the SCS rolled out in 2014 is to foster trustworthiness in society, enhance market efficiency, strengthen social governance and build a harmonious society within the socialist state.<sup>15</sup> Whilst that may sound like CCP rhetoric, the distinctive, and most controversial, feature of the SCS is its rating of the trustworthiness of each and every business entity and citizen. According to the SCS Outline, the authorities can use financial, law enforcement, and other data to evaluate all enterprises and citizens and hold them accountable for any misbehaviour.<sup>16</sup> The goal is to build a comprehensive, nationwide platform aggregating all related data by 2020. Accordingly, every citizen's/business entity's scores in the political-administrative, commercial, social and judicial arenas will be compiled.<sup>17</sup>

The idea of 'social credit' was originally introduced in the early 2000s to steer economic reforms that increase the financial creditworthiness (信用) of businesses and individuals.<sup>18</sup> It gradually expanded to encompass their integrity or trustworthiness (诚信) with respect to fulfilling contractual and legal commitments.<sup>19</sup> Since 2011, CCP directives and central government policies have used 'social credit' as a comprehensive concept that is closely related to both market regulation and social

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<sup>15</sup> SCS Outline, supra note 3, Introduction.

<sup>16</sup> Ibid, Parts I & II; see also Michelle Florcruz, "China To Use Big Data To Rate Citizens In New 'Social Credit System,'" *International Business Times*, April 28, 2015, <http://www.ibtimes.com/china-use-big-data-rate-citizens-new-social-credit-system-1898711>.

<sup>17</sup> SCS Outline, supra note 3, Introduction, para. 3.

<sup>18</sup> For the evolution of the understanding of social credit in national policies, see Xiaoyuan Liu [刘肖原] et al, *On Constructing the Social Credit System in China [我国社会信用体系建设研究]* (Intellectual Property Press [知识产权出版社], 2016) 85-91. For an account of the historical development of social credit system in national policies from 2003 to 2011, see Yue Liu et al., "An Overview of Big Data Industry in China," *China Communications*, December 2014, 2.

<sup>19</sup> See Yancun Lei [类延村], "Beyond the Rule of Law: Rule-based Regulation under the Social Trustworthiness System" [超越法治: 社会诚信体系的规则治理], *Journal of Central South University (Social Science Edition) [中南大学学报 (社会科学版)]*, No.4, 2014, 65-72. Lei and other scholars object confounding the "social credit system (understood by them as essentially a financial credit system) with the "social trustworthiness system" (社会诚信体系). Nevertheless, "social credit system" is now predominantly used in both official and academic discourses to denote the comprehensive networked system of behaviour rating and responsibility placing.

governance.<sup>20</sup> In addition, governments at the local level have harboured the idea of building a multidimensional social credit system to restore trust in society.<sup>21</sup> In 2010, Suining County in Jiangsu Province (north of Shanghai) launched a pilot programme that awarded points for good behaviour and deducted points for bad behaviour such as traffic violations and illegally petitioning the higher authorities for help.<sup>22</sup> Rewards included the fast-tracking of promotions at work or of public housing applications. Although the programme was heavily criticised,<sup>23</sup> it provided an early glimpse of a social scoring system. Another attempt at a social credit system was made by the Shanghai municipal government, which published a catalogue of more than 1200 items that would be awarded points for entry into a credit system.<sup>24</sup> About 1000 of the items related to business entities, with the remainder concerning individual citizens. In 2016, the Shanghai government suggested that filial piety be entered into the scoring system, assessed, for example, by the frequency with which an individual visited his or her parents and by whether an individual's parents had enough food.<sup>25</sup> Regardless of the controversy surrounding such suggestions, more than 35 local governments across the country had joined the SCS by 2016, gathering digital records on the social and financial behaviour of their citizens.<sup>26</sup> Two outstanding questions remain: Where does all of this data come from, and what happens to those with a low social credit score?

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<sup>20</sup> Liu, note supra 18, 88.

<sup>21</sup> Yue Liu et al, note supra 18, 4.

<sup>22</sup> "Creating a Digital Totalitarian State," *The Economist*, December 17, 2016, 20.

<sup>23</sup> According to *the Economist*, it was criticized by *China Youth Daily* and *Beijing Times*.

<sup>24</sup> "R&D on Credit Scoring Facilitates Accurate Governance in Shanghai" [上海研发信用分助精准施政], *Wenhui News* [文汇报], 4 August 2016, p 3. See also Rogier Creemers et al., "What Could China's 'Social Credit System' Mean for Its Citizens?," *Foreign Policy*, August 15, 2016, <http://foreignpolicy.com/2016/08/15/what-could-chinas-social-credit-system-mean-for-its-citizens/>.

<sup>25</sup> Josh Chin, "China's New Tool for Social Control: A Credit Rating for Everything," *Wall Street Journal*, November 28, 2016, sec. World, <http://www.wsj.com/articles/chinas-new-tool-for-social-control-a-credit-rating-for-everything-1480351590>.

<sup>26</sup> *Ibid.*

## **Big Data: Where Does all the Data Come from?**

Although government officials can easily retrieve such information as court records and health, loan and tax data from state departments, that information is insufficient to generate a comprehensive profile of individuals. To do so, the government has to capture their nonfinancial activities. Eyeing the capture of more extensive Internet data that can reveal a person's social media use, online shopping activity and everyday habits, the central authorities are keen to utilise big data technology. Big data sources include administrative, transactional, sensor, tracking, behavioural and opinion data.<sup>27</sup> In 2016, as part of the 13th five-year plan (2016-2020), the CCP announced that the SCS would go hand in hand with a series of social and economic initiatives utilising big data technology, including a national big data strategy focusing on the opening up and sharing of data resources.<sup>28</sup> In other words, the SCS is intertwined with both government and society-generated big data applications, both online and offline. As noted, China provides an ideal big data and social laboratory. It has 1.3 billion citizens, and had 731 million Internet users by the end of June 2016, for a penetration rate of 53.2%.<sup>29</sup> Equally impressive is China's more than 695 million mobile phone users, nearly a quarter of whom use their mobile phones only to go online.<sup>30</sup> Furthermore, the authorities are armed with a real name

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<sup>27</sup> Administrative data include electronic medical, insurance, bank and school records; transactional data include credit card and online transactions; sensor data include satellite imaging, climate sensors and air pollution measurement devices; tracking devices include GPS and tracking data from mobile phones; behavioural data include online searches; and opinion data include comments on social media. Jackie Hoi Wai Cheng, "Big Data for Development in China" (UNDP China Working Paper, November 2014), 3,

[http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP%20Working%20Paper\\_Big%20Data%20for%20Development%20in%20China\\_Nov%202014.pdf](http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP%20Working%20Paper_Big%20Data%20for%20Development%20in%20China_Nov%202014.pdf).

<sup>28</sup> Outline of the 13th Five-Year Plan for the National Economic and Social Development of the PRC [中华人民共和国国民经济和社会发展第十三个五年规划纲要] (approved by Nat'l People's Cong., March 16, 2016).

<sup>29</sup> "No. 39 Statistical Report on China Internet Network Development" [第 39 次中国互联网络发展状况统计] China Internet Network Information Center, January 2017, 33.

<sup>30</sup> "No. 38 Statistical Report on China Internet Network Development" 第 38 次中国互联网络发展状况统计 [] China Internet Network Information Center, August 2016, 12.



registration system that records the users of telecommunications services in China,<sup>31</sup> and such data can be easily and accurately matched with users' identities.

## Partnerships

The authorities are partnering with various Internet titans and private entities to unlock the power of big data. As early as 2014, China boasted more than 50% of the world's big data enterprises<sup>32</sup> specialising in the collection, aggregation, analysis and mining of data, the building of cross-platform infrastructure, and the design of various big data applications.<sup>33</sup> In 2013, China's National Bureau of Statistics signed a series of agreements with 11 major Chinese companies for long-term collaboration on the use of big data,<sup>34</sup> including Baidu, Alibaba and China Unicom.<sup>35</sup> The country's three Internet giants have all tapped into the big data market. Baidu, the Chinese equivalent of Google's search engine, for example, operates its own Big Data Lab in Beijing,<sup>36</sup> which has developed predictive programmes for disease monitoring.<sup>37</sup> Alibaba, China's largest e-commerce company, makes use of a wealth of financial information gleaned from its Taobao and Alipay programmes to determine which businesses are worthy of loans.<sup>38</sup> Tencent, the tech mobile giant that runs WeChat, is using social data to identify the trendsetters within social groups to target them in marketing so as to influence the spending habits of the other members of those groups.<sup>39</sup> What is

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<sup>31</sup> National People's Congress Standing Committee Decision Concerning Strengthening Network Information Protection [全国人民代表大会常务委员会关于加强网络信息保护的決定] (adopted by Standing Comm. Nat'l People's Cong. on 28 December 2012, effective 28 December 2012).

<sup>32</sup> Liu et al., "An Overview of Big Data Industry in China," 4.

<sup>33</sup> Ibid.

<sup>34</sup> National Bureau of Statistics of China, "Big Data and Official Statistics in China: Working Paper," 2014, <http://www.unescap.org/sites/default/files/1-Big%20Data%20and%20Official%20Statistics%20in%20China.pdf>.

<sup>35</sup> Cheng, "Big Data for Development in China," 9.

<sup>36</sup> Ana Swanson, "The Power of Big Data in China," CKGSB Knowledge, 26 July 2015 at <http://knowledge.ckgsb.edu.cn/2015/07/28/technology/the-power-of-big-data-in-china/>

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

potentially worrying is that these companies share data with the government for the SCS.<sup>40</sup>

China's central bank once considered issuing licences to such companies as Tencent, Alibaba and Ping An Insurance to develop experimental credit ratings for use in assessing applicants for small business loans or consumer credit.<sup>41</sup> In determining whether applicants are creditworthy, these companies rely on such non-traditional indicators as Internet search histories, mobile phone purchases and social media activity. By 2015, Tencent alone had rated the creditworthiness of 50 million Chinese consumers using social networking and computer gaming data.<sup>42</sup>

Beyond the lending and borrowing arena, Alibaba introduced Sesame Credit in 2015 as an internal rating system based on the spending habits of Alipay users.<sup>43</sup> Credit scores range from 350 to 950 points, with users scoring above 600 considered to be creditworthy.<sup>44</sup> What is worrying is that individuals' credit scores are based not only on their own lending and spending habits but also on what the money in question is going towards and also on the lending and spending habits of their friends.<sup>45</sup> Although it is unclear whether the Sesame Credit scoring system accurately predicts credit defaults, the system's impact is clearly being felt in the daily lives of Chinese citizens. For example, individuals' Sesame score affects the level of screening they

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<sup>40</sup> See SCS Outline. For the public concerns raised by this system, see Charles Clover, "China: When Big Data Meets Big Brother," *Financial Times*, January 20, 2016, <https://www.ft.com/content/b5b13a5e-b847-11e5-b151-8e15c9a029fb>.

<sup>41</sup> "The Central Bank Instructs Eight Entities to Prepare for the Service of Credit Investigation Pertaining to Individuals" [央行要求八家机构做好个人征信业务准备工作], (5 January 2015), [http://finance.sina.com.cn/money/bank/bank\\_hydt/20150105/172921227406.shtml](http://finance.sina.com.cn/money/bank/bank_hydt/20150105/172921227406.shtml). Two years later, the central bank nevertheless decided not to issue the licenses in view of the abuse in some applicants' collection and use of personal credit information among other regulatory concerns. See "Credit Investigations Pertaining to Individuals Should be Subject to Regulation Before Sliding into Chaos" [个人征信不可先乱后治], *Caixin Weekly* [财新周刊], 1 May 2017.

<sup>42</sup> Charles Clover, "China P2P Lender Banks on Social Media Usage," *Financial Times*, August 30, 2015, <https://www.ft.com/content/673d9608-4d83-11e5-b558-8a9722977189>.

<sup>43</sup> Florcruz, "China To Use Big Data To Rate Citizens In New 'Social Credit System.'"

<sup>44</sup> *Ibid.*

<sup>45</sup> Clover, "China: When Big Data Meets Big Brother."

are subjected to at airport security,<sup>46</sup> the insurance premium they have to pay,<sup>47</sup> their chances of adopting a pet from an animal shelter<sup>48</sup> and even their placement on online dating services.<sup>49</sup> Although some citizens enjoy the convenience offered by the Sesame Credit scoring system,<sup>50</sup> the other side of the coin is that many can ill afford to remain outside the system regardless of what they think of it. Furthermore, benefits and convenience to some mean sanctions and exclusion for others.

## Sanctions

Despite the extensive reach of the Sesame scoring system, it is voluntary in nature. The national SCS, in contrast, is mandatory, and the possible sanctions against the untrustworthy are wide-ranging.<sup>51</sup> For example, a low social credit rating can affect one's ability to travel, with reports suggesting that judgment defaulters (i.e. those defying a court order) had been blocked from buying an airline ticket on approximately 5 million occasions as of August 2016.<sup>52</sup> This type of sanction is commonly used by the courts against judgment defaulters, with such individuals also stopped from travelling on high-speed trains.<sup>53</sup> There are also reputational sanctions, with information on untrustworthy persons or businesses disclosed on the national Credit China website<sup>54</sup> or similar provincial websites and on major news websites.<sup>55</sup> Furthermore, a poor SCS score can also diminish one's employment prospects, with those deemed untrustworthy being barred from the civil service and employment in

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<sup>46</sup> Since September 2015, Beijing International Airport has offered fast security screening to Sesame Credit customers with credit scores of 750 or above. Luxembourg and Singapore airport are believed to soon follow suit. *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Celia Hatton, "China 'Social Credit': Beijing Sets up Huge System," *BBC News*, October 26, 2015, sec. China, <http://www.bbc.com/news/world-asia-china-34592186>.

<sup>50</sup> *Ibid.*

<sup>51</sup> "No. 141 [2016] of the National Development and Reform Commission."

<sup>52</sup> "Creating a Digital Totalitarian State," 22.

<sup>53</sup> *Ibid.*, para. 19.

<sup>54</sup> *Supra* note 51, para. 15. Credit China website is at <http://www.creditchina.gov.cn>

<sup>55</sup> *Ibid.*, para. 16.

public institutions.<sup>56</sup> Even worse, not only are the untrustworthy themselves punished, but the education of their children is affected, as the latter are disqualified from studying in private schools.<sup>57</sup>

At the time of writing, both the official SCS and private credit scoring systems such as the aforementioned Sesame system are only just beginning to flex their muscles. Many pieces of information on the SCS, which seems to have been hatched by a dystopian imagination, remain missing from the literature. Despite publication of the SCS Outline and its implementing documents, a great deal of obscurity surrounds the issues of the types of data likely to enter the system and the possible sanctions it entails. In addition, the extent of the data sharing between the state and private sector remains unknown,<sup>58</sup> and it is also unclear how data is being used, whether any algorithm is involved in ratings and what can be done about inaccurate data. Now is thus an opportune time to survey the pilot legislation emerging in various regions of the country to make sense of the national framework. The adequacy of such legislation for protecting personal data privacy is an important starting point for an inquiry into ways of addressing the various challenges the SCS poses to the fundamental interests of individuals.

## EVOLVING LEGISLATION ON CREDIT DATA

Corresponding to the changing concept of social credit, legislation regulating social credit data has evolved along with, and sometimes despite, the uncoordinated legal framework governing the processing of various kinds of personal data held by

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<sup>56</sup> Ibid, para. 17.

<sup>57</sup> Ibid, para. 22.

<sup>58</sup> In 2016, Jack Ma, the co-founder and CEO of Alibaba Group Holding LTD encouraged 1.5 million political and legal officials to embrace internet data in their fight against crime and terrorism in a public speech. This raises concerns about whether data held by Internet companies would be shared easily with the authorities. Jie Yang and Alyssa Abkowitz, "Alibaba's Jack Ma Supports Internet Data Use in Fighting Crime," *Wall Street Journal*, October 25, 2016, sec. Tech, <http://www.wsj.com/articles/alibabas-jack-ma-supports-internet-data-use-in-fighting-crime-1477314916>.

various authorities. The distinction between public law and private law bears heavily on China's personal data protection regime. That distinction is of even greater importance under the SCS, which encourages the flow of big data on individuals amongst public authorities and private entities.

Before the introduction of the comprehensive SCS, the central authorities promoted a credit investigation system (征信系统) as a pioneering project to improve the credit environment of the market and encourage sincerity amongst business entities and individuals.<sup>59</sup> Individuals' rights with respect to the collection and processing of their own financial credit information (FCI) were gradually recognised. Those rights were provided primarily under the administrative rules issued by the People's Bank of China in 2005<sup>60</sup> and subsequently under the 2013 Regulation on the Administration of The Credit Investigation Industry (RACII).<sup>61</sup> The regulatory approach within RACII is inspired to some degree by the US Fair Credit Reporting Act.<sup>62</sup> Insofar as the credit investigation institutions and entities providing credit data (e.g. commercial banks) are both private bodies, individuals enjoy civil rights with regard to the protection of personal credit information. Such rights include, among

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<sup>59</sup> Although the State Council put forward the idea of social credit system in 2007, it placed the policy thrust of the time at building a system of financial credit investigation. See *Several Opinions on the Construction of the Social Credit System* [国务院办公厅关于社会信用体系建设的若干意见, issued by the General Office of State Council on March 23, 2007, Part I. Cf. *SCS Outline* of 2014, Part I, Sections (1) and (2).

<sup>60</sup> The most comprehensive rule is the *Interim Measures on the Basic Databases of Personal Credit Information* [个人信用信息基础数据库管理暂行办法] (issued by the People's Central Bank of China on Aug. 18, 2005, effective Oct. 1, 2005).

<sup>61</sup> *Regulation on the Administration of Credit Investigation Industry* [征信业管理条例]. This regulation uses the term "personal credit information" to refer to personal information on loans and transactions and other information that may reflect an individual's credit situation.

<sup>62</sup> See Zhiwei Su [苏志伟] et al., *Development Model and Practice of the Credit Investigation Systems in Major Jurisdictions: Reflections on Building the Credit Investigation System in China* [世界主要国家和地区征信体系发展模式与实践：对中国征信体系建设的反思] (Economic Science Press [经济科学出版社], 2014).

others, consent must be sought of the use of one's credit records and individuals have a right to access and rectify those records.<sup>63</sup>

However, with the central authorities' moves to construct the SCS that we see today, more complicated issues have arisen over the nature and scope of the rights pertaining to personal credit records. As specified in the SCS Outline, government agencies collect — and put to various uses — 'social credit information', and such information extends beyond the credit records used in economic transactions to encompass a great variety of records pertaining to compliance with laws, administrative norms, moral standards and contractual terms. The rights of individuals concerning this broader range of credit data held by government agencies belong to the realm of public law, and their legal basis must be sought from laws other than the aforementioned RACII. The legislative and administrative enactments concerning social credit data resulting from local pilot schemes and the Regulation on Open Government Information (ROGI) have become the most important sources of law on information rights.

Furthermore, a number of regions began experimenting with the construction of social credit systems in the late 2000s, and introduced pioneering local legislation on the collection and use of social credit data, including both local regulations and administrative rules.<sup>64</sup> Such regulations and rules generally use the term 'public credit information' (公共信用信息, PCI) to refer to information indicating an individual's

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<sup>63</sup> Arts 17 & 25, RACII.

<sup>64</sup> Local regulations made by People's Congresses at the provincial or prefectural level and capable of creating actionable rights. Administrative rules are enactments made by provincial and prefectural governments that have general binding effect. See for example Shaanxi Provincial Regulation on Public Credit Information [陕西省公共信用信息条例], (promulgated by Shaanxi Provincial People's Congress on Nov. 1, 2011). Administrative rule is a source of law but is not capable of creating actionable rights. See for example Interim Measures of Hangzhou City on the Collection and Use of Public Credit Information [杭州市公共信用信息归集和使用暂行办法], (issued by the Hangzhou City Government on Oct. 1, 2009).

trustworthiness that is generated or collected by the authorities in the course of exercising their public powers (i.e. government agencies, judicial authorities, organs that exercise administrative power under the authorisation of laws and regulations) or by public service providers. PCI is thus distinct from FCI, which is processed by credit investigation bodies, and is in essence equivalent to ‘social credit information’ referred to in the SCS Outline. This article uses PCI to refer to credit information regulated by local enactments.

After promulgation of the national SCS Outline, local legislation accelerated in the developed coastal cities of China. Most focuses on elaborating the categories of PCI subject to sharing amongst government agencies and the purposes for which such information can be used, as well as the rights of ‘information subjects’ to processed information.<sup>65</sup> The following sections of the article review typical examples of local legislation enacted since 2014.

### COLLECTION OF CREDIT DATA

Local legislation invariably allows the extensive collection and use of PCI, a situation that derives from the holistic approach adopted by the SCS to curtail rampant fraud in economic transactions and evasions of basic social obligations. This holistic approach focuses on introducing incentive schemes for ‘faith keeping’ across

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<sup>65</sup> Typical local regulations include Regulation of Wuxi City on Public Credit Information [无锡市公共信用信息条例] (promulgated by Wuxi City People’s Congress on Dec. 4, 2015) (“Wuxi Regulation” hereafter); Hubei Provincial Social Credit Information [湖北省社会信用信息管理条例] (promulgated by Hubei Provincial People’s Congress on May 30, 2017, effective July 1, 2017) (“Hubei Regulation” hereafter).

Typical local administrative rules include: Shanghai Municipal Provisions on the Collection and Use of Public Credit Information [上海市公共信用信息归集和使用管理办法] (issued by Shanghai Municipal Government on Dec. 30, 2015) (“Shanghai Rules” hereafter); Provisions of Wuhan City on Public Credit Information [武汉市公共信用信息管理办法] (issued by Wuhan City Government on July 20, 2016) (“Wuhan Rules” hereafter); Provisions of Hangzhou City on Public Credit Information [杭州市公共信用信息管理办法] (issued by Hangzhou City Government on Aug. 28, 2016) (“Hangzhou Rules” hereafter).

government departments, industries and societal sectors. The most prominent such scheme is a joint punishment/reward mechanism that amplifies the consequences of particular behaviour beyond the original context into other spheres of the wrongdoer's life, thereby markedly raising the cost of misbehaviour. The system relies not only on a combination of mechanisms implemented by state agencies, market participants, and individuals, but also on the smooth flow of credit records, i.e. on the sharing of knowledge about the behaviour concerned amongst those agencies/participants/individuals. Although the collection and use of credit records serve the general purpose of credit-based decision-making, that purpose is highly malleable and may differ from the purposes for which those records were originally generated by a particular government department or collected from a particular entity of an industry or a sector. As revealed by the analysis below, purpose limitation as an essential component of data protection is largely ineffective under the policy documents and local legislation on social credit.

SCS operation begins with the collection of social credit records by the agencies in charge of social credit ('SC authorities' hereafter). The major form of collection is transferring the records that are generated by various responsible agencies to dedicated information systems at given levels ('PCI platforms' hereafter). The scope and categories of the collected records, a considerable portion of which is personal information,<sup>66</sup> are determined by local governments rather than local legislatures, primarily by SC authorities.<sup>67</sup> Following the RACII approach, local PCI legislation forbids the collection of certain sensitive personal information, including genetic data,

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<sup>66</sup> Another part of information is records concerning enterprises which are regulated by a special system of enterprise.

<sup>67</sup> The reform and development department, one of the most powerful government branches, is usually designated as the SC authority at local levels. See Wuxi Regulation, Wuhan Rules, and Hangzhou Rules. Hubei Regulation requires the provincial government to approve the collection scope.



blood types, fingerprints, and information on diseases and religious beliefs.<sup>68</sup> Unlike the collection of FCI under RACII, however, government agencies do not need to obtain the consent of data subjects to collect PCI, nor do they need to satisfy any purpose limitation rule.<sup>69</sup> In addition, most local legislation does not vest individuals with the right to be notified about the transfer of discrediting records from agencies to PCI platforms.<sup>70</sup>

Under current local legislation, PCI generally consists of two major categories: (1) identity information on individuals, e.g. ID numbers or social security registration, and (2) credit records generated or acquired by government agencies in the exercise of their administrative powers or in the course of providing public services.<sup>71</sup> Credit records encompass both positive assessments received by an individual (e.g. recognition and rewards) and ‘discrediting information’, e.g. information on the violation of or failure to comply with legal, contractual or even ethical requirements. The common types of misbehaviour logged in discrediting information correspond to those prescribed under the SCS Outline, including tax evasion, the non-payment of administrative fees, failure to perform the obligations prescribed in court judgments, being subject to administrative penalties or coercive measures, being held liable for accidents that affect public, food or work safety or environmental protection, being prohibited by the regulatory authorities from entering certain industries, and fraud in business transactions, state-held exams or social security applications. Disruptive

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<sup>68</sup> Cf. Art. 14, RACII.

<sup>69</sup> Article 13 of the RACII stipulate that collection of personal information should obtain the consent of the subject of the information, unless for information which should be disclosed pursuant to or administrative regulations.

<sup>70</sup> The only exception is the most recent Hubei Regulation. See Art. 23. The same article provides nevertheless that laws and other regulations can mandate the transfer without notifying the information subjects. In contrast, Article 15 of the RACII stipulates that provision of bad [financial] credit information about an individual to a credit investigation institution should be conducted only after the individual concerned is informed, except for information that is disclosed pursuant to laws and regulations.

<sup>71</sup> These two categories are common to all local legislation and normative documents on SCI reviewed in this article.

behaviour in the course of using public services is also included. Such behaviour common in China includes ticket evasion on public transport and disturbances in hospitals by patients dissatisfied with medical treatment.

In addition to agency-submitted records, the SC authorities in some regions are allowed to gather records from non-state credit service providers, industry associations or the media.<sup>72</sup> They may also receive discrediting information on individuals from members of the public after confirmation with both the individuals concerned and the agency with jurisdiction over the activity in question. The SC authorities may then record that information in the PCI platforms.<sup>73</sup> Compared with the credit records generated by government agencies following statutory procedures, those generated by other parties may be of questionable reliability. Possibly because of this concern, the most recent PCI legislation, Hubei Provincial Social Credit Information, imposes an obligation to seek consent for the collection of credit records from non-state organisations,<sup>74</sup> although other legislation lacks any such obligation. The earlier experience of Shanghai demonstrated that the mere mention of a consent obligation in legislation fails to ensure that consent is indeed sought before the government extends PCI collection to any records it sees fit.<sup>75</sup>

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<sup>72</sup> Art. 16, Wuxi Regulation; Art. 15, Hubei Regulation.

<sup>73</sup> Art. 30, Hangzhou Rules.

<sup>74</sup> Art. 17, Hubei Regulation.

<sup>75</sup> Under an earlier local pilot scheme which combined FCI and PCI, Shanghai government had once stressed that collection of PCI generated by entities other than public authorities should be based on consent. See Art. 7, Shanghai Interim Provisions on the Investigation of Personal Credit [上海市个人信用征信管理试行办法] (issued by the Shanghai Municipal Government on Dec. 28, 2003, effective Feb. 1, 2004). However, until the interim provisions were substituted for by the Shanghai Rules 2015, the Shanghai government had included into the PCI platform a great variety of non-government information without consent of the data subjects, such as vehicle renting records, overdue notices on books borrowed from municipal libraries, and payment logs for electricity. See “Shanghai Enters the Era of ‘Social Credit Management’” [上海迈入“社会信用管理”时代], *Liberation Daily* [解放日报], 17 August 2008; “Credit Records Being Misunderstood” [被误读的信用记录], *Spiritual Civilization News* [精神文明报], 10 October 2014, p 1.

## USE OF CREDIT DATA

Breaking the geographical and jurisdictional barriers to PCI use is the major rationale for the SCS. The integration of PCI into unified platforms enables its exploitation by various parties, as called for by the SCS Outline. In addition, as a government information resource, massive PCI datasets in China are concurrently governed by the Action Outline for Big Data Development (‘Big Data Outline’ hereafter), which actively promotes the cross-departmental sharing of government data to enhance governance capacity and opens data for social applications to facilitate a data-driven economy.<sup>76</sup> Based on the two national policy frameworks, PCI users can be divided into three groups: government agencies, whose access to PCI is via inter-agency sharing; non-state entities providing credit services, whose access is via authorisation; and businesses and individuals, whose access is primarily via the SC authorities’ proactive publication of PCI.

### **Inter-Agency Sharing**

Under local legislation, government agencies can access the credit records stored in local PCI platforms in the course of discharging their responsibilities.<sup>77</sup> The Interim Measures on the Sharing of Government Information Resources, a policy document implementing the Big Data Outline, explicitly mandates the sharing of credit information within the overall government apparatus.<sup>78</sup> The recent guidelines issued by the General Office of the State Council further emphasise the necessity of unified

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<sup>76</sup> See Big Data Outline (note 4 above).

<sup>77</sup> See for example Art.18, Hangzhou Rules; Art. 21, para. 1, Hubei Regulation.

<sup>78</sup> Art. 10(3), Interim Measures on the Sharing of Government Information Resources [政务信息资源共享管理暂行办法] (issued by St. Council on Sep. 5, 2016). According to the Measures, information resources generated or collected by government agencies in the course of discharging their responsibilities should generally be subject to sharing with other agencies. Exempting information from sharing is only warranted by “laws, administrative regulations or policies made by the Central Committee of the Chinese Communist Party or the State Council.”(Art. 10 (1)). In particular, “information resources concerning the same theme of economic and social development and generated by various agencies together” should be shared inter-departmentally through the sharing platforms at different levels. Credit information is a highlighted example of such resources. (Art.10 (3)).

standards for PCI collection, categorisation, and sharing and of enhancing the interconnection and interoperability of PCI platforms across the country.<sup>79</sup> In addition, a comprehensive credit information sharing system is under construction on the basis of the national data exchange platform, which by December 2016 had aggregated PCI submitted by 37 departments of the State Council and government agencies from 31 provincial-level regions.<sup>80</sup> It is expected that in the near future most government agencies will be allowed to access all PCI generated or acquired by their counterparts across the country.

Furthermore, government agencies are required to request and use PCI under prescribed circumstances, most of which relate to the joint punishment or reward scheme. The scheme mainly covers the exercise of regulatory powers (such as licensing and punishment), government procurement, the granting of financial subsidies and the management of civil servants.<sup>81</sup> The scope of ‘mandatory PCI use’ is determined by local governments or their agencies.<sup>82</sup> Those agencies are thus allowed, and even encouraged, to perform the automatic matching of the personal information contained in various PCI databases for any purpose related to the exercise of their administrative powers.

As in the case of PCI collection, local legislation does not confer individuals with the right to object to the inter-agency sharing of PCI, and neither does it provide

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<sup>79</sup> Part V, Section 1, Guiding Opinions on Strengthening the Construction of the System for Individual Integrity [关于加强个人诚信体系建设的指导意见] (issued by the General Office of St. Council on Dec. 23, 2016) (hereinafter Guidelines on Individual Integrity).

<sup>80</sup> Yuandian Credit [源点信用], “Annual Report on China’s Social Credit System Construction” [2016 中国社会信用体系全景报告], January 2017, p 7, at [http://yuandiancredit.com/h-nd-1312-2\\_347.html](http://yuandiancredit.com/h-nd-1312-2_347.html); “Officials in the National Development and Reform Commission Receives Interview on The Action Outline for Big Data Development” [我委有关负责人就《促进大数据发展行动纲要》答记者问] (The SDPC’s Website, Sep. 25, 2015) [http://www.sdpc.gov.cn/zcfb/jd/201509/t20150925\\_752279.html](http://www.sdpc.gov.cn/zcfb/jd/201509/t20150925_752279.html); The *Big Data Outline* set the target of installing a unified data exchange platform by 2018 to cover all government departments at the central level. See Part III, Section I(1) of the Outline.

<sup>81</sup> See for example Art. 18, Shanghai Rules; Art. 27, Wuxi Regulation; Art. 24, Hubei Regulation.

<sup>82</sup> *Ibid.*

any mechanism for an agency sharing PCI to set limits on the purposes for which other agencies can use that information, despite such limits being permitted in the Interim Measures on the Sharing of Government Information Resources.<sup>83</sup> However, in an attempt to inhibit PCI abuses, some local legislation requires agencies and PCI platform operators to keep logs of the collection, alteration, and deletion of PCI and access to such information,<sup>84</sup> whilst other such legislation instructs agencies to specify the procedures for authorising internal personnel access to PCI.<sup>85</sup>

### **Use by Non-State Parties upon ‘Authorisation’**

Compared with government agencies, non-state parties are subject to greater restrictions on their access to PCI. All current local legislation provides a general rule specifying that private parties should obtain authorisation from the individuals concerned before seeking access to PCI on them that has not been published by the government.<sup>86</sup> Although that rule seemingly increases individuals’ degree of control over their PCI, its enforcement is challenged by the government’s strong inclination to facilitate the access of credit service providers.<sup>87</sup>

Local legislation notably stresses that SC authorities should encourage and support credit service providers to access and use PCI in developing credit products,<sup>88</sup>

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<sup>83</sup> Article 14 of the Interim Measures provide that “the user shall only use the information obtained from the sharing platform for the performance of its functions according to the specified use purpose, [and] shall not directly or indirectly use the information for any other purpose.”

<sup>84</sup> See for example Art. 29, Wuxi Regulation.

<sup>85</sup> See for example Art. 19, Shanghai Rules; Arts. 19 & 33, Hangzhou Rules.

<sup>86</sup> Art.16, Shanghai Rules; Art. 23, Wuxi Regulation; Art. 21, Hangzhou Rules (which further requires written consent of information subjects); Art. 19, Hubei Regulation. The imposition of authorization by the subject of credit information may be inspired by the similar requirements under the financial credit investigation. See Art. 13, RACII.

<sup>87</sup> Credit service providers mainly refer to for-profit intermediary organizations that are engaged in credit investigation, credit rating, credit consulting and other credit-related service. See Zhejiang Provincial Interim Measures on Credit Service Organizations (issued by Zhejiang Provincial Commission for Development and Reform on Aug. 21, 2007).

<sup>88</sup> See Art. 25, Shanghai Rules; Art. 28, Wuxi Regulation; Art. 24, Wuhan Rules; Art. 20, Hangzhou Rules; Art. 25, Hubei Regulation.

echoing the provisions of both the SCS Outline<sup>89</sup> and Big Data Outline.<sup>90</sup> In some regions, SC authorities are instructed to afford credit service providers bulk access to the records held by PCI platforms if certain information security requirements are met.<sup>91</sup> However, concerns may be raised about whether those authorities sometimes discretionarily grant access to providers that have not obtained the consent of all individuals concerned. A case in point is the problematic operation of the aforementioned Sesame Credit scoring system offered by a branch of Internet giant Alibaba, which operates China's largest e-commerce platform Taobao.<sup>92</sup> Sesame Credit offers credit scoring for tens of millions of Taobao users based on diverse sources, including the records held by such government PCI platforms as those of Shanghai and Hangzhou.<sup>93</sup> The company claims that credit scores will be available to Taobao users who subscribe to Sesame Credit services and authorise the company to access their personal credit information.<sup>94</sup> However, personal credit information on every Taobao user is likely to have been collected and processed before any such authorisation has been granted, as Sesame Score is readily available to subscribers as soon as they accept the service agreement.<sup>95</sup> The so-called 'retrospective authorisation' obtained by the company is by no means proper authorisation under the Shanghai Municipal Provisions on the Collection and Use of Public Credit Information and Provisions of Hangzhou City on Public Credit Information . The

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<sup>89</sup> See SCS Outline, Part IV entitled "Accelerating the Construction and Application of Credit Information System".

<sup>90</sup> See Big Data Outline, Part III, Section 1.2 entitled "Steadily Advancing the Openness of Public Data Resources".

<sup>91</sup> Art. 20, para. 3, Shanghai Rules; Art.22, Hangzhou Rules; Art. 23, para. 3, Wuhan Rules.

It is noteworthy that no equivalent stipulation is available under the RACII whose approaches to the collection and processing of FCI are followed by most local SCI legislation. Article 18 of the RACII provides unequivocally that credit information holders should not allow access by the third parties which have not obtained consent from information subjects, unless otherwise prescribed by the laws.

<sup>92</sup> See discussion in Part IB of this article.

<sup>93</sup> See Sesame Service Agreements as of 25 December 2015, <https://xy.alipay.com/auth/agreement.htm>.

<sup>94</sup> Ibid.

<sup>95</sup> See "Sesame Credit Crosses the River by Touching Stones" [芝麻信用“摸石头过河”], *Caixin Weekly*, No.7, 2015 (16 February 2015).

apparent failure to obtain consent from data subjects in this case adversely affects the reliability of the whole system for PCI sharing between the government and private market entities, particularly given the massive coverage of Alibaba users and growing market influence of Sesame Credit.<sup>96</sup>

In addition, the outsourcing of PCI processing may also open the door for further circumvention of the requirement to obtain consent from data subjects. In several regions, including Shanghai and Shenzhen, it was non-state organisations that assumed the role of collecting both FCI and PCI in the 2000s.<sup>97</sup> Later, the non-financial credit system has been separated from the financial credit investigation system and integrated into government-owned PCI platforms. Platform operators that find themselves short of technological capacity tend to entrust market-based organisations with PCI processing and the provision of credit services to PCI users. For instance, the Shanghai SC authority has commissioned a leading credit rating company to develop comprehensive credit scores for 24 million residents based on their PCI. The scoring results are allegedly the largest big data application in the field of social credit, and will likely constitute an important component of the Shanghai government's joint punishment scheme.<sup>98</sup> Given that the company is concurrently offering credit ratings and consulting services to local consumers,<sup>99</sup> there is a risk that the entrusted PCI may be exploited for the company's self-enrichment without the

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<sup>96</sup> Sesame Credit is among the first eight credit service providers which are being considered by the Chinese People's Bank for granting license for financial credit investigation, which means that it can be an important role player in combining PCI and FCI services nationwide. See "The Central Bank Instructs Eight Entities to Prepare for the Service of Credit Investigation Pertaining to Individuals", n 41 above.

<sup>97</sup> See Xiaodong Cao [曹晓冬], "Credit System Construction in Shanghai: From the Perspective of Public Administration" [公共管理视角下的上海信用制度建设] (unpublished Master's Dissertation of Shanghai Jiao Tong University, 2010) p. 26, 32-35.

<sup>98</sup> "R&D on Credit Scoring Facilitates Accurate Governance in Shanghai", n 24 above.

<sup>99</sup> See the company's "Self-introduction", <http://www.foison-credit.com/foison-credit/columns?columnId=6&pageSize=15>, accessed 15 April 2017. The company also provide

knowledge of the data subjects. Unfortunately, no current legislation mentions the regulation of PCI outsourcing.

### **Proactive Disclosure**

Individuals' control over PCI is further weakened by the government's proactive disclosure of selected records. Whilst the inter-agency sharing of PCI is aimed primarily at enabling government-imposed joint punishments,<sup>100</sup> the public disclosure of PCI serves as a collaborative disciplinary tool exercised by business entities and individuals. The SCS Outline and its implementing measures highlight the publication of records on 'serious discrediting behaviours' (often labelled as blacklist items) to effectuate 'social discipline', which places the record subjects under public criticism and moral pressure, as well as 'market discipline', which includes restrictive measures imposed by industry associations and discriminative treatment by business operators.<sup>101</sup> The Guidelines on Joint Rewarding and Joint Punishment explicitly endorse the reuse of disclosed PCI by third parties, encouraging the inclusion of such records in financial credit reports and their analysis in commercial reputation rankings.<sup>102</sup>

Local PCI legislation regulates 'open PCI' differently. Some such legislation stipulates that PCI concerning individuals is generally not publicly available,<sup>103</sup> whereas some permits the SC authorities to define the scope of PCI subject to proactive disclosure.<sup>104</sup> The Hubei Regulation even provides that all PCI should be published unless laws and regulations prescribe otherwise.<sup>105</sup> These divergent

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<sup>100</sup> Joint punishment of this kind is usually called "administrative/regulatory discipline" in policy documents on SCS.

<sup>101</sup> See Part V, Section 1, SCS Outline; Part VI, Sections 2 & 3, Guidelines on Individual Integrity.

<sup>102</sup> Points 11 through 13, 26, Guidelines on Joint Rewarding and Joint Punishment.

<sup>103</sup> Art. 24, Shaanxi Regulation; Art. 21, Wuxi Regulation; Art. 19, Wuhan Rules.

<sup>104</sup> Art. 16, Shanghai Rules; Art. 17, Hangzhou Rules.

<sup>105</sup> Art. 19, Hubei Regulation.



approaches reflect the uncertain attitudes amongst agencies towards government transparency.

Open PCI is governed primarily by the 2007 ROGI, which requires government agencies to proactively disclose information that ‘involves the vital interests of citizens or organizations’ or matters ‘that need to be extensively known or participated in by the general public’.<sup>106</sup> ROGI generally exempts information concerning privacy from disclosure, but allows agencies to release such information if they consider that non-disclosure would exert a major negative impact on the public interest.<sup>107</sup> Great discretion is thus vested in government agencies. Research shows that local agencies tend to deny activists’ access to administrative penalty decisions despite the fact that the disclosure of anonymised decisions would enable the public to monitor the exercise of administrative power.<sup>108</sup> In the SCS context, however, the central authorities have undergone a remarkable attitudinal shift, actively mandating the publication of administrative penalty decisions that name the individuals being penalised.<sup>109</sup> That shift is associated with the SCS policy to expose what is considered to be ‘serious discrediting behaviour’.

A similar extensive list of serious discrediting behaviour is provided in all local legislation. Yet the disclosure of such behaviours does not serve the same purpose. Some of the enumerated behaviours indeed involve the vital interests of citizens, as referred to in ROGI, such as ‘activities severely endangering the health and safety of the public’ in the areas of food and drug safety, environmental protection,

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<sup>106</sup> Art. 9, Regulation on Open Government Information [政府信息公开条例] (promulgated by the State Council on April 5, 2007, effective May 1, 2008).

<sup>107</sup> Art. 14, para 4, ROGI.

<sup>108</sup> Yongxi Chen, “Privacy and Freedom of Information in China: Review through the Lens of Government Accountability”, Vol. 1 *European Data Protection Law Review* (2015) 265, 274-275.

<sup>109</sup> These instructions sought to implement the State Council’s calls. See 2015 Key Initiatives of Open Government Information [2015 年政府信息公开工作要点] (issued by the General Office of the State Council on April 3, 2015).

construction quality, production safety and fire prevention.<sup>110</sup> Some behaviours may not directly affect livelihoods, but their disclosure is considered essential for some compelling public interest. For instance, the public naming of judgement defaulters is acknowledged to be necessary for inhibiting the prevalent circumvention of obligations imposed by effective judicial rulings.<sup>111</sup> There is another sweeping category of behaviour whose disclosure serves obscure interests, that is, ‘deliberative refusals to perform legal obligations and hence seriously jeopardizing the credibility of judicial authorities and administrative authorities’.<sup>112</sup> All evasions of administrative penalty decisions fall within this category. Their indiscriminate disclosure raises concerns about disproportionality and fairness. Substantial differences exist in the social impacts of such behaviour, as well as in individuals’ faults in engaging in it. Subjecting individuals punished on various grounds to the same level of exposure does not correspond to the gravity of their contraventions, nor to the normal understanding of ‘serious’ discrediting behaviour. The correctness or appropriateness of administrative penalties also varies. Administrative decisions may be reached in accordance with government-issued rules that are not necessarily consistent with the law. Such decisions are inferior to judicial rulings in terms of the openness and fairness of the decision-making process, impartiality of the decision-maker and rigorousness of the evidential rules. They are also not necessarily final or legally

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<sup>110</sup> Point 9, Guidelines on Joint Rewarding and Joint Punishment.

<sup>111</sup> Several Provisions on Publishing the Name List of Untrustworthy Personals Subject to Judicial Enforcement [最高人民法院关于公布失信被执行人名单信息的若干规定] (promulgated by the Supreme People’s Ct. on July 16, 2013, effective Oct. 1, 2013). The Provisions were amended on 16 January 2017. The name list can be found at the online portal, Open Information of Judgement Enforcement in China [中国执行信息公开网]: <http://shixin.court.gov.cn/>. On its necessity, see Jianfu Chen, *Chinese Law Context and Transformation* (Brill, 2008) 665-666; Shouyong Hu [胡守勇], “The Social Effects of the System of Publishing the List of Untrustworthy Judgment Defaulters” [公布失信被执行人名单制度的社会效应], *Chongqing Social Sciences* [重庆社会科学] No. 9 (2013) p 30-36.

<sup>112</sup> Point 9, Guidelines on Joint Rewarding and Joint Punishment; Part VI, Sections 2, Guidelines on Individual Integrity. The records of this category of behavior are also subject to publication under the Hubei Regulation (Art. 29) and the draft Shanghai Regulation (Art. 26).

binding because their legality can be reviewed by the courts. Accordingly, public trust in administrative decisions is weaker than public trust in judgements.

It is doubtful whether the indiscriminate publication of ‘serious discrediting records’, those on administrative penalty decisions in particular, creates positive incentives for ‘keeping faith’ or being ‘sincere citizens’. It does, however, raise privacy concerns. For example, it enables the profiling of an individual based exclusively on sanctions imposed upon him or her by the government, information on which used to be scattered and not readily accessible. Legislative attempts to make such publication mandatory have indeed been criticised by some mainland lawyers.<sup>113</sup> According to these critics, citizens’ privacy rights are inevitably compromised by the publication of certain contraventions occurring in the private domain, including, for example, the concealment of disease in contraction of marriage or of infidelity to a spouse.<sup>114</sup> Such criticism is broadly consistent with the rationale for introducing privacy exceptions to public trials and the publication of judgments. All three Chinese laws governing litigation proceedings exempt cases concerning privacy from open trial.<sup>115</sup> The Supreme People’s Court (SPC) also forbids the online publication of ‘information concerning privacy’ in rulings on familial disputes and personality rights and that of the full names of parties to marriage and succession cases.<sup>116</sup> In this regard, secrecy in at least some part of family life is protected by the law. However, there is

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<sup>113</sup> See Arts. 20 & 26 of the Draft Shanghai SCS Regulation.

<sup>114</sup> See “Municipal Congress Holds ‘Mini Hearing’ in the Community for the First Time; When Social Credit Meets Privacy” [市人大“微听证会”首次走进社区，当社会信用遇上个人隐私], *Wenhui News*, 30 August 2016; “Shanghai Social Credit Regulation Draft Seeking Public Comments; 12 Representatives from the Community Airing Their Views” [上海市社会信用条例征求意见，12位代表各抒己见], *Eastern Radio Online* [东广新闻网], 30 August 2016, <http://sh.sina.com.cn/news/m/2016-08-30/detail-ifxvixeq0688442.shtml>.

<sup>115</sup> See Art. 183, Criminal Procedure Law (amended 2012); Art. 134, Civil Procedure Law (amended 2012); Art. 54, Administrative Litigation Law (amended 2015).

<sup>116</sup> Arts. 8 & 10, Provisions on Publishing Judgments onto the Internet by the People’s Courts [最高人民法院关于人民法院在互联网公布裁判文书的规定] (issued by the Supreme People’s Ct. on July 25, 2016, effective Oct. 1, 2016).

no Chinese legislation defining the content of the right to privacy. According to dominant civil law doctrine, as an element of the right to privacy, ‘private information protected from disclosure’ refers to information that is irrelevant to the public interest or to the interests of other persons.<sup>117</sup> The implication is that information on a violation of the law may not amount to ‘private information’ if that violation implicates the public interest.<sup>118</sup> Furthermore, civil law doctrine does not cover the right to privacy against the intrusion of public authorities. In this regard, the scope of privacy is far from clear in the public law context, and is hardly an operable defence for citizens looking to restrict the proactive release of PCI by the government.

The only restriction on such disclosure imposed by local legislation is the setting of an expiry date for access to all discrediting records: five years after commission of the recorded behaviour<sup>119</sup> or five years after generation of the record<sup>120</sup> unless otherwise prescribed by the state. Expired records are to be neither disclosed nor used. Although this ‘sunset clause’ to the accessibility of PCI arguably reduces the perpetuation of negative track records, it affords data subjects no role in, let alone any control over, the selection of PCI for disclosure. Furthermore, no local legislation has ever sought to regulate the reuse of disclosed PCI by third parties, a perilous omission given the strong possibility of an individual’s discreditable past being exploited to his

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<sup>117</sup> See Xinbao Zhang, *Legal Protection of the Right of Privacy (Second Edition)* (The Mass Press, 2004) 6-7; Liming Wang, *On Right of Personality* (Chinese Remin University Press, 2005) 561-564.

<sup>118</sup> The implication can be found in Wang, note supra, p 563. For doctrinal development until the enactment of Tort Liability Law, see Shengping Gao, *PRC Tort Liability Law: Issues, Overseas Experience, and Cases* (Peking University Press, 2010) 648-649. For the judicial understanding of privacy in the context of FOI, see Chen, supra note 108, p. 269-270.

<sup>119</sup> Art. 27, Shanghai Rules; Art. 20, Wuhan Rules; Art. 24, Hangzhou Rules; Art. 30, Draft Shanghai Regulation. Their inspiration is likely to be the provision on expiry of financial credit record under Article 15 of the RACII.

<sup>120</sup> Art.5, Wuhan Rules.

or her detriment.<sup>121</sup> Prevention of the storage and use of expired records by third parties has received little attention to date.

Overall, local PCI legislation does not allow individuals to exert effective control over the collection and use of their personal credit data. It remains to see whether it enables individuals to ensure the accuracy of such data.

## ACCESS AND CORRECTION RIGHTS

### **Weak Legal Basis for Rights**

A converging trend that has emerged in local legislation is the recognition that individuals have certain interests as data subjects. Accordingly, individuals are entitled to access their own PCI after providing proof of identity to the authorities concerned or to the credit portal operators holding the information.<sup>122</sup> Furthermore, individuals are permitted to dispute PCI that they deem inaccurate. The authorities generating, or credit portal operators holding, the information must then verify its accuracy and rectify or delete any erroneous records.<sup>123</sup> PCI legislation closely resembles RACII and its implementing measures with respect to the procedures and standards for access to and the correction of FCI. Policy makers seem to be extending the regulatory approach from FCI to PCI, which is a commendable move.

Nevertheless, stipulating or implying a channel for access to and the rectification of PCI in administrative rules or policy documents does not confer legally enforceable

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<sup>121</sup> Even the “good records” of individuals may be abused by third parties to seek profits. Alibaba had included its users with high Sesame Credit scores into a new social networking platform as an attempt to increase Alibaba’s influence in the social networking market. The platform was reported to involve indecency and was closed by Alibaba with apology. As mentioned above, Sesame Credit scores are generated based on PCI and other factors. See “Aftermath of the Controversy over Alipay’s ‘Circle’: Sesame Credit Rethinks the Confines of the Use of Credit Investigation” [支付宝“圈子风波”后续：芝麻信用反思征信使用边界], *21<sup>st</sup> Century Business Herald* [21 世纪经济报道], 9 December 2016, [http://news.21so.com/2016/21cbhnews\\_129/321892.html](http://news.21so.com/2016/21cbhnews_129/321892.html).

<sup>122</sup> See, for example, Art.16, Shanghai Rule; Art. 23, Wuxi Regulation; Art. 21, Hangzhou Rule.

<sup>123</sup> Arts. 28 through 30, Shanghai Rule; Arts. 31 & 32, Wuxi Regulation; Arts. 26 through 28, Hangzhou Rule.

rights. Under Chinese public law, judicial remedies are available primarily for violations of rights of the person and property rights (right to privacy not included). Individuals cannot sue the administrative agencies for activities affecting any other rights or interests unless a specific law or regulation so prescribes.<sup>124</sup> Thus, in legal terms, individuals can enforce their rights to access and rectify their PCI only as far as the information concerned is generated or held by a government agency in a jurisdiction in which local regulations recognise such rights. To date, only Shaanxi Province and two cities in Jiangsu Province, namely, Wuxi and Taizhou,<sup>125</sup> have adopted local regulations of this kind. The Shanghai Municipal People's Congress is deliberating on a draft regulation which explicitly provides for the right to both access and rectification.<sup>126</sup> The disparity in the legal enforcement of PCI policies in different regions not only causes unfairness in data protection, but also weakens the accuracy of a data system that purports to overcome jurisdictional limits on the flow of data.

### **Limits Imposed by Personal Archive Regime**

It is noteworthy that the national regulation on freedom of information (FOI) have bearing on information rights related to PCI, which also constitutes government information. ROGI, which entered into effect in 2008, creates a general right to request the disclosure of information held by government agencies, subject to certain exemptions.<sup>127</sup> In the absence of specific legislation on personal information protection, ROGI further confers a specific right on the subjects of government-held personal information. Article 25 of ROGI guarantees individuals access to

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<sup>124</sup> See Art. 12, [Administrative Litigation Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, amended Nov. 1, 2014, effective May 1, 2015).

<sup>125</sup> See Wuxi Regulation (note 122 above), 泰州市公共信用信息条例, (adopted by the Taizhou City People's Congress on July 29, 2016, effective Oct. 1, 2016).

<sup>126</sup> Arts 29 & 31, Shanghai Municipal Social Credit Regulation (Draft) (published for public comments on Dec. 31, 2016). See “上海市社会信用条例（草案）.” Shanghai Government Portal, December 31, 2016. <http://www.shanghai.gov.cn/nw2/nw2314/nw2315/nw4411/u21aw1187561.html>.

<sup>127</sup> Art. 13, ROGI.

‘government information about themselves such as tax and [administrative] fee payments, social security and medical care information’ and allows them to request the correction of such information if it is not recorded accurately.<sup>128</sup> Ambiguity arises, however, concerning how far the scope of ‘information about themselves’ extends beyond the categories enumerated by the article. Nevertheless, social credit records pertaining to social security or the payment of taxes and administrative fees — the typical records specified in most local PCI legislation — arguably fall neatly within the ambit of this ‘subject access right’.

Although ROGI appears to provide extra guarantees affording citizens control over their own PCI, its utility is reduced by the party-state legacy of ‘personal archives’ (个人档案), a point that is best illustrated by a judicial review case concerning Article 25: *Xie v. Education Bureau of Rugao City*.<sup>129</sup> The plaintiff in the case was a primary school teacher who had been dismissed by the education authority in 1983 based on allegations that he had violated family planning policies. Resorting to ROGI, he requested access to his personal archives, which were held by the defendant, to determine the decision-making process leading to his dismissal. The defendant refused, citing a provision in the Cadre Archives Regulation of 1991 stipulating that ‘no one shall be allowed to consult or borrow the personal archives about himself or his intermediate relatives’.<sup>130</sup> In upholding the nondisclosure decision, the court held that the requested information constituted ‘personal archives’,

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<sup>128</sup> Art. 25, ROGI.

<sup>129</sup> *Xi v. Education Bureau of Rugao City* [谢某诉如皋市教育局] (People’s Court of Rugao City, Oct. 2011). See “Private Teacher Dismissed Decades Ago Sued for Denial of Access to His Personal Archives; His Claim Was Rejected” [民办教师早年被除名 要求查阅档案被驳回] (Jiangsu Online [中国江苏网], Oct. 11, 2011), <http://www.chinanews.com/edu/2011/10-11/3381403.shtml>.

<sup>130</sup> Art. 31(5), Cadre Archives Regulation [干部档案工作条例] (adopted by the Organization Department of CCP Central Committee & State Archives Administration on April 2, 1991, effective April 2, 1991).

and thus fell outside the scope of government information prescribed by ROGI.<sup>131</sup> In fact, however, ROGI defines government information as information made or obtained by the administrative agencies in the course of exercising their powers and recorded and stored in a given form,<sup>132</sup> which obviously covers all government-held personal archives. ROGI is at a higher level in the hierarchy of sources of law than the Cadre Archives Regulation (which, despite its title, is actually an administrative rule issued by a department of the State Council together with a central organ of the ruling party), and was enacted more recently. Hence, in the event of any inconsistency between the two, ROGI should prevail according to the constitutional principles for resolving conflicts amongst legal norms.<sup>133</sup> The ruling in *Xie* obviously misapplied the law. Unfortunately, it set the tone, with subsequent cases following suit in blocking access to personal archives with reference to the Cadre Archives Regulation.<sup>134</sup>

These problematic rulings demonstrate the predicament in which the legal protection of personal data finds itself in a political system that prioritises the control of personal data considered critical to the party-state. The personal archive regime was established in 1956 by the CCP, and primarily covers students and the employees of state-run entities.<sup>135</sup> A personal archive is a dossier on an individual that is compiled throughout his or her life by the institutions directly supervising him or her

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<sup>131</sup> See note 129 above.

<sup>132</sup> Art. 2, ROGI.

<sup>133</sup> See Arts 88 & 92, Law on Legislation [立法法] (adopted by Nat'l People's Cong., March 15, 2000, amended and effective March 15, 2015).

<sup>134</sup> See for example three recent cases adjudicated respectively in Jiangsu Province, Shandong Province and Inner Mongolia Autonomous Region: *Chen Xiaohui v. Market Supervision Bureau of Danyang City* [陈晓辉诉丹阳市市场监督管理局] (Intermediate Court of Zhenjiang City, June 8, 2016); *Li Xin v. Licheng District Education Bureau of Jinan City* [李心公诉济南市历城区教育局] (Shandong Provincial High Court, June 12, 2016); *Song X v. Human Resource and Social Security Bureau of Hangjinhou Banner* [宋某等诉杭锦后旗人力资源和社会保障局], (Intermediate Court of Bayannao'er City, Sep. 30, 2016).

<sup>135</sup> Education Department of the Ministry of Labor and Personnel [劳动人事部人事教育局] & Anhui Provincial Personnel Bureau [安徽省人事局], *Management of Personnel Archives* [人事档案管理] (Beijing: Labor & Personnel Press, 1987) 19-22.



(e.g. his or her schools and/or state-owned employers). It comprises materials indicating the most important merits of an individual, such as his or her diplomas and degrees, academic transcripts, professional qualifications, work appraisals, political affiliations and major political activities, any awards and disciplinary sanctions received, and his or her history of employment, promotions, transfers, dismissals and retirement.<sup>136</sup> As declared in the SPC case comment on *Xie*, personal archives are not merely records of an individual's life trajectory, but are also closely correlated with his or her remuneration, social security benefits and political party membership.<sup>137</sup> In view of the importance of those archives, the SPC comment argues that the personal archive regime represents a significant feature of China's personnel management system, and involves secret matters of the party and state.<sup>138</sup> This argument actually restates the orthodox CCP principle that personal archives, particularly those concerning cadres (e.g. officials of state authorities and party organs), serve as the crucial basis upon which the party selects cadres and appraises the merits of individuals.<sup>139</sup> Such personal information is thus necessarily of a political nature and deserving of secrecy.<sup>140</sup> For the same reason, the imperative to withhold personal archives from their subjects extends to the archives on non-cadres working in state or CCP organs and state-run institutions,<sup>141</sup> as well as individuals working in the private

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<sup>136</sup> Art. 10, Cadre Archives Regulation.

<sup>137</sup> The judicial comment is published on the official portal for judicial news, and authored by a staff member of the same court that rendered the judgement. See "The Party Concerned Shall Not Have Access to His or Her Own Personnel Archives" [当事人不可要求查阅本人人事档案] (China Court Online [中国法院网], June 13, 2014)

<http://www.chinacourt.org/article/detail/2014/06/id/1315016.shtml>.

<sup>138</sup> *Ibid.* In explaining justifications for the ruling, the author adds that personal archives constitute "classified information of the Party and the State," and are hence covered by the exemption of state secrets. However, no law or regulation generally identifies personal archives as classified information or state secrets. The author's argument is untenable.

<sup>139</sup> See the description of the nature of personal archives in a textbook compiled by the central authority: *Management of Personnel Archives* (note 135 above) 23-24.

<sup>140</sup> *Ibid.*, 6-7. See also [当代中国的人事管理] (Beijing: Contemporary China Press, 2009) 222-223.

<sup>141</sup> See Art. 17(4), Provisions on Personal Archives of Enterprise Staff [企业职工档案管理工作规定] (issued by the Ministry of Labor & State Archives Administration on June 9, 1992).

sector.<sup>142</sup> All these rules that were issued jointly by the CCP and the state organs sustain a party-state regime that governs the most important types of personal information and one-sidedly stresses the utility of such information to the ruling party. The unfortunate reality, as confirmed by the courts in a variety of FOI cases, is that the party-state regime overrides national legislation that purports to protect data subjects' access right and safeguard individuals' intermediate interests.

The dominance of the personal archive regime may extend from the FOI context to the SCS. There is similarity between personal archives and social credit records: both include appraisals of individuals' performance of their societal roles, particularly their compliance with state-sanctioned rules. In fact, the SCS Outline calls for the establishment of 'integrity archives' for various focal groups, such as civil servants, members of the judiciary, experts and agents working in the statistics, advertising and environmental impact assessment sectors, and the creation of 'credit archives' for all citizens in relation to certain types of behaviour, such as online activities and violations of traffic codes.<sup>143</sup> The personal information contained in the aforementioned integrity archives may well fall within the ambit of 'personal archives'. In particular, the General Office of the State Council advocates for the compilation of student honesty archives by universities to include records on academic cheating, failure to repay loans and the falsification of materials for job applications.<sup>144</sup> Such records overlap in full with what is collected in the personal archives of university students under the Cadre Archives Regulation. More

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State Archives Administration is concurrently a department of the State Council and a department under the CCP Central Committee. In practice, however, its operation, funding and personnel management is carried out within the CCP system.

<sup>142</sup> See Art. 14(4), Provisional Provisions on Personal Archives of Persons in Mobility [流动人员人事档案管理暂行规定] (issued by the Organization Department of the CCP Central Committee & Ministry of Personnel on Dec. 18, 1996).

<sup>143</sup> See SCS Outline.

<sup>144</sup> See [国务院办公厅关于加强个人诚信体系建设的指导意见] (issued by the General Office of St. Council on Dec. 23, 2016), Part II, Section 4.

importantly, part of the rationale for the SCS, i.e. the need to select individuals who satisfy certain state-approved standards, fits precisely with the political functions of the personal archive regime. Although it is unclear whether the SCS will operate independently from the personal archive regime, we should not ignore the impacts of the party-state's secrecy imperatives on the officials who design and operate the SCS, which is refreshed system of citizen profiling. Even if more localities adopt legislation that recognises the subject access right, the subordination of that legislation to CCP rules may reoccur in practice.

Given the weak legal force of most local PCI legislation and the extra-legal restraints on ROGI, the protection of access and correction rights in relation to PCI is at a rather primitive stage, although the initiatives undertaken by local pilot schemes are broadly consistent with the regulatory trends of big data profiling in some pioneering jurisdictions such the EU and US.

## CONCLUSION

Law-making on public credit information at the local level is the first step taken by the Chinese state to standardize the practices in constructing the ambitious Social Credit System. It deserves close examination for those who are concerned with the privacy impact and other profound implications of the SCS, a big data-empowered system that is potentially capable of tracking and profiling each individual and rating him or her according to state-imposed criteria with legal and social consequences. Distinct from the regimes common to most jurisdictions that regulate private bodies' handling of financial credit data, PCI legislation focuses on government agencies and adopts a highly fluid concept of credit data. In the absence of general legal framework

for personal data protection, it is such legislation that sets the basic albeit interim rules for the “jungle of big credit data”.

However, PCI legislation largely fails to live up to the tenets of personal data protection, as demonstrated by the foregoing analysis in this paper. This regulatory approach gives virtually free rein to secondary use of and big data analytics concerning records on misbehaviours, including those records that many individuals regard as sensitive and should be kept private. Automatic matching of credit data databases and profiling about individuals are hence permissible, entailing threats to a series of privacy-related interests including rehabilitation, personal autonomy, and non-discrimination.

From a legal perspective, the existing Chinese legislation at both national and local levels does not effectively prevent the party-state from expanding and intensifying its control over each citizen by generating, aggregating and exploiting personal data on their social behaviours. While law-making concerning the SCS may evolve, the party-state’s governance strategy is one of the most important factors to consider when we try to understand the effectiveness of legislation in mitigating the privacy impacts of the SCS. A natural response to the flaws of current PCI legislation is to call for substantial revision of existing provisions and making of new and, ideally, national law which incorporate the cardinal principles of data protection. For instance, the public may demand the law to explicitly grant data subjects’ with a right to access and correct their credit data, and a right to object to access and use of credit data by third parties. However, if the SCS develops truly according to the blueprint prescribed by the SCS Outline and Big Data Outline, there may be growing gaps between the system and wishful suggestions on legal reform towards more stringent protection of personal data. Throughout the construction of the SCS, tension persists between the

statist big data profiling and the societal call for privacy preservation. Our current study is meant to be an invitation for follow-up studies of the interaction between the law and practices concerning the SCS.