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Can Chinese legislation on informational privacy benefit from European experience?

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*Can Chinese Legislation on
Informational Privacy
Benefit from European Experience?*

张琨蓓

(Kunbei Zhang)

献给我的父母

Preface

This thesis records the experiences and observations that I collected in the past six years. I spent the most brilliant period of my youth at eLaw, of Leiden University. The interdisciplinary institution helped me find and investigate an interesting field, personal data protection. I selected it as my research subject and will pursue it in my subsequent research efforts (in China).

The conceptions in the thesis are diverse. Part of them is drawn from the legal training I received during the last 12 years. Another part stems from a new interest in the philosophy of science, considering complexity. In this thesis, I weave them together. Indeed, this has seriously challenged my capabilities to cope with creative scientific research, since I needed to describe my arguments and results in a manner understandable to who are strange to this field. The result has been a drastic shift in my research. Readers can find that my research bridges across positivist and realist comparison, law and economics, cultural exploration and complexity theory. Nevertheless, the main purpose of the research remains to improve our comprehension of the law, of data processing and of their interactions.

The book is also an attempt to explain to myself and to my readers how I struggled through the whole journey, with its disappointment and pleasant surprises. Initially, I wrote the thesis in the form of a dialogue to myself. The dialogue I had in mind was a sort of personal testimony, a testimony of how my understandings and misunderstandings unfolded over time, with many detours and shining points hidden in paragraphs, as pleasant surprises. And sometimes I was happy as a playful child when I could change the tune of the story at an unexpected

moment and place. Yet, as a Ph.D student who not only wants to investigate the unexplained, but also wants to graduate, I had to bend this inclination and provided a second version in a more serious tone.

Nevertheless the result still has the traces of a mixed bag that can best be classified as exploratory law research. My research project's structure has (at the level of a single project) become analogous to Kuhn's dynamic scheme for scientific revolutions: normal science within a paradigm, crisis in the paradigm, revolution, the inkling of a new paradigm (Kuhn (1962)). The research was originally triggered by an assumption. Upon its inspection, the research story adapts when anomalies are brought to bare, and finally something new is found, at the point where the initial assumption has itself become an anomaly. Again, the chapters in this thesis follow the logic of exploratory research. Not the "order" of a random walk, but the dynamics of contextually informed search: the conclusion from the current chapter/stage provides the bridge to the questions to be discussed in the following chapters/stages (and then the questions derived thereof become new points for exploration).¹ As a whole, the thesis displays a dynamic scheme because its research path could not be foreseen completely in advance.²

One of its most important arguments leads to the conclusion that the community of personal-data users is a complex adaptive system, and that this finding supports and helps further interdisciplinary cooperation for improved information of the legislator. This gives me the courage to follow my intuition in my research to come, to think out my own ideas and to form

¹I cannot but feel that the legal discipline is currently more in a situation that Kuhn (1962) would qualify as being "in crisis" (also internationally) than in a situation of paradigmatic stability (of "normal science"), when legal data protection arrangements are under consideration.

²"The world which we want to explore is a largely unknown entity. We must, therefore, keep our options open and we must not restrict ourselves in advance. Epistemological prescriptions may look splendid when compared with other epistemological prescriptions, or with general principles, but who can guarantee that they are the best ways to discover, not just a few isolated 'facts', but also some deep-lying secrets of nature? (Feyerabend (1975):12)"

my own independent theories, and to investigate them further in diverse scholarly cooperation. I do not have – none of us has – sufficient scientific education to singlehandedly research in an adequate manner the serious and complex problems of our current communities. Personal data protection is central to many of these problems, and that is where my research will remain focused. During my project I have been encouraged by the finding that there are many people around the world, from many disciplines, who agree with me in this. I cannot wait to join forces with them in my future projects.

Leiden, 15 juli 2014, 张琨蓓

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