

【Research Article】

Establishment of Privacy Rights in China and its Specialities

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Abstract

The spread of modern information technology such as artificial intelligence (AI) and Big Data has significantly changed the lives of the population. Governments have also introduced policies that utilise information technologies to solve social problems. Because of this change, information derived from the population is considered an essential resource when there is an apparent conflict between the government and the people. Accordingly, the question of how the population's privacy rights should be protected in such a situation has become the focus of recent attention. However, recognition and protection of privacy rights diverges by country, especially depending on political structure, social situation, and cultural basis.

First, it is essential to clarify the reality of privacy rights in China, which has entirely different values from Western society. It is true that in recent years, China has established legislation to protect privacy rights and personal information; however, at the same time, the Government of China has introduced modern information technologies such as AI, Big Data, facial recognition systems and gathering personal information on the population (for example, a social crediting system prepared for its introduction and Health Code as a COVID-19 measure). While foreign states criticise such policies as an infringement of privacy, domestic voices in China demonstrate high appreciation. Therefore, it is necessary to clarify how privacy protection and associated specialities have been established.

In this paper, the specialities of privacy protection in China are analysed. Unlike Western societies that focus on freedom and dignity within the private sector, China protects the safety of individuals while solving social problems by prioritising public welfare.

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Contents

- I. Introduction**
- II. Traditional Concept and Development of Privacy Rights**
- III. The Concept of Privacy Rights in China: Its Establishment and Changes**
- IV. Constructing Privacy Rights in China**
- V. The Speciality of Privacy Protection in China**
- VI. Conclusion**

I. Introduction

Since the beginning of the twenty-first century, modern information technologies (such as the Internet, cell phones, artificial intelligence (AI), and Big Data) and biometrics have spread around the globe, changing people's behaviours and activities significantly. This not only changes the lives of the population but also affects how to manage a nation through policy application. Such changes in the new era mean personal information is considered an essential resource of the state, and the outcome of policies that utilise information technology have created significant social effects.

Implementing such policies in support of modern technologies has created conflict between the government and the wider population. This includes concerns about how to protect the privacy rights of the public and how to prevent infringement of personal rights by the government through the expansion of public rights in terms of the use of personal information. Moreover, how to handle the issues of privacy rights infringement that occur as a result of implementing these policies is also a focused task.

When we consider the aforementioned issues, it is also essential to consider how privacy rights protection differs depending on state structure, cultural ideas, and values. According to Daniel J. Solove, the new concept of privacy rights is a pluralistic concept with pluralistic values. Privacy rights are protected differently depending on the society, and values attributed to interests that conflict with privacy differ by state. As privacy has multidimensional characteristics according to political structure or cultural basis, it is inevitable that the specialities of privacy rights will be analysed with a good understanding of the state's unique social, political, and moral-ethical background when discussing the concept of privacy rights in a state. In fact, 'cultural attributes toward privacy are so divergent that

little can be done to bridge the gap', as 'there is no shared worldwide understanding of privacy' but 'just several localised notions'.¹

The question then arises: what are the privacy rights in Chinese society, where values differ entirely from the West? This is an original and exciting research topic. Much legislation that protects personal information and privacy has been enacted in China. Conversely, the Government of China also actively tries to implement modern information technologies, such as AI, Big Data, and face recognition systems, using the mass-collection of personal information about the Chinese population. This means that the Government of China has now become a significant owner of personal information of the general population, which is also utilised for many government policies. For example, the social crediting system and health code is used as a COVID-19 measure. While the handling of personal information in China has been criticised as an infringement of privacy rights and as a potential means of establishing a 'surveillance state' by foreign states, domestic voices mostly praise such policies.

In response to the gap in understanding Chinese policies that utilise personal information between domestic and foreign ones, questions arise in terms of privacy and privacy rights in China, and whether any originality or speciality in the way Chinese privacy rights arose can be determined. With these questions in mind, this paper will clarify the reality of privacy rights (and any speciality), focusing on personal information and privacy protection issues within Chinese policies that utilise personal information gathered from the population.

II. Traditional Concept and Development of Privacy Rights

More than 130 years have passed since Samuel D. Warren and Louis D. Brandeis first advocated the idea of privacy. Privacy has been considered 'the most inclusive right', which is 'the essence' for democratic essence has been recognised as a general right that needs to be protected, as it is essential to ensure 'emotional and psychological peace' and is 'the core of freedom'.² The theory and concept of privacy rights changed with the flow of society and were imported to many countries, which led to the creation of new concepts of privacy rights adapted to different social environments.³

However, just like Warren and Brandeis could not predict how quickly information technology would develop, this has occurred much quicker than we might have imagined in recent years, resulting in more complicated privacy issues than before. Currently, privacy rights comprise more than the

¹ Daniel J. Solove, *Understanding Privacy*, (the USA: Harvard university Press, 2008), p185.

² *Olmstead v. United States*, 277 U.S. 438, 478, (1928) (Brandeis, J., dissenting); Ruth Gavison, "Privacy and the Limits of Law", 89 *Yale Law Journal*, (1980), pp.421-455; *Lake v. Wal-Mart Stores, Inc.*, 582 N. W.2d 231, 235 (Minn, 1998); *Pub. Utilities*.

³ Julie C. Inness, *Privacy, Intimacy, and Isolation*, Oxford University Press, (1992), p.56.

original concept and definition—the right to be left alone or the right to control individual personal information—and the range of protection is more comprehensive. Furthermore, privacy rights as a research topic has become more complicated with the introduction, spread, and application of modern information technologies such as AI, Big Data, facial recognition systems, the Internet, and mobile phones, together with the government implementation of governance policies that utilise such technologies.

To escape such complications, Solove has demonstrated a new approach to the concept of privacy rights in recent years. His theory guides a multidimensional and pluralistic understanding of privacy rights through a bottom-up method, using Wittgenstein’s Family Resemblances Approach rather than previous existing definitions.⁴

This means privacy is:

“[a] pluralistic concept and therefore its value should also be understood pluralistically, as it does not have a standardised value. [Moreover], the value of privacy should be understood by the degree of the contribution that the privacy has made to the society, as privacy protects individuals as there is a benefit to the society to do so, [and] the freedom of individuals should be justified from the perspectives of its social contribution. Privacy is not just a freedom from control in society but is a protection of a socially established structure. Hence, the value of privacy does not depend on privacy itself in different forms but depends on the range of activities protected by privacy.”⁵

Privacy rights, which are diverse in their characteristics, have a background in cultural ideology, social structure, political structure, and many other factors. According to Solove’s new concept, cultural differences are most apparent in the values placed on the benefits that contradict privacy.⁶ The differences in privacy rights are applied when policies or legislation are structured and enforced. De George stated that questions such as how privacy is structured, how much it is essential, and how much it should be protected vary in different societies, mean that the cultural structure itself affect the values of privacy in that culture.⁷ Furthermore, privacy rights change in response to historical and societal changes.

⁴ Ludwig Wittgenstein, *Philosophical Investigation* §§91,43(G.E.M. Anscombe trans), (1958).

⁵ Daniel J. Solove, *Understanding Privacy*, (the USA: Harvard university Press, 2008), pp66-77.

⁶ Daniel J. Solove, *Understanding Privacy*, (the USA: Harvard university Press, 2008), p183.

⁷ Richard T. De George, *The Ethics of Information Technology and Business*, (the UK: Blackwell Publishing, 2004).

A typical example of differences in privacy rights due to cultural differences is demonstrated by the concept in the United States and Europe, already analysed in many existing studies. Looking more closely, it is evident that while privacy in the United States ensures freedom, in Europe its purpose is to seek dignity; therefore, the concept is associated with two utterly values that are fundamental in each society.⁸ These concepts continue to change as modern society evolves. Because China holds completely different values from those in Western society, this paper continues by examining whether there is any speciality and originality in the Chinese approach to privacy rights.

III. The Concept of Privacy Rights in China: Its Establishment and Changes

Despite various privacy rights being established around the globe, there is no standard definition or mutual understanding of what privacy means.⁹ Therefore, when discussing beliefs about privacy in a country, it is important to consider its original background and to remember that the cultures and habits of that specific nation and region will affect the legal characteristics of privacy. Accordingly, researchers need to look into the conditions and social situation of the nation or region individually and in detail to focus on the concept and characteristics of privacy rights specific to the nation, region, or individual. Hence, this chapter will analyse how the western concept of privacy was adapted and developed in China, where its values differ entirely from Western countries. Further, it will be clarified whether the Chinese concept of privacy rights is unique.

In recent years, terms such as ‘personal information protection’ and ‘privacy right protection’ began to be used in China, from which we can see rapid progress in the establishment of legislation in the field of personal information protection. A few recent examples of legislation include the implementation of the Civil Code of China (January 01, 2021) and the Personal Information Protection Act of China (adopted August, 20 2021; implemented November, 01 2021). However, there seems to be a contradiction between the legislation implemented and policies enforced by the government of China, as they enforce policies that collect and utilise personal information through modern information technologies and Big Data. By contrast, the government also tries to protect the privacy rights and personal information of the population through legislation. Accordingly, this section will first examine the characteristics of Chinese privacy protection and public opinion toward the utilisation of personal information.

⁸ James Whitman, “The Two Western Cultures of Privacy: Dignity Versus Liberty”, 113 Yale Law Journal, (2004), p1151, p1160, p1163, p1171, p1204, p1164, p1221.

⁹ Hiroshi Miyata, *Return of Privacy Rights – Conflict between Freedom and Pride*, (Japan: Chuo University Press, 2015), pp112-113 (宮田紘『プライバシー権の復権—自由と尊厳の衝突』) .

As I (2020) noted, the concept of privacy rights does not originate from mainland China, and historically, even the term ‘privacy’ in relation to rights barely existed.¹⁰ Traditionally, Confucianism has been the basis of morals and ethics in China; hence, a liberal mindset did not exist and the concept of privacy, which is heavily associated with freedom and individualism, was not present within the cultural base.¹¹ Furthermore, due to modern China’s historical and political background, the topic of privacy rights protection was not the focus of attention in China. It is therefore commonly recognised among China academics that the western mindset of ‘privacy’ barely existed. Therefore, the Western concept of privacy, such as ‘the right to be left alone’ in which ‘private life will not be interfered with by others’ is something that has been imported from foreign states and hence barely existed in Chinese society.

The protection of privacy rights in China was born along with the development and promotion of the informatisation of society. Primarily due to the increase in social crimes, the need to protect personal information gradually increased, and its importance started to be acknowledged. Academic discussions within China regarding privacy rights and the establishment of the legal structure only really commenced in recent years. Hence, the development of privacy rights protection in China was a very gradual process from establishing mindsets of privacy protection to establishing legislation. In other words, the Western concept of privacy rights protection has been accepted in response to changing needs among Chinese society with some adaptation to ‘the climate’ of China; therefore, it can be said that a concept of privacy rights that is original to China was formed. The following sections will analyse two points: (1) privacy rights development in China from the perspective of language, (2) privacy right development in China from the perspective of morals.¹²

1. Privacy Rights and Changes in Wording

Language is one of the most essential and representative categories to examine at the roots of culture and thought.

“Languages seem as if they are unrelated to political authorities as they are natural activities of human society. However, languages also have fast connectivity with politics like

¹⁰ Mue I, “Personal Data Protection and Privacy Rights in China’s COVID-19 Measures”, *The Hitotsubashi Journal of Law and International Studies* Vol. 20 No. 1, (2021), pp541-576 (伊夢瑛「中国の新型コロナウイルス感染症対策から見る個人情報保護とプライバシー権」).

¹¹ Xiuzhe Wang, “Research on Constitutional Protection of the Privacy of Our Nation”, (China: China Civil Law Publishing, 2011), p.372-394 (王秀哲『信息社会個人隱私權的公法保護研究』).

¹² For more detailed explanation of these two sections, please refer to: Mue I, “Personal Data Protection and Privacy Rights in China’s COVID-19 Measures”, *The Hitotsubashi Journal of Law and International Studies* Vol. 20 No. 1, (2021), pp541-576 (伊夢瑛「中国の新型コロナウイルス感染症対策から見る個人情報保護とプライバシー権」).

regions and politics. The artificial side of languages are quite strong, as we see from the enactment of official languages and standard languages; therefore, the modern political mechanisms show that “the states create languages”.¹³

Languages tend to reflect the social awareness and morality of the people of that era. Therefore, changes in the wording of ‘privacy’ in the Chinese language also reflect the changes in traditional culture, moral ethics, timelines, and society in China.

The word ‘privacy’ is ‘*Yin Si*’ (隐私) in Chinese, of which the original definition slightly differs from the definition of privacy currently in use. The original definition of *Yin Si* meant to hide a secret from others, indicating something with negative nuance that could result in embarrassment or a loss of prestige, and that could result in trouble if known by others. In detail, these secrets include something related to the nature of bodies or scandals and issues within households and are to be hidden to avoid embarrassment and disgrace.

In the Chinese language, the proverb ‘we will not leak our scandals within the household to outsiders’, which explains the definition of privacy in traditional China. In other words, as *Yin Si* in Chinese means to keep issues within the household secret from outsiders, there is a difference in the terminology compared with other states. While the Western term emphasises rights with strong objectivity, the Chinese term *Yin Si* emphasises secrecy in a subjective way. Therefore, the term and mindsets of *Yin Si* and *Yin Si Quan* (隐私权), which reflects “privacy rights” barely existed in China originally.¹⁴ Indeed, Liming Wang, a Chinese legal scholar, pointed out that ‘in the Chinese history of few thousand years, up until the 1980s, the term “*Yin Si*” was recognised as a negative term. Chinese society was unfamiliar with the concept of “privacy rights”, therefore, (now) topics such as face recognition technology were not focused nor discussed much in China’.¹⁵ Another legal scholar, Xiuzhe Wang, also stated that ‘under the mindset of eliminating values of individualism, a concept of privacy, which tries to hide personal life, had no basis for growth in China’s long history’.¹⁶

The Western concept of privacy rights has been imported from foreign countries for Chinese people. Even during the 1980s with the early development of reform and the Open Door Policy, the

¹³ Katsuhiko Tanaka, *Languages and Nations*, (Japan: Iwanami Shoten, 1991), p.19, (田中克彦『ことばと国家』); Toshiho Terajima, *Overview of Political Philosophy*, (Japan: Horitsu Bunka Sha, 2019), p.116 (寺島俊徳『政治哲学概説』).

¹⁴ The relationship between personal information, privacy rights (*Yin Si Quan*) and privacy (*Yin Si*) in China is planned to be discussed in another paper.

¹⁵ From the speech at the *International Big Data and Privacy Conference held in Hong Kong* in 2017, written in the blog of: Yasheng Wang, “Face Recognition – Privacy and Differences between China and the US”, (16th December 2019), accessed on 20th December 2021, <http://huangyasheng.blog.caixin.com/archives/217792> (黄亚生「人脸识别，隐私和中美差异」).

¹⁶ This is a common understanding among the academics in China: Xiuzhe Wang, “Research on Constitutional Protection of the Privacy of Our Nation”, (China: China Civil Law Publishing, 2017), p.372-394 (王秀哲『信息社会个人隐私权的公法保护研究』).

Western concept of privacy rights in Chinese society (such as ‘private life will not be interfered with by others’ and ‘the right to be left alone’) had little effect on the Chinese population. Changes in language occurred after 2000. After China’s economic development reached a certain level, the population enjoyed material abundance with changes in personal income and property. As Western political philosophy and ideology started to inflow even more, the desires of the population also increased. Social instability increased as the population faced broader economic markets, and the need to protect individuals from different crimes became a concern. All of these factors led to the emergence of privacy as a right in China.¹⁷ Nevertheless, in the early stages, claims that privacy should be protected as an individual right were only limited to academics and specialists and had not yet spread among the wider public.

The rise of the mindset to protect privacy rights in China had a deep relationship with the development and penetration of modern information technologies in Chinese society. Furthermore, the progress in information technologies—such as the Internet—has fast-forwarded the promotion and penetration of privacy rights in China. The population of China has learnt the importance of personal information, especially through the use of mobile phones. As social crime increased, people became more concerned with protecting personal information and privacy rights by hiding individuals’ private lives to protect them from criminals and keep their personal information safe. The term *Yin Si* thus changed definition, meaning individuals’ private lives could be hidden to protect the rights of the individual.¹⁸

In other words, along with changes in society, social needs, ideology, and moral ethics, the term privacy penetrated the Chinese language over an extended timeframe, to the point that it became a daily used term with a definition close to that of privacy in Western societies.

2. Chinese Moral Ethics and Privacy Rights

When discussing privacy rights, we can argue from various perspectives. Many academics conduct their research from the perspectives of law, legal philosophy, and moral ethics, which is necessary to see the basis of recognition of privacy rights by the population.¹⁹ We must note that Chinese moral ethics is completely different from liberalism, the basis of modern political philosophy, which values freedom. The core value of privacy rights in liberalism praises individuals, personality,

¹⁷ Xinyue Gan, *Limitations to Privacy Right in Big Data Era*, (2019), accessed on 20th December 2021, <http://media.people.com.cn/n1/2019/0619/c427924-31167715.html> (甘馨月『大数据时代隐私的边界及限度』).

¹⁸ Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Civil Law Publishing, 2011), p.372-394 (王秀哲『我国隐私权的宪法保护研究』).

¹⁹ Daniel J. Solove, *Understanding Privacy*, (the USA: Harvard university Press, 2008), p1.

and autonomy, considering privacy rights as individual rights.²⁰ In his book *On Liberty*, John Stuart Mill stated that, ‘in humans’ activities, what we must obey society is something related to others. Of course, their independence is absolute regarding parts that are related only to themselves. For themselves, their body, and their spirits, individuals have the authority’.²¹

When comparing the traditional philosophy of China with Western ideas, Michael Sandel stated that in liberalism, ‘humans must be able to choose their life plans freely, and the society is allowed to prevent people from harming others but must not prevent people from making choices that would uphold their moral personality for themselves’.²² In other words, liberalism praises individualism and freedom, and ‘the value of privacy right is that its basic core lies upon the freedom and pride of individuals and that it emphasises the characteristics of individualism and liberalism as a personality right that must not be violated’. Therefore, for liberals, ‘recharge of virtue is a private matter, not a public matter’.²³

However, in China, with a Confucianist moral, ethical basis, such liberalism mindsets did not exist. Just as privacy rights barely existed in China, the mindset of privacy barely existed in Chinese ethics or philosophical thought. The core of Confucianism is the community, which has family as its basis.²⁴ In its moral ethics, ‘the boundary between private moral and public morality is not that clear’ and all humans should act in favour of the community to which they belong.²⁵

In the Chinese way of thinking, the first and most basic social institution that human beings encounter is family.²⁶ In China, filial piety to parents and loyalty to family are valued within the mindset that considers family as a community, and that society is community-centred. The family is structured according to a patriarchal system, and because it is the father (as the head of the household) who holds the most authority, a father is considered someone to be feared and respected. At the same time, a father would absorb household members’ personalities and become the ‘face’ of the household externally. In other words, *Yin Si* of a father equates to *Yin Si* of the household, and all family members must fulfil their duty by conducting or satisfying piety, obedience, and loyalty for the harmony of the

²⁰ Tetsuki Tamura, *The Start-line of Political Theories*, (Japan: Yuhikaku Studia, 2017), pp.37-50 (田村哲樹『ここから始める政治理論』)。

²¹ John Stuart Mill, *On Liberty*, (the UK: Longmans, Green and Company, 1865).

²² Michael Sandel, Paul J. D’Ambrosio, *Encountering China: Michael Sandel and Chinese Philosophy*, (the USA: Harvard University Press, 2018).

²³ Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Civil Law Publishing, 2011) p.47 (王秀哲『我国隐私权的宪法保护研究』)。

²⁴ Chisako Masuo, *Chinese Principles of Action – International Relations Decided by Domestic Trends*, (Japan: Chukoron-Shinsha, 2019), p.62 (益尾知佐子『中国の行動原理』)。

²⁵ Michael Sandel, Paul J. D’Ambrosio, *Encountering China: Michael Sandel and Chinese Philosophy*, (the USA: Harvard University Press, 2018).

²⁶ Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Civil Law Publishing, 2011) p.47 (王秀哲『我国隐私权的宪法保护研究』)。

family as a community. Furthermore, the whole nation is also considered a ‘big family’, just like a household; therefore, the institutional structures of both are similar, and the population have a strong bond to each other. Hence, historically, the highest governor of the nation is the emperor, and they would be the symbol of the state as the head where authority gatherers within the centralised system.²⁷

Under such morality and valuation that weighs heavy on the community bond and individual humanity, people create strong solidarity and try to materialise harmonious relationships; however, due to this moral ethical stance, individualism and liberalism in China have disappeared from the household as a society.²⁸ Furthermore, according to this Chinese way of communitarianism, individuals judge their position in the community and decide on the balance between how much of their privacy is to be shown or hidden. There has therefore not traditionally been a mindset of privacy rights that priorities the freedom and rights of individuals while emphasising ‘self’ does not exist, and historically, an environment to establish such mindset has not been created to the point that it is still fragile even today.²⁹

IV. Constructing Privacy Rights in China

In recent years, terms such as personal information protection and privacy protection have begun to be used in China, and the establishment of legislation to protect privacy has also significantly progressed. On January 01, 2021, the Civil Code was enforced, and on August 20, 2021, the Personal Information Protection Law was adopted, enforced from November 01, 2021. Examining policies implemented by the Government of China in recent years, many issues such as infringement of privacy rights and contradiction with legislation emerge as the utilisation of personal information continues to increase through modern information technologies and Big Data.

The concept of privacy rights barely existed historically and still exist very little in China. Since the ancient era, Chinese moral ethics have been based on Confucianism as a foundation; therefore, libertarianism has not existed in the mindset of the people.³⁰ Furthermore, due to the speciality of modern China’s historical, social and political structure, privacy rights simply barely existed until

²⁷ Chisako Masuo, *Chinese Principles of Action – International Relations Decided by Domestic Trends*, (Japan: Chukoron-Shinsha, 2019), p.87 (益尾知佐子『中国の行動原理』) .

²⁸ Tom Butler-Bowdon, *50 Politics Classics Freedom Equality Power: Mind-changing, World-changing Ideas from Fifty Landmark Books*, (the USA: Discovery Publisher, 2016), p.404.

²⁹ Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Civil Law Publishing, 2011) p.47 (王秀哲『我国隐私权的宪法保护研究』) .

³⁰ Xiuzhe Wang, *Research on the Public Law Protection of Privacy Rights in Social Crediting Society*, (China: China Civil Law Publishing, 2017), pp.372-394 (王秀哲『信息社会个人隐私权的公法保护研究』) .

some time after 1949. Because of this background, China had no ‘genes’ in terms of the western mindset, being a relatively new concept that was imported from abroad.

The mindset of privacy protection in China was born with the development and spread of digitalisation throughout society. In particular, the significance of protecting privacy began to be recognised alongside the increase in crime related to personal information. Moreover, the population started seeking personal information protection from the Government of China. However, the establishment of privacy rights mindsets and legislation for privacy protection in China was gradual, and only really became established in the past few years. The following sections will analyse how Western privacy rights were imported into and structured in China, from the perspectives of domestic academic research and legislation within China.

1. Academic Research regarding Privacy Rights

Due to traditional moral ethics and historical factors, privacy protection in China faces three subsequent difficulties. First, the public authority of the government is absolute in China as a result of the impact of its political and social structure and traditional moral ethics, leading to the concept of community supremacy doctrine being penetrated across Chinese society powerfully. As a result, there is no strong, legally binding legislation against privacy rights infringement by the public authority. Second, as the Government of China actively promotes its digitalisation strategy, China has rapidly become an information society. Using information technologies, the government can easily collect the personal information of the population, and legislation to protect private rights has not yet been soundly achieved. Third, it is true that legislation to prevent privacy rights infringement in the private sector has gradually become legalised; however, it is still in its infancy and its effectiveness is still weak.

With such difficulties, Chinese academics have studied how to protect privacy via legislation from two perspectives: first, privacy should be protected from other individuals and private institutions; and second, privacy should be protected from states and public authorities.³¹ The former concerns civil matters, while the latter concerns public authorities of the state.

First, whether privacy should be protected as a right in China began as research in civil law. The first paper regarding privacy rights in China, *Analysis on Legal Protection of Privacy Rights of the General Population*, was published in 1985, and stated that ‘privacy is a secret in an individual

³¹ Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Civil Law Publishing, 2011), p.47 (王秀哲『我国隐私权的宪法保护研究』)。

physical body and private life and is a legal right of the person who is the target to adjust privacy'.³² It was also argued that privacy rights include the right to be protected by legislation when the freedom of the individual, physical body, and secrecy of private life (and the right to keep them secret) is violated'.³³ Considering the social background in China in the 1980s, discussing such content was extraordinarily bold and innovative; however, because the cultural revolution had only just ended, this point of argument was not very popular amongst academic society in China. Privacy rights became the centre of focus in Chinese law society due to a further paper published in 1990: *A Research on Privacy Rights*.³⁴ This paper led the way to actively arguing for privacy rights in legal and political science studies.³⁵

In recent years, research on the definition of privacy rights has been conducted, although there are many different interpretations. For instance, the Chinese civil law scholar, Wanlin Peng, explained privacy as 'a secret within daily lives that other general populations do not want to be published or known'.³⁶ Meanwhile, Tangfa Chen stated the reality of privacy is 'a combination of individual and hiding'.³⁷ However, China has an original social and political structure, culture, ethics and ideology; therefore, there had been various aspects concerning the theory and concept of privacy, such as: against who should privacy be protected as an individual right, how much privacy should be protected, against who personal information should be handled carefully, how much personal information should be protected, and what would determine whether personal information was protected.³⁸

Part 4, Chapter 6, of The Civil Code of China, which concerns personality rights, was adopted on May 28, 2020. This included regulations related to personal information and privacy protection, the definition of privacy rights, and the necessity to provide protection. This demonstrates that the Government of China has officially considered privacy rights and personal information protection and

³² Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Civil Law Publishing, 2011), p.47 (王秀哲『我国隐私权的宪法保护研究』)。

³³ Xiaoping Chen, "Discussion on the Legal Protection of Chinese Population's Privacy Right", *Evaluation on Law, Law Review* Vol.5, (1985), (陈啸平『论公民隐私权的法律保护』)。

³⁴ Xinbao Zhang, "Research on Privacy Right", *Legal Research* Vol.3, (1990), (张新宝『隐私权研究』)。

³⁵ Mue I, "Personal Data Protection and Privacy Rights in China's COVID-19 Measures", *The Hitotsubashi Journal of Law and International Studies* Vol. 20 No. 1, (2021), pp541-576 (伊梦瑛「中国の新型コロナウイルス感染症対策から見る個人情報保護とプライバシー権」)。

³⁶ Wanlin Peng, *Civil Law*, (China: China University of Political Science and Law Publishing, 1999), (彭万林『民法学』)。

³⁷ Tangfa Chen, *The Dissemination of Private Content in New Media and the Review of the Concept of Privacy*, *Monthly Academics*, (2014), pp.13-21, (陈堂发『新媒体涉私内容传播与隐私权理念审视』)。

³⁸ Liming Wang, *Study on the Major Difficulties of the Personality Law of the Civil Code*, (China: China Legal Publishing, 2017), (王利明《民法典人格权法重大疑难问题研究》); Junju Ma and Heng Wang, *Inappropriateness to Adopt the Concept of General Personality Rights in Our Future Civil Code*, (China: Hebei Law Study, 2012) Vol8, (马俊驹、王恒《未来我国民法典不宜采用一般人格权概念》); Lixin Yang and Zhaocheng Liu, *Abstract of Personality Rights and the Structure of Personality Rights System*, China: Legislation Study, 2011), Vol11, (杨立新、刘召成《抽象人格权与人格权体系之构》)。

represents a big step forward for privacy and personal information protection in the field of Chinese civil law. However, ‘it is not enough to protect privacy right only through civil rights. China has a socialist system, and there is a trend that the state and public authority tend to dominate and infringe private rights. Therefore, limitations to public authority should not be rough and vague if privacy rights are to be protected seriously’.³⁹ China successfully transitioned to a market economy after the 1980s, and individuals and private enterprises began to witness their release from the public authorities (at least in terms of the economy). Meanwhile, the Government of China utilises modern technologies such as AI and Big Data to utilise personal information of the population to implement different policies. This has resulted in a situation where the government’s authority expands while the population has lost their authority to control personal information, meaning the risk of private lives being infringed continues to increase.

Some scholars in the field of policy, politics and law have taken on this serious issue by researching the relationship between the state and private individuals, together with the imbalance between public welfare and protection of private rights.⁴⁰ Significantly, research on the methods of limiting the public authority of the Government of China has been conducted, and legal suggestions to solve the violation of private rights for public welfare have also been made. One recent example stated that ‘due to the renewal of [the] Chinese constitution, it is essential, from the perspectives of human rights, to soften the conflict between public welfare and private right through methods to protect the minimum line of privacy protection’.⁴¹ Wang, a scholar in the field of the Chinese constitution, has stated that infringement of privacy rights by a public authority is a matter of protection of the fundamental rights of the constitution. He further stated that the Chinese constitution clearly states:

“Personal rights and dignity should not be violated, private residence should not [be] trespassed, and freedom of communication and secrets of the general population must be protected. These contents are the origins of protecting the privacy of the Chinese population; however, in China, the constitution is applied indirectly through applications of individual laws. Therefore, the protection of privacy rights through the constitution cannot be said to be effective

³⁹ Mue I, “Personal Data Protection and Privacy Rights in China’s COVID-19 Measures”, *The Hitotsubashi Journal of Law and International Studies* Vol. 20 No. 1, (2021), pp541-576 (伊夢瑛「中国の新型コロナウイルス感染症対策から見る個人情報保護とプライバシー権」).

⁴⁰ Kaixiang Yang, *Introduction to Constitutional Right to Privacy*, (China: China Legal Publishing, 2010), (杨开湘『宪法隐私权导论』).

⁴¹ Lingyun Yu, Hongfang Wang, and Qing Xu, *Privacy under the Camera*, (China: Chinese People’s Security University Publishing, 2008), (余凌云、王洪芳、许晴『摄像头下的隐私权』).

properly, and the need for privacy rights protection by limiting public authority through the constitution further rises.”⁴²

He also claims that it is a new challenge for the renewal of the constitution in China to decide how to control and limit public authority from privacy rights infringement through to essential proper protection in the constitution.⁴³

However, there are many counterarguments toward this point of view. Xiao Cheng stated:

“The Chinese way of privacy right differs completely from the ones in the American law, as Chinese privacy rights is not a right protected in the constitution. China has an entirely different cultural and ideological foundation and political structure from the ones in the western society in the first place; therefore, it is challenging to accept the western concept of privacy rights as it is. Privacy rights in China are always considered a civil right and never as a right in constitutional law, as from the legislation to application of the law, privacy rights have now been recognised as personality in civil law through concepts such as the protection of reputation and personal interest protection.”⁴⁴

Scholars have also researched administrative law perspectives, apart from constitutional arguments.⁴⁵ This field of research focuses on the relationship between privacy protection and public authority for intra-societal governance policies. Research is also actively conducted on issues for which the government expands the range of personal information utilisation to solve social issues. An increasing number of researchers agree that ‘the value of privacy protection in administrative law is the equilibrium between public welfare and private benefits, and hence the government has responsibility on both to protect the privacy and not to infringe private rights’.⁴⁶ Furthermore, much research exists on the subject of the establishment of Big Data and surveillance systems, utilisation of personal information through information technologies, and the standard of publication of personal

⁴² Art 37-40 of the Constitution of China

⁴³ Xiuzhe Wang, *Research on Constitutional Protection of the Privacy of Our Nation*, (China: China Law Publishing, 2011) p.2 (王秀哲『我国隐私权的宪法保护研究』).

⁴⁴ Xiao Cheng, *Research on Legal Issues in the Development of Personal Information to Data Interconnection Politics and Law*, Main Seminar, Vol.8 (2020), (程啸『个人信息向数据互联发展中的法律问题研究政治与法律』).

⁴⁵ Zhenyu Tu, *Research on Constitutional Privacy Protection – A Theoretical Argument Without Citing Fundamental Rights*, (China: China Law Publishing, 2008), (屠振宇『宪法隐私权研究——项未例举基本权的理论论证』).

⁴⁶ Xiuzhe Wang, *Research on the Public Law Protection of Privacy Rights in Social Crediting Society*, (China: China Civil Law Publishing, 2017), pp.372-394, (王秀哲『信息社会个人隐私权的公法保护研究』).

information. However, current research mainly focuses on case studies of privacy infringement, and there is little theoretical argument on these issues.

One of the most popular topics to be researched in China relating to the establishment of personal information protection law is the structure of the law. Much research has been conducted on a range of topics, such whether personal information should be protected as a private right or as part of public interests considering the digitalisation of society.⁴⁷ Although research and the establishment of law on privacy protection in China have progressed significantly in recent years, research on the balance between public authority and private rights, or research on limiting the government's authority—whilst important—has not seen a breakthrough.

Even amongst Chinese scholars, it has been suggested that public authority should be limited so that it can no longer violate privacy rights and that legal structures that respond to different policies should be established quickly. Notwithstanding the need, unlike civil law, China has a different cultural, social, and political foundation. Accordingly, the conditions to limit public authority has not yet been established.

2. Establishment of Legislation for Privacy Protection

Before it had any concept of privacy or a mindset to protect privacy, China did not even consider protecting privacy through legislation. Therefore, the legislation introduced for personal information and privacy protection has only recently been established. 'Between 1987 and 2010, China mainly enforced laws to rehabilitate individuals and compensation profit loss with lessons from the Cultural Revolution and persecution of individuals'. The word privacy only appeared in written civil law for the first time in 2010 under the *Tort Liability Law of the People's Republic of China*. In the *General Principles of Civil Law of the People's Republic of China* in 1987, the word privacy did not exist even though there was an emergence of the concept and mindset. Protection of privacy existed to an extent as *Art. 101 (Reputation Rules)* could be judicially interpreted as privacy protection.

Scholars in China have categorised the stages of development of privacy protection law separately. Zhang has categorised the establishment of a privacy mindset and development of privacy protection law into three phases. The first phase (1987–2001) is 'the phase to protect privacy

⁴⁷ Xinbao Zhang, "From Privacy to Personal Information: Theories and Institutional Arrangements for Re-evaluation of Benefits", *China Legislation Publishing Vol.3*, (2015), (蒋坡《个人数据信息的法律保护》); Aiming Qi, *Rescue the Personality in the Information Society: A General Overview of the Personal Information Protection Law*, (China: Peking University Publishing, 2008), (齐爱民《拯救信息社会中的人格：个人信息保护法总论》).

reputation’, the second phase (2001–2009) is ‘the phase of protecting privacy interest’, and the third phase (2010–current) is ‘the phase to protect privacy adequately’.⁴⁸

Gan stated that the enforcement of the *General Principles of Civil Law of the People’s Republic of China* in 1987 provided alternative protection of privacy rights and enforcement of the *Tort Liability Law of the People’s Republic of China* as the establishment stage for privacy protection. Gan further stated that the *Decision for the security protection of the Internet* published by the Government of China in 2012 was where awareness about privacy protection started to increase.⁴⁹ Thus, the word privacy appeared for the first time in the *Tort Liability Law* in 2010.

Therefore, this research proposes a new way of dividing the stages of development of privacy protection legislation in China with the arguments presented in existing research. The first stage is the Transition Period for the Establishment of Privacy Protection Awareness (1987–2010) and the second stage is the Period of Establishment of Legislation of Privacy Protection (2010–present).

The reason behind such division is that the concept of privacy did not exist in the Chinese legal structure until 1988. After the Cultural Revolution ended, implementation of policies and enforcement of legislation were conducted to recover victims’ reputation to correct the injustices of the political movement. Next, as the economy continued to grow, a new law to protect the interests of individuals was established. However, during this time, the word ‘privacy’ did not exist in the legislation; even in the *General Principles of Civil Law of the People’s Republic of China* (1987), the term ‘personality rights’ was applied regarding the protection of privacy indirectly.

The *Tort Liability Law of the People’s Republic of China* in 2010 only had the definition of privacy rights written down but lacked details about how to protect the right. Instead, the 2010 *General Provisions of the People’s Republic of China* clearly stated that the natural person must enjoy rights such as privacy rights (Chapter 5, Rights under Civil Law, Art 110 (1)) to protect privacy under civil law for the first time officially. The *Civil Code* was adopted on May 28 2020, where the personality right was decided to be written independently (Part 4, Chapter 6). In this part, privacy rights and personal information were defined: ‘...natural persons have privacy rights. Any institutions or individuals shall not infringe privacy right through reconnaissance, harassment, leakage, disclosure etc. Privacy is the safe and sound private life, as well as private space, private activities, and private information that one does not want to be published’ (Art. 1032). Therefore, this paper considers that privacy protection first became a part of written law in 2010, as legislation was slowly established.

⁴⁸ Hong Zhang, *Personality Right Theories*, (China: High Education Publishing, 2015), pp.478-490, (张红『人格权各论』) .

⁴⁹ Xinyue Gan, *Limitations to Privacy Right in Big Data Era*, (2019), accessed on 20th December 2021, <http://media.people.com.cn/n1/2019/0619/c427924-31167715.html> (甘馨月『大数据时代隐私的边界及限度』) .

With this shift, privacy was structured as a right and gradually became something to be protected during the Transition Period for the Establishment of Privacy Protection Awareness. However, the focus was mainly on recovering individual reputation, dignity, and interests during this period. Furthermore, accepting privacy as a right in China differs completely from Western societies such as the United States and Europe. It began as a lesson of false charges and persecution during the political activities in the past rather than ensuring freedom, human rights, and dignity for individuals. Furthermore, privacy protection during this period was only applicable to some victims of the Cultural Revolution. Therefore, it cannot be said that it was privacy protection for the population as a whole, but was a starting point of generalisation. Hence, the western approach had been imported into China during this period.

The Second period, the Period of Establishment of Legislation of Privacy Protection, is when more fundamental privacy rights were established in Chinese society. Information technology and the Internet became popular domestically, which also caused an increase in social crimes and issues. Research started to focus on the Western definition of privacy rights and argue theoretical and legislative perspectives. The establishment of legislation started during this period, with the Tort Law as a trigger.

V. The Speciality of Privacy Protection in China

More than 130 years have passed since the Western concept of privacy rights was born in 1890 in the United States. However, the western approach to privacy protection remain novel and privacy has only been protected since 2010. The absence of a concept of privacy rights in the traditional moral ethics of China together with the fact that communitarianism (where individuals should not be significantly emphasised) affected the establishment of privacy rights in China.⁵⁰

However, after 2000, as the Chinese economy continued to grow, living conditions for the Chinese people improved and modern technologies such as the Internet and cell phones spread throughout society. As a result, the population started to voluntarily provide personal information to enjoy the benefits of information technology in return. At the same time, social crimes (where person criminals use personal information) increased. The general population of China, who are vulnerable to such social crimes, increasingly needed protection and sought a safe and sound environment for

⁵⁰ Mue I, "Personal Data Protection and Privacy Rights in China's COVID-19 Measures", *The Hitotsubashi Journal of Law and International Studies* Vol. 20 No. 1, (2021), pp541-576 (伊夢瑛「中国の新型コロナウイルス感染症対策から見る個人情報保護とプライバシー権」).

private lives from the government.⁵¹ Therefore, China's mindset on protecting privacy and personal information started to develop to ensure security and safety.

It is true that part of the population, inspired by a more liberal way of thinking, sought an environment in which they could express their thoughts freely. Moreover, some wish to be free from the government. However, this is not a significant choice in the case of privacy protection.

The community-based hierarchy that underpins Chinese traditional moral ethics and centralised authority structure still significantly affects the way the population thinks. Consequently, the population has little awareness about protecting privacy against the government, leading to an imbalance between public authority and protection of privacy rights remaining an unsolved social problem. This is particularly the case when the Government conduct mass-collection of personal information for social and public welfare policies. The population tend to follow the request of the government, being satisfied with improvements in the environment of society with little awareness of the risks.⁵²

According to Solove, privacy values should be evaluated based on how they contribute to society.⁵³ Observing the shift in the concept of privacy in China, it is evident that the protection of privacy in China was structured under the needs of society at that time. The principal aim of the concept was to solve social conflict in the private sector; hence, privacy protection was mainly against society, private sector, and enterprises but not the government. In other words, the population of China lacks the mindset of privacy protection against the Government of China. This basic difference in privacy protection is opposite to Western society that supports protecting human rights, dignity and freedom.

The Government of China has been actively developing modern information technologies over the past decade and implementing policies that utilise information technologies to solve social issues. However, the Government of China has become the largest owner of personal information of the general population by creating an enormous Big Data through information technologies such as AI and Big Data, as digitalisation progresses. Moreover, there is no doubt that these policies are for society and public welfare. In China, the government holds the most significant authority while being the enforcer and monitor legislation; however, a law limiting public authority is still lacking. Legislation that balances public welfare and private rights or regulation to protect governmental authorities' private rights is still very weak.

⁵¹ Xinyue Gan, *Limitations to Privacy Right in Big Data Era*, (2019), accessed on 20th December 2021, <http://media.people.com.cn/n1/2019/0619/c427924-31167715.html> (甘馨月『大数据时代隐私的边界及限度』).

⁵² This issue will be discussed in another paper that is about Social Crediting System and Privacy.

⁵³ Daniel J. Solove, *Understanding Privacy*, (the USA: Harvard university Press, 2008), p185.

Measures that are implemented to fight against COVID-19 and the Social Crediting System have been pushed by the Government of China. These already face problems of personal information and privacy rights. While implementing aggressive policies with traditional moral ethics and original values based on the principles of public welfare and the government's absolute authority, there are risks of shrinking private space as government authority increases.⁵⁴

Currently, the protection of privacy has only just been developed and the establishment of its legislation had also only just begun. As there is little understanding of the fundamental characteristics of privacy rights, it will take more time to spread this new mindset throughout society and create policies and legislation that will protect privacy adequately. However, an overly transparent society and over-emphasis on public welfare could cause risks of surveillance and fake news. Therefore, it should be appreciated that the Government of China recognises the delay in political and legislative structure in terms of privacy protection and has started to work on this.

China has been successful in transforming management and business to the private sector by shifting the economic structure from a planned to a market economy. However, regarding the legal protection of privacy rights, long-standing traditional ethics and ideologies still play a significant role and hence significant innovation is needed. Therefore, just like restructuring the economy, the government should abolish a certain amount of authority from managing personal information in data governance. Otherwise, the aftermath of digitalisation will cause many troubles for Chinese society in the future.

VI. Conclusion

This paper has analysed the establishment, change, and specialities of privacy rights in China. China had no concept of privacy that originated in Chinese legislation due to its cultural, historical, and social background. Furthermore, China had no environment in which to develop a social mindset toward privacy rights. Therefore, privacy protection is a relatively new and foreign concept to China, and by accepting Western concepts concerning privacy rights, an original privacy right that adapts to the social environment of China is possible.

The Chinese approach to privacy rights protection differs from the American approach (seeking freedom) and the European approach (protecting dignity). However, the reality of privacy rights structured and developed in China is mainly to protect the privacy rights and safety of individuals

⁵⁴ Mue I, "Personal Data Protection and Privacy Rights in China's COVID-19 Measures", *The Hitotsubashi Journal of Law and International Studies* Vol. 20 No. 1, (2021), pp541-576 (伊夢瑛「中国の新型コロナウイルス感染症対策から見る個人情報保護とプライバシー権」).

against individuals, enterprises, and legal persons and is not to protect rights and seek privacy from the government. Moreover, it is not something to attain independence from the central government. Necessities to protect personal information became more necessary and evident as economic development led to increased social crimes and the progression of digitalisation. This means that the population started to learn the importance of privacy protection facing situations where their safety is threatened if their privacy is not protected as a right.

The central Government of China has become the largest owner and consumer of personal information domestically. While the development of laws is delayed, the Government of China has introduced social crediting system policies and measures against COVID-19 and has connected the two. Through such measures and policies, the authority of the Government of China to control the personal information of the population continues to grow. Due to this mass collection of personal information, the private life of the people has become almost entirely transparent, which leads to an increase in the risk of the ‘after-effect of digitalisation’, of which we must be vigilant.