

**【Research Article】**

**Characteristics of the Identification and Protection  
of Personal Data and Privacy Rights in China**

**Mue I\***

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**I. Introduction.**

In recent years, with the accelerated informatisation and digitalisation of Chinese society, the Chinese Government has accelerated its legislation on the protection of personal information and privacy rights: the Civil Code has been in force since 1 January 2021, establishing the position of personal information and privacy rights protection in the highest codes in the civil law field. In addition, the Law on the Protection of Personal Data was adopted on 20 August 2021, which entered into force on 1 November. Having a closer look at such changes, it can be determined that China is also aiming to be one of the countries that is ruled by law. However, the content of personal data and privacy right protection reflected in these laws and the actual enforcement of the laws show that the individualistic<sup>1</sup> and democratic<sup>2</sup> nature of the original Western theories of personal data and privacy rights is disappearing, and that the personal information protection and privacy rights in China are also departing from Western theories and legal systems. It can be said that the personal information protection and privacy rights in China have become one that mainly aims to solve issues related to

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<sup>1</sup> Charles Fried, "Privacy", 77 *YALE L. J.*, pp. 475,482-484(1968); Alen Westin, *Privacy and Freedom*, Atheneum, p.7 (1967)

<sup>2</sup> Alen Westin, *Privacy and Freedom*, Atheneum, p.7 (1967).

civil law and that prioritise the societal and national benefits under the umbrella of a Chinese-style government, which has been adopted in Chinese society.

Indeed, the conflict within Chinese domestic academia on the extent to which this Western-style protection of personal information and privacy rights should be accepted has been raging for many years and has not resulted in a unified conclusion. The result is that even though the Civil Code and the Personal Data Protection Law have been legislated, the wording remains legally ambiguous and remains, and that personal information and privacy right protection is an unresolved issue that is still debated among academics in China. Through an analysis of China's Civil Code and Personal Data Protection Law, this paper takes a closer look at the definition and nature of personal data and privacy right protection as well as how it is actually expressed in Chinese law.

## **II. Various protections of the right to privacy and personal data**

The concepts of personal data and the right to privacy are defined differently in different countries. Some countries interpret them as the same concept, while others define them separately. If they are defined separately, each country's society, culture, politics and laws also have their own views on how the boundary between the two should be drawn and what kind of protection they should be recognised as. For example, in the USA, the birthplace of the right to privacy, the scope of the concept of the right to privacy has gradually expanded over time to protect it as an individual right, while it has also changed to include information directly related to the individual, such as the individual's name and honour, in response to social needs. In particular, as information technology has progressed, the US has developed several privacy rights, such as the 'right to decisional privacy'<sup>3</sup>, the 'right to physical privacy'<sup>4</sup> and the 'right to informational privacy'<sup>5</sup>, to the point where the right to information privacy has become the core of personal information and privacy rights protection, in response to the information age.

The right to information privacy in the US is regarded as "the right of individuals to control the possession, disclosure and use of their personal information" (also referred to as the right to control

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<sup>3</sup> *Griswold v. Connecticut*, 381 U.S. 479(1965).

<sup>4</sup> *Katz v. United States*, 389 U.S. 347(1967).

<sup>5</sup> *Whalen v. Roe*, 429 U.S. 589(1977).

personal information)<sup>6</sup>, and the right to control when, to what extent and in what manner their personal information is disclosed to others, which is recognised as a right to be held by the individual<sup>7</sup>. The Information Infrastructure Task Force Principles for Providing and Using Personal Information, promulgated by the US Government, link identifiable personal information with the right to privacy<sup>8</sup>.

On the other hand, unlike the US, Europe separates privacy rights and personal data and defines each separately. For example, the General Data Protection Regulation (GDPR) separates personal data protection from the right to privacy and establishes personal data as 'any information about an identified or identifiable natural person (data subject)' (Article 4). Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights also state that everyone has the right to have their private and family life, home and correspondence respected, and Article 8 of the Charter of Fundamental Rights says that everyone has the right to the protection of their personal data, with a specific and clear purpose of use and with their consent or the Charter regulates that personal data can only be processed impartially, with a specific and clear purpose of use and with the consent of the person or with a legitimate basis in law. It also stipulates that everyone has the right to know and the right to delete the content of their personal data and that these principles must be observed under the supervision of an independent supervisory authority.

In comparing the situation in Europe and the US, Juliane Kikitt & Christoph Sobotta note that 'given the existence of different regulations, Europe considers personal data and privacy rights as separate concepts, and merely It does not distinguish between the two as purely symbolic concepts'<sup>9</sup>. Of course, there is not a complete unanimity of opinion on this point of view in the academic field, as there are still various points of contention against it, especially given the intrinsic connection between the right to privacy and personal data, and the confusion between the two concepts in dealing with various actual cases. In many cases, for example, in the analysis of Paul De Hert & Serge Gutwirth, the European Court of Human Rights also adopted the European Court of Human Rights claim to protect personal data in 'private life', equating the protection of personal data with the right to privacy

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<sup>6</sup> Daniel J. Solove, Paul M. Schwartz, *Information Privacy Law*, Wolters Kluwer, (2017), p.36.

<sup>7</sup> Westin & Alan F, Privacy and Freedom, *Washington and lee law Review* 25.1 (1968) p.166.

<sup>8</sup> Privacy Working Group, Information Infrastructure Task Force: Principled for Providing and Using Personal Information (1995); Xu Ke, Sun Mingxi, "The Re-clarification of Personal Information - From the Relationship between Privacy and Personal Information", *Chinese Applied Law, Vol. 1*, (2021), pp. 3-9.

<sup>9</sup> Juliane Kokott & Christoph Sobotta, "The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR", *International Data Privacy Law, Volume 3, Issue 4*, (November 2013), pp.222-228.

and equating the violation of the right to privacy with the violation of the right to personal data (data) protection Directive as unlawful processing<sup>10</sup>.

Given this situation, it is challenging to distinguish between personal data and privacy rights protection, both in the USA, where personal data and privacy rights are unified and in Europe, where they are dualistic<sup>11</sup>. However, although both the US and Europe differ in the way they define the concepts of personal data and privacy rights, both are unified in protecting them as individual rights, i.e. they have evolved and continue to change from basic civil rights to constitutional rights, with democracy and individualism as their fundamental basis. In this sense, the protection of personal data and the right to privacy in Europe and the US are united in the protection of individual 'rights', which have been diversified by the development of modern information technology, and which arose to avoid conflicts between the public and the government, besides disputes in the private sector.

### III. Personal Information and Privacy Rights in China

In light of this situation, the paper will delve into what personal data and privacy rights protection in China is like and what are the characteristics of the Chinese style. As already mentioned in the paper, *Personal Data Protection and Privacy Rights in China's COVID-19 Measures*<sup>12</sup>, as a result of the influence of traditional Chinese cultural thought and morality, in the past, the individual right to The idea of privacy protection was almost non-existent and, as the Chinese jurist Wang Limin pointed out, due to the influence of thousands of years of Chinese culture, until around the 1980s, 'hidden private' was perceived as a word with negative connotations and considered disgraceful<sup>13</sup>. For Chinese society, personal information and the 'right to privacy' was an unknown concept, and there had been little

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<sup>10</sup> Paul De Hert & Serge Gutwirth, "Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power" in Erik Claes and others(eds), *Privacy and the Criminal Law*, Intersentia, (2006).

<sup>11</sup> Maria Tzanou, "Balancing Fundamental Rights: United in Diversity? Some Reflections on the Recent Case Law of the European Court of Justice on Data Protection", *6 Croatian Yearbook of European Law & Policy*, (2010) pp.53-59.

<sup>12</sup> 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, (March 2021), pp.561-567.

<sup>13</sup> Wang XiuZhe, *Study on the Public Law Protection of Individual Privacy in the Information Society*, China Democratic Legal System Press, (2017) pp.327-394; Wang XiuZhe, *A study on the constitutional protection of the right to privacy in China*, Legal Publishing, (2011) p.19; Yao-Huai lu, "Privacy and Data Privacy Issues in Contemporary China", *Ethics and Information Technology: Vol.7*, (2005) p.12; 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, (March 2021), pp.561-567; Daniel J. Solove, *Understanding Privacy*, Harvard University Press (2008).

thought of protecting it as an individual right<sup>14</sup>. Of course, amid this ideology and awareness, Chinese legal protections were also barely in place<sup>15</sup>.

Only in 2010 the Liability Act explicitly protected the right to privacy (Article 2, paragraph 2)<sup>16</sup>. The initial definitions were similar to that of the USA, Taiwan and other countries and regions, which equated the definition of personal information with the definition of the right to privacy and adopted an ambiguous and centralised method of protecting personal information as part of the right to privacy<sup>17</sup>. However, with the development of the times and the information society and laws that have been developed, China began to express personal information and privacy rights as different concepts according to the community's needs<sup>18</sup>. Nevertheless, as there were no strict definitions of privacy rights and personal information at that time, the rationale for the division between the two definitions remained vague<sup>19</sup>. As a result, there was a heated debate among scholars in China over the right to the nature of the concept of privacy and personal information<sup>20</sup>. In particular, each debater argued his or her own view on whether the right to personal information and privacy is a protection of private or public rights, or a fundamental right. Therefore no unifying opinion can be reached even nowadays. Furthermore, there was considerable conflict among scholars as to whether personal data and privacy rights should be incorporated into the personality rights section of the Civil Code.

The Civil Code implemented on 1 January 2021 finally compiled the concepts of privacy rights and personal information into the Pact of Personality Rights and clearly defined each. However, it can be said that this concept has become quite Chinese in nature and has almost lost its original Western-style colours of personal information, democracy and individualism inherent to the right to privacy

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<sup>14</sup> Reference to the speech given by Wang Liming at the 2017 International Conference on Big Data and Privacy Protection in Hong Kong (written by Huang Yasheng, <https://mp.weixin.qq.com/s/Jn9ec61iIPduj5SFdtfoQw>, (2017)).

<sup>15</sup> Zhang Xinbao, "Limits to the application of the 'informed consent' principle to the collection of personal information", *Comparative Law*, Vol. 6, (2019) p.7.

<sup>16</sup> The 2005 Law on the Protection of Women's Rights and Interests has provisions for the protection of the right to privacy (Article 42). Scholars have their own arguments and reasons for the breakthrough in the protection of personal data and privacy rights in China, and this paper, based on the opinions of many Chinese scholars, considers the 2010 Tort Liability Law to be a very important boundary.

<sup>17</sup> Ma Te, *Privacy Studies - Centered on Systemic Constructs*, Renmin University of China Press, (2014), pp. 66-78.

<sup>18</sup> For example, the Criminal Code was amended in 2015 to introduce the offence of infringement of personal data (Article 253-no.1), while the General Provisions of the Civil Code and the Cyber Security Act were legislated in 2017, thus clearly separating the concepts.

<sup>19</sup> Zhang Xinbao, "Limits to the application of the 'informed consent' principle to the collection of personal information", *Comparative Law*, Vol. 6, (2019) p.1-20.

<sup>20</sup> Lv Bingbin, "The Protection of Personal Information: The Function of the System and its Relationship with Special Legislation", *Social Science Series*, Vol. 1, No. 258, (2022), pp. 93-102.

and personal information. Besides, looking at the relevant articles, the wording of the legal terms is also ambiguous, and even about the contents that have not been resolved in response to previous debates and conflicts between scholars, the legal articles did not answer the question head-on and avoided clear legal terminology.

For example, Articles 1032 and 1033 of the Civil Code define the concept of privacy and the specific forms of infringement of the right to privacy, stating that "Natural persons shall enjoy the right to privacy. No organisation or individual shall infringe the right to privacy of others using reconnaissance, invasion or harassment, leaking or disclosure. Privacy is defined as 'the tranquillity of the private life of a natural person and his private space, private activities and private, confidential information which he does not want others to know' (Article 1032). Article 1033 also states that, except as otherwise provided by law or with the express consent of the right-holder, no organisation or individual shall engage in any of the following acts. (1) Disturbing the tranquillity of another person's personal life using telephone calls, short messages, instant messaging tools, e-mails, leaflets, etc.; (2) Entering, photographing or peeping into the personal space of another person, such as a house or hotel room; (3) Filming, peeping into or photographing the personal activities of another person. (4) filming and peeping into the private parts of another person's body; (5) processing another person's personal information; and (6) violating another person's right to privacy by any other means. And Articles 1034 to 1038 also set out in detail the concept and protection of personal data. Namely, 'Personal data of natural persons shall be protected by law. Personal data are various types of information, recorded electronically or by other means, which alone or in combination with other information can identify a specific natural person. This includes a natural person's name, date of birth, ID number, biometric information, address, telephone number, email, health information and mobility information. Provisions relating to the right to privacy apply to private information in personal data. Where there are no provisions, the provisions relating to personal data shall apply' (Article 1034)<sup>21</sup>. Furthermore, it has been clearly stated that a data processor shall not divulge or falsify personal data collected and stored by him, nor shall he unlawfully provide such personal data to another person without the consent of the natural person. However, except where, through processing, a specific individual cannot be identified and cannot be restored..." (Article 1038).

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<sup>21</sup> Misako Oda and Zhu Ye, "The Code of the People's Republic of China" (2, complete), *Ritsumeikan Law Review* 2020, no. 3 (391), p. 482 (1456).

However, at least the following four uncertainties clearly remain regarding these articles relating to personal data and the right to privacy. First, the issue of the 'right' to privacy right protection. Article 1032 of the Chinese Civil Code clearly stipulates that the right to privacy is a right enjoyed by natural persons and that no organisation or individual may infringe on this right. However, at this stage, the protection of the right to privacy in China is still only explicitly recognised in civil law, with the Chinese Constitution stating that 'personal freedom, civil dignity and civil housing are inviolable, and civil freedom of communication and confidentiality of communication is protected by law (Articles 38 - 40)'. The extension of the right to privacy from the civil to the constitutional level has been heavily debated among scholars in China, with no clear answer yet. In fact, opposition to the extension of the right to privacy from the civil to the constitutional level is mainstream among scholars<sup>22</sup>. The majority of scholars believe that extending the right to privacy from the civil to the constitutional sphere should not be allowed, as it would mean that opposition to public authority would be permissible. For China, where the traditional Chinese culture of patriarchy is deeply embedded in society, and the political system has been under the absolute leadership of the Communist Party government, it is an extremely difficult task to accept that private rights and public power are measured equally, even before the law<sup>23</sup>. In particular, the question of how to maintain the dynamic balance between individual interests, community interests, the public interest of society, government power and state interests, i.e. whether to prioritise individual interests or the public interest under government power, is one of China's most difficult balancing act. Of course, in recent years, some scholars have hoped that the Personal Data Protection Law legislation would solve this problem. Still, as related to the following fourth point, the discussion on the concept of 'personal data rights' in China, the nature of whether this privacy right protection is limited to civil law has not been clearly stipulated in law at present and remains one of the pending issues<sup>24</sup>.

Furthermore, although the term 'any organisation' is mentioned, as in Article 1032 of the Civil Code, it is extremely unclear to what extent the scope of 'organisation' used here is covered. Chinese

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<sup>22</sup> Lv Bingbin, "The Protection of Personal Information: The Function of the System and its Relationship with Special Legislation", *Social Science Series*, Vol. 1, No. 258, (2022), pp. 93-102; Cheng Xiao, Personal information to the study of legal issues in the development of data interconnection, Politics and Law 2020 No. 8 Main Seminar; Wang Liming, "Redefining the Concept of Privacy", *The Jurist*, 2012, pp. 108-120.

<sup>23</sup> 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, (March 2021), pp.561-567; Feng Tianyu, "The historical and cultural origins of modern Chinese democracy", *China 21*, Society of Aichi University Modern Chinese Study, (2000, translated by Akiko Tanaka) pp.139-150.

<sup>24</sup> Zhang Hong, "Exploring Japanese Personal Information Protection Law in the Era of Big Data", *Financial Law No.3*, (2020), pp.150-160.

legal experts have analysed that the term 'organisation' in social phenomena is not originally a technical term for legal concepts. However, in recent years, the word has been used as a general concept in at least 65 laws and about 165 places in Chinese law, where it is said to be an 'organisation' in legal relations, abstracted from the results of judgments based on the values of the legislator<sup>25</sup>. Some scholars have pointed out that the scope of the term is supposedly analysed to include all legal entities, unincorporated organisations, or related entities beyond civil law. However, the term still has a shadow of the former Soviet-era civil law behind it, and, in fact, it is unclear whether the scope of 'organisation' here includes legal entities or the government<sup>26</sup>.

Second, in terms of the concept of the right to privacy in the Civil Code, the Chinese right to privacy is recognised as a kind of individual right, and it is clearly stipulated that it may not be infringed by any organisation or other person. In practice, however, mainstream Chinese legal scholars view the right to privacy as a mental personality right, a kind of passive, passive and defensive right. Their perspective is that such a passive right to privacy cannot be exercised proactively and actively by the person in question before others violate it and that the only time it is possible to exercise the right is when it is violated and only when there is an exclusion to the interference of others and compensation for the loss<sup>27</sup>. Such a concept is very different from the Western-style, individualism-centred, individual freedom and ideas developed from a proactive and active conception of the protection of dignity, and is completely out of step with the Western-style individual 'right to control one's own information', at least in the early stages of the US, and even more so in the civil law field. It can be recognised as remaining a reduced version of privacy rights protection.

This is because the theory of personal data control must meet at least two a priori conditions: one, the person concerned and the personal data processor must be on equal footing; the other, the person concerned must be informed of all information in advance. However, it is also argued that 'it is unlikely that these conditions are currently ensured, although Chinese law currently contains only formalities'<sup>28</sup>. Therefore, even if the text of Chinese law states that the person has the right to control his or her personal information, it can be attributed to the fact that this right to control is simply a kind of passive

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<sup>25</sup> Gu Zhuxuan, *A Conceptual History of Civil Law - General Provisions*, Law Press, (2014), p. 97

<sup>26</sup> Zhang Xinbao, "Analysis of the meaning of "any organization or individual" in China's Civil Code", *Chinese Law Review*, Vol. 4, No. 46, (2022), pp. 37-51.

<sup>27</sup> Wang Liming, "Redefining the Concept of Privacy", *The Jurist*, (2012), pp. 108-120.

<sup>28</sup> Zhang Jihong "Research on the designed personal information protection mechanism", *Journal of Northwest University of Political Science and Law of Legal Science*, Vol. 3, (2022), pp. 31-43.

and passive protection of personal information and privacy rights that is effective against the private sector to some extent and is powerless against government power.

It should be noted that, in fact, these characteristics are clearly reflected in various policies in China, for example, in the case of the Chinese social credit system, which is currently being introduced with a view to implementation and are also manifested in the ongoing measures against new coronavirus infections. A typical feature is that even if the government collects excessive personal data unless there is a clear violation of personal interests or an incident of information leakage, it is not regarded as an infringement of personal data or privacy rights, and the public either tolerates the government's collection of personal data or does not regard it as a major problem. The public generally tacitly accepts or does not regard government collection of personal data as a major problem. Appropriately, the protection of privacy rights in China does not lie on the axis of 'individual rights' or 'individual control' but rather the protection of personal information and privacy rights under government control and with government protection.

On the other hand, some researchers within China have a different perception. For example, some scholars argue that if all individuals feel that their privacy rights are at risk of being violated, even before they are violated, and if there is solid evidence that their privacy space is being shown on surveillance cameras or other equipment, individuals have the report states that individuals should have the right to submit a request to have the device removed, and should say so regardless of whether it is against an organisation or against an individual<sup>29</sup>. However, the number of researchers making such claims is still limited in China, with many scholars viewing the Chinese right to privacy as passive and only as a right of self-preservation. This point that the right is only allowed to be exercised as an exclusion to interference when it is violated is also linked to the possibility and justification of collecting, utilising and disclosing personal data from the government. As is evident from this point of view, Chinese-style protection of the right to privacy loses much of its democratic content.

Third, the overlap between personal information and the right to privacy is discussed. First, although China's right to privacy and personal information adopt a dualistic conceptual structure, in practice, there is some overlap between the two concepts<sup>30</sup>. Mainly, this is the 'private, confidential

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<sup>29</sup> Li Jia Ni, "A Study of Privacy Issues under Surveillance Cameras", *Knowledge Power*, Issue 46, (November 2019).

<sup>30</sup> Wang Liming and "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly)*, Vol. 2, No. 226, (2021), pp. 15-24.

information' part of Article 1032 of the Civil Code and the concept of 'sensitive information' as stipulated in the 'Information Technology Personal Information Security Code', which corresponds to the previous Chinese Personal Data Protection Law, and the Personal Data Protection Law newly in force since 1 November 2021. In other words, sensitive information, as defined in the Personal Data Protection Act, is "information that, once leaked, illegally provided or abused, is extremely likely to violate the dignity of the personality of a natural person and threaten the security of person and property, including biometric identification, religious belief, specific status, medical health, financial accounts, movement information and personal information of minors under 14 years of age' (Law on the Protection of Personal Data, Article 28), and regulates the use of such information. On the other hand, the fact that the content of the right to privacy in Article 1032 of the Civil Code, 'private information', and the content of Article 1304, 'biometric information, health information, movement information', overlap with the content of 'sensitive information' of personal information, suggests that, conceptually, there is no clear distinction between the right to privacy and personal information in part. It has been argued that there may be a distinction between the right to privacy and the right to personal information in some cases<sup>31</sup>.

For example, "Sensitive information is central to protecting the right to privacy and is highly private. If such content is disclosed or utilised, individuals may be severely affected. Therefore, private and sensitive information have the same content" and therefore conceptually overlap, leading some experts to argue that they are protections of the same nature about the content of personal data and the right to privacy<sup>32</sup>. On the other hand, however, 'while acknowledging that sensitive and private information have the same content, sensitive and non-private information cannot easily be judged to be the same because the difference between private and non-private information is the civil right and the method of protection'. The right to privacy in the safety of private life and private and confidential spaces such as residences and hotels is clearly different from the concept of private information, and therefore 'the right to privacy and the concept of private information do not overlap, although they do overlap' in the Civil Code<sup>33</sup>. Some scholars have therefore argued that personal data and the right to privacy are separate concepts and have different meanings for protect. The focus of this debate is not

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<sup>31</sup> Xu Ke, Sun Mingxi, "The Re-clarification of Personal Information - From the Relationship between Privacy and Personal Information", *Chinese Applied Law*, Vol. 1, (2021), pp. 3-9.

<sup>32</sup> Zhang Xinbao, "From Privacy to the Theory and Institutional Arrangement of Re-Equalization of Personal Information Interests", *Chinese Jurisprudence*, No. 3, (2015).

<sup>33</sup> Cheng Xiao, "Sensitive and Private Information in Personal Information Protection," *People's Court Daily*, Vol.5, (November 19, 2020).

so much a dispute over the right to privacy and the concept of personal data but rather a dispute over whether the meaning of their protection is the same. The reason for being so concerned with the two concepts is closely related to the nature of personal data and the methods of protection that follow.

Fourth is the lack of clarity regarding the nature of personal data protection. In the Chinese Civil Code, the term 'right to privacy' was clearly written, but the term 'right to personal data' was not. Indeed, the Civil Code clearly stipulates that the personal information of natural persons is protected by law. However, it does not clearly state what kind of protection this protection is, i.e. whether it is a personal right. In the opinion of some scholars, personal data should be protected as an individual right, just like the right to privacy. In addition, "personal data protection law is a kind of public law rights protection and should be considered as a new type of public law rights protection for information subjects to counteract information processing acts on the part of information controllers. Such rights protection belongs to the statutory rights category. ...and since the main object of infringement of the right to personal data is public law liability, it is argued that personal data protection law also has a public law character and is irrelevant to private law in the Civil Code"<sup>34</sup>. On the other hand, in response to this point of view, China's 'Civil Code plays an important role in clarifying the definition of personal information. It clearly stipulates that natural persons are not protected against personal information as an individual right, but as a civil right (interest), and also that it is not a right under public law". Indeed, some scholars argue that although "the Civil Code does not use the term 'right to personal data'", it does not change the fact that "the protection of the rights (interests) of personal data is a civil right (interest protection), and a private right (interest) protection"<sup>35</sup>.

#### **IV. Analysis on reasons why there are differences between protections**

The underlying cause for scholars' adherence to their own views to this extent is the concern that recognising the protection of personal data and the right to privacy in the same way would expand the individual's right to domination and control over his or her personal data and make the right absolute. There is concern that this will have an adverse impact on the future free flow of personal information

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<sup>34</sup> Zhou Hanhua "The Legal Positioning of Personal Information Protection", *Legal and Business Studies*, No. 3, (2020), p. 52.

<sup>35</sup> Cheng Xiao "Innovation and Development of the Personal Information Protection System in China's Civil Code", *Financial Law No.4*, (2020), pp.32-53.

and the development of the information and digital society of Chinese society<sup>36</sup>. It is also for this reason that the articles themselves are ambiguously worded in China's Civil Code and Personal Data Protection Law, which has resulted in an ongoing debate among scholars on the issue<sup>37</sup>. Indeed, there is a lively debate among foreign scholars that in this day and age, it is no longer possible to regard personal data as completely owned by individuals<sup>38</sup>. However, this is precisely why countries are cautious about the use of this personal data when enforcing their laws and policies. For example, the attitude of governments towards the use of personal information is expressed, for instance, in the infected person detection apps introduced by various countries in response to new coronavirus infections, and the collection and processing of information is also largely divided between anonymous and real-name systems. However, in the case of China, the public ownership of personal information is clearly expressed in policies and laws, so that laws, and the effectiveness of policies, take precedence over the protection of personal information and personal interests.

According to an analysis by Chinese jurist Wang Liming, "In the Western view of the right to privacy, the right to privacy is recognised as the dignity of one's personality and personal information is reflected as the person's right to control his or her personal information", but in the Chinese Civil Code, the articles on the right to privacy and personal information shows a clear difference in these definition. Whether the Civil Code should have the word right after both privacy and personal information has been the focus of significant debate within China for many years. In Wang's argument, "the core of the right to privacy is to avoid disturbance from others and to protect the rights of individuals, and protection by law is absolute. However, personal information is not the protection of rights, as it is the personal rights and interests (gains) of the subject of the information, a kind of civil rights and interests (gains) protection. Some personal data rights (interests) belong to individuals, while others are responsible for the public interest. It is, therefore, important that protection against personal data is based on the principle of balance of interests. Moreover, while the protection of the right to privacy is an absolute protection of the right for the individual, protection against personal data does not reach an absolute level". This is because personal data also includes the protection of rights (interests) belonging to the public interest, and "even in the Civil Code, the right to privacy is

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<sup>36</sup> Cheng Xiao " Innovation and Development of the Personal Information Protection System in China's Civil Code ", *Financial Law No. 4*, (2020), pp. 33-34.

<sup>37</sup> Wang Xixin, Peng Chun, "Constitutional Foundations of the Legal System for the Protection of Personal Information", *Tsinghua Law vol. 15, No. 3* (2021), pp. 6-24.

<sup>38</sup> Jerry Kang, "Information Privacy in Cyberspace Transaction", *50 Stanford Law Review* pp.1193,1202,1246 (1998).

recognised as an independent personality right, but personal data does not constitute an independent right, but merely the protection of one personality right (interest). The analysis states that 'protection to legal rights is higher because it exceeds the level of protection to interests (profits)'<sup>39</sup>.

And according to Wang's analysis, although there is no clear distinction in the Chinese Civil Code regarding the protection of rights and interests (profits) as in other laws, there is a clear distinction between the protection of the right to privacy and the protection of personal data. For example, Article 1033 on immunity from infringement of the right to confidentiality regulates that 'the explicit consent of the person must always be obtained'. On the other hand, Article 1038's exemption for processing personal data states that 'the consent of the natural person or the guardian shall always be obtained', but the word 'explicit' is absent from Article 1038. This is a careful conclusion of the legislator and not an accidental omission. The reason for the absence of the word 'explicitly' is that if the word 'explicitly' is added to personal information, the method of using the person's 'implicit consent' cannot be used when collecting personal information, and the 'explicit' consent of the person must be obtained. Currently, in China, the government's "collection of personal data (although the law states that the person's consent is required) can, in fact, be processed without the person's explicit consent, as long as there is tacit consent. Wang analyses that the reason this is not illegal is that it does not protect personal data as a right but as a right (benefit) for both the individual and society<sup>40</sup>. Furthermore, the logic in China is that the public interest as a society stands above the private interest.

In other words, Chinese law defines the right to privacy and personal information as separate concepts and clearly distinguishes between the protection of both as well as their realities. The reasons for this division of the two according to their substance are analysed by Chinese experts in the following five ways.

The first is the difference in the nature of the two rights. The right to privacy is a kind of spiritual personality right, and its value as property is unclear. The right to privacy is one of comprehensive rights (interests) and includes both spiritual and property interests. On the other hand, the right to privacy is a personality right and is regarded as an absolute individual right in its nature. However, the

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<sup>39</sup> Wang Liming "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly)*, Vol. 2, No. 226, (2021), p. 19.

<sup>40</sup> Wang Liming "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly)*, Vol. 2, No. 226, (2021), p. 18.

Civil Code does not define the interest (benefit) of personal data as an absolute right. The reason for this is that the protection of personal data must be coordinated between the safety of the interests of natural persons, freedom of information and reasonable use. For example, the Civil Code stipulates that the reasonable use of personal data for 'acts such as newspaper reporting and public opinion supervision to implement public interests' (Article 999) is possible, and the personal data infringement exemption (Article 1037) also clearly defines the details. On the other hand, the difference between the two is evident in the absence of rules against the right to privacy, such as cooperation and reasonable use of personal data.

Second, personal data is aggregated, whereas the right to privacy is less characterised by aggregation. Personal information can be processed as aggregate data, whereas the right to privacy cannot be processed this way.

Third, personal information is available, and the law plays a role in protecting and promoting its use. The emphasis here is on the consent of the individual at the time of collection and use, as personal information, in general, is allowed to be known by others. However, as the right to privacy is, in principle, non-useable, the degree of protection is overwhelmingly superior.

Fourth, the person has the right to self-disposal of the right to privacy but does not allow others to use it without permission or for business purposes. However, personal information, other than private and confidential information, can be used under the Civil Code, provided that the rules are observed, such as the collection of personal information under lawful and legitimate reasons, not excessive, and that the data is not processed (Article 1035). And it is legal for it to be used by others to develop the internet and other information industries and the digital economy.

Fifth, there are many types of violations of the right to privacy. For example, the Civil Code lists six types of infringements of the right to privacy and stipulates that they apply to the business activities of companies and the official activities of government departments, as well as to the scope of activities of individuals<sup>41</sup>. On the one hand, the protection of personal data rights and interests (interests) mainly

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<sup>41</sup> (i) Disturbing the peace and quiet of another person's private life by means of telephone calls, short messages, instant messages, e-mails, leaflets, etc. (ii) Entering, photographing or peeping into the private space of another person's residence, hotel room, etc. (iii) Photographing, peeping into, eavesdropping on or disclosing the private activities of another person. (iv) filming or peeping on the private parts of another person's body (v) processing another person's private information (vi) Violating another person's right to

covers personal data processing, and the rule scope includes activities such as the collection, storage, use, processing provision and disclosure of personal data. Conversely, it is stipulated that the protection of personal data does not apply to communications between family members and friends or to the provision of personal data in social activities<sup>42</sup>.

As this analysis shows, Chinese law and mainstream experts see the concepts of privacy rights and personal data as distinct and different. Some scholars hold opposing views to this notion. For example, in the interpretation of some scholars, personal data protection is the core content of fundamental rights and reflects human dignity and independence of personality. However, as the Chinese Constitution does not incorporate the content of personal data protection, they argue that it should be written into the Constitution through constitutional precedents<sup>43</sup>. On the other hand, requiring personal data to be protected from the Constitution is not compatible with China's (culture, ideology, political system, etc.) national circumstances. There are also notable dissenting voices that argue that protecting personal data as a fundamental right is an overemphasis on personal data and clashes with the free circulation of information and the development of the information industry<sup>44</sup>.

At the heart of the debate on whether personal data protection should be protected as an individual right is the dispute over the absolute right of ownership and control of information by the subject of personal data. That is, it is generally recognised in China that personal information contains individual rights (interests) as well as social rights (interests). It is true that the law takes the form of requiring the consent of the individual when collecting personal information. Still, in Chinese society, where the public interest prevails over the rights (interests) of the individual, when the government collects personal information in response to social needs (such as policy enforcement), it is based on implied consent. These issues are at the heart of the debate. It is efficient and convenient for governments to collect personal data through the introduction of various policies if they can freely collect personal data at any time in the form of implied consent. Conversely, if the protection of personal data is legally defined as a right, various legal restrictions will be imposed on the use of personal data. This may lead

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privacy by any other means (Civil Code, Article 1033) (see Soga Law Office, Japanese translation, [https://www.sogalaw.com/archive/200528%20Minfadian\\_JP\\_ver201222.pdf](https://www.sogalaw.com/archive/200528%20Minfadian_JP_ver201222.pdf)).

<sup>42</sup> Cheng Xiao, "Sensitive and Private Information in the Protection of Personal Information", *People's Court Daily*, p. 5, 19 November 2020; Wang Liming "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly)*, Vol. 2, No. 226, (2021), p. 18.

<sup>43</sup> Sun Ping, "Protection of Citizens' Privacy in the Era of Government Mega-Databases", *Jurisprudence*, No. 7, (2007), p.41.

<sup>44</sup> Xu Mei, "Re-discussing the Path of Personal Information Protection - Taking Article 111 of the General Principles of Civil Law as a Starting Point", *Journal of China University of Political Science and Law*, Vol. 5, (2018), p. 89.

to various disadvantages when enforcing policies, so both in the legal system and in the academic field, the definition and protection of personal data protection are very carefully debated, which is one of the main characteristics of personal data protection and privacy rights protection in China. This is also one of the main characteristics of the protection of personal data and the right to privacy in China that reflects the essence of the community interest and public interest priorities of Chinese society.

However, I argue here that consent is a kind of declaration of intent. For example, under Article 140 of the Civil Code, manifestations of intention, including consent, can be indicated by express and implied means. However, a legal provision stipulates that an implication can only be recognised as a declaration of intent if it conforms to a promise or a trade custom between the parties concerned. Reasoned statements of intent, which can be considered implied consent, involve strong interference with personal autonomy and may be intended to remove legal ambiguity and forcefully pursue the achievement of a goal<sup>45</sup>. Therefore, silence regarding personal data and privacy rights cannot be taken as consent, as it is not generic as a typical normal case. The perception that the attitude of silence on the subject of personal data is an acceptance is mere speculation. It is unlikely to be considered real consent to personal data processing. Otherwise, the person is regarded as consenting, even though he or she has done nothing, and the collection and processing of personal data are made voluntary, which can easily lead to a state of lawlessness in society. As a result, legislation to protect various types of personal data becomes meaningless. Therefore, some Chinese experts have expressed alarm in this regard, and therefore the idea of tacit consent is also out of step with the fundamentals of democracy<sup>46</sup>.

Moreover, such an approach is clearly contrary to the principle of the rule of law, which states that all individuals, organisations and governments are equal before the law. Article 1035 of the Civil Code originally stipulates that the consent of the individual or his/her guardian is the principle for processing personal information, and the Personal Data Protection Law, which will come into force on 1 November 2021, specifically states that, with regard to sensitive information, "the individual has the right to know and control the processing of personal information and others have the right to restrict or refuse the processing of personal information. The principle of requiring the person's consent is clearly emphasised: 'The person has the right to restriction or refusal of the processing of personal

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<sup>45</sup> Shi Yifeng "The Meaning of Silence in Civil and Commercial Interactions - A Multi-Level Balance of Private Autonomy", *The Jurist*, Vol. 6, (2017).

<sup>46</sup> Lv Bingbin, "The "Consent" Dilemma of Personal Information Protection and Its Way Out", *Legal and Business Studies*, Vol. 38, No. 28, (2021).

information' (Article 44). However, the convenient interpretation of the concept of personal data in the name of national digitisation and the development of informatisation, as well as the ambiguity of the scope of the law's reference to 'organisations' in 'any organisation', makes it unclear whether the government is included, and indeed, when implementing the law, the government is above the law, etc., this is clearly at variance with the principle of legal impartiality and contrary to democratic principles.

Of course, under such a leading policy, China, in the process of implementing various procedures, frequently has cases that violate personal information and privacy rights without obeying the law. For example, health codes are being introduced in many parts of China to combat new coronavirus infections. However, all kinds of personal information are being collected, not only information on those infected with the epidemic but also personal health examination information and life management information of the general public. The scope of personal information collected far exceeds that required for epidemic control, but local governments are single-handedly expanding the scope of personal information collected under the guise of controlling epidemics<sup>47</sup>. CCTV cameras on the streets are also constantly checking people's behaviour, checking for traffic rule-breakers and criminals. The moment a problem is detected, without confirmation, the person's face image and personal details are shown on the monitor screen, sometimes without the person even knowing if they have done anything wrong, and in some cases, their personal details are exposed. While this kind of overarching approach is very effective in creating a social environment, it is difficult to say that the protection of an individual's personal data and privacy rights is reliably ensured<sup>48</sup>.

China's Personal Data Protection Law emphasises, among other things, the principle of the person's consent to the handling of sensitive information, stipulating that "the person has the right to know and control personal information processing and others have the right to restrict or refuse to process personal information" (Article 44). However, although it states that the person has the right to control his or her personal data, in reality, this right to control is protection of personal data under government power and against the private sector, and what is being protected is the overriding protection of the interests of the private sector as a whole. On the other hand, the public is certainly 'powerless' against exercising government power. This is because, as there is a latent and continuing

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<sup>47</sup> Wang Xixin, Peng Chun, "Constitutional Foundations of the Legal System for the Protection of Personal Information", *Tsinghua Law vol. 15, No. 3*, (2021), pp. 6-24.

<sup>48</sup> Shi Jiayou, "Protection of personal information in public video equipment applications", *Jiangsu Social Sciences Vol. 3*, (2022).

recognition in traditional Chinese culture, the government is the representative of the 'public', the 'public' stands above the 'private', and government action is for the benefit of society as a whole, and personal information is not an absolute right of the individual. Therefore, when considering individual rights and interests, the individual, first of all, as a member of society, is increasingly aware that all citizens are obliged to serve society under the principle that the 'community interest' takes precedence, and this tendency is expressed prominently in law and the enforcement of policy.

Through the analysis of the concepts of personal data and privacy rights, of the nature of protection in both, and the claims of scholars in China, it has become clear that some of the typical features of this Chinese-style protection of personal data and privacy rights are as follows. It aims to solve various social problems under the Chinese government's governance. This means that the protection of privacy rights in China prioritises the protection of the public interest, the community and society as a whole rather than the individual's personal data and privacy rights, with a clear "hierarchical distinction" and "protecting the public interest" - in short, ensuring the successful development of China's information society as a top priority. As China continues to be influenced by traditional Confucian moral ethics and is under the political system of Communist Party leadership, with a strong sense of community, clear hierarchical relations and a political structure of concentration of power, the Chinese-style protection of personal information and privacy rights that is being nurtured and developed are consistent with these aforementioned characteristics. Hence, the Chinese-style protection of personal information and privacy rights is not coloured by democracy and individualism but is used by the government as a tool for the governance of one society<sup>49</sup>.

However, two questions remain about the way personal data protection is shaped by this political system and values: first, with regard to legal personal data and privacy rights in China, in a context where all personal data is collected and processed by the government, what is still left as a right to privacy; and second, what is left as a right to privacy in a context where all personal data is collected and processed by the government. The second question is what is still left as a right to privacy in a situation where all personal data is collected and processed by the government. Another question is that personal information contains both private and public interests, but how can the boundary between the two be demarcated, and how can the balance point be reached? In short, even under the guise of prioritising the public interest, the answer to the question of how much private interest is ultimately

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<sup>49</sup> Regarding Confucianism, please refer to: Kei Amago, *Chinese Logic and Western Thinking*, (Seitousha, 2021).

left to the private interest is extremely unclear.

## **V. Summary**

This chapter has identified four characteristics of the right to privacy and personal information in China, based on the Chinese Civil Code and Personal Data Protection Law and the discussions of scholars in China, including the conceptual similarities and differences between the two and the nature of their protection. Personal data and the right to privacy in China are regarded as two separate things, and the types of protection are quite different. In recent years, Western-style theories of personal information and privacy rights have been introduced and accepted in China by the needs of Chinese society and have been strongly influenced by China's unique culture, ideology, morality, values and political system, etc. As a result, the original colours of democracy, individualism, liberalism, etc., have been shed, and China's own form of personal information and privacy rights protection has been formed. These characteristics of personal data and privacy rights protection are expressed prominently in laws such as the Civil Code and policy enforcement. In effect, this Chinese-style protection of personal information and privacy rights is a passive right protection under the Chinese government, with the aim of resolving frictions and conflicts between the private sectors to protect the stability of Chinese society and the people's living environment. Through an analysis of Chinese law, this paper took a closer look at the nature of personal data and privacy rights protection and the attitudes of scholars in China towards personal data and privacy rights protection.

