

# Personal Information Protection: China's Path Choice

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Under the background of data as means of production, it is the goal of the world powers to protect personal information comprehensively and effectively. Although the appellation of “personal information” is not exactly the same due to different legal traditions and customs, its substantive content is similar or even the same. In both civil law countries and common law countries, the definition of personal information tends to converge, with “identifiability” as its core component. Unlike the United States and European Union countries, China’s Civil Code does not adopt a “right-based mode” to protect personal information, but chooses a unique “legal interest protection mode”, demonstrating that natural persons enjoy their personal information as personality interests rather than property interests. They are civil interests independent of the right to privacy, and are civil interests protected by law rather than a separate right. In the future, China should set up special supervision and management institutions, and the criterion for judging the facts of damage should be appropriately relaxed to strengthen the private law protection of personal information.

*Keywords:* China’s Civil Code, personal information protection, personality interests, legal interests protection, supervision agency

## Introduction

“SALE end tomorrow! Buy two get one free!”, “30% OFF on all coats, only this weekend”, are you familiar with these? We receive this kind of spam and email almost every day. With the rapid development of information technology and internet big data, all kinds of information are collected, used and transferred infinitely. Although it indeed can bring great convenience to our lives, it will inevitably lead to the leakage of personal information. For example, we often find that after Google searches for a pair of shoes, when opens Amazon app, the homepage will push us some information about shoes. That is to say, our consumption habits and other information are collected and analyzed by the website in real time (Ness, 2013). Although this may help us choose a pair of shoes faster, it also means that our personal information has been leaked. Another example is the “health code mode”<sup>1</sup> adopted by China in the prevention and control measures of COVID-19 that broke out globally in 2020. Once a case is diagnosed as a COVID-19 patient, big data will immediately summarize which places the case has been to within 14 days, and will publish it in the mainstream media, so that other citizens can check their itinerary to

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<sup>1</sup> The health code is based on real data, which can be generated by the citizens or the staff returning to work through their own online declaration and background audit. When entering or leaving supermarkets and other public places, citizens need to show their health code and scan registration, leaving their records of visiting the area, see Baidu Baike, <https://baike.baidu.com/item/健康码/24365975?fr=aladdin>.

determine whether they have been to the same place at a similar time and are likely to be infected with COVID-19. The epidemic prevention department will also inform close contacts<sup>2</sup> in time according to the registered health code data to do nucleic acid detection, in order to maximize the fastest control of virus transmission. It is precisely because of this that China can control the spread of the COVID-19 epidemic so quickly and ensure the safety of the Chinese people to the utmost extent. In essence, scanning “health code” to record and track the movements of natural persons harm personal information interests, especially in the case of excessive disclosure. But in order to safeguard the public interests, personal information should be appropriately disclosed in accordance with the association principle. For example, the European Data Protection Board adopted the Statement on the Processing of Personal Data in the Context of the COVID-19 Outbreak, making it clear that “[d]ata protection rules (such as the General Data Protection Regulation) do not hinder measures taken in the fight against the coronavirus pandemic” (European Data Protection Board, 2020).

Various signs indicate that “[h]umanity has entered a new stage of data-driven development, personal data is the basic resource of data resources, and the use of personal data has become one of the core data-driven” (Gao, 2021, p. 107). In other words, promoting the social use of big data resources is an important measure to promote social and economic development and transformation (Wang, 2018). Therefore, how to balance the amplitude relationship between the flow and utilization of personal information and the protection of personal information is the focus of the legislation in the field of personal information protection all over the world. With the continuous development of information society, how to protect personal information in the most systematic, comprehensive and perfect way becomes more and more important.

With the widespread use of computers and information systems, the United States and European countries paid attention to the use and abuse of personal information in 1960s and 1970s.<sup>3</sup> In 1970, the German state of Hesse formulated and promulgated the world's first Data Protection Act.<sup>4</sup> In 1974, the United States also formulated and promulgated the Privacy Act applicable to federal government agencies.<sup>5</sup> The EU General Data Protection Regulation (hereinafter: GDPR), which came into effect on May 25, 2018, coordinated and integrated the data protection laws of EU member States (EDRM GDPR Drafting Team, 2018), and strengthened the data protection rights of all individuals in the EU. However, China, as the country who has the largest population in the world, the protection of personal information did not start at the same time with European countries and America. It was not until the internet began to rise in China in 1990s that the first regulation mentions personal information protection appeared (Yang, 2018), namely the Decision of the Standing Committee of the National People's Congress on Maintaining Internet Security (Quanguo renda changweihui guanyu weihu hulianwang anquan de jue ding, 全国人大常委会关于维护互联网安全的决定).

In this article, the author will introduce and analyze the overall framework of China's personal information protection combined with the relevant provisions of China's Civil Code, by horizontally comparing the normative systems of personal information (data) protection in European Union, the United States and other

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<sup>2</sup> Close contacts refers to members who live directly with confirmed or highly suspected cases of virus, including office colleagues, a class in the school students and teachers, the same plane passengers, see Baidu Baike, [https://baike.baidu.com/item/close contacts](https://baike.baidu.com/item/close%20contacts).

<sup>3</sup> For the U.S., see Miller (1971); for Germany, Palmer (2017).

<sup>4</sup> Datenschutzgesetz (Data Protection Act), Hessisches Gesetz-Und Verordnungsblatt I.

<sup>5</sup> Privacy Act of 1974, 5 U.S.C § 552a.

countries, and put forward reasonable suggestions. The full article will be divided into three parts. To start with, in the first part, the author will introduce the connotation and extension of personal information of the Civil Code, and distinguish it from the concept of data in Chinese law. In the second part, the overall framework and civil law position of China's personal information protection will be interpreted from three aspects: the attribute of the interests of personal information, its relationship with the right of privacy, and the interests level of personal information. It communicates the special of the "legal interest protection mode" by comparing the differences of "right-based mode". Finally, the third part will summarize China's current personal information supervision mechanism, and public law and private law relief modes. And try to put forward some suggestions for improvement.

### What Is "Personal Information"?

The premise of exploring and comparing personal information protection norms is to define "what is personal information", that is, the connotation and extension of personal information. The word "information" (xixi, 信息) in China has a very long history. It appeared and was used in Han Dynasty more than 2,000 years ago (Xie, 2016). However, how to define personal information in law has been controversial in theoretical and practical circles.

As mentioned above, China was relatively late in paying attention to the issue of personal information protection, and only began to formally introduce the personal information protection system in 2012. The Decision of the Standing Committee of the National People's Congress on Strengthening the Protection of Internet Information (Quanguo renda changweihui guanyu jiaqiang wangluo xixi baohu de jue ding, 全国人大常委会关于加强网络信息保护的決定) declared that "[t]he state protects the electronic information that can identify the personal identity of citizens and involves the personal privacy of citizens",<sup>6</sup> which is the first time that China announced the protection of personal information from the legal level, and has a milestone significance. Subsequently, personal information protection was mentioned in the Law of Protection of Consumer Rights and Interests, Cybersecurity Law, E-Commerce Law and other laws. The China's General Provisions of Civil Law also clearly indicate that personal information of natural persons is protected by law (The National People's Congress of the People's Republic of China, 2017).

Therefore, as a whole, before the promulgation of the Civil Code, there were more than 100 laws, regulations and rules mention "personal information" in China (Qi & Zhang, 2018), and the scope also covers many industries, such as internet, telecommunications, credit, banking, and so on, and the definition of the concept of "personal information" has undergone a process of constant change and development (Zhang, 2019). It was not until the Civil Code of the People's Republic of China passed on May 28, 2020 that the concept of personal information, its handling and use specifications were regulated in a more systematic and detailed way.

Personal information is mentioned in Book One *General Provisions* and Book Four *Personality Rights* of the Civil Code. Chapter V "Civil Rights" of the *General Provisions* has made general provisions on the protection of personal information (Civil Code of the People's Republic of China, 2020). In the Chapter VI "Right of Privacy and Protection of Personal Information" of *Personality Rights*, six provisions are used to

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<sup>6</sup> The Decision of the Standing Committee of the National People's Congress on Strengthening the Protection of Internet Information.

stipulate the meaning of personal information and its handling, and the exemption reasons for handling personal information (Civil Code of the People's Republic of China, 2020). And the Article 1034 of the China's Civil Code has made the latest and most complete regulation on the concept of personal information:

Personal information is the information recorded electronically or in other ways that can be used, by itself or in combination with other information, to identify a natural person, including the name, date of birth, identification number, biometric information, residential address, telephone number, email address, health information, whereabouts, and the like, of the person. (Civil Code of the People's Republic of China, 2020, Art. 1034)

In 2019, China included the Personal Information Protection Law in its legislative plan, and issued the Personal Information Protection Law of People's Republic of China in August 2021. Article 4 also defines the concept of personal information: “[p]ersonal information is recorded electronically or by other means, and all kinds of information related to identified or identifiable natural persons, excluding information after anonymous processing” (Standing Committee of the National People's Congress, 2021, Art. 4).

It can be seen that China has clearly chosen “identifiability” as the core element of personal information, that is, the information is associated with a specific individual or can point to a specific person. In other words, the parties can be directly or indirectly “identified” through information. As for the definition mode of personal information, the Civil Code adopts the method of “general definition + enumeration”, which not only gives a general description of personal information, but also enumerates several typical types of it. Compared with the concept of personal information in the Civil Code, the concept in the Personal Information Protection Law is relatively general. There is no general enumeration of the types of personal information, but only a separate emphasis that derived data does not belong to the scope of personal information protection (Yang, 2021). The author believes that as a special legislation in the field of personal information, the Personal Information Law in the future should be consistent with the definition of personal information in the Civil Code. And this issue should be revised when the Personal Information Law is officially promulgated.

In terms of comparative law, most countries in the world have chosen to enact personal information (data) protection laws. Up to now, more than 120 countries have already enacted relevant law (Gao, 2021). But, as countries and regions have their own legal traditions and habits, from the perspective of their legislation, the appellation of “personal information” is not consistent, and different countries adopt different appellation. For instance, Japan adopt “personal information”, Germany and the European Union adopt “personal data”. According to the Article 4 of General Data Protection Regulation (GDPR),

“[P]ersonal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;<sup>7</sup>

The United States, as the representative country of the common law system, adopts the appellation of “personally identifiable information” (Hutchinson, 2015, p. 1151). And because there is no uniform personal information protection law in the United States, there is no universal definition of personally identifiable

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<sup>7</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), OJ 2016 L 119/1, Art. 4(1).

information in American legislation at present (EDRM GDPR Drafting Team, 2018), the relevant provisions are scattered in laws and regulations of different departments and industries (EDRM GDPR Drafting Team, 2018), for example, the Video Privacy Protection Act, the Children's Online Privacy Protection Act, and so on. By comparing the definitions of personal information between China and other countries and regions, it can be found that, although the appellation of "personal information" is not exactly the same due to different legal traditions and customs, its substantive content is similar or even the same, "it is to protect the specific information of natural persons from illegal collection, dissemination and processing, so as to protect personal rights and interests from infringement" (Zhou, 2005).

One thing needs to be noticed. Chinese laws also have the concept of data. Article 3 of the Data Security Law of People's Republic of China newly published in 2021, "data means any record of information in electronic or non-electronic form".<sup>8</sup> This means that in Chinese context, personal data is different from personal information. "[d]ata" is a symbol sequence (not limited to words) used to express people, events, time and place; and "information" is more inclined to refer to the content that can be provided for people to use and utilize after the data are processed (Zhang & Wang, 2000, p. 13). "[i]nformation is the content of data, and data is the manifestation of information. However, the expression and existence of information are various and do not necessarily appear as data" (Jiang, 2008, p. 1). Moreover, data have strong objectivity, because it is essentially a kind of mark invented by human beings, and the results will not be different due to different cognitive abilities of different people (Li, 2013). On the contrary, information has a certain degree of subjectivity, because information is the content carried by data symbols, and different people may have different understanding of data (Li, 2013). Therefore, in Chinese legal system, the concept corresponding to personal data in EU and information privacy in USA is personal information rather than personal data. And the content discussed in this paper will focus on China's personal information protection system.

### **Civil Law Position of Personal Information**

Since China began to attach importance to the protection of personal information and formulated relevant system norms, the legal circles have been arguing endlessly about whether personal information is a legal interest or a civil right, a personality interest or a property interest, and whether it belongs to privacy right or a general personality right (Ding, 2020). The author believes that the promulgation of the China's Civil Code in 2020 has answered the above questions.

#### **Personal Information Interests Is a Personality Interests**

In China's civil law system, civil interests can be divided into personal interests and property interests, and personal interests can be subdivided into personality interests and identity interests. Since China began to formulate relevant norms to protect citizens' personal information, there has been controversy over the attribution of personal information interests. In China, most civil law scholars believe that the civil interests enjoyed by natural persons to personal information belong to personality interests, because personal information will extensively involve the personal dignity and freedom of natural persons (Cheng, 2020a). And according to the concept of personal information, personal information is information that can identify specific natural persons,

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<sup>8</sup> Data Security Law of the People's Republic of China, Art. 3.

and this identifiability reflects the characteristics of personality (L. M. Wang, 2012). There are also a few intellectual property law scholars who believe that natural persons enjoy property interests in personal information (Liu, 2012), because personal information has property factors (Qi, 2009). Once the data in the personal information database is leaked and used by others, the users will get rich profits.

The author thinks that the personal information interests of natural persons is a personality interests rather than property interests, which can be illustrated by two points in China's Civil Code. Firstly, according to the structural arrangement of the Civil Code, the Book of *General Provisions* are common rules abstracted from two aspects of human law and property law by adopting the method of "extracting common factors". The Chapter V "Civil Rights" of the Book of *General Provisions* enumerates all civil rights and interests in the order from personal interests to property interests. And the Article 110 lists some specific personality rights of natural persons, such as the rights of life, health, name and privacy, while the following Article 111 is a declaratory provision for the protection of personal information. This shows that for legislators, they also believe that the protection of personal information of natural persons is based on their personality interests, rather than pure property interests. Secondly, the Civil Code places the main content of personal information protection in the Book of *Personality Rights*, which further shows that the civil interests enjoyed by natural persons for their personal information belong to personality interests. Legislators did not declare that the personal information is protected by law in the Book of *Real Rights* and the Book of *Contract* of the Civil Code can also prove legislators' attitude.

It is undeniable that personal information does have obvious property factors. Therefore, to protect the personal information of natural persons, it is necessary to protect not only their spiritual interests but also their economic interests (Z. J. Wang, 2012). Although most countries in the world believe that personal information interests are a personality interests, because European countries and the United States have different values in protecting personal private lives (European law pays more attention to protecting personal dignity, while the United States pays more attention to protecting personal freedom [Whitman, 2004]), regarding how to protect the economic interests contained in the interests of personality (Wang, 2014), China, Germany and other civil law countries and the United States have adopted a "unified protection mode" and "dualization protection mode" (Wang, 2014, pp. 162-164) separately.

The "unified protection mode" is to gradually affirm the economic value of personality interests by expanding the connotation of personality interests, so as to protect the spiritual and economic interests of natural persons while protecting personality interests (Z. J. Wang, 2013). In this case, there is a distinction between spiritual interests and economic interests in personality rights, but the economic value contained in it cannot be completely separated from personality rights (Wang, 2014). The "dualistic protection mode" adopted by the United States is to create a new right—the right of publicity, which is specially used to protect the economic interests of personality right,<sup>9</sup> and at the same time through right of privacy to protect the spiritual interests of personality rights. The right to privacy is a passive and defensive right, which is exclusive and cannot be transferred or inherited. And the right of publicity refers to the right of individual citizens to

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<sup>9</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 886, (2d Cir. 1953). *Zacchini v. Scripps—Howard Broadcasting Co.*, 433 U.S. 562 (1977).

commercial use and protecting their own names, portraits, characters, voices, gestures, images, cartoon characters and other factors (Felcher & Rubin, 1979), and this right can be freely transferred. Therefore, the “dualistic protection mode” can make individuals actively use the economic value contained in their names, portraits, and so on (Beverley-Smith, 2002) through the right of publicity, which cannot be satisfied achieved by the right of privacy.

Comparatively speaking, in the “unified protection mode”, economic interests are an integral part of personality interests, and cannot be completely separated. Although doing so is conducive to safeguarding and maintaining the personal dignity of natural persons, it does limit the use of economic value in personality interests to a certain extent (Wang, 2014). For the “dualistic protection mode”, the freely transferable and inherited nature of the right to publicity can make natural persons freer to use the right to publicity. However, although the “dualistic protection mode” is more conducive to the utilization of economic value in personality interests, this practice of forcibly separating economic value from personality interests is likely to separate the relationship between the personal dignity and economic value of personality interests, and “will easily lead to the utilization of economic value of personality interests out of personal control, and threaten personal dignity” (Wang, 2014, p. 165). Therefore, China's Civil Code attributes personal information interests to personality interests, which can not only protect the personality interests of natural persons, but also provide legal support for natural persons to obtain economic benefits through personality interests. In this way, it will not prevent natural persons from collecting fees for others to use their personal information, nor will it prevent companies from obtaining economic benefits by collecting, summarizing and using personal information in the era of big data (Cheng, 2020b). It can not only fully protect the personal dignity of natural persons, but also use their economic value to obtain economic benefits, which is a choice that conforms to the China's civil law system.

### **Personal Information Interests Is an Independent Interests**

From a global perspective, in the field of personal information protection, there is no obvious distinction between civil law system and the common law system. And there are mainly two legal modes of personal information protection, namely, the privacy law mode and the information (data) protection law mode. The former is represented by the United States, Canada and other countries, while the latter is represented by Germany, Japan and others.

Many European countries enacted their own Data Protection Law in 1970s, such as Germany, France, and Sweden. They clearly abstract personal data as an independent basic right of citizens, and use independent legislation to protect personal data as a specific personality right. Different from this, the United States places personal information in a privacy law system for protection. According to the common view, the concept of privacy was first put forward by Samuel Warren and Louis Brandeis in the Article “The Right to Privacy” published in *Harvard Law Review* in 1890, which developed from the protection of freedom in the United States common law. It emphasizes that the law should protect the right of individuals to keep their personal thoughts, emotions and private lives from the public (Warren & Brandeis, 1890). Subsequently, in 1974, the Privacy Act highlighted the fairness and legitimacy of the federal government's collection and utilization of personal identifiable information (Hutchinson, 2015), in order to urge the federal government to provide active protection

for citizens' personal information (Zhang, 2015). So, in the United States, the protection of personal information normally is called information privacy or data privacy.

One point needs to be emphasized that because the United States does not have a personality right system, its connotation of privacy right is different from that of civil law countries, like China and Germany. In civil law countries, the right to privacy is a specific personality right, while in the United States, it adopts the concept of "big privacy", which is highly open and can include many personal interests, such as the right to name and portrait. In this mode, "it is a default premise that personal information can be used, and personal information including sensitive information can be collected, unless the law or judgment determines that it cannot be collected" (Gao, 2021, p. 113).

In China, during the process of legislation related to personal information protection, another great controversy focuses on the relationship between personal information protection and privacy, that is, whether personal information interests are independent personality interests and should be protected separately (Zhang, 2015), or are they included in the right to privacy and protected by the right of privacy (Xu, 2017). The author thinks that China's personal information protection has chosen the latter mode, that is, personal information interests are personality interests that are independent of privacy rights and should be protected separately. Chapter VI of the Book Four of the Civil Code is entitled "Privacy and Personal Information Protection", which proves that China clearly distinguishes privacy from personal information and chooses the "dual system protection mode" to protect them separately. The Personal Information Protection Law is another proof.

The reason why the functional orientation of personal information is controversial is that it is undeniable that the right of privacy and personal information are indeed closely related, which is mainly reflected in that the protection objects of the two have some crossover. Article 1032 of China's Civil Code defines what privacy is: "[p]rivacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he does not want to be known to others" (Civil Code of the People's Republic of China, 2020, Art. 1032). Therefore, many undisclosed personal information belongs to the scope of privacy. They are private spaces that people do not want others to intervene in, and private information that people do not want to publish and let others know, such as someone's bank account number.

However, from another angle, there are obvious differences between personal information and personal privacy, which are mainly reflected in the following three aspects: First, although there is a certain overlap between the objects protected by the two, as mentioned above, they are not completely coincident. Article 1034 of the Civil Code clearly stipulates: "[t]he provisions on the right to privacy, or, in the absence of which, the provisions on the protection of personal information, shall be applied to the private personal information" (Civil Code of the People's Republic of China, 2020, Art. 1034). It can be seen that there are also sub-types of personal information, and only personal information belonging to private information is the protection object of privacy right. And it does not matter what the specific content of private information is, whether it is illegal or not, and whether it is disrespectful, it should be protected by the right to privacy. On the contrary, the highly publicized personal information does not belong to the scope of privacy right protection. Second, they have different protection emphases. The right to privacy emphasizes the meaning of "secret". Any content that a person is unwilling to disclose publicly, is unwilling to let others know widely, and does not involve public interests can become personal privacy. Its emphasis and attention is that personal private places are not violated and private



life is peaceful and undisturbed. On the other hand, personal information interests pay more attention to its “identifiability” and the ability of individuals to control and dominate information, that is, they can identify someone directly or indirectly according to this information. As Judge Robinson’s point of view in the *Compare Reuber v. United States*, personal letters should belong to the scope of personal information, because they clearly indicate the name and address of individuals.<sup>10</sup> Nevertheless, those personal privacy that cannot meet the standard of “identifiable” do not belong to the scope of personal information. Third, the results of exposure of the two are different. Personal privacy that has been disclosed, such as photos, contact numbers, email addresses that already disclosed on social software, like Facebook, is no longer personal privacy. Therefore, the damage caused by disclosing others’ privacy is often irreversible (L. M. Wang, 2013). Because once it is disclosed, its privacy is impossible or is difficult to restore. On the contrary, personal information can be used repeatedly. For example, even if information such as name and address has been disclosed, because it can be identified and corresponds to an individual through this information, it always belongs to personal information.

Generally speaking, although countries may take different modes of legalization, the original intention and purpose of protecting personal information in China, the United States and other countries are the same. They are all through the formulation of relevant laws to regulate the handling of personal information, so that in the era of big data with rapid information circulation, the handling of personal information does not infringe on the personal dignity and privacy of individuals (Gao, 2021). It is just that the United States regulates the specific behaviors of data handling through specific normative mode, while the European Union GDPR adopts abstract normative mode to propose a more abstract concept of “data handling” and establish a complete system with general rules and exceptional rules for data information (Gao, 2021).

### **Personal Information Is a Civil Interest Protected by Law Rather Than a Right**

There is no doubt that personal information is the object of civil law protection, but there are disputes on the level of interests of personal information. Since China’s General Provisions of Civil Law promulgated, its Article 111<sup>11</sup> has aroused widespread concern in the field of law. Several books on interpretation of general provisions of civil law drafted by famous professors of civil law in China have interpreted Article 111 in detail, but no consensus has been reached as to whether personal information is just a civil interest protected by law or an independent right to personal information. The main reason of the former is that this provision does not use the expression of “right to personal information”, while the main reason of the latter is that although Article 111 does not use the concept of “right to personal information”, this provision is “the declaratory provision and confirmation provision that natural persons have civil rights” (Chen, 2017, p. 785).

In fact, this divergence is not only a theoretical discussion, but also affects the overall system construction of the personal information protection system. If personal information is considered to be a right, it means that the subject of personal information has all rights to control and dominate personal information, and the corresponding other people have the negative obligation of omission (Zheng, 2021). While if personal

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<sup>10</sup> Compare *Reuber v. United States*, 829 F.2d 133, 142 (D.C.Cir.1987).

<sup>11</sup> General Provisions of Civil Law, Art. 111: “The personal information of a natural person shall be protected by law. Any organization or individual that needs to acquire the personal information of an individual shall obtain such information in accordance with law and guarantee the safety of such information. No one may illegally collect, use, process, transmit, trade, provide or publicize the personal information of others”.

information is considered as a civil interest, it means that the right to control and dominate personal information does not completely belong to the subject of personal information, and others have the right to collect and process the personal information of others as necessary, as long as comply with the principles and conditions stipulated by law (Zheng, 2021). That is why China's state agencies have the right to process personal information within the scope permitted by laws and regulations, in accordance with the prescribed authority and procedures (Standing Committee of the National People's Congress, 2021).

The author believes that China's Civil Code enriches and perfects the relevant contents of personal information protection, and also clarifies the level of personal information interests, that is, at present, China does not explicitly recognize that natural persons enjoy a right to personal information, but considers that it is only a civil interest protected by law. There are two main reasons: firstly, in the Chapter of "Civil Rights" of the Civil Code, it clearly stipulates the specific personality rights and identity rights of natural persons, such as the right to life, health and name, but does not directly use the expression of "right to personal information". And Article 111 only makes a recapitulative introduction of personal information protection.<sup>12</sup> Secondly, the title of Chapter VI of the Book of *Personality Rights* in the Civil Code is "Right of Privacy and Protection of Personal Information", and it does not treat the protection of legal interests of personal information as a "civil rights with the attributes of absolute power and strong dominance and control" (Huang 2020). In addition, there is also no expression of "right of personal information" in the all six legal provisions related to personal information protection in this Chapter of the Civil Code (Civil Code of the People's Republic of China, 2020, Art. 1034-1139). Thus, actually, China has adopted "legal interests protection mode" to protect personal information.

Choosing "legal interests protection mode" to protect personal information of natural persons is an original creation of China, regarding personal information as a civil interest protected by law rather than an independent right does not exist in other national legislation (Yang, 2018). From a comparative perspective of law, whether the United States, which chooses the privacy protection mode, or Germany and the European Union, which choose the data protection mode, they all clearly stipulate that personal information is a basic right and a civil right. Although the right to privacy is not explicitly written in the United States Constitution, the Supreme Court of the United States has admitted that the right to privacy is contained in the First, Third, Fourth, Fifth and Ninth Amendments (Hutchinson, 2015), and gradually formed two major areas: self-determination privacy and information privacy in the constitution (Zhang, 2015). In the EU, the Recital of the GDPR clearly states that the protection of natural persons in the processing of personal data is a fundamental right, the Article 8(1) of the Charter of Fundamental Rights of the European Union<sup>13</sup> and Article 16(1) of the Treaty on the Functioning of the European Union<sup>14</sup> have relevant provisions.<sup>15</sup> Germany also recognizes the right to self-determination of personal information as a basic right under the general personality right in the Constitution through the jurisprudence of the Federal Constitutional Court.<sup>16</sup>

<sup>12</sup> "A natural person's personal information is protected by law. Any organization or individual that needs to access other's personal information must do so in accordance with law and guarantee the safety of such information, and may not illegally collect, use, process, or transmit other's personal information, or illegally trade, provide, or publicize such information" (Civil Code of the People's Republic of China, 2020).

<sup>13</sup> Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389, Art. 8.

<sup>14</sup> Treaty on the Functioning of the European Union, OJ 2012 C 326, Art. 16(1).

<sup>15</sup> GDPR, Recital 1.

<sup>16</sup> BVerfG, Urteil des Ersten Senats vom. Dezember 1983, 1 BvR 209/83 u. a.—Volkszählung —, BVerfGE 65, s.1.

Many scholars in China still believe that “legal interests protection mode” is not desirable after the promulgation of Civil Code, and the main reason is that the protection level and strength of civil law to rights and interests is different. Specifically speaking, the level and strength of personal information protection by law is lower than that of other personality rights, which makes the private law protection of personal information fail to achieve the desired effect (Yang, 2021). The “legal interests protection mode” is to clearly regulate the specific behaviors related to personal information through legislation, and accurately inform civil subjects such as natural persons and companies what kind of behavior rules should be observed in collecting, processing and utilizing personal information in daily life and in the process of production. For the “rights-based protection mode”, the right to personal information is a rights cluster, or rights collection. It covers some other rights, like the right to modify personal information, the right to delete, the right to be forgotten, and so on. At the same time, these corresponding rights and interests are assigned to the obligee, giving the obligee exclusive possibilities (Ye, 2017), which put more emphasis on individual control and domination of personal information. So, the protection through the rights-based mode is generally comprehensive and has a high degree of protection, while the protection of legal interests mode commonly does not provide comprehensive protection, only protects them from a certain type of infringement (Yang, 2018), and the protection strength may be relatively weak (Ye, 2017). Therefore, they prefer to make it clear that personal information is a specific personality right.

However, the author believes that personal information does not have the conditions to be established as a right currently. First of all, the object of personal information is not specific and clear. As has been demonstrated above, the core feature of personal information is “identifiability”. But with the continuous development of big data technology, the types of personal information will be constantly updated, and it is difficult to make complete and extensive limits on the types and scopes of personal information. In other words, it is difficult to fully specify it. While an important difference between rights and legal interests is whether there is a concrete and specific objects. Secondly, defining personal information as a right will make it difficult to balance the interests of many parties. Personal information involves the interests of multiple parties, in addition to the person of information, personal information processor, personal information handler; it also involves the public interests. The first few interests parties are easy to understand; the appropriate disclosure of the itinerary of infected patients during the COVID-19 pandemic is the result of balancing personal information interests and social interests. As some scholars point out that “personal information is an important social resource in the era of big data, and it is vital to the technological innovation of enterprises, the innovation of business mode and government governance innovation” (Guo & Ma, 2020, p. 184). Therefore, while protecting personal information from illegal infringement, it is also necessary to ensure that personal information can get an orderly circulation. If personal information is determined as a right, it is easy to ignore the public interest attribute it contains, “it can neither provide substantial protection for citizens’ privacy, but also become an important obstacle restricting the development of data value” (Fan, 2016, p. 92).

Moreover, protecting personal information through the “legal interests protection mode” is highly feasible and has its own unique advantages. The purpose of establishing a civil right by law is to protect certain interests of civil subjects, so that the needs of the subjects of rights can be met (Cheng, 2019). With the development of society and economic progress, the interests of civil subjects are not static, and will change with time. It is impossible for the law to protect all the interests and needs of civil subjects, or to give equal protection, but to

weigh the relationship between the interests and the freedom of reasonable conduct (Cheng, 2019). In China's civil law system, civil interests are usually protected in two ways. One is directly stipulated by law as rights, such as the right to name, right of succession; and the other way is protected by law as legal interests,<sup>17</sup> such as Article 16 of China's Civil Code to protect the interests of the fetus (Yang, 2018). No matter whether it is the rights mode or the legal interests mode, both are the protection of the interests of natural persons by civil law, but the degree of protection of the two ways is different. For the "legal interests protection mode", the clarity and comprehensibility of implementation will be significantly higher than that of the "rights-based protection mode" with uncertain rights boundary, which can help to avoid obstructing with the freedom of others because of overprotection (Cheng, 2015), after all, "the protection of one person is often at the expense of another's rights or interests" (Medicus, 2000, p. 807).

In the 21st century, with the rapid development of science and technology, coordinating the relationship between the protection of personal information interests, information freedom and public interests (Cheng, 2019) is a very important work and task. Adopting the "legal interests protection mode" can provide the lowest degree of protection for the personal information interests, and then by virtue of its strong development and flexibility (Huang, 2020), adjusting the standards of the protection at any time according to the actual situation and social needs, so that the density and scope of relevant legal interests protection can be controlled more. However, it needs to be made clear that no matter how to lower the protection standard of personal information in order to promote industrial development; it must be based on keeping the bottom line of personal information protection, and cannot give up the protection of personal information for any reason. As China's legislature points out in the interpretation of the provisions of the various Books of the Civil Code:

The protection of personal information must properly balance the relationship between the interests of the information subject and the sharing and utilization of data. The expression of "personal information protection" not only emphasizes the protection of the interests of information subjects, but also avoids unnecessary misunderstandings and hindering the sharing and utilization of data, and hinder the development of the big data industry in our country. (Huang, 2020, p. 196)

On the whole, China's "legal interests protection mode" for protecting personal information interests is a good choice in the new era.

## **The Supervision of Personal Information and the Relief of the Interests**

### **Personal Information Supervision Mode and Mechanism**

China is one of the countries with the largest number of internet users in the world. According to the official data, as of March 2020, there are as many as 900 million internet users, more than four million internet websites and more than three million applications in China (Zhu, 2020). In August 2021, the Law Committee of the National People's Congress of China<sup>18</sup> promulgated the Personal Information Protection Law. It is Articles 13

<sup>17</sup> "A fetus is deemed as having the capacity for enjoying civil-law rights in estate succession, acceptance of gift, and other situations where protection of a fetus' interests is involved. However, a stillborn fetus does not have such capacity ab initio" (Civil Code of the People's Republic of China, 2020).

<sup>18</sup> Law Committee of the National People's Congress of China, the full name is the Legislative Affairs Committee of the Standing Committee of the National People's Congress, which is entrusted by the chairman's meeting to draft basic bills and laws on criminal, civil, state institutions and other aspects.

and 14 clearly confirm the “inform-agree” principle of personal information processing, which means that when processing personal information, it is required to obtain personal consent on the premise of full prior notification, and the individual has the right to withdraw the consent (Standing Committee of the National People's Congress, 2021).

Nevertheless, although this principle makes individuals have the right to weigh the pros and cons of disclosing personal information and decide whether to agree with others to collect and use it (Solove, 2013), and its implementation cost is lower (Ben-Shahar & Schneider, 2011), there are still many difficulties during the implementation. For instance, when opening a new website or app, an inquiry box will pop up: “we attach great importance to your personal information. Before using our products, please read carefully and fully understand the User Privacy and Personal Information Policy”<sup>19</sup>, and the user can choose whether to agree to the request. Due to the long and obscure contents of documents, users seldom read them carefully (Solove, 2013); instead, they have little even no knowledge of the contents stated in the statement in fact. In addition, sometimes users can continue to visit the website or use the app only after giving their consent.<sup>20</sup> In this case, this kind of “inform-agree” is completely a superficial and formally consent. Therefore, relying solely on the “inform-agree” principle and self-management and control of information by individuals is far from the control standard that should be achieved in the era of big data when personal information is widely collected and processed. In addition to obtaining the consent of the information subject through informing in advance, some corresponding measures should also be taken to strengthen the law enforcement supervision in the process of personal information processing.

The Civil Code, as a norm code to solve almost all civil problems, cannot make comprehensive and detailed provisions on the protection of personal information, and can only explain the core issues, such as its definition and connotation. So, there are no provisions of personal information supervision in the Civil Code, while the Personal Information Protection Law, as a special legislation in this field, should make detailed and clear provisions on the details not mentioned in the Civil Code. In the process of legislating the Personal Information Protection Law, several legislative expert proposal drafts have proposed the establishment of a special information supervisory agency, which is responsible for the supervision and implementation of personal information (Zhou, 2006; 2015). However, as far as the Personal Information Protection Law, there is no plan to establish a special authority to responsible for the supervision and law enforcement in the process of personal information processing. The Article 60 of the Personal Information Protection Law stipulates that the national cyberspace administration is responsible for the overall coordination of personal information protection, while the supervision and administration work is responsibility of the national cyberspace administration and relevant departments of the State Council based on the fields (Standing Committee of the National People's Congress, 2021).

From the perspective of comparative law, there are two main modes of supervision. One mode of supervision is to set up a united regulatory and supervisory agency, which is represented by the GDPR of the EU. The GDPR clearly requires EU member states to stipulate one or more independent public authorities specifically

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<sup>19</sup> For example, Sina Weibo, <https://weibo.com>.

<sup>20</sup> For example, Didi Chuxing, an App for booking vehicle on the mobile phone in mainland China. Like Uber in America.

responsible for overseeing the implementation of GDPR.<sup>21</sup> Although there are some differences in the name and regulatory mode, most countries within the EU have established their own information protection regulatory agencies (Gao, 2016). The other mode is separating regulatory adopted by the United States. Because there is no unified personal information protection legislation in the USA, it has not set up a unified information protection supervision and law enforcement authorities. Instead, according to the fields involved in personal information, the competent departments of various industries are responsible for protecting consumers' privacy rights and interests. For example, the Federal Trade Commission (FTC), authorized by the FTC Act, is responsible for supervising whether an enterprise protects the personal information of consumers as promised,<sup>22</sup> and can impose punitive measures. The Federal Communications Commission (FCC), Consumer Financial Protection Bureau (CFPB) and other departments also fully protect consumers' private information rights in related fields.

In the author's opinion, the supervisory mode currently selected by the Personal Information Protection Law in China is a combination of two regulatory modes, that is, the national cyberspace administration takes the lead in coordinating other relevant departments of the State Council to jointly supervise the using and handling of personal information. But according to the Cybersecurity Law and relevant Decisions of the State Council, the original intention of establishing the national cyberspace administration is to maintain internet security and strengthen cyber information protection.<sup>23</sup> The focus of the work should be the supervision of major national and social security cyber incidents, and the supervision of personal information protection is only a secondary job. In order to alleviate the pressure of the cyberspace administration, the Article 58 of the Personal Information Protection Law stipulates the self-supervision obligations of personal information processors who provide basic internet platform services, a large number of users, and complex business types. They are required to establish an independent organization to supervise their personal information processing activities, and regularly publish personal information protection social responsibility reports and accept social supervision (Standing Committee of the National People's Congress, 2021).

In the era of big data, the amount of information exchange is huge, and the fields involved are comprehensive and diverse. The efficiency of decentralized supervision and law enforcement work will be significantly lower than that of unified personal information protection authorities, and it is easy to have regulatory gaps in the areas of personal information that are not valued, or appear in the situation where all parties shirk and put-off, or issues of duplication of supervision (Deng 2020). Moreover, with the globalization of information and data, the cross-border flow of personal information needs special attention and protection. Setting up special authorities to take charge of law enforcement and supervision in personal information protection has become one of the main trends in the field of personal information protection in recent years (Greenleaf, 2015).

Therefore, in order to maintain the independence and unity of the supervisory agency, China should also conform to the global trend, set up a special personal information protection authority. Integrating the existing supervision functions of the national cyberspace administration and the various departments of the State Council,

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<sup>21</sup> GDPR, Art. 51.

<sup>22</sup> Federal Trade Commission Act, 15 U.S.C. §§ 45. FTC has jurisdiction over the protection of personal information from the perspective of making sure companies keep their privacy promises to consumers, and forming a "promise-oriented" privacy enforcement practice.

<sup>23</sup> Cybersecurity Law of the People's Republic of China, Art. 1.

to take special responsibility for protecting domestic and cross-border personal information, and provide convenient one-stop rights protection services for individual citizens. This authority will strictly supervise the processing and using of personal information, and if any illegal or breach of contract is found, it can be ordered to correct immediately and be punished according to the seriousness of the case, so as to achieve the whole process control of personal information protection.

### **Protection of Personal Information by Public Law and Private Law**

Comparing the relevant regulations and practical experience of EU countries and the United States, it can be seen that the international common practice is to adopt the dual protection mode of public law and private law to protect citizens' personal information. In brief, the public law relief which is mainly based on the law enforcement by judicial organs and relevant administrative organs, and the private law relief which is mainly based on the civil lawsuit filed by relevant obligees (Zhang 2017). China's protection framework for personal information interests is no exception. The public law protection of personal information in China is mainly criminal law protection. In 2015, the Amendment (IX) to the Criminal Law of People's Republic of China added the crime of infringing on citizen's personal information, which clearly stipulates that whoever sells or provides citizens' personal information in violation of the relevant provisions of the state shall, will be sentenced to imprisonment or criminal detention.<sup>24</sup> In order to clarify the conviction and sentencing standards, the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Infringing on Citizens' Personal Information issued in 2017. It clarifies the standard judgment issues such as what constitutes a 'serious case' and makes the application of the provision of the crime of infringing citizen's personal information more operable.<sup>25</sup> Since the crime was explicitly set up, almost all provinces and cities in China have carried out a number of large-scale centralized clean-up operations. According to the data released by the Supreme People's Court, in the four years from June 2017 to June 2021, courts across the country accepted 10,059 criminal cases of this crime, and the number of effective judgments reached 21,726.<sup>26</sup> It can be seen that public law protection which has clear standards of conviction and sentencing has a quite obvious protective effects. And the focus of this section will be on the private law protection of personal information.

According to the Civil Code and the Personal Information Protection Law, there are two private law remedies: the claim of personality rights and the claim of torts, but the applicable conditions and standards are limited. One of the major breakthroughs and innovations of China's Civil Code is the independent establishment of the Book of *Personality Right*, which separates the claim of personality rights from the torts system. Article 995 of the Civil Code establishes the claim of personality rights:

A person whose personality rights are infringed upon has the right to request the actor to bear civil liability in accordance with the provisions of this Code and the other laws. Where the said person exercises his right to request the actor to stop the infringement, remove the nuisance, eliminate the danger, eliminate the adverse effects, rehabilitate his reputation, or extend apologies, the provisions on limitation periods shall not apply. (Civil Code of the People's Republic of China, 2020, Art. 995)

<sup>24</sup> The Criminal Law of People's Republic of China, Art. 253.

<sup>25</sup> Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Infringing on Citizens' Personal Information, Art. 5.

<sup>26</sup> Chinanews, <https://baijiahao.baidu.com/s?id=1706498968923521905&wfr=spider&for=pc>.

It shows that the exercise conditions of the claim of personality rights do not require the occurrence of damage. However, in the author's opinion, this provision can be applied only when the law clearly recognizes the right to personality which is obvious exclusive and absolute, and the provision shall not apply to personal information that is merely personality interests. But there is one exception that is stipulated in the Article 1034 of the Civil Code. According to this provision, "private information in personal information shall be governed by the provisions on privacy right" (Civil Code of the People's Republic of China, 2020, Art. 1034). So, for the infringement of private information, the obligee can choose to get relief through the claim of personality rights. And if it meets the applicable conditions of the claim of torts, it can also choose to seek relief through it.

For the claim of torts, a question that needs to be clarified and improved is how to define the damage result in a case of infringement of personal information. In other words, it needs to be clear to what degree and extent of the damage needs to reach before relief can be obtained through the claim of torts? Is it necessary to achieve substantial damage results, or is it sufficient to have a general threat of damage? Only by clarifying this issue can the smooth protection of private law be guaranteed. In the author's opinion, the criteria for determining the element of damage to the fact should be relaxed. In addition to substantive damage, the damage suffered by personal information being violated also includes intangible damage, such as spiritual damage. Employment discrimination and impairment of social trust caused by tort of personal information should also be included in the consideration of intangible damage (Xu, 2017). So, the protection of personal information by private law reaches all-round and multi-level standards. However, excessive expansion may lead to a sharp increase in the number of lawsuits, and the workload of the courts will also increase. Therefore, the Personal Information Protection Law should consider how to better balance the relationship between the two. To sum up, the protection scope of China's private law on personal information is relatively broad, and the private law remedies are as follows:

Table 1

*Private Law Remedies of Personal Information Protection in China*

	Cause damages	No damages
Private information	Claim of personality rights Claim of torts	Claim of personality rights
General personal information	Claim of torts	

## Conclusion

In the information age, strengthening the protection of personal information has become the consensus of various countries and regions. Although there are some differences in the appellation of personal information due to different cultural traditions and legal habits in different countries, their connotations tend to be consistent. They are all aimed at protecting the specific information of natural persons from illegal collection, dissemination and processing in order to protect the interests of individuals. And the difference only is in the broad extension or narrow extension of personal information.

China's Civil Code has stated it clear through the legal provisions and chapters layout that personal information is a kind of personality interests including economic interests, and the "unified protection mode" should be adopted to protect the spiritual and economic interests of natural persons at the same time. In view of



the difference between personal information and privacy, the Civil Code makes it clear that personal information is a civil interest which is independent of the right to privacy and should be protected separately.

One unique thing is that the Civil Code creatively puts forward the “legal interest protection mode” of personal information and established a relative complete personal information protection system based on it. Under this protection mode, personal information is only a civil interest protected by law, not an exclusive and independent right. Personal information can be protected to some extent by regulating certain behaviors of actors. In other words, only when personal information is violated, the natural person has the right to get relief.

China's current supervision mode for personal information is a combination of the European Union's unified supervision mode and the United State's separate supervision mode, that is, the cyberspace administration coordinates the overall work and the relevant departments of the State Council regulate and supervise personal information protection within the scope of their duties. However, due to the complex work of cyberspace administration and other reasons, China should establish a united personal information supervision and administration agency, which shall be exclusively responsible for supervising domestic and cross-border personal information processing and utilization.

For legal protection and relief, China has adopted a dual protection mode of public law and private law concurrently protecting personal information. The conviction and sentencing standards for the crime of infringing on personal information are relatively clear, and the judicial applicability is relatively high. For private law protection, the scope of protection is relatively broad. According to the distinction between private information and general personal information, the ways of private relief are not exactly the same. Private information can seek relief through claim of personality rights and claim of torts. And general personal information can only obtain private law relief through claim of torts. In addition, the criteria for judging the facts of damage should be appropriately relaxed.

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