
CHINA LAW UPDATE

THE CIVIL CODE AND THE PRIVATE LAW PROTECTION OF PERSONAL INFORMATION

Xu Duoye*

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* Xu Duoye, LL. B. student at Tsinghua University School of Law. Many thanks to Cui Jiale, Li Enhan, Lin Meng, Qiu Qunran, Sun Yirong, Zhang Shichao, and Zhou Yuexin for their inspiring and helpful comments and the TCLR editors for careful editing. Any errors contained herein are mine.

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I. INTRODUCTION

With the development of the digital economy, personal information protection has become an increasingly important issue in China and legislators have responded to this trend. The year 2020 witnessed a great leap in China's legislation on personal information protection. In May, China issued the Civil Code of the People's Republic of China¹ (the "Civil Code"), which is one of the most significant events in China's legal history. In the Civil Code, one of the major highlights is the rules for personal information protection. Five months later, the Request for Public Comments on the Personal Information Protection Bill² (the "Personal Information Protection Bill") was released.

Previously, China's personal information protection rules scattered in more than 30 domain-specific laws (and affiliated judicial interpretations) and administrative regulations, each confined to their respective domains, such as consumer protection and cybersecurity.³ Most of the laws and administrative regulations prescribe administrative liability but only a few provide private law remedies for victims.⁴ The Civil Code provides a general structure for personal information protection, including the definition and scope of personal information, information subject's rights, and processor's obligations. Although the personal information protection rules of the Civil Code inherit the main structure from the rules on the same issue in Cybersecurity Law of the People's Republic of China⁵ (the "Cybersecurity Law"), the legislators has made important developments. Based on the Civil Code, the Personal Information Protection Bill will further develop private law protection of personal information.

In this note, Part II reviews China's personal information protection mechanism before the Civil Code. Part III introduces the personal information protection under the Civil Code, with an emphasis on the new developments. Part IV discusses the ideal functions of private law in personal information

¹ Min Fadian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021) (Chinalawinfo).

² Geren Xinxu Baohu Fa (Cao'an) Zhengqiu Yijian (个人信息保护法(草案)征求意见) [Request for Public Comments on the Personal Information Protection Bill] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 21, 2020) (Chinalawinfo).

³ Wang Xiuzhe (王秀哲), *Woguo Geren Xinxu Lifa Baohu Shizheng Yanjiu* (我国个人信息立法保护实证研究) [An Empirical Study on China's Personal Information Protection Legislation], DONGFANG FAXUE (东方法学) [ORIENTAL LAW], no. 3, 2016, at 58.

⁴ *Id.*

⁵ Wangluo Anquan Fa (网络安全法) [Cybersecurity Law] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective Jan. 6, 2017) (Chinalawinfo).

protection and evaluates to what extent the Civil Code fulfills these functions. Finally, in the light of the Personal Information Protection Bill, Part V discusses potential developments after the Civil Code in China's private law protection for personal information.

II. CHINA'S PRE-CIVIL CODE PRIVATE LAW PROTECTION OF PERSONAL INFORMATION

Before the Civil Code, private law rules on personal information protection are domain-specific, each confined to respective domains, such as consumer protection and cybersecurity.⁶ Key laws and judicial interpretation include the Law of the People's Republic of China on Protection of Consumer Rights and Interests⁷ (the "Consumer Rights and Interests Protection Law"), Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Civil Disputes over Infringements upon Personal Rights and Interests Through Information Networks (2014)⁸ (the "Provisions on Infringements Through Networks (2014)"), and Cybersecurity Law.⁹

⁶ Wang, *supra* note 3.

⁷ Xiaofeizhe Quanyi Bohu Fa (2013 Xiuzheng) (消费者权益保护法(2013修正)) [Law on the Protection of Consumer Rights and Interests (2013 Amended)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 25, 2013, effective Mar. 15, 2014) (Chinalawinfo).

⁸ Zuigao Renmin Fayuan Guanyu Shenli Liyong Xinxi Wangluo Qinhai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Guiding (2014) (最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定(2014)) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks (2014)] (promulgated by Sup. People's Ct. Aug. 21, 2014, effective Oct. 10, 2014) (Chinalawinfo) [hereinafter *Provisions on Infringements Through Networks (2014)*]. After the promulgation of the Civil Code, the Supreme People's Court has replaced the Provisions on Infringements Through Networks (2014) and removed the personal information related rules therein. Zuigao Renmin Fayuan Guanyu Shenli Liyong Xinxi Wangluo Qinhai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Guiding (2020 Xiuzheng) (最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定(2020修正)) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Civil Disputes over Infringements upon Personal Rights and Interests Through Information Networks (2020 Amended)] (promulgated by Sup. People's Ct. Dec. 29, 2020, effective Jan. 1, 2021). The personal information protection rules in the Provisions on Infringements Through Networks (2014) are discussed in this article to provide a historical background.

⁹ In addition to laws, administrative regulations, and judicial interpretations, China has a national standard that stipulates the recommended operation standard of information processors: Xinxi Anquan Jishu Geren Xinxi Anquan Guifan (信息安全技术 个人信息安全规范) [Information Security Technology — Personal Information Security Specification] (promulgated by Standardization Admin. of P.R.C. & General Admin. Quality Supervision, Inspection and Quarantine of P.R.C., Dec. 29, 2017, revised by Standardization Admin. of P.R.C. Mar. 6, 2020, effective Oct. 1, 2020) [hereinafter *Specification*]. Since the Specification has no authority of law, it is not within the focus of this note. For a general introduction of China's personal information regulatory mechanism, see Zhou Yuexin, *Cyber Protection of Personal Information in a Multi-Layered System*, 12 Tsinghua China L. Rev. 159 (2019).

A. *Consumer Rights and Interests Protection Law (2013)*

The Consumer Rights and Interests Protection Law governs the relationship between consumers and business operators. In its 2013 amendment,¹⁰ legislators revised Article 29 and Article 50 to enhance the protection of personal information. Article 29 sets out requirements on the collection and usage of personal information by business operators and the obligation of business operators to secure personal information.¹¹ Additionally, Article 29 prescribes that business operators shall not send commercial information to consumers without consumer's request or consent.¹² According to Article 50 of the law, consumers can sue business operators if consumers' rights on personal information are violated.¹³

B. *The Provisions on Infringements Through Networks (2014)*

The Provisions on Infringements through Networks (2014) is a judicial interpretation issued by the Supreme People's Court for online personal rights and interests infringement cases. According to the Provisions on Infringements Through Networks (2014), the Supreme People's Court affirms that unlawful disclosure of personal information incurs tort liability, but also provides preclusions to civil liabilities of personal information disclosure without consent of the information subject (the "fair use rule"), including the disclosure within the necessary scope to promote public interests, the disclosure of pseudonymized information for academic research or statistics, the disclosure of lawful public personal information without violation of social morals, public interests or important personal interests, the disclosure of lawfully obtained personal information without violation of social morals, public interests or important personal interests, and the disclosure authorized by law or administrative regulation.¹⁴ Similar fair use rule is common in personal information protection laws around the world and reflects the balance between personal interests and public interests.¹⁵

¹⁰ Quanguo Renmin Daibiao Dahui Changweihui Guanyu Xiugai Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohufa de Jueding (2013) (全国人民代表大会常务委员会关于修改《中华人民共和国消费者权益保护法》的决定(2013)) [Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 25, 2013, effective Mar. 15, 2014) (Chinalawinfo).

¹¹ Consumer Rights and Interests Protection Law, art. 29.

¹² *Id.*

¹³ Consumer Rights and Interests Protection Law, art. 50.

¹⁴ The Provisions on Infringements Through Networks (2014), art. 12.

¹⁵ See Cheng Xiao (程啸), *Lun Woguo Min Fadian Zhong de Geren Xinxi Heli Shiyong Zhidu* (论我国民法典中的个人信息合理使用制度) [On the Fair Use of Personal Information in China's Civil Code], 32 ZHONGWAI FAXUE (中外法学) [PEKING UNIV. L.J.] 1001 (2020); examples of "fair use rule" includes art. 6, art. 9 and art. 23 of the General Data Protection Regulation, art. 17 of Singapore's Personal Data Protection Act 2012, and art. 16–18 of Japan's Act on the Protection of Personal Information. Regulation 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, Council Regulation 2016/679, art. 6, art. 9 and art. 23, 2016 O.J. (L 119) 1 (EU)

C. Cybersecurity Law (2017)

The Cybersecurity Law mainly consists of regulatory rules governing the conduct of “network operators”. It establishes a framework for personal information protection in the context of online activities.¹⁶

It is noteworthy that Article 74 of the Cybersecurity Law provides that whoever violates the Cybersecurity Law and causes damage shall assume civil liability, though most of the legal liabilities under the Cybersecurity Law are administrative liabilities. This provision and the aforementioned Article 50 of the Consumer Rights and Interests Protection Law are the main basis for private law claims before the Civil Code takes effect.

III. NEW DEVELOPMENTS OF PERSONAL INFORMATION PROTECTION IN THE CIVIL CODE

Unlike the previous domain-specific laws, the Civil Code develops a complete framework for private law protection of personal information and covers all types of private entities (and to a limited extent, public entities) and all types of operations on personal information. The rules of personal information protection under the Civil Code are generally modeled after the rules in the Cybersecurity Law but the coverage is significantly broadened, with several important developments.

Most personal information protection rules in the Civil Code are in Chapter Six “Privacy Rights and Personal Information Protection” in Book Four “Personality Rights”. Like the Cybersecurity Law, Chapter Six stipulates the principles of “lawfulness, justification and necessity” and the principle of informed consent when processing personal information and prescribes the general requirements for handling personal information.¹⁷ Chapter Six also sets forth the rights of the information subjects, including the right to consult or reproduce¹⁸ and the right to request correction and deletion,¹⁹ and the obligations of the processors of personal information, including the obligation to ensure the security of the personal information,²⁰ the obligation not to disclose the personal information to the third party,²¹ and the obligation to

[hereinafter *General Data Protection Regulation* or *GDPR*]; Personal Data Protection Act 2012, No. 26 of 2012, art. 17 (Sing.); Act on the Protection of Personal Information, Act No. 57 of 2003, art. 16–18 (Japan).

¹⁶ The Cybersecurity Law sets out the definition of personal information (art. 76), the collection (art. 41 and art. 44) and usage (art. 43) of personal information, the provision of personal information to other parties (art. 42 and art. 44), the leak notification and report (art. 42), and the information subjects’ right to request deletion or correction (art. 43). The Cybersecurity Law also stipulates the confidentiality obligation of network regulatory administrations and their staff (art. 45).

¹⁷ Civil Code, art. 1035.

¹⁸ *Id.* art. 1037.

¹⁹ *Id.* art. 1037.

²⁰ *Id.* art. 1038.

²¹ *Id.* art. 1038.

notify the relevant person and government authority when personal information leak happens.²²

Despite the apparent similarity between the rules in the Civil Code and the Cybersecurity Law, there are several important developments:

A. Definition and Classification of Personal Information

The Civil Code defines personal information as information “that can identify a specific natural person separately or in combination with other information”.²³ Compared with privacy right, the Civil Code does not recognize personal information as a “right”; instead, personal information is protected as a legal interest. The Civil Code distinguishes personal information from privacy, but also recognizes private personal information as a type of personal information, which is the overlap between these two categories; both rules for privacy right and personal information apply to private personal information.

1. Personal Information Protected as a Legal Interest. During the drafting process of the Civil Code, there was intensive discussion on whether there should be a general personal information “right” like property right, or personal information should be protected only as a legal interest.²⁴ Supporters thought establishing a general personal information right affords information subjects a better control over their personal information, while scholars opposing personal information right believed the absolute and exclusive control granted by a general right of personal information would impose a high hurdle to the circulation of information, which is crucial to the digital economy.²⁵ The Civil Code does not adopt the concept of “personal information right” and chooses to protect the personal information as a legal interest.

However, it should also be noted that while there is no general personal information “right” under the Civil Code, the Civil Code does provide a set of separate and tailored personal information related rights, or in other words, information subject rights, such as the right to consult or reproduce and the right to request correction and deletion.²⁶ This shows the legislators’ effort in balancing personal information protection and economic innovation and development.

2. Personal Information, Privacy, and Private Personal Information. The Civil Code distinguishes between two different but overlapping concepts: personal information and privacy. In the Civil Code, personal information is

²² *Id.* art. 1038.

²³ *Id.* art. 1034.

²⁴ Wang Hongliang (王洪亮), *Min Fadian yu Xinxì Shehui — Yi Geren Xinxì wei Li* (《民法典》与信息社会——以个人信息为例) [*The Civil Code of China and the Information Society — Taking Personal Information as an Example*], ZHENGFA LUNCONG (政法论丛) [J. POL. SCI. & L.], no. 4, 2020, at 3.

²⁵ *Id.*

²⁶ Civil Code, art. 1037.

defined as information “that can identify a specific natural person separately or in combination with other information”.²⁷ Privacy, according to the Civil Code, refers to the “tranquility of the private life of a natural person, and the private space, private activities, and private information that he is unwilling to be known to others”.²⁸ The legal definition of these two concepts demonstrates that the key to personal information is identifiability, while the concept of privacy centers on the subject’s unwillingness to be disturbed or to be known. The “unwilling to be known” nature of privacy limits its economic value; in contrast, a significant economic value can be attached to a variety of personal information.²⁹ Therefore, the protection for privacy is more passive and defensive; the protection for personal information, however, should consider the utility of personal information and balance the economic interest of the information subject and the economic interest of the society in general.³⁰

The Civil Code further classifies personal information into private information and other personal information, based on whether the personal information meets the criteria of privacy. Thus, private personal information is the overlap between personal information and privacy. Consequently, private personal information is protected under both privacy right protection rules and personal information protection rules.³¹

It is unclear which types of information will fall within its ambit since the concept of private information does not appear in previous legislation³² and the Civil Code provides no example. The Supreme People’s Court, in Article 12 of the Provisions on Infringements Through Networks (2014), acknowledged genetic information, medical records, health examination information, criminal records, home address, and private activities as “privacy”.³³ However, since the Provisions on Infringements Through Networks (2014) was issued in 2014 and the public’s and the judges’ understanding of the distinction between personal information and privacy might not be the same as today,³⁴ the “privacy” in the Provisions on Infringements Through Networks (2014) might

²⁷ *Id.* art. 1034.

²⁸ *Id.* art. 1032.

²⁹ Ren Longlong (任龙龙), *Geren Xinxi Minfa Baohu de Lilun Jichu* (个人信息民法保护的理论基础) [*The Theoretical Basis of the Civil Protection of Personal Information*], 35 HEBEI FAXUE (河北法学) [HEBEI L. SCI.] 181 (2017).

³⁰ *Id.*

³¹ Civil Code, art. 1034.

³² Before the Civil Code, the Specification provides another set of classification, sensitive personal information and other personal information. The Specification defines sensitive personal information as the information which, once leaked, is very likely to cause harm to the subject’s reputation, health, and personal and property safety, or cause discrimination against the information subject, including financial information (such as bank accounts and credit records), health and medical information, biometric information, identity information, and other sensitive information (such as sex orientation, marriage history and previous criminal conviction). See Specification, art. 3.2.

³³ Provisions on Infringements Through Networks (2014), art. 12.

³⁴ See Zhang Li’an (张里安) & Han Xuzhi (韩旭至), *Dashuju Shidai Geren Xinxi de Sifa Shuxing* (大数据时代下个人信息权的私法属性) [*The Private Law Nature of Personal Information Right in the Big Data Era*], 165 FAXUE LUNTAN (法学论坛) [LEGAL FORUM] 119, 120–22.

not have the same meaning as privacy in the Civil Code. It is left for future legislation and judicial interpretation to clarify the scope of private information.

Comparatively, the General Data Protection Regulation (the “GDPR”) lists a set of “special categories of personal data”, including “personal data revealing racial or ethnic origin, political opinions, [...] data concerning a natural person’s sex life or sexual orientation”.³⁵ From the definition of private information and types of information listed in GDPR as “privacy”, one can expect the coverage of private information under the Civil Code to be broader than the “special categories of personal data” under the GDPR, since private information can potentially include any personal information that is usually unknown to others.

B. Parties Governed by the Civil Code

The personal information protection related rights and obligations in the Civil Code are applicable to all private entities. The broad coverage is a major development compared to the previous domain-specific laws.

Additionally, under Article 1039,³⁶ the Civil Code prescribes the confidentiality obligation of administrative bodies and their staff when performing public duty. This is an uncommon extension because the behavior of administrative bodies and their staff typically should be governed by administrative laws rather than the Civil Code. This extension probably originates from a similar provision in the Cybersecurity Law.³⁷ The scope of the obligations of administrative bodies listed in Article 1039 is narrower than the obligations of ordinary information processors, including only the obligations to keep personal information confidential, not to disclose, and not to illegally provide to others. Although it is unclear in the Civil Code which kind of remedies, administrative or private law remedy, shall be applied, a judge in charge of Civil Adjudication Tribunal No.1³⁸ in the Supreme People’s Court stated in an interview in 2014 that tort liability will not be applied.³⁹ Considering suing an administrative body based on its behaviors in the performance of public duty involves a different branch of court and different

³⁵ General Data Protection Regulation, art. 9.

³⁶ Civil Code, art. 1039.

³⁷ Cybersecurity Law, art. 45.

³⁸ Civil Adjudication Tribunal No.1 is the highest tribunal for civil cases concerning personal right infringement, see *Civil Adjudication Tribunal No.1*, THE SUPREME PEOPLE’S COURT OF PEOPLE’S REPUBLIC OF CHINA, <http://www.court.gov.cn/jigou-fayuanjigou-zhineng-11.html> (last visited Jan. 20, 2015).

³⁹ Luo Shuzhen (罗书臻), Jiu “Guanyu Shenli Liyong Xinxi Wangluo Qinhai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Guiding” Zuigao Renmin Fayuan Minyingting Fuzeren Da Jizhe Wen (就《关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定》最高人民法院民一庭负责人答记者问) [Person in charge of Civil Adjudication Tribunal No.1 of Supreme People’s Court Responds to Questions on the Application of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Civil Disputes over Infringements upon Personal Rights and Interests Through Information Networks], Renmin Fayuan Bao (人民法院报) [People’s Court News], Oct. 12, 2014, at 03, http://rmfyb.chinacourt.org/paper/html/2014-10/12/content_88984.htm?div=-1.

procedures, the purpose of Article 1039 is more likely to be signifying the completeness of personal information protection than giving information subject right to seek private law remedy from public administrations.

C. Processing of Personal Information

1. The Definition of “Processing”. The Civil Code adopts the concept “processing” to describe the kinds of behavior covered. Processing under the Civil Code includes “collection, storage, use, handling, transmission, provision, and disclosure, among others, of personal information”,⁴⁰ covering almost all operations on personal information. This is an expansion compared to the language of the Cybersecurity Law, which covers only collection and usage among various interactions with personal information. Unlike the GDPR, there is no processor-controller dichotomy in the Civil Code, so the “processor” of personal information under the Civil Code is broader than the “processor” under the GDPR. The broad coverage of personal information “processing” makes essentially all operations on personal information subject to the governance of the Civil Code.

2. Fair Use Rule. As discussed in Part II, the Provisions on Infringements Through Networks (2014) prescribes a fair use rule which provides that the disclosure of personal information without the information subject’s consent does not incur civil liability under several circumstances. The Civil Code adopts this fair use rule with developments.

Article 1036 of the Civil Code expands the application of the fair use rule from the use of personal information online to the use of personal information under all contexts, and from disclosure of personal information to all types of information processing. In addition to the processing with consent by the natural person or his guardian, the Civil Code lists the following as exceptions that do not incur civil liabilities: the processing with consent by the natural person or his guardian; the processing of legally published information, except when the person explicitly refuses or the processing infringes upon his significant interests; and other acts to protect public interests or the rights or interests of the person.⁴¹ Compared with the fair use rule in the Provisions on Infringements Through Networks (2014), the fair use rule in the Civil Code is broader and more general, allowing the court to interpret and apply according to the different specific circumstances.

Additionally, Article 999 of the Civil Code provides an exception to civil liability for the proper use of personal information for news reporting and supervision by public opinion.⁴² Article 1020 and Article 1023 of the Civil

⁴⁰ Civil Code, art. 1035.

⁴¹ *Id.* art. 1036.

⁴² *Id.* art. 999.

Code prescribe specific exceptions for the use of personal image, name, and voice.⁴³

D. Information Subject's Rights

In addition to the right to request deletion or correction already adopted in the Cybersecurity Law, the Civil Code provides information subjects with the right to “consult or reproduce his information from the processor”.⁴⁴ This is a crucial development because knowing what information is being processed is the basis of further action. Similar right can also be found in personal information (data) protection laws in other jurisdictions, such as the GDPR⁴⁵ and the California consumer privacy protection law.⁴⁶

IV. THE FUNCTION OF PRIVATE LAW IN PERSONAL INFORMATION PROTECTION AND THE EFFECT OF THE CIVIL CODE

Private law has indispensable functions in the protection of personal information. Scholars point out that ideally, private law should serve the following unique functions which can hardly be replaced by administrative regulations: (1) Private law sets out the fundamental content and scope of personal information protection, which is flexible enough to deal with new developments in society (“establishment function”); (2) private law signifies the respect for the rights and interests of individuals (“signal function”); (3) private lawsuits enable victims of personal information infringement to obtain compensation (“remedial function”); (4) private law enables information subject to protect their interests when administrative agencies fail to take action (“private enforcement function”).⁴⁷

The Civil Code fulfills the first and second functions. As discussed in Part II, the Civil Code provides the definition and classification of personal information, the principles of personal information processing, and information subject's rights and information processor's obligations; therefore, a general information protection structure applicable in all domains is established by the Civil Code. The definition of personal information and information processing is broad but not exhaustive, leaving room for future development. Also, the general principles of information processing provide a foundation for personal

⁴³ *Id.* art. 1020 and art. 1023.

⁴⁴ *Id.* art. 1037.

⁴⁵ General Data Protection Regulation, art. 15.

⁴⁶ CAL. CIV. CODE tit. 1.81.25 § 1798.91.

⁴⁷ For discussion about the unique function of private law in personal information protection, see Cheng Xiao (程啸), *Min Fadian Bianzuan Shiye Xia de Geren Xinxi Baohu* (民法典编纂视野下的个人信息保护) [Personal Information Protection from the Perspective of the Legislation of the Civil Code], ZHONGGUO FAXUE (中国法学) [CHINA L. SCI.], no. 4, 2019, at 26 (2019). The increasing incidents of class actions in Europe recently, despite the heavy fines under the GDPR, can also shed some lights on the merits of private enforcement of personal information/data protection law, see Vincent Manancourt, *Have a GDPR Complaint? Skip the Regulator and Take It to Court*, POLITICO (Aug. 30, 2020, 5:00 PM), <https://www.politico.eu/article/have-a-gdpr-complaint-skip-the-regulator-and-take-it-to-court/>.

information claims when more specific rules and regulations are not applicable, and the fair use rule allows the judge to balance various interests when necessary. As one of the most significant events in Chinese legal history, the Civil Code catches broad attention. The fact that personal information protection rules is included in Book Four “Personality Rights” signifies that personal information is an important personality interest protected by the law.

However, the special characteristics of personal information infringement cases bring difficulties to the application of traditional tort law. In lack of special rules for the enforcement of personal information interest, the Civil Code does not sufficiently fulfill the remedial function and private enforcement function.

A major legal barrier is the lack of compensation for spiritual harm which is not serious. China’s tort law allow compensation for personal right infringement under two circumstances: (1) When there is a property loss due to personal right infringement, the victim may sue for the property loss, the gain of the liable party, or an amount determined by the judge;⁴⁸ (2) when there is a serious spiritual harm, the victim may sue for compensation.⁴⁹ Personal information infringement usually does not cause actual property loss and in many circumstances the gain for the liable party from a single infringement is minimal and hard to prove. Often, the spiritual harm caused by personal information infringement cannot reach the standard of seriousness required by tort law.

Besides, there are also technical barriers for a personal information infringement suit: First, the fault element in a tort claim is hard to prove; second, when multiple parties are involved in the processing of personal information, it is difficult to pinpoint the liable party; third, the process of personal information processing is often unknown to the information subject, which increases the difficulty in collecting evidence.⁵⁰ Also, the value of a single personal information infringement may be too low to make the litigation worthwhile, causing a collective action problem.

It is noteworthy that courts in China have been actively developing the jurisprudence of personal information protection. In some cases, courts are willing to give discretionary damage as a remedy for plaintiffs even when there is no evidence of property loss of the victim or the gain of the liable party.⁵¹ Also, in cases where the plaintiff is not able to pinpoint the specific source of

⁴⁸ Civil Code, art. 1082.

⁴⁹ Civil Code, art. 1083.

⁵⁰ For an analysis of the difficulties in applying tort law to personal information infringement cases, see Ye Mingyi (叶名怡), *Geren Xinxi de Qinquanfa Baohu* (个人信息的侵权法保护) [*Tort Law Protection of Personal Information*], FAXUE YANJIU (法学研究) [CHINESE J.L.], no. 4, 2018, at 83 (2018).

⁵¹ For example, see *Ling Moumou Su Beijing Weibo Shijie Youxian Gongsi* (凌某某诉北京微博视界有限公司) [*Ling Moumou v. Beijing Weibo Shijie Co., Ltd.*], (2019)京0491民初6694号 (Beijing Internet Ct. July 11, 2020). In this case the court believes that though there is no evidence of actual property loss and gain for the liable party, the personal information infringement brings a risk of property loss and gain for the liable party, and thus compensation should be available.

information leak among two or three possible sources, the courts sometimes allow the plaintiff to seek redress from the party most likely to be the source of the leak.⁵² However, these cases have no binding effect and do not solve all the problems. Even after the promulgation of the Civil Code, there is still no clear and practical special rules in legislation to help plaintiffs overcome those difficulties.

V. THE FUTURE DEVELOPMENT OF PRIVATE LAW PROTECTION OF PERSONAL INFORMATION

As is discussed in Part IV, the Civil Code establishes a general framework for personal information protection to make private law protection widely available, but some key issues in the private enforcement of the rules have remained unsolved on the legislation level.

In October 2020, the National People's Congress released the Personal Information Protection Bill. The Personal Information Protection Bill sets out a set of more detailed personal information protection rules and importantly, demonstrates a clear intent to solve the difficulties in personal information infringement suits.

According to Article 65 of the Personal Information Protection Bill, victims of personal information infringement can sue for either compensation for the damage, the benefits obtained by the processor, or compensation determined by the court based on the circumstances; importantly, the availability of this cause of action is not limited to property loss.⁵³ Therefore, if the court interprets this provision properly, in the future plaintiffs may use this provision to claim for compensation, without being barred by the inability to prove property loss or the lack of seriousness of spiritual harm. Also, the Personal Information Protection Bill shifts the burden of proof regarding the element of fault in the personal information tort claim to the defendant.⁵⁴ These special arrangements, if preserved in the final legislation, would greatly enhance the chance of the plaintiff to win a personal information infringement suit.

In addition to the special arrangements for personal information infringement litigation, the Personal Information Protection Bill also authorizes the "people's procuratorates, the department performing the duties of personal information protection", and "organizations determined by the state cyberspace administration" to bring suits on behalf of a large number of individuals.⁵⁵ This mechanism will help solve the collective action problem when damage is made to a large number of individuals but the value of a single claim is low.

⁵² For example, see *Shenjin Su Zhifubao Zhongguo Wangluo Jishu Youxian Gongsi Deng* (申瑾诉支付宝中国网络技术有限公司等) [*Shenjin v. Zhifubao China Internet Technology Co., Ltd et al.*], (2018)京0105民初36658号 (People's Ct of Chaoyang District, Beijing Dec. 29, 2018).

⁵³ Personal Information Protection Bill, art. 65.

⁵⁴ *Id.*

⁵⁵ *Id.* art. 66.

Therefore, the future Personal Information Protection Law will likely solve most of the problems identified in Part IV. It is probable that after the Personal Information Protection Law comes into effect, China will have a more complete and enforceable private law system for personal information protection.

VI. CONCLUSION

The Civil Code establishes a general framework for personal information protection to make private law protection widely available. Most of the rules on personal information protection are modeled after the Cybersecurity Law, but significant developments are made in terms of definition and classification of personal information, parties governed by the law, information processing, and information subject's rights.

Some difficulties in the enforcement of personal information protection remain unsolved by the Civil Code, but the future Personal Information Protection Law will likely solve most of these problems. Probably, China will have a more complete and enforceable private law system for personal information protection soon.