

# Personality Rights in China's New Civil Code: A Response to Increasing Awareness of Rights in an Era of Evolving Technology

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## Abstract

This article explores and assesses the significance of the adoption of a separate part (or, book 编) on personality rights in China's new Civil Code. We argue that there are profound socioeconomic meanings underlying the technical changes in the classic structure of the civil codes in civil law tradition. On one hand, the stand-alone part on personality rights is the fruit and embodiment of the rising rights consciousness of personality in Chinese civil society, which has been largely unexplored in existing China studies. On the other hand, the part provides a new legislative model to comprehensively tackle the pervasive technological challenges to the protection of personal spheres, which is entangled with the rising rights consciousness over personality in China. Yet, the robustness of the acknowledgment of personality rights in this special part in promoting the protection of such rights remains to be tested in future court judgments.

## Keywords

personality rights, Civil Code, rights awareness, evolving technology

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Legal precepts have to be fitted to the life of the people they are to govern, not the life of the people fitted arbitrarily to the legal precepts.

—Roscoe Pound, 1948

The diffusion of new technologies has begun to raise serious concerns over the invasion of personal spheres. In a recent interview at Davos (Huawei, 2020), Professor Yuval N. Harari, a historian and futurologist, warned that human society is close to or even at the point where organizations such as biotech and info-tech giants and governments are capable of systematically hacking millions of people. Once such data-controlling organizations obtain enough personal data and computing power, they can predict and even manipulate human decisions. This will ultimately create data “colonies,” with the potential to undermine the ideas of individual freedom, free markets, and liberal democracy.

Though such a “colonial” situation is unlikely to appear in the next two or three decades or even after, the already introduced algorithm in a wide range of sectors in digital markets (Gal and Elkin-Koren, 2017; Wagner and Eidenmüller, 2019) has raised serious concerns about the protection of personal information and, in general, personality. Unprecedentedly changing modern technologies are posing great risks to personal integrity, freedom, and dignity, which constitute legally significant interests that are often embedded in the branch of law now known as personality rights law.

The right to personality is primarily a civil law concept (Popovici, 2004; Resta, 2014). It generally means an aggregate of personal rights that are aimed at the protection of the integrity, freedom, and dignity of a person. It comprises corporeal rights, including one’s rights to life, body, and health, and incorporeal rights, including one’s rights to one’s name, portrait, reputation, honor, privacy, and personal information. Legitimate personal interests (but not enumerated “personality rights”) have also been recognized by China’s courts on a case-by-case basis, such as the interests to mourn deceased family members, to protect one’s sexual autonomy, and to defend against false imprisonment.<sup>1</sup>

China’s profound social and economic development is leading the materially richer Chinese people to seek the fulfillment of their nonmaterial needs. This is unlike circumstances a decade ago, when the drafting of the Tort Liability Law was still aimed mainly at addressing issues concerning people’s subsistence (deLisle, 2012). China observers have pointed out a rising demand among the public for their “rights.” However, in the pursuit

of nonmaterial rights in China, the emphasis has been primarily on the relationship between individuals and the state, and the dimension of such rights vis-à-vis private parties in civil society has been little explored. Studies on this subject are typically centered on social grievances that stoke public outcry and “mass incidents,” as public protests are euphemistically referred to in the Chinese context (Tong and Lei, 2010; Feng Chen, 2000; Hurst and O’Brien, 2002). This exclusive attention to demands for political rights or the right to subsistence (Perry, 2007; Perry, 2008) has left many other emerging needs unaddressed, such as the need to honor personal integrity, freedom, and dignity among individuals.

The growing consciousness of personality rights, coupled with their vulnerability under modern technologies, has led to one of the most noteworthy innovations in China’s new Civil Code, adopted by the National People’s Congress on May 28, 2020 (NPC, 2020). The new Civil Code builds on the parts in classic civil codes (consisting of six books: general provisions, property rights, contract, marriage, succession, and tort liability) and adds to them a separate book on the protection of personality rights.<sup>2</sup> This step admittedly has not been free of academic controversy, in particular, regarding whether such an unprecedented approach might lead to confusion over the structure of the code and to political disturbance within Chinese society.<sup>3</sup> However, as we argue in this article, the adoption of an independent book on personality rights is not “just a minor technical issue,” as some academics have put it (Chen, 2018b). Rather, behind the technical structure of a separate book is a vigorous academic and legislative endeavor to respond to the growing consciousness of personality rights among the public and the ubiquitous technological risks they face in contemporary China, such as the widespread collection of facial geometry and biometric information by public and private entities, the disclosure of defaulters’ information through apps like TikTok and WeChat to coerce them to comply with court decisions, and the application of gene-editing tools on human embryos as a disease prevention measure.

Adapting the law to respond to new technologies is not a new phenomenon in legal history. The emergence of personality rights protection as an autonomous problem in the nineteenth century was a consequence of the introduction of photography in the press and commercial advertisements (Mensel, 1991). In response, both German legal scholars’ construction of the paradigm of the “general right of personality” and American legal academics’ advancement of the inviolable value of the “right to privacy” pointed to a defensive structure of personality rights mainly within the framework of tort law (Zweigert and Kötz, 1998: 688; Warren and Brandeis, 1890).

However, today, more than ever before, human society has reached a tipping point of technological explosion. “Breakthroughs in biotech, physics, chemistry, neurology, and mathematics, as well as interdisciplinary and cross-domain innovations have built significant momentum for humanity’s advancement” (Huawei, 2020). Yet, the challenges that this technological explosion poses to the protection of personality are quantitatively and qualitatively incomparable to the problems raised by photography in the nineteenth century.

For China it has become crucial to reassess whether the defensive structure of personality rights protection under tort law remains the best legislative choice. As some scholars of comparative law have already pointed out, diffusing the entire body of personality-rights issues into tort law is rather simplistic and reductionist because the sanctioning regime against the tortfeasor in tort law does not pay sufficient attention to persons’ claims for respect. Social respect is essential to personal integrity and human dignity (Schwerdtner, 1977). This paradigm can neither reflect social and economic evolution in a timely and effective manner nor serve to protect a wide range of proactive uses of personal attributes within contractual relationships.

The limits of the nineteenth-century defensive structure of personality rights protection under tort law to some extent led China to adopt an independent Book of Personality Rights in its recently adopted Civil Code. Such a book, if designed well, can encompass a wide range of personality interests and harms in the face of technological explosion, old and new, tangible and intangible, patrimonial and inalienable, tortuous and contractual, commercial and gratuitous, reactive and proactive, defensive and preventive, and so forth. As many jurisdictions are contemplating adapting their existing codes or designing new ones to keep pace with modern technologies (Resta, 2011; Chen, 2018b), hopefully, the comprehensive treatment of the protection of the personal sphere in an independent book in the Chinese Civil Code, in conjunction with the remedial provisions in its Book of Tort Liability Law, can enrich the legislative modes of the entire family of civil codes and provide an alternative choice for legal projects in other jurisdictions.

In this article, we first explain how the special Book of Personality Rights in the Civil Code responds to the rising consciousness of nonmaterial rights in Chinese civil society, and then analyze the parallel challenges from three types of modern technologies to the protection of personality rights, and critically assess the extent to which the protection of personality rights spelled out in the Civil Code can effectively address them. We end the article with several remarks on the future application of provisions on personality rights.

## Growing Rights Consciousness and China's Personality Law

Personality rights in China, as in many other jurisdictions, have grown in a piecemeal fashion. It takes considerable time for the law to respond to new areas of human interest and to protect them as “rights,” as the experience in both continental Europe and the United States shows (Brüggemeier et al., 2010: 3). Codifying personality rights law as a separate book in China's new Civil Code is primarily a response to the growing consciousness of rights in China's civil society. As economic development lifts millions out of poverty, more and more Chinese people are now enjoying a comfortable life, rather than a life of mere subsistence, and are becoming more assertive in pursuing their personal interests. The synthesis of social and economic rights has been a key foundation for the codification of the new code.

The Chinese people believe that not only should more such interests be recognized as rights, but existing and established rights should also be expanded in their essence and scope, creating a new landscape that calls for a comprehensive statute, instead of the fragmented legal instruments that came before.<sup>4</sup>

### *Hierarchical Needs and the Demand for Emerging Rights*

Personality rights as they are known today cover a wide range of rights, including a person's body, portrait, reputation, and privacy. These are recent ideas in China and are mostly the outcome of China's economic boom. A hungry nation might well care less about human dignity. Modern psychology shows that people's needs are hierarchical and that lower needs in this hierarchy generally have to be satisfied before people turn to “higher” needs. As Maslow (1943: 374) put it, “man lives by bread alone—when there is no bread.” Similarly, according to an ancient Chinese saying, “When the granaries are full, [the people] will know propriety and moderation; when their clothing and food are adequate, they will know [the distinction between] honor and shame” 仓廩实则知礼节, 衣食足则知荣辱.<sup>5</sup>

Socioeconomic and legal developments over the past four decades reflect more or less the same trajectory (Wang Liming, 2019b). Economic development in China has lifted many people out of poverty and enabled them to turn to largely non-physical higher needs in the hierarchy. New types of rights have arisen as people have started to have expectations for legal protection of previously unrecognized or under-recognized needs. As Warren and Brandeis (1890: 195) put more than a century ago,

the intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition.

The right to privacy epitomizes this trend. Unlike in common law countries where the right to privacy has been a familiar idea since the noted article by Warren and Brandeis (1890), the concept of privacy is rather strange for Chinese people. For thousands of years, China remained a rural society where social ties and interpersonal relationships were highly valued. People were so close to each other that even the number of eggs laid by the neighbor's hen was known to all. The idea of privacy in such a context is unimaginable.

This lack of attention to privacy in a largely rural China was carried into the People's Republic. A planned economy relying on state guidance replaced rural-based networks, but placed a similar constraint on people's social ties, as individuals were seen as relatively closed units that bonded directly with the state. Privacy was distorted as an idea and was belittled and even resisted by the public because people largely equated privacy 隱私 with physical intimacy 阴私, two words that share a similar pronunciation (*yinsi*) with only a slight difference in tone. Even authoritative law dictionaries have defined cases of privacy as those involving content that is deemed offensive to public decency or involving sexual relations or other private matters. The derogatory connotation attached to privacy hindered its legal recognition as a right. It was not until the Reform and Opening-up that the idea of privacy as a legitimate claim began to gain acceptance. This comprehensive reform ushered in a market economy and industrialization, with more people moving into cities. Urbanization changed China fundamentally as people began to demand more private space.

With the rising desire for the right to privacy among the public, the law began to respond. The legal protection of privacy developed in four stages in China. When the General Principles of Civil Law was enacted in 1986 ("the 1986 GPCL"), the right to privacy was not recognized as an enumerated personality right. Unlike the right to life, health, and reputation, there was no direct provision addressing the right to privacy in the 1986 GPCL. However, privacy did not go unprotected in court. In the judicial interpretation (a *de facto* source of law though not directly binding on lower courts in China) issued by the Supreme People's Court on the 1986 GPCL, it was held that the violation of privacy could lead to damages if it adversely affected others' reputation (Supreme People's Court, 1988: Art. 140). In other words, the protection of privacy was achieved vicariously, by drawing an analogy with the right to reputation.

However, not all privacy infringements involve reputational losses. Thus, the Supreme People's Court issued another judicial interpretation in 2001, in which privacy was recognized for the first time as an independent *personal interest* to be protected by law (Supreme People's Court, 2001: Art. 1). This marked a major step in the legal protection of privacy. However, recognizing privacy as merely a personal interest rather than a legal right limits the rights of a victim. A victim can be compensated only when the infringement of his or her privacy is so serious that it violates the interests of both the victim and the public and when the infringing party is malicious rather than merely faulty. With increasing public awareness of privacy rights, this approach needed to change.

In the 2009 Tort Liability Law, privacy was finally included as a *personality right*, alongside the right to life, health, body, name, portrait, reputation, and honor (NPCSC, 2009: Art. 2). The 2017 General Principles of Civil Law ("the 2017 GPCL") further acknowledges this (NPC, 2017: Art. 110). The enumeration of the right to privacy, being a response to the demand of the public, ushered in a new wave of privacy cases. As of February 5, 2020, a total of 89,482 court judgments including the keyword "privacy" were published on China Judgments Online, the official database for judgments from all levels of courtrooms. Only twenty-six were decided before 2009.

This large number of cases has laid a solid ground for the final stage in the legal protection of privacy. As courts across the country encountered more cases involving privacy, experiences began to accumulate. More detailed questions involving the right to privacy, such as its meaning, scope, categories, and the protection that each category deserves, are now being answered and such answers are being constantly challenged and refined. This explains why the more comprehensive Civil Code includes a whole chapter on the right to privacy. This shift from obscurity to recognition is proof that people are far more concerned about their privacy and demand greater protection of nonmaterial rights today.

### ***Restrictive Commercial Exploitation of Personal Attributes***

The growing consciousness of the new category of rights is not the only trend that has unfolded with respect to personality rights. As Chinese people have become increasingly conscious of their rights, the idea of recognized categories is also being expanded. When the economic value of personal attributes becomes more apparent and well-received, a shift in the essence of personality rights renders the existing legal framework rather inadequate.

Original doctrines considered personality rights as inalienable. Kant (2002), for instance, refused to acknowledge a person's right to sell his or her body parts because to do so would mean degrading the human body for the

sake of financial gain. Later, the rigid prohibition on the commercial exploitation of personal spheres was gradually thought of as inconsistent with an individual's autonomy to exercise his or her own private rights. The commoditization of certain personal aspects, particularly a person's name and portrait, has gained growing acceptance across different societies. In early cases such as *Shields v. Gross*,<sup>6</sup> the court denied a young model's petition to revoke her consent to the publication of a nude photograph of her, though the snapshot was taken with her mother's authorization when she was just ten years old.

Nonetheless, a growing number of jurisdictions, civil law countries in particular, tend to recognize a reduced binding force of a contract for the commercial exploitation of personal attributes if the performance of the contractual obligation is proved to be morally detrimental to the obligee (Mak, 2008). The obligee is permitted to rescind such a contract provided that he or she indemnifies the obligor. The basic idea behind constraining contractual autonomy to transform personal attributes into pure commodities is to prioritize the inner world of a person and one's human dignity over his or her commercial engagement with outer society (Resta, 2011; Xue Jun, 2006).

Following this trend, the Book of Personality Rights in the Chinese Civil Code reflects the idea of reduced autonomy to exploit certain incorporeal personal attributes commercially. The traditionally defensive approach still holds sway, as the personality rights part lists the rights to life, body, and health in its second chapter, immediately after its general provisions. When the aggregate of personality rights expanded to include other personal spheres in relation to what Zhang Pinghua (2018) calls "derivative interests," the defensive model naturally came into play. The Chinese Civil Code prohibits unwarranted invasion by protecting individuals' right to control their personality (NPC, 2020: Art. 991).

Nonetheless, new technologies and emerging business models have constantly reshaped the meaning of personality. The transformation of social and economic conditions owing to scientific and technological developments has gradually increased the practical significance of the instrumental exploitation of certain personal attributes to advance purely economic interests (Resta, 2011). A person can, for instance, license his or her portrait in an endorsement deal. And a merchandiser can exploit the power of association and accumulate goodwill by suggesting that a celebrity favors his or her products. As Beverley-Smith et al. (2005) have observed, even underexploited fame has "recognition value" and its commercial potential can be fully realized once advertisers identify the best way to use it. This commodification of personality is not limited to public figures, as digital economies render everyone's personal information an unprecedented asset (Bergelson, 2003).



This new social and economic reality has significantly challenged the received wisdom of the defensive structure of personality rights protection. As Giorgio Resta puts it, “whereas in the past the focus was mainly on the *protection* of the inviolate personality against invasions by third parties and on the recovery of *nonpecuniary* losses arising from the infringement of dignitary interests, the emphasis is now on the *exploitation* of the commercial value of personality and compensation for *profits* foregone (or restitution of unlawfully earned profits) as a result of the unconsented use” (Resta, 2011: 42, emphasis in the original). While the extra-contractual model can more or less deal with infringements on personality rights, the protection of personality in contractual relations is either unacceptably ignored or comes in a piecemeal fashion.

The Book of Personality Rights takes the complex nature of personality seriously and aims to close this loophole in traditional civil codes. While it primarily provides for control-based rules that prohibit infringement of all personality rights, attributes of certain personality rights with economic value are well recognized. For example, a natural person’s right to name, as acknowledged by the personality rights part of the code, first and foremost includes the person’s right to defend any infringement upon his or her name, including interference, theft, and counterfeiting, etc. (NPC, 2020: Art. 1014). In addition to this inherently defensive right, the law also stipulates that the person can authorize others to use his or her name (NPC, 2020: Art. 1012), thus acknowledging the commercial exploitation of the right to name. This hybrid approach enables one’s personality rights to include both moral and economic rights, and this can also be found in the right over a business name (NPC, 2020: Art. 1013) and the right over a portrait or likeness (NPC, 2020: Art. 1018).

To acknowledge the fact that some categories of personality rights are a mixture of defensive and proactive rights is significant. But the commodification of personal spheres is never absolute. Trading one’s name or portrait will never be the same as trading cars or houses since personal attributes represent an integral part of the person’s identity. Thus, the common law technique of labeling these attributes as one’s property is often criticized for stretching the concept of property so far as to include interests that, on one hand, require legal protection and, on the other hand, do not possess all elements of full ownership (Beverley-Smith et al., 2005). Consequently, while certain personal attributes are transferable and licensable, the new Civil Code rules out a complete transfer of personality rights (NPC, 2020: Art. 992, 993). Furthermore, the difference in the object of licenses also dictates that personality licenses be revocable with “justiciable reason” (NPC, 2020: Art. 1022). When disputes arise as to the scope and method of portrait licenses, the law

allows an interpretation of the terms of portrait permission contracts in a manner that is favorable to the licensor (NPC, 2020: Art. 1021). This is also proof that the law is skewed toward individuals, as commercialization must not be pursued at the expense of individual personality.

The fact that personal attributes can be traded also tests what some sociologists call “the moral limits of markets” (Satz, 2010). Some serious ethical concerns might arise. For instance, as human organs are in short supply, establishing a market for such scarce resources seems to make economic sense (Becker and Elias, 2007; Healy, 2006). Yet, the sale of human organs is banned in most societies not only because of the moral concern of the objectification of the human body and the degrading of human dignity, but also, more pragmatically, because market mechanisms are likely to involve problems of severe inequality. In a country with great economic discrepancies, the poor and disadvantaged tend to be exploited, both physically and mentally (Almeling, 2009). An inappropriate introduction of market mechanisms could cause public health disasters. In the early 1990s, thousands of low-income peasants in Henan in central China were infected with HIV/AIDS in illegal blood collection stations. Since then, tens of thousands more have faced the spread of the virus because of blood product consumption and sexual contact (China.org, 2004; Zhang Feng, 2004). This case shows why there is little space for the market mechanism in the field of body parts transfer.

The Book of Personality Rights adopts this view. While acknowledging the economic value of human cells, tissues, organs, and remains and therefore allowing their donation, it explicitly bans any form of their sale (NPC, 2020: Art. 1066). To ensure that the donation is decided upon carefully, the law requires a valid will, or a donation agreement signed in writing by the donor (NPC, 2020: Art. 1066). As for people who have not explicitly refused to donate before their death, the law entitles the spouse, adult children, and/or parents of the deceased to donate on behalf of the deceased through a unanimous decision in writing (NPC, 2020: Art. 1066). Nonetheless, the Book of Personality Rights is silent on donations by persons with limited civil capacity, which is strictly prohibited by a state regulation issued in 2007 (State Council, 2007: Art. 8). In the years after the issuance of the Regulation on Human Organ Transplantation, a few cases arose in which minors suffering from terminal illness voluntarily asked their parents to donate their organs after their death (Wan Yunjie and Deng Mulin, 2015). The silence in the Book of Personality Rights, arguably intentional, leaves room for further policy deliberation over donations by minors and the like, which may bring more hope to those in need of organ transplantation.

Surrogacy is another ethically controversial issue in the commercial exploitation of personality. It is not new to Chinese society. Even in ancient

China, there were men who “borrowed women’s bellies to produce offspring” 借腹生子 for the sake of extending their family line. Statistics show that, as of 2019, 10 to 15 percent of the couples in China suffer from fertility disorders, and about 20 percent of them need intervention in the form of reproductive technology to conceive (Wang Yang, 2019). Though China prohibits medical institutions and medical staff from providing surrogacy services, insider information on the massive underground surrogacy network and markets is shocking. It is estimated that there are over four hundred surrogacy intermediaries in China, most of whom provide surrogacy services underground. Surrogacy fees can amount to 1.5 million yuan (about US\$210,000). At the same time, the number of lawsuits concerning surrogacy has continued to rise. Chinese courts are frequently called upon to decide legal issues such as the validity of surrogacy contracts, parenthood of surrogate children, and the sole guardianship of surrogate children. Judicial opinions have varied from court to court, this partly because of the legislative vacuum on surrogacy outside of medical institutions (Ding, 2015).

Considering the strong demand for surrogacy services from a large number of Chinese couples and the presence of a massive surrogacy market in China, the legislature is unlikely to prohibit surrogacy altogether as it once planned to do years ago.<sup>7</sup> Nonetheless, it has been quite cautious about the regulation of surrogacy perhaps because of the ethical concern of the complete commoditization of surrogate mothers and babies. Several reports on the surrogacy markets in China and abroad suggest that more than a few surrogate mothers were turned into “reproduction machines in dark mills” and that surrogate babies became commodities that were sold to surrogate fathers by surrogacy agencies (Wang Yang, 2019). The insufficiency of institutional design to prevent the risk of degrading personhoods into material goods explains why the Book of Personality Rights continues to remain silent on surrogacy despite the many calls from academics and social media for legislating on surrogacy (Li Dan, 2017; Zhang Suhua and Li Ya’nan, 2018). There is still a long road to walk before the NPC becomes confident about addressing surrogacy in the Civil Code. A pragmatic choice may be to address the legal issues surrounding surrogacy in special legislation or regulations in a piecemeal fashion.

### *Gender Equality and the Personal Right to Sexual Autonomy*

Apart from the public demands that more rights should be protected and that such rights should be more inclusive, some more structural social changes are shaping public attitudes and further complicating the landscape of the legal protection of personality.

One such change involves gender. Before the modern era, China had more or less adhered to Confucianism, wherein everyone was expected to behave consistently with his or *her* status and identity in society. The idea that women should be obedient to their fathers when they are young, to their husbands when they are married, and to their sons when they are widowed dictated that women would be subordinate to men in Confucian China. This was attacked by Chinese intellectuals in the early twentieth century, as they considered the liberation of women an essential part of modernity for China (Liu, 2007: 3–4). The founding of the People’s Republic of China also promoted women’s emancipation, making gender equality a mainstream ideology and legal principle. Yet, gender equality has not been sufficiently achieved. Progressive economic development has led to widening social gaps. It later became clear that this “surging inequality in Chinese society is highly gendered” (Qi Wang, 2016: 2). Economically, gender disparity is found in employment, income, and unpaid care work (Liu, Li, and Yang, 2016). Culturally, women are discriminated against, as sons are preferred by rural families under the one child policy (Li Huiying, 2016).

Like in any other society, gender inequality cannot be addressed single-handedly by law. Institutional and societal changes that empower women individually and collectively are necessary (Lin and Yang, 2019). However, the law can play an essential role. The Book of Personality Rights, for example, tackles one of the most manifest forms of unfairness based on gender, sexual harassment. This is, to a large extent, a Chinese response to the global #MeToo movement. Notwithstanding censorship and a systemic bias against activism, Chinese women are joining the world in coming forward and being heard (Economist, 2018; Kuo, 2018). As more women level accusations of sexual harassment and misconduct against their former bosses, colleagues, and professors, it has been pointed out that the Chinese legal system seemed unacceptably inadequate to address such predatory behavior. Sexual harassment was not even defined by the law before this. The Supreme People’s Court has only recently recognized it as a new cause of action for damages.<sup>8</sup> Feminist activists in China have resorted to social networking platforms such as Weibo and WeChat to advocate for anti-sexual harassment laws, on-campus prevention mechanisms, and helplines for victims (Mistreanu, 2019).

Partly in response, the Book of Personality Rights includes a lengthy article on sexual harassment, as sexual misconduct primarily violates one’s right to bodily and psychological integrity (Neethling, 2005). Article 1010 (NPC, 2020) provides that a victim who suffers from any form of sexual harassment, be it verbal, in action, or by any other means, against their will, can apply under the law for the tortfeasor to bear civil liability. The article also imposes the duty on governments, enterprises, and schools to prevent sexual

harassment. It stipulates that reasonable measures should be taken toward enabling reporting, investigating, and penalizing sexual misconduct owing to the exploitation of positions of power and relationships of subordination. This is primarily undertaken with the intent to address the imbalance in power relations that is often exploited in sexual harassment and violence cases.

The inclusion of this article promises to be a good starting point for the promotion of gender equality in Chinese society. However, this article is largely declaratory. It does not provide a clear definition of sexual harassment, probably because of the difficulty involved in generalizing a concept merely based on limited awareness of the types of such misconduct. It is up to the judiciary to interpret the concept in accordance with specific scenarios. One of the most debatable issues is whether sexual innuendo constitutes sexual harassment. Some courts have ruled in favor of the plaintiff because such misconduct is detrimental to the mental health of the victim whereas other courts have rejected such complaints on the ground that such conduct had not materially violated the victim's sexual autonomy (Baidu, 2020). Another challenging issue concerns the standards of proof. Going by past judgments, the failure rate in this segment is high. A recent study of courtroom judgments suggests that up to 70 percent of the plaintiffs had failed to prove sexual harassment as they had no evidence but their own statements against the defendants. In a recent survey of 109 courtroom judgments concerning sexual harassment in China, disputes over the facts of sexual harassment arose in 16 judgments (Baidu, 2020). That said, the prevention of sexual harassment needs more tools in addition to the trajectory of civil liability, such as moral teaching and disciplinary education as required by the second paragraph of this article.

## **Technological Advances and Personality at Risk**

Economic development enriches people's lives and encourages them to pursue needs beyond bare subsistence. A second and equally important consequence of this progress is the arrival of countless and dynamic technologies, with the power to transform and revolutionize modern life (McAfee et al., 2012; Williamson, 2014). Technological advancements have always been a thorny problem for the protection of personality. As Warren and Brandeis put it in the late nineteenth century, "instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'" (Warren and Brandeis, 1890: 195). The latest scandalous event of the discovery of hidden cameras in hotel rooms again raises public concerns over

privacy challenged by technologies (Zuo, 2019). While cameras themselves do not harm, the fact that such neutral technologies can be exploited for immoral ends suffices to illustrate the vulnerability of personality. Risks that technologies have created to personality, technically, economically, and culturally, call for a comprehensive law in response (Minow, 2020). The current Book of Personality Rights strives to address tech-related risks that generally involve the internet, data, and biomedicine.

### *Internet-Based Risks to Personality Protection*

For most people in modern China, the internet is no longer an option, but a must. The internet is interwoven with important aspects of life. “In many ways the Internet has succeeded in remaking us inhabitants of a small village” (Levmore and Nussbaum, 2010: 1). Such is the power of the internet that its accessibility—or the lack of it—can affect people’s standing socially, culturally, and financially.

Yet the internet, with all its conveniences, can offend and intrude. Instantaneity not only brings people closer, but is also capable of magnifying any damage to one’s personality rights in a way that humankind has never seen before. One can become a victim of cyber bullying within hours or have his or her personal information collected through one click without even knowing it. One’s rights to reputation, honor, portrait, and privacy have all become far more vulnerable in the internet era. While privacy issues related to the internet generally concern data collection and breaches, a topic discussed below, other personality rights, such as the rights to name,<sup>9</sup> portrait, and reputation, can be easily infringed upon as well, perhaps even more easily. One empirical study shows that among the 204 internet-related Chinese district court cases on personality rights in 2017, 155 were concerned with the right to reputation and 64 with the right to portrait (Wei Daping, 2019).

Take the right to reputation as an example. The internet has undoubtedly brought tremendous challenges to the protection of one’s reputation and honor in respect to the following three features. First, anonymity. While it is key to safeguarding free speech, it also serves as a catalyst for cyber mobs. Participating in online discussions while maintaining anonymity may help foster antisocial, malicious, and immoral behavior, which can easily ruin one’s reputation (Rowland, 2006). Second, the fragmentation of information. Back in smaller, web-free communities, disreputable information was judged in the context of a person’s whole life, as the audience knew the person relatively well. On the internet, however, fragmented information is often taken out of context and used to judge people. This discrediting effect is becoming all the more worrisome. Third, permanence. This means that fragments of a

person's information can be collected and stored forever and will be searchable in an instant. In essence, people are deprived of a second chance on the internet. A tiny mistake is likely to permanently define a person. This "digital scarlet letter" prolongs the negative effect on one's reputation and exacerbates the damage (Solove, 2007: 94–95).

A good example in China that shows how anonymity, fragmentation, and permanence can combine to damage one's personality rights is commonly known as "human flesh search." In human flesh search, the aim is to identify individuals, and in the process people's acts are exposed online without their consent. This process then discloses more personally identifiable information of the victims, who are often the targets of ridicule, shaming, or punishment (Cheung, 2009: 191). In the reportedly first case on human flesh search brought before a Chinese court, the victim, a cheating husband whose wife committed suicide after the exposure of his extramarital affairs, faced physical assault and was dismissed by his employer after internet users launched a human flesh search on him and disclosed his name, home address, and phone number.<sup>10</sup> In two other cases, a middle school teacher and a teenager committed suicide because of human flesh search invasions (RMZXB, 2018; CNTV, 2013).

It is because of this ease of wrecking one's reputation and creeping into one's privacy that the current Book of Personality Rights includes rules to deal with internet-based risks to personality rights. One noteworthy innovation is the device of interim injunctions. The 2009 Tort Liability Law already sets out a general liability for internet service providers (NPCSC, 2009: Art. 36). The Book of Personality Rights follows this tradition by allowing victims of online defamation to require deletion or correction. It also takes a step forward to highlight, in its general provisions, the availability of the device of interim injunctions for victims of personal infringements (NPC, 2020: Art. 997), the prototype of which appeared in China's Civil Procedure Law in 2012 (NPCSC, 2017: Art. 100). In an increasingly instantaneous and ubiquitous online environment, providing the victimized the device of an interim injunction to prevent further infringements before full trial and a permanent injunction may prove effective in defending one's personality rights against irreparable harm.

In 2013, a renowned scholar, Yang Jiang 杨绛, sued the International Auction Company of Zhongmao Shengjia 中贸圣佳国际拍卖有限公司 for an interim injunction against an auction (Beijing Court, 2014). The company wanted to auction the private letters of Mr. Qian Zhongshu, Ms. Yang's late husband, which contained information on their family life. Ms. Yang applied to the court to prohibit the company from auctioning the letters. The court decided in her favor under Article 100 of the Civil Procedure Law. Predictably,



the reiteration of the interim injunction by a lengthy article in the Book of Personality Rights will encourage victims to take more effective action against personal infringements.

In the legal protection of personality rights in cyberspace, an individual's right to privacy or reputation should be balanced with others' right to free speech. A relevant question is whether public figures should enjoy the same level of legal protection of their privacy or reputation as ordinary people. The Book of Personality Rights makes genuine attempts to address such questions. It makes clear that news reporting and public opinion supervision are generally excluded from liability for reputational damage, while limitations exist to avoid over-stretching free speech at the cost of others' reputation (NPC, 2020: Art. 1025). The current law does not explicitly include a provision for the protection of public figures, but in explaining what constitutes the duty of reasonable review by journalists, it enumerates "the likelihood that victims' reputation would be disparaged" as one factor to be considered (NPC, 2020: Art. 1026). This leaves room for courts to develop a detailed regime for the protection of public figures in the future.

### *Data-Based Risks to Personality Protection*

Apart from the possible damage listed above related to the internet, a conspicuous risk factor in today's digitized world is data. As the world undergoes a shift from Web 1.0 to Web 2.0, personal information continues to be collected in both unprecedented form and speed. Internet users are largely accustomed to free services that range from search engines to social networking sites, media platforms, and price comparison services. These services may be free monetarily, yet enterprises gain personal data in exchange overtly or covertly. Individuals and enterprises are mutually dependent in this new era of big data, forming a "symbiotic web." Actually, this data-based symbiosis is not limited to the online world. Loyalty cards and transport payment systems connect consumers and enterprises in an increasingly similar manner in cyberspace (Bernal, 2014: 53–81).

In all these circumstances, people exchange their personal information for convenience. Yet the so far benign reality has the risk of turning dark. Its challenges are deeply felt, as major jurisdictions make efforts to legislate on data protection. Typical legislations concerning data protection include the European Union's General Data Protection Regulation and California's Consumer Privacy Act. Behind this kind of regulation lurks a shared worry about data-based risks, notably around how personal data may be exploited at the expense of privacy. In the Anglo-American tradition, legal discourses that have long been centered on "privacy" serve as the major academic vehicle for



the conceptualization of dignitary interests and the closest analog to the continental concept of personality rights (Solove, 2008; Strömholm, 1967). While privacy is traditionally understood as a defensive right to be left alone that prohibits unwanted intrusion or disclosure, the exploitation of personal information in the era of big data focuses primarily on the consent-based use of such information (Borghgi, Ferretti, and Karapapa, 2013). Simply put, the traditional understanding is centered on “privacy as secrecy,” while in the latter the emphasis is on “privacy as control” (Prosser, 1960; Westin, 1967).

This expansion leads Alan Westin to redefine privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (Westin, 1967: 7). In a sense, the notion of privacy has been reoriented and has gained a social dimension. The traditional idea that privacy means the “individual against the world” is gradually shifting toward privacy being seen as trust. From this perspective, disclosure in the context of trust continues to remain private (Waldman, 2015). This also means that in a networked world, a privacy-careless person may disclose not only data about himself, but about others as well. Data protection requires coordination and this has prompted Fairfield and Engel (2015) to argue that privacy is now a public good. Yet as the World Economic Forum succinctly pointed out, “an information differential exists between institutions and individuals, creating a crisis of trust that results from uses of data being inconsistent with user expectations and preferences” (World Economic Forum, 2014: 1).

To some extent, China has witnessed this generational shift since the advent of Web 2.0. As outlined above, privacy underwent a gradual development as a personality right that culminated in the legal acknowledgment in the 2009 Tort Liability Law. However, only over a decade later, the protection of personal information was included explicitly, although only symbolically, in the 2017 GPCL (NPC, 2017: Art. 111). Whether personal information should be protected primarily by the mechanism of entitlements to individuals under private law or regulatory regimes under public law remained controversial (Ding Xiaodong, 2018; Cheng Xiao, 2019). Nonetheless, the legislature eventually chose a multipronged approach to protect personal information. The current Book of Personality Rights in the Civil Code has followed the path of the GPCL and enriched private law entitlements to individuals to defend their personal information.

A separate chapter titled “Right to Privacy and Protection of Personal Information” (Chapter 6) systematically responds to data-based risks to personality. Article 1034 in this chapter defines personal information as “all kinds of information recorded electronically or in other form that can identify specific natural persons either by itself or when combined with other

information, including the names, birth dates, ID numbers, biometric identification information, addresses, phone numbers, email addresses, health conditions, whereabouts and so forth.” This is consistent with the definition in the Cyber Security Law and offers a broad umbrella under which individuals can seek to protect all kinds of information that can be used to specify their personal identities. Around this umbrella are coordinating rules, including guiding principles for data processing (NPC, 2020: Art. 1035) and the right of individuals to access their data and demand their correction or deletion (NPC, 2020: Art. 1036–1037). Those who have collected and stored data also have the legal duty to ensure their security and shall bear legal liability when such data are disclosed or divulged (NPC, 2020: Art. 1038). This may not be the cure for all data-based risks in the ever-changing cyberspace, but it will be the first time that courts in China have principles and, more importantly, detailed rules under the Civil Code to rely on when judging individuals’ claims for the protection of personal information against information collectors and processors.

The Book of Personality Rights also has established rules to strike a balance between the protection of personal information and the interests of information collectors and processors, as well as those of the general public. It provides for exceptional conditions to the prohibition on the illegal provision of personal information without consent, namely where information is processed in a way that makes it impossible to identify specific individuals and to restore the proceeded information to its original condition (NPC, 2020: Art. 1038), allowing for some flexibility for information collectors. It also exempts collectors and processors from civil liabilities when the collection and processing of personal information of natural persons involves “other conduct reasonably carried out to preserve the public interest” (NPC, 2020: Art. Article 1037), indicating that public interest outweighs the interest of specific natural persons in some circumstances. A good example is the collection and processing of travel information on confirmed or suspected patients with COVID-19 by the government for the purpose of epidemiological analysis and public health protection.

Despite the efforts mentioned above, the Book of Personality Law has left some questions unanswered. Following are three interconnected ones. First, what is the nature of the legally protected interest over personal information? Does it constitute a definitively enumerated type of civil right that, like the right to privacy, avails individuals self-determination over their personal information; or merely a type of legally protected interest, the recognition of which is context dependent? (see Yang Lixin, 2018; Wang Liming, 2013). If it is merely a type of legally protected interest, then second, what is the relationship between “personal information” and “privacy”? Third, what is the

scope of the legal interest over personal information? Aside from the right to access one's personal information, the right to copy one's personal information, and the right to correct errors in recording one's information, as already set forth in Article 1036, does the legal interest over personal information also avail individuals the rights to erasure and data portability and others?<sup>11</sup>

We believe that some confusion can be cleared up with the text available, while other questions are yet to be answered as social development unfolds. Unlike privacy, the subjects of which generally hope to keep personal information secret, individuals may use personal information in multiple contexts, and their expectations may vary depending on the context. In a job-seeking context, they want their LinkedIn profiles accessible to credible users. If a registrar makes mistakes while recording individuals' addresses, they want the mistakes corrected. When they no longer use an app, they want all their information stored on its servers deleted. When they move to another city, they want their social security information transferred to the new city.

The legal interest over personal information is hardly a definitive type of civil right, but a broad umbrella under which individuals can safeguard multiple types of claims over their personal information, including the claim to access, copy, correct, and possibly erase and remove one's personal information. Each claim, once legally acknowledged, can constitute an independent type of civil right. The "legal interest over personal information" stipulated in Chapter 6 of the Book of Personality Rights acknowledges this combined nature. In an even broader sense, the right to privacy also falls under this umbrella, as it is no more than a legally acknowledged claim to keep certain personal information secret from others. The distinction between privacy claims and other personal information claims lies in individuals' expectations concerning their personal information. The former concerns passive restraint and the later mainly involves active usage. This explains why Paragraph 3 under Article 1034 provides that "secret personal information is subject to both the rules for personal information protection and the relevant provisions of privacy protection."

In response to whether the legal interest over personal information avails individuals the rights to erasure, data portability, and others, which was a widely debated question while drafting the Civil Code, the text in Chapter 6 suggests that the legislature has intentionally avoided the issue. In our view, the availability of these legal claims is still context dependent. As Bao Xiaoli and Xiong Bingwan (2020) have argued, there is a "partnered" relationship between the individuals from whom personal information is generated and the collector or processor of such information, rendering self-determination an unfeasible and socially inefficient rule for the collection and processing of personal data.

### *Bioethical Risks to Personality Protection*

While the internet in general poses risks to the incorporeal personal spheres, ever-developing biotechnologies are bringing further challenges to corporeal personal attributes. Bioethical risks are arguably among the most controversial ones in the legal protection of personality, not least because they often involve hard ethical questions. Human embryos, surrogacy, organ transplantation, genetic engineering of embryos, and simulation by AI (artificial intelligence) entail fraught issues everywhere in the world. The sometimes intertwined relationship between biomedical and data risks complicates the situation further, as biological data such as fingerprints, faces, voices, and genomes are digitally collected, disseminated, and used, and are therefore subject to ever growing misuse and manipulation (Chen, Chan, and Joly, 2015).

Developments in biotech have immense implications for the law. For one thing, biomedical technologies in a way objectify human bodies, as modern technologies have blurred “the boundaries between nature and artifice, constraint and freedom” (Resta, 2011: 40) and controversial uses of body parts or tissues now abound in the private law area. This process of objectification makes a person not only a legal subject but also a legal object at the same time, transcending the traditional subject/object dichotomy while also reinforcing the freedom of choice and self-determination. Objectifying such corporeal rights and interests inevitably leads to their commercialization. As Chapter 6, “Right to Privacy and Protection of Personal Information” points out, owing to ethical and equality concerns, they will never be fully commercialized. The distinctive measures taken by the current law for commercialization of corporeal/incorporeal rights is an example.

Yet biomedical risks can go far beyond the excessive commodification of personal attributes. Many medical advances in China rely on clinical trials on human bodies and scientific studies of human genes and embryos (Man Hongjie, 2012). The inherent unpredictability of biotechnological risks also requires taking major precautions in clinical applications and trials and scientific studies. Otherwise, the result may be irreparable harm to individuals and possibly the general public.

Early cases brought before Chinese courts after the passage of the Tort Liability Law in 2009 were mainly centered on clinical trials of non-biological medical products, in which the medical institutions and staff neither fully respected the will of the testing participants nor fully informed the participants of all the risks involved (Man Hongjie, 2012). Article 55 of the Tort Liability Law requires that

During the diagnosis and treatments, the medical staff shall explain the illness condition and relevant medical measures to their patients. If any operation, special examination or special treatment is needed, the medical staff shall explain the medical risks, alternate medical treatment plans and other information to the patient in a timely manner, and obtain a written consent of the patient. [ . . . ] Where any medical staff members fails to fulfill the duties in the preceding paragraph and causes any harm to a patient, the medical institution shall assume the compensatory liability.

However, this fails to pay special attention to malpractices in clinical trials; at least, it does not specify whether medical staff should bear a higher level of duty of care in clinical trials than in ordinary clinical treatments. The ambiguity in this article has also led to divergent views in courtroom decisions on liability (Man Hongjie, 2012).

More recently, the focus of the debate has shifted to cutting-edge biomedical technologies, as the necessity and appropriateness of gene editing is being significantly challenged. In late 2018, He Jiankui, a Chinese medical scientist, stunned the world by announcing that he had created the world's first genetically edited babies. Exploiting the most popular gene-editing tool, known as CRISPR-Cas9, his team edited the DNA of two embryos so that they would be less susceptible to HIV. The human embryos were later implanted into two women who gave birth to three babies (Cryanoski and Ledford, 2018). The research has been condemned widely by scientists worldwide, raising questions of risk disclosure to and consent from the ones experiencing the procedure and of other unknown consequences. He Jiankui was later convicted of the illegal practice of medicine, practicing medicine without a certificate, and other serious violations of the law (Sample, 2019). Though issues pertaining to ethical review did not figure in the criminal conviction, the court stated that the defendant had fabricated ethical review documents while carrying out embryo gene-editing (Associated Press, 2019). According to Article 7 of Measures for Ethical Review of Biomedical Research Involving Humans ("Measures for Ethical Review") issued in 2016 by the then National Health and Family Planning Commission, medical institutions conducting biomedical research involving humans shall establish ethics committees and take measures to ensure that the committees conduct ethics reviews.

Since 2003, when the China Food and Drug Administration enacted the Norms on Quality Management for the Clinical Trials of Drugs, China has been promoting two major measures in protecting patients who accept clinical trials. One aims to ensure that patients are well informed of the medical

risks and legal consequences of clinical trials; the other aims to strengthen the ethics review process (State Food and Drug Administration, 2003: Art. 8, 10). In addition to the Measures for Ethical Review issued in 2016, the State Council promulgated the Regulation on the Prevention and Settlement of Medical Disputes in 2018 to maintain order and security in medical institutions. Article 11 of this state regulation reiterates the significance of the ethics review of clinical trials in medical institutions (China Daily, 2018). A year later, the Standing Committee of the NPC adopted the Basic Healthcare and Health Promotion Law, which expanded the scope of the application of ethics review measures to include all medical research activities (NPCSC, 2019: Art. 32). The Book of Personality Rights in the Civil Code has gone a step further, devoting two lengthy articles (NPC, 2020: Art. 1008, 1009) to systemically reconstructing the fragmented rules governing clinical trials and scientific studies at the national level. They provide a legal framework for the ethics of medical experiments in general and biomedical technologies related to human genomes and embryonic tissues as well, in order to prevent the moral hazards of life science and medical treatment. In conjunction with the rule of tort liability for malpractice in clinical applications in the Book of Tort Liability (NPC, 2020: Art. 1219), the Civil Code has established a comprehensive system for the entire field of medical practices and disputes.

Article 1008 of the code covers not only the clinical trials of drugs and medical devices but also those of the medical methods of disease prevention and treatment. The application of gene editing for the sake of disease prevention and treatment, like the gene editing operation carried out by He Jiankui, falls within the scope of this article. The tried persons' consent in writing on the condition of detailed information on the purpose, usage, and possible risks involved in the medical research, as well as the approvals from the competent governmental departments and ethics committees, is clearly required before such clinical trials are conducted.

Article 1009 addresses medical and scientific research on human genes and embryos and the like. It provides that such activities shall observe laws, regulations, and other relevant state rules without jeopardizing human health and violating ethics and morality. This article is not declaratory, but legally binding on the judiciary. In an era when cases of animal cloning are not rare (Coghlan, 2018), and discussions on human cloning have not stopped, it is foreseeable that both therapeutic and possible reproductive cloning concerning humans will be subject to definitive legal principles.<sup>12</sup> Where biomedical technologies revolutionize what it means to be human, these articles can arguably generate far-reaching effects in tackling the risks of biomedical technologies to personality protection.

Nonetheless, the Book of Personality Law's addressing of biomedical risks is still preliminary. Cases and experiences in Chinese society are not rich enough to spur a systematic response to all the various and sundry questions that have been raised. We reflect on two questions that are in need of answers today.

One centers on the scope of application. Whereas Article 1009 lays down the requirements for conducting "medical and scientific research relating to human genes and embryos," to what extent it operates as "relating to" needs an explanation. For example, is creating a chimeric virus considered medical and scientific research relating to human genes and embryos? During the COVID-19 pandemic, Dr. Shi Zhengli of the Wuhan Institute of Virology was questioned about a study she had participated in earlier, where a chimeric virus was made using a surface protein of SHC014 and the backbone of a SARS virus (Menachery et al., 2015). The study was questioned for virus engineering, which might pose a "non-natural risk" (Butler, 2015). There has been no scientific evidence proving such "non-natural risk" yet. However, given the ethical concerns that such research might raise, it may seem reasonable to interpret the law as covering such research activities in the future. Also, considering the context in which the article was added, it may also be interpreted as applying only to research "targeting" human genes and embryos.

Another question concerns the nature and "ownership" of biomedical "products." The nature and "ownership" of frozen embryos and correspondingly biobanks are two examples. In 2013, in Shen Xinnan 沈新南 and Shao Yumei 邵玉妹 v. Liu Jinfa 刘金法 and Hu Xingxian 胡杏仙, a couple in Jiangsu died in a car accident leaving behind four frozen embryos in a hospital. The parents of the husband filed a case against the parents of the wife to inherit the embryos. The court of first trial denied the claim on the ground that the embryos were not objects to be inherited (Yixing Court, 2013), while the court of appeal overturned the judgment, avoided mentioning "inheritance," and decided that the parents of both the husband and the wife should have the right of guardianship and disposal of the embryos (Wuxi Court, 2014).

Disputes over the nature and "ownership" of frozen embryos continue. Professor Yang Lixin (2014), for example, argued that frozen embryos, as organs and tissues separated from the human body, should be recognized as "ethical objects"—special objects with attributes of a human being deserving particular protection, but not a third category beyond the subject/object dichotomy, which can be inherited. In contrast, Professor Ji Hailong (2015: 90) recognized embryos as objects and the old couples' general right to inherit them. Nonetheless, considering the high likelihood that the old couples would



turn the embryos into human beings with assisted reproductive technology, Professor Ji argued that the old couples' claim that the embryos be given to them should be denied.

Regarding the issue of frozen embryos, whether the custodian should be free to dispose of frozen embryos should the depositor fail to renew the custody agreement, and whether this should be within the duties of biobanks, are questions yet to be discussed. Voices have spoken out on the comparative law experience, such as the five-year time limit for the third-party storage of frozen embryos in France (French Act 94-654, adopted on July 29, 1994), but such voices have not had much of an impact on legislation.

### *Personality Right: Methodology for an Ever-Evolving Landscape*

In the face of ever-evolving technology, how far can the Book of Personality Rights reach? This is probably not determined by the enumeration of major types of personality rights. Rather, the general clause on personality rights in this Book of Personality Rights will play a crucial role in the long run. Enumerations cannot be all-encompassing owing to the limited circumstances legislators can apprehend while drafting the law, while, from time to time, evolving technologies may present new threats to significant personal spheres that have thus far not been enumerated in the Book of Personality Rights.

The general clause in the Book of Personality Rights stipulates that “In addition to the personality rights explicitly provided in the previous paragraph, natural persons enjoy other personality rights and interests arising from personal liberty and human dignity” (NPC, 2020: Art. 990). This general clause reflects the inexhaustible nature of personality rights and acknowledges the emerging claims of personality interests that do not fit into those enumerated types easily, but are equally worthy of protection.

The articulation of “other personality rights” in this clause would require a comprehensive assessment of the social circumstances and impact of new claims for legal protection. Article 1026 illustrates this approach when enumerating factors considered to determine whether news reporters or watchdogs have met the “obligations for reasonable review”<sup>13</sup>: “(1) credibility of the source of the content; (2) whether necessary investigation was conducted into the content that might clearly lead to controversy; (3) the time sensitivity of the content; (4) the relationship of the content with public order and good morals; (5) the likelihood that victims' reputation would be derogated; (6) the capacity and the cost for review.” Here, the code requires that attention be paid to specific circumstances and interests of multiple stakeholders—the victim, the conductor, and the public. Whereas there is no definitive answer



as to how to apply the general clause, similar approaches can be employed in the sense that a comprehensive assessment of social circumstances and impacts is necessary and that the interests of all related stakeholders are balanced.

Moreover, the open, general clause may add to the probability that the Civil Code can make up for the shortcoming that China's Constitution cannot be directly invoked and enforced by courts in individual cases (Liu Kaixiang, 2012; Zhang Xinbao, 2012; Qianfan Zhang, 2010). As we have argued throughout this article, while dealing with personality protection vis-à-vis private parties, the Book of Personality Rights has the merit of implementing Article 38 of the Constitution, which declares the inviolability of personal dignity (Cabrillac, 2020). While it is hard to tell how far such implementation might extend to the relationship between individuals and public authorities, an open general clause may be a major channel for such an extension.

For example, public authorities' disproportionate measures to coerce defaulting debtors to comply with effective court decisions can constitute an invasion of people's personality rights. Recently, some local courts have begun to post defaulters' information on their official Douyin (the Chinese version of TikTok) accounts or the news app Toutiao, and display such information repeatedly among the defaulters' localities with the facilitation of big data (Sohu, 2018). This shaming measure has proven effective in uncovering hiding defaulters or coercing some of them to pay their debts (You Yiwei, 2019). But arguably, it is disproportionately detrimental to the defaulters' social reputation and should be replaced by other enforcement tools. While it is unlikely that overexposed defaulters may claim definitive enumerated rights under the Book of Personality Rights for practical remedies, an open general clause at least provides a possibility to make a claim before the court.

## Concluding Thoughts

The adoption of a stand-alone book on personality rights in China's new Civil Code is not a mere technical matter. Instead, behind the technical change in the structures of conventional civil codes lies the growing consciousness of nonmaterial rights in Chinese civil society and the Chinese legislature's efforts to respond to them in a systemic manner. We hope that our investigation of the Book of Personality Law in the Chinese Civil Code can enrich Chinese studies that have primarily paid attention to the consciousness of both the right to subsistence and political rights.

The structural departure from conventional civil codes arguably provides a new approach to cope with the unprecedented quantitative and qualitative challenges to personality protection posed by technology

explosion, inasmuch as a stand-alone part on personality rights may provide the opportunity to systemically address emerging claims in personal spheres against technological risks through high-level legislation.

Notwithstanding questions solved or likely to be solved by the Book of Personality Rights, its role in promoting personality protection in Chinese society should not be overestimated. The growth of rights consciousness and the evolution of technology are never-ending. The actual impact of the Book of Personality Rights is largely to be demonstrated in judgments following its adoption. In circumstances where the legislature remains silent, the courts inevitably have to decide whether certain claims of personality are worth protecting. For example, legal theorists have widely considered facial geometry and biometric information as an essential part of the personal sphere that are worth defending.<sup>14</sup> The collection of facial information, if leaked or hacked, may result in deep-fake videos and social discrimination. While the Book of Personality Rights has provisions addressing the right to privacy and personal information protection, it does not take an additional step, as Shi Jiayou (2019) has proposed, to label certain categories of personal information as “sensitive” in order to heighten their legal protection. It is questionable whether facial geometry can be effectively protected since facial recognition has become ubiquitous in China. In a recent case, a law professor from Zhejiang Sci-Tech University in eastern China filed a lawsuit against a wildlife safari for conducting facial recognition upon entry, claiming that the mandatory collection of visitors’ facial data by the safari had violated its obligation to obtain his informed consent under China’s Consumer Protection Law (Li, 2019). In the future, plaintiffs may invoke the Book of Personality Rights to challenge those who collect their facial information. As the Book of Personality Rights provides the same level of protection for personal biometric information as for other types of personal information, courts will play an essential role in deciding whether such a change in the cause of action from consumer protection law to civil law can establish a substantively strengthened personality protection regime or remain a matter of mere technical presentation.

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## Notes

1. In one case, a funeral parlor mistakenly delivered the wrong person's cremation urn to a family. This resulted in the family mourning with the ashes of another family's loved one. Thus, the family members felt that their personal spheres were damaged, but they could not find an enumerated personality right (so-called nominate personality right) to contain it. In this case, family members could lay a claim against the funeral parlor for damages for harm to their personal dignity. Such cases are not rare (Zhejiang Online, 2011). In a case on sexual autonomy, the plaintiff filed a lawsuit against her ex-boyfriend whom she came to know through a dating website, where both the plaintiff and the defendant had stated that they were single in their profiles. The plaintiff, later pregnant with the defendant's child, had an abortion after learning that the defendant was actually married. She claimed, and the court agreed, that the defendant had violated her sexual autonomy by concealing his marital status (Beijing Court, 2016). Finally, in a typical case involving false imprisonment, Zhang Qun 张群 v. Foshanshi Xinyijia Supermarket Co., Ltd. 佛山市新一佳百货超市有限公司, a customer was accused by a supermarket of stealing when she tried to leave the premises after paying for her purchases. After being searched and questioned by the supermarket, she sued the latter for infringing upon her personal freedom. The court ruled in her favor (Foshan Court, 2004).
2. Unlike many classic civil codes, such as the German Civil Code, China's Civil Code does not have a chapter detailing the general provisions governing obligations. Instead, the general provisions of obligation that materially overlap with the general rules of contract (such as joint and several obligations, divisible and indivisible obligations, obligations involving third parties, performance, assumption, and subrogation of obligations) have been absorbed into the General Rules of the Book of Contract (Zhu Hu, 2019).
3. Liang Huixing (2016) and other scholars have argued that the inclusion of a separate section on personality rights in the code violates the time-honored Pandectist system adopted by the German Civil Code and others. Provisions in such a stand-alone section are merely declarative of personality rights that can fall within the scope of the General Provisions of the Chinese Civil Code, which enumerates all types of civil rights covered by the code. The protection of these rights ultimately depends on the concrete remedial provisions in the part on tort liability. However, there is a rich literature arguing that the new structure of the code is coherent (Wang Liming, 2016; Wang Liming, 2019a; Yang Lixin, 2016). Moreover, Professor Liang Huixing, a renowned civil law scholar in China who strongly opposed the separate book approach, held that such an approach follows the structure of the Civil Code of Ukraine and has repeatedly warned that this may lead to a "color revolution" in China similar to that in Ukraine in 2014

- (Shepherd, 2017). Nonetheless, the idea to establish a stand-alone book of personality rights in the Civil Code was advanced much earlier than the adoption of the Civil Code of Ukraine (Shi Guanbin, 2018).
4. Chen Lei, 2018, provides an introduction to the previous legal and statutory framework on personality rights in China.
  5. This quote is from “Mu Min” (On Shepherding the People), a prose piece by Guan Zhong (d. 645 BCE), one of the best-known philosophers in the Confucianist school.
  6. *Shields v. Gross*, 58 N. Y. 2d 338(1983).
  7. On December 27, 2015, the Standing Committee of the NPC voted to amend the Population and Family Planning Law. Article 35 of the Amendment (Draft) stated that “The sale of sperm, eggs, fertilized eggs and embryos is prohibited, and surrogacy in any form is prohibited.” Eventually, this article was deleted because of strong opposition from academics and social media.
  8. On December 12, 2018, the Supreme People’s Court published a Notice by the Supreme People’s Court on Adding Causes of Action in Civil Cases, where “dispute over tort liability in sexual harassment” was listed as an independent cause of action for the first time.
  9. A typical mode of infringing upon one’s right of name is cybersquatting (Gatsik, 2001). The Book of Personality Rights acknowledges the higher risks that well-known figures face and provides greater protection to their right of name (NPC, 2020: Art. 1017).
  10. The district court held that extramarital affairs, however immoral, fall within the scope of privacy, a determination that was upheld by the intermediate court (Wang Jia, 2018).
  11. The right to erasure, or the right to be forgotten, has been claimed in civil trials. For example, in *Ren Jiayu 任甲玉 v. Beijing Baidu Netcom Science and Technology Co., Ltd. 北京百度网讯科技有限公司*, the plaintiff claimed that Baidu had infringed upon his rights to name, reputation, and “to be forgotten,” as included within the scope of the general personality right, by refusing to erase keywords for searches that related his name to an ill-reputed company for which he had worked for a short time in the past. For the “right to be forgotten” claim, without an enumerated “right to be forgotten” in Chinese law, the court of first trial examined the plaintiff’s claim of legal interest in the case to see if it could be covered by the general personality right, and denied that it could. The decision was upheld by the court of appeal (Beijing Court, 2015).
  12. Current discussions on the legal restraints on human cloning in China are mainly from the perspective of constitutional and criminal law (Meng Fanzhuang, 2018; Liu Changqiu, 2010). International discussions rarely touch upon the Chinese context (Kim, 2004; Daar, 2013).
  13. Except in situations including the failure to meet obligations to reasonably review inaccurate information provided by others, one does not bear civil liability by “affecting any other’s reputation” merely because of one’s conduct, such as carrying out news reporting or public opinion supervision (Item 2, Article 1025).

14. Issues arising out of facial recognition are not unique to China but are becoming matters of global concern. In the United Kingdom, a case was brought against police use of facial recognition (Satariano, 2019). Facebook and Google have also been sued for allegedly violating the Illinois Biometric Privacy Act by failing to get users' consent for collecting, storing, and using their biometric identifiers, including face geometry (Marotti, 2020).

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