

If There Needs No Privacy Right in the Chinese Civil Code? ——New Thoughts on Privacy and the Right to Privacy

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Abstract: The Chinese Civil Code provided explicit new regulations on privacy and the right to privacy in article 1032 and 1033 in 2020 at the first time. It defines privacy as personal tranquility, and private spaces, private activities and private information that one is unwilling to be known by others. This concept of privacy is highly subjective, making privacy right a pocket right in civil law. Any portraits, names and other personal information that are protected by portrait right and other civil rights can be in the protection of privacy right only if it is unwilling to be known. It results the privacy right being unspecified and its boundary being unclear, fails to meet the basic requirements of a concrete personality right in Chinese Civil Law, which has the different legal system with American of “general privacy right framework”. This article argues that, based on the development history of traditional Chinese “yin si” and the concept of privacy, legal privacy in China should be defined as personal information that is unrelated to public or societal interests but directly concerns an individual's reputation or personal dignity. Thus, privacy clearly encompasses both personal dignity and reputation interests. Given that Chinese Civil Code acknowledges the general personality right, personal dignity in privacy can be protected through this right, while reputation interests can be attributed to the right of reputation. Therefore, after a proper understanding of the concept of legal privacy in Chinese Civil Code, it is worth exploring whether there is a need for the introduction and separate regulation of the concept of the right to privacy.

Keywords: Privacy; Right to Privacy; Chinese Civil Code; Legal Privacy; Chinese “Yin Si” Concept

1 Introduction

In May 2020, The Chinese Civil Code provided explicit new regulations on privacy and the right to privacy in article 1032 in combined with mainstream theories and concepts [1], [2]. It categorizes four forms of personal privacy: the tranquility of private life, and private spaces, private activities, private information unwilling to be known by others. The Chinese Civil Code also enumerates common behaviors that infringe upon the right to privacy. Whenever mentions privacy in China and abroad, people think it originates from Warren and Brandeis' privacy in 1890 [3]. This to some extent reveals the transplantation of the legal concept from "privacy" in English to "隐私" in Chinese. However, it seems that both the Chinese people and the Chinese Civil Code forget the "yin si(隐私)" concept, which is the traditional Chinese privacy concept in the 1870s. After the Chinese Civil Code was promulgated finally, there are huge controversies and discussions within Chinese legal academia regarding the new concepts and contents of privacy and right to privacy, since it is the first time the law in China regulates the concept of privacy and the right to privacy.

Even though the right to privacy has entered a new era in China, significant disputes still exist in legal academia over the current definition and scope of privacy and the right to privacy stipulated in the Chinese Civil Code. This lack of clarity results in an unclear boundary of the right to privacy, making it challenging to establish limits and lines among other concrete personality civil right in the Civil Code, not alone on individual behavior for the public. Thus, clarifying the legal concepts and contents of privacy and the right to privacy has become an urgent issue.

To address this, this article first introduces theoretical and legislation development of privacy right in China in Part I. It is a detailed study of the evolution of privacy in China, encompassing the transition from the negative concept of "yin si" to the positive concept of privacy, theory development, and the provisions regarding privacy and the right to privacy in the Chinese Civil Code. After knowing the development history and the privacy right regulations now in China, Part II analyzes in length about three main disputes over the privacy and the right to privacy in Chinese Civil Code and the reasons. Furthermore, in Part III the article aims to clarify the essential characteristics and actual attributes of privacy and explore the new concept of privacy. Part IV following to anticipates the future of the right to privacy in Chinese law from a comparative view, based on the privacy concept in part III. This paper aims to provide new insights into privacy and the right to privacy, serving as a reference for both theoretical exploration and practical considerations.

2 From Negative "Yin Si(隐私)" to Positive Privacy: Theoretical and

Legislation Development of Privacy Right in China

In Chinese law, the terms privacy and the right to privacy are foreign imports, resulting from legal transplantation [4]. The positive term "privacy" evolved from the negative and criticized concept of "yin si(隐私)" [5], [6], [7], [8], [9]. In the early days, the concept of "yin si" was used in Chinese society and domestic law. With the introduction of the concept of privacy from abroad, Chinese society and legal texts gradually began to use the term "privacy" more frequently, replacing the concept of "yin si".

2.1 Negative "Yin si" Concept in Early China

"Yin si" has been a long-standing concept in early Chinese society with a relatively stable connotation. In modern times, various dictionaries generally define "yin si" as a secretive matter that cannot be revealed, and such matters typically carry a sense of disgrace for the subject involved [10]. "Yin Si" was traditionally viewed negatively, associated with illicit private life, improper relationships, obscenity, and other information deemed harmful to societal morals due to conservative cultural norms and customs at that time. Both in Chinese society and law, "yin si" was used before the introduction of privacy.

For instance, at the end of the Qing Dynasty, the "Imperial Approved Newspaper Regulations" of 1911, Article 11 stipulates: "Expressions that harm the reputation of others shall not be published in newspapers, except when specifically for the public interest and not involving personal 'yin si'." [11]. In 1935, the Legislative Yuan of the Nanjing National Government passed the amended "Publishing Law", which in Article 21 stipulated, "Regarding personal or family 'yin si' matters, they shall not be published." In 1956, the Standing Committee of the National People's Congress made a decision: "People's courts may conduct closed trials when handling cases involving state secrets, cases concerning personal privacy of the parties, and cases involving crimes committed by individuals under the age of eighteen." In 1986, the "People's Courts Organization Law" stated: People's courts shall conduct public trials in the trial of cases, except for cases involving state secrets, personal 'yin si', and crimes committed by minors." In 1979, the Chinese "Criminal Procedure Law" stipulated that cases involving personal "yin si" should not be publicly tried. These reflect the typical expression of the indigenous concept of "yin si" in the Chinese law.

2.2 Positive Privacy Concept Abruptly Appears in China

By the mid-1980s, the western concepts of privacy and privacy right gradually entered the

Chinese legal discourse. In 1982, the term privacy appeared for the first time in the “Chinese Civil Procedure Law (Trial Implementation)”. It can be seen from the above combing of the provisions of “yin si” that, at the 1980s, although the privacy term had appeared in Chinese law, the “yin si” and the privacy terms are mixed use in Chinese society and law. And the legal academia has an argument for the differences or uses of “yin si” or privacy. For instance, the Criminal Procedure Law Article 111 stipulates: “Cases involving state secrets or personal privacy shall not be tried in public.” While, the Provisional Civil Procedure Law Articles 54, 53, and 103 also mention “materials involving state secrets or personal ‘yin si’...” At that time, both “yin si(隐私)” and “privacy” refer to intimate aspects such as personal relationships or extramarital affairs, essentially carrying the same meaning. It is advisable to unify the legal terminology and “yin si” should be used consistently [12]. The Other argues that “yin si” and privacy are not identical, there is an important connection. The modern concept of privacy is itself a discovered expression and cannot be used as the proper starting point for all discussions [13].

At the 1980s, the privacy term begins to be used in China, however, it shares the same negative meaning with “yin si” at first. Thus, it can be seen that Chinese privacy concept has originated from the traditional “yin si” concept [14]. When Chinese social morality thought underwent changes and Article 38 of the 1982 Constitution stipulated the clause on human dignity, the concept of privacy began to replace “yin si” and acquired a positive connotation.

In 2005, the term privacy right was used for the first time in Chinese law on the Protection of Women's Rights and Interests (2005 version). Subsequently, in 2009, the Tort Law of China formally defined the privacy right. Afterward, in Chinese legal texts, the traditional concept of “yin si” totally disappeared, replaced by the terms of privacy and the right to privacy.

As the western concepts of privacy and privacy right were newly introduced and primarily remained at the theoretical level, they were rarely and challenging to be effectively applied in judicial practice. From the introduction of the concept of privacy in Chinese law in 1982 to the formal regulation of the right to privacy more than twenty years later in 2005, China's civil law has consistently classified personal privacy under the indirect protection of the right to reputation. It wasn't until the promulgation of the Chinese Civil Code that the legal definition of privacy and privacy right was officially established.

2.3 Privacy Right Theory Development in China Influenced by Western Theories

The focus on the indigenous logic of privacy concepts in China does not hinder communication with western theories. The evolution of privacy concepts in modern and contemporary China has been influenced by intrusions into personal life portrayed in newspapers, films, and other media. Meanwhile,

Warren and Brandeis also made similar observations: instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; They formally introduced the concept of the right to privacy, asserting that individuals have an inviolable personality and a decisive right to control the disclosure of their own thoughts, emotions, and feelings [15]. In 1880, the “right to be let alone” or the “right to be free from interference” as a new understanding of privacy [16]. In the 1960s, Alan Westin introduced the concept of information privacy: the right of individuals, groups, or institutions to autonomously decide when, how, and to what extent they disclose information about themselves to others [17]. This led to the development of the autonomy privacy right, alongside situational privacy and informational privacy, forming new theories of privacy rights in America [18].

The development of China's privacy right theory just drew on various western mainstream privacy right theories. We can observe the development of privacy right theory in China as follows: In Chinese civil law textbooks and studies on privacy right, early scholars believed that privacy right was the right to private life or the right to be undisturbed, [19] encompassing the right to conceal personal affairs and secrets, which should not be disclosed without permission [20]. Some scholars also argued that privacy right involves an individual's right to self-determination over their private affairs for the protection of human dignity. Subsequently, scholars began to assert that privacy right is a personality right enjoyed by citizens, ensuring the protection of private life tranquility and private information under the law [21]. Privacy right is seen as the personality right of a natural person to autonomously decide and control their private information, private life [22] tranquility, and personal affairs within the realm of private life. Others argue that privacy right involves the dominion and control over one's private life tranquility, private information, private activities, and private domains [23].

In summary, the theoretical landscape in China has different definitions of privacy right. In the early stages, it was mostly regarded as the right to self-determination and autonomy over personal affairs, etc. Currently, the prevailing view is that the right to privacy encompasses rights such as tranquility in life, protection from intrusion into personal secrets, and disturbance. Notably, the privacy right theory in Chinese civil law textbooks and academia does not fundamentally differ from mainstream western theories, especially the right to solitude in the United States, the right to respect for private life in France, [24] and Germany's theories of private sphere and the right to self-determination.

2.4 Privacy and Privacy Right in In the Chinese Civil Code

The provisions regarding privacy and privacy right in the Chinese Civil Code adapt the current mainstream theories of privacy right in civil law, primarily concentrated in Articles 1032 and 1033. Article 1032 of Chinese Civil Code marks the first time in Chinese legal texts that privacy is defined: “Privacy refers to the personal life tranquility of a natural person and the private space, activities, and information that one does not wish others to know.” The so-called privacy right refers to the personality right of citizens to enjoy private life tranquility, and personal private space, activities, and personal information are legally protected. It is a right that private things should not be unlawfully probed, disturbed, known, collected, utilized, or disclosed by others. Article 1033, in a “listing + catch-all provision” manner, specifies five typical manifestations of privacy right violations.

According to Article 1032 of the Chinese Civil Code, privacy includes personal life tranquility, private space, private activities, and private information. The four forms of privacy are derived from the American right to be alone or solitude, the establishment of place privacy and information privacy theories in mid-to-late 20th-century American case law [25], and the traditional German legal theory of private sphere. Additionally, Article 1032 of Chinese Civil Law defines the key aspect of privacy, not only requiring an objective determination of private space, activities, and information but also including the subjective element of “not wishing others to know”.

After the Chinese Civil Code has explicitly regulates the concepts and contents of privacy and the right to privacy in 2020 at the first time, the right to privacy has entered a new era in China legal academia. However, as this is the first time the concept and content of privacy and the right to privacy are regulated in Chinese law, there are significant discussions and disputes over them.

3 Three Main Disputes over the Privacy and the Right to Privacy in Chinese Civil Code and the Reasons

The concept and content of privacy and the right to privacy in the Chinese Civil Code has the following three main issues exist:

3.1 Shall the Right to Tranquility of Life be Considered as a Separate Civil Right, Parallel to the Right to Privacy?

According to the article 1032 of the Chinese Civil Code, one type of privacy is the tranquility of the private life of a natural person. This represents a significant new change for China's legal concept of privacy, and some scholars argue that including personal life tranquility in the scope of privacy is an innovative move in China's Civil Code [26].

However, this new definition of privacy has sparked heated debates in Chinese academia, with the

focus of contention being whether the tranquility of private life constitutes an independent right or a form(part) of privacy interest [27]. The rights to life tranquility and privacy are closely related, both originating in the United States. While, at the beginning of their introduction to China, the two were initially separate. The right to life tranquility emphasizes the orderliness of private life and the protection of a person's normal mental state [28]. Common instances of violating the right to life tranquility include disturbances from junk information, noise, and psychological harm. In contrast, privacy right emphasizes solitude and the protection of human dignity. The connotations, extensions, and purposes of the two rights are different. Moreover, the disruption of the tranquility of private life can be considered an indirect consequence of the violation of all personal rights. To be more specific, the so-called interests in personal life tranquility can be either indirect consequences of other rights being violated or content protected by adjacent rights in property law. Treating the tranquility of private life as privacy may lead to difficulties in distinguishing privacy interests from other rights.

From the perspectives of connotation, extension, infringement methods, and consequences of harm, the interest in a tranquil life is difficult to encompass within the scope of privacy rights. The right to a tranquil life should be established as an independent legal right [29]. Also, before the Chinese Civil Code was enacted, courts had already fully recognized the status of the right to tranquility as a specific personality right, and provided reasonable judicial interpretations of the legal basis for this right and the corresponding characteristics of non-property damage relief. Therefore, there are researchers in China have long advocated for the legalization of the right to tranquility [30]. This paper also supports the same view.

3.2 Critique of the Subjective Requirement of “Unwilling to be Known by Others” in the Privacy Concept

The second is, the subjective requirement of “unwilling to be known by others” makes privacy and the right to privacy a highly subjective concept [31]. Any portrait, name, or other personal information that an individual does not wish others to know has the potential to be recognized as privacy protected by the right to privacy. This turns the right to privacy in China into a catch-all right, no longer a concrete civil law right.

1.A Conflation of Factual Life Situations with Normative Legal Content

The reason the right to privacy becomes a pocket right is that the concept of privacy conflates factual life situations with normative legal content. According to “unwilling to be known by others”, any personal information may be considered private as long as it satisfies the subject's subjective

intention, making privacy a concept in the eye of the beholders. For example, individuals hold varied views on what constitutes privacy. Some argue that disclosing “measurements, height, and weight” without permission violates the right to privacy. Others contend that revealing someone's family background, education, financial status, etc., without consent is an invasion of privacy. Additionally, opinions differ on whether aspects such as racial origin, political views, and religious beliefs should be protected under the right to privacy.

However, the classification of “measurements, height, and weight” as privacy is subject to significant psychological differences. For instance, some male individuals may not perceive this information, which can be visually assessed, as private. While the unique psychological perceptions of individuals fall within the realm of psychological research, making “measurements, height, and weight” essentially a form of privacy advocated by psychology. Furthermore, in gatherings of specific social classes, individuals often voluntarily discuss information such as family background, educational history, income, and financial status. These shared details within the same social stratum can be considered a form of privacy from a sociological perspective, as sociology emphasizes the study of social stratification issues. Similarly extrapolating, racial origin, political views, and religious beliefs are subjects of privacy discussed in anthropology, political science, and religious studies, respectively. Too subjective of a law concept of privacy often leads to a conflation of factual life situations with normative legal content [32]. Finally, transferring this sense of subjective invasion of privacy (unwilling to be known by others) into legitimate privacy protections will be very difficult, especially given the tendency of legal systems to avoid accepting subjective notions of victims.

2.The Privacy Right Fails to Meet the Basic Requirements of a Concrete Personality Right and is Incompatible with China's Legal Framework

Moreover, in China, personality rights are divided into the general personality right(provision) and concrete personality rights [33]. That is different from the German and American civil law (This will be specialized in Part IV ii) [34]. An overly subjective privacy concept results in the privacy right failing to meet the basic requirements of a concrete personality right. This can be analyzed from the fundamental elements and efficacy source of concrete civil rights.

(1)Fundamental Elements and Efficacy Requirements of Concrete Civil Rights

Specific civil rights regulated in the Chinese Civil Code should be a specific and concrete civil interest protected by civil law [35]. It establishes clear boundaries and normative relationships between the right holder and the social public by specifying the specific scope of the right. Jurisprudentially, there are various theories regarding rights, such as the interest theory, freedom theory, qualification theory, power theory, and normative theory [36]. Among these theories, legal rights have two key elements

fundamentally. One is the interest; the interest serves as the foundation, essential content, and objective orientation of the right [37]. Civil rights are typified civil interests enjoyed by subjects recognized and protected by the law [38]. Specific civil rights, as a sub-concept under civil rights, represent the legal protection of a particular and specific civil interest. Bounded freedom of action is the other fundamental element of legal rights. From an empirical or utilitarian standpoint, legal rights can be viewed as the legal provision of a certain range, degree, or standard of freedom of action to individuals, thereby offering the possibility or qualification to pursue specific benefits. By establishing and clearly defining the scope of specific rights, the law ensures a certain degree of freedom for the right holder while providing a boundary for the freedom of action of the public. In the orderly operation of society, this maximally guarantees the freedom of action for each individual, thereby achieving the legal function of defining and resolving disputes, and safeguarding freedom order and settling disputes.

The other perspective is efficacy of rights. It pertains to the issues related to the obligated subjects and the scope of applicability targeted by the publicization of rights in Chinese civil law. If a specific right is to have binding force on the general public, its scope must be publicly known through legal provisions or other means. Otherwise, it may unduly restrict the freedom of action of the public [39]. In civil law, real rights are against the world because the types of rights and their methods of publicization are prescribed by law [40]. Inherent personality rights, being an integral part of human beings, also belong to rights against the world [41]. While the types of these rights are not statutory, and they do not require publicization, their efficacy against the world can be traced to the principle of reciprocity. For material personality rights such as the right to life, health, and physical integrity [42], the principle of reciprocity is easily understood since the boundaries of these rights can be interpreted by one's own objective manifestations, respecting the boundaries of others' rights. However, for the “spiritual personality right” of privacy, protection of which involves externalized information symbols, the scope of these symbols is uncertain and subjective. Thus, compared to other physical personality rights in Chinese civil law, the extension of the right to privacy can only be achieved through explicit legal provisions to foster consensus, promote mutual respect, and achieve the purpose of defining and resolving rights in disputes.

In conclusion, whether considering the fundamental elements of legal rights or examining the efficacy of rights, the interests protected by specific civil rights [43], especially the right to privacy, must be concrete and specific, and the boundaries of these rights must be clear. Otherwise, it does not constitute a specific civil right. This

serves as a criterion for determining whether a “right” qualifies as a specific civil right and is a basic requirement for the efficacy of rights against obligated persons.

(2) The Subjective Definitions of Privacy Fails to Meet the Right Requirements

The Chinese Civil Code establishes the privacy right as a concrete personality right, one of the specific civil rights. Thus, two fundamental consensuses must be established: Firstly, as a concrete personality right, the right to privacy must gain the respect of the public, serve the function of defining and resolving disputes, and have clear boundaries; Secondly, the efficacy of the right to privacy is against the world (any other else individual), which needs it involves limited freedom of action within a specified scope, with distinct boundaries.

Especially, the right to privacy, as a spiritual personality right, is not as easily visible or outwardly embodied as physical personality rights (such as the right to life, health, and bodily integrity). Thus, privacy must be explicitly defined by law as a specific category, protecting specific and concrete interests within a defined legal domain to foster a universal consensus within the public. The determination of privacy cannot rely on the subjective wishes of the right holder.

Otherwise, the legal right to privacy will become a subjective and inconsistent concept, making it difficult to clearly define its boundaries, which contradicts the objective nature required for concrete civil rights. This lack of clarity would not only reduce its effectiveness in protecting individuals but also undermine the law’s ability to define and resolve disputes.

However, the element of “not willing to be known by others” in Article 1032 of the Chinese Civil Code gives privacy a strong subjectivity and uncertainty. As long as the subject’s intention is satisfied, the scope of privacy can be infinitely expanded. From the current definition of privacy, its connotation has expanded to include the rights to tranquility, private space, any personal information that satisfies the subjective intentions of the subject, and even remains at risk of unlimited expansion. It is challenging to form a specific, typified interest group, and this person-dependent concept of privacy cannot reach a general consensus in society. The overly subjective concept of privacy renders the protection interests of privacy right unable to be specified and blurs the boundaries of the privacy right [44].

The uncertainty in the scope of privacy in the Chinese Civil Code directly leads to the inability to clearly define the boundaries of the privacy right. When the boundaries of privacy right, as a counterbalance to state power, are difficult for the general public to know, it becomes challenging to accurately and clearly delineate the respective behavioral freedoms of the right holder and the social public. That is to say, according to the theory of rights effectiveness, when the boundaries of the right to privacy, as a right enforceable against the world,

cannot be known by the general public, it becomes impossible to accurately and clearly delineate the respective freedoms of action between the rights holder and the public. Consequently, the law’s function of setting rights to resolve disputes cannot be fulfilled. Privacy right, as a specific personality right, explicitly do not conform to the basic elements of specific objects and efficacy requirements of clear boundaries for concrete personality rights in the continental legal system and are theoretically problematic. The subjectivity and uncertainty of privacy undermine the intrinsic importance of right, diminish the efficacy of delineating the boundaries of freedom of action, and impede the legal function of setting rights to define disputes [45]. It could even undermine the system of Chinese civil rights [46]. As a specific personality right, the right to privacy is incompatible with the civil rights system of the Chinese civil law tradition, and there are obvious theoretical issues with it.

3.3 Four Types Enumerated in the Concept of Privacy Lack Consistency in Essential Attributes in the Legal Logic of Definition

The third one is, the definition of privacy in Article 1032 of the Chinese Civil Code violates the basic rules of logic of defining terms. That is to say, in logic, the three defined terms of privacy (private spaces, private activities and private information), along with the tranquility of private life, lack commensurable and essential attribute with the defining term of privacy.

In legal logic, legal concepts should reflect both the essential attributes of objective things and reveal the external characteristics and scope of the reflected objective things [47]. When defining terms, there must be a consistent relationship between the defined items and the defined terms, and the scope must correspond accordingly [48]. However, the personal life tranquility, private space, private activities, and private information lack a consistent relationship. Take the right of likeness in article 1018 as an example. It also addresses the concept of likeness as an image in legal terms when regulating the right to likeness. The image is the essential attribute of the likeness in law. Also, we can see the right of reputation in article 1024. Reputation is the social evaluation whether it is evaluated from moral character, prestige, talent, and credit. However, we can’t see the true attribute of privacy from private space, private activities, and private information, since they are used to describe certain so-called “privacy phenomena”, but do not abstract their common essential attribute. And in layman’s terms, the space, activities and the information are different objects(things).

Particularly, there arises controversy over how to differentiate between the concept of private space in privacy and the spatial or residential space in property law. Disputes have arisen in judicial practice regarding whether residents of model

homes purchased but not yet inhabited are entitled to privacy right. The court ruling that a non-residential house does not enjoy privacy right indicates that privacy cannot be directly defined as a private space even that one is unwilling to be known by others. The key issue in the dispute lies in whether privacy right protects the private space itself or the personal private interests (the true privacy attribute) contained within the private space, such as private information (content). Besides, is the concept of private activities in the definition of privacy equivalent to individual behavior traces in personal information? [49] Thus, can private activities be essentially attributed to private information?

Furthermore, including personal life tranquility in the scope of privacy does not correspond proportionally, violating the logical laws of defining terms with a consistent relationship [50]. In legal logic, the defining term and the defined term must be exactly equivalent. Violating this rule results in the logical errors of over-definition or under-definition [51]. As discussed above, the so-called interests in personal life tranquility can be either indirect consequence of other rights being violated. Defining the tranquility of private life as a part of privacy results in the extension of the defining term being greater than that of the defined term.

All in all, the definition of privacy in Article 1032 fails to reflect the essential attributes, characteristics, and scope of privacy. This both reflects a current lack of understanding of the essence of privacy [52].

3.4 Why There Arise Disputes?

From the above, China's Civil Code, by simply mixing western mainstream concepts and theories of privacy, has brought numerous adverse consequences. Firstly, the definition of privacy in Article 1032 of the Chinese Civil Code not only fails to reflect the essential attributes of privacy but also struggles to specify its scope, evidently violating the basic requirements for defining legal concepts. Secondly, the indeterminacy of the privacy category results in an unstable boundary for privacy rights, failing to meet the basic requirements in law for the specific protection of rights and the clear delineation of rights boundaries, as well as the publicity efficacy for the rights in the eyes of the public. The provisions on privacy and privacy right in China's Civil Code are not in harmony with the legal soil of China.

The reason of these disputes is clear. The concept and content of privacy and the right to privacy in Chinese law are the results of legal transplantation. For a concept or system successfully transplanted from another legal system to be compatible with the local legal framework, it needs to undergo a lengthy process of introduction, adaptation, modification, and absorption. Just like an organ transplant that grows in its new body [53]. Legal concepts can only play a role in judicial practice if they truly align with the national conditions and the unique historical, cultural, political, and legal system background of a country. In essence,

privacy concepts often exhibit significant differences in different eras, regions, ethnicities, cultures, and historical or institutional backgrounds. For instance, the determination of whether information about wealth, marital status, religious beliefs, etc., falls under the category of privacy can vary between countries.

However, when China adopted the foreign concepts of privacy and privacy right, it overlooked the differences and influences hidden behind the legal concepts and systems, such as regional and cultural backgrounds, legal traditions, customs, economic development status, and prevailing social values. Instead, it at first directly imposed this concept of privacy and the right to privacy in common law, which inherently carries significant cultural and legal system differences, onto China, a civil law country with a distinct cultural and social background. The extreme and broad definition of privacy in the Chinese Civil Code and the conflict between the privacy right and the domestic legal system can be attributed to the neglect of these culture and region differences and influences. Also, this is a result of directly applying a concept that has substantial cultural traditions, perspectives, and legal system differences without considering the unique characteristics of China's legal and cultural context.

In total, even the advocates of legal transplant agrees that the convergence of laws is the premise for the development of legal transplantation [54].

However, the privacy concept in China undergone implantation from external pressure, initially ignored and did not assimilate local cultural, traditional “yin si” concept and the Chinese legal texture when it first appeared. Therefore, the mixed concept of privacy and the right to privacy has these issues exist.

4 The New Privacy Concept in the Chinese Civil Law

As mentioned above, after the Chinese Civil Code was promulgated in 2020, its first regulations on privacy and the right to privacy arises three main disputes. The subjective element and broad definition of privacy results that the stipulated privacy right also does not align with the basic elements and efficacy requirements of civil rights, failing to integrate with China's native legal context. And the reasons of these disputes are due to the privacy concept just simply compiled from mainstream western privacy theories. Seen from the theoretical and legislation development of privacy and privacy right in China, the privacy concept has experienced abruptly emergence, replacing the traditional Chinese concept of “yin si”. It didn't undergo the necessary process of introduction, adaptation, modification, and absorption, resulting in the legal transplant of privacy and the right to privacy not being in harmony with the legal context of China.

Thus, a reconstruction of privacy and the right to privacy should stem from the practical needs of Chinese cultural traditions, indigenous perspectives, legal terminology, rights systems and judicial practices. And the key and foundation for the implementation of the privacy right lie in the determination of the definition and scope of privacy. Hence, to address the existing issues in the Chinese Civil Code regarding the privacy right, it is essential to first have a correct understanding of legal privacy. The following discussion will return to the semiotic cultural aspects of indigenous privacy in China first, and then examining privacy's essential attributes through the lens of traditional concepts of “yin si(阴 私)”, the objective requirements for the right object in the legal system, and the perspectives of individuals and society involved in privacy issues within China's legal framework. This part aims to figure out the true and new concept of privacy in Chinese law.

4.1 Etymology and Semantics of Privacy

From an etymological perspective, the Chinese character term “隐私” (privacy) is composed of the characters “隐 (yin)” and “私 (si)”. “隐 (yin)” historically served as a verb in ancient China, implying concealment, hiding, or secrecy [55]. For instance, in “The Biography of Ji Deng” in “Records of the Grand Historian”, it is mentioned, “He quietly hid in the fields [56].” On the other hand, “私 (si)” the other Chinese character of the privacy, generally functions as a noun or adjective, denoting something personal, private, opposite to public, and often associated with secret or private matters and personal activities. For instance, in “The Book of Rites”, it states, “Detesting prying into others' privacy” [57]. From a semantic perspective, the combination of the ancient verb “隐 (yin)” and the noun “私 (si)” in Chinese characters “隐私 (privacy in English)” refers to the private subject hiding or concealing matters they do not wish to expose [58]. The definition of privacy in Modern Chinese Dictionary aligns with the ancient sense, indicating personal matters one is unwilling to disclose or make public [59].

In essence, privacy involves individuals concealing personal information they do not wish others to know. The ultimate object of non-disclosure, represented by “私 (si)”, refers to personal matters or private activities and behaviors. These private matters or private activities and behaviors, when translated into legal terms, constitute personal “information”. Therefore, based on the historical understanding from etymology and semantics, privacy is the concealment of personal information that individuals prefer to keep undisclosed, with the reasons for non-disclosure varying based on different regional, cultural, and institutional perspectives on privacy.

4.2 Privacy Under the Traditional “Yin Si” Perspective

Within the context of the indigenous “yin si” [60] perspective in China, “yin si” was traditionally

negatively viewed as illicit private life, improper relationships, obscenity, and other information harmful to societal morals and conservative customs at that time [61]. Later, in the early Chinese Criminal Procedure Law, “yin si” cases referred to those involving suspected crimes such as rape, molestation, and insulting women [62]. According to the Organic Law of the People's Courts of China (1983), “In the trial of cases, the people's courts shall conduct open hearings, except for cases involving state secrets, personal “yin si”, and juvenile crimes. Apart from cases in criminal proceedings, the personal “yin si” aspects in marriage and family cases were also not subject to public trial. From this regulation and the interpretation in the judicial practices of that time, “yin si” in legal terms was began to be considered a natural term. Personal “yin si” referred to personal private information not disclosed publicly, encompassing not only information related to traditional views on relationships and sexuality but also the private lives of spouses.

In the early judicial judgments under the “yin si” perspective in China, judges often interpreted privacy as secrets that are taboo to disclose or make public in people's lives, which, when published, will inevitably lead to a decrease in the social evaluation and reputations of individuals. That's why the early privacy was protected by the right to reputation and the general personality right in China, as the consequence of infringing privacy is a decrease in reputations, and the decrease in social evaluation is related to a human's dignity.

Besides, the essence of these secrets is private personal information. Consequently, the historical and contemporary etymology and semantics of privacy align with the traditional “yin si” perspective in China, where the essence of privacy is personal information. In other words, privacy involves the private information generated by individuals when engaging in specific activities in certain spaces or contexts.

Therefore, from the traditional Chinese “yin si” perspective, the starting point for defining privacy should be centered on personal information rather than the places, activities, forms, or abstract states of privacy information, as defined in Article 1032 of the Civil Code, to avoid a misguided understanding of the true attribute of privacy. And the privacy would directly relate to one's reputation and human dignity.

4.3 An Objective Concept of Privacy from both Personal and Societal Perspectives

Epistemologically, the essential attribute of privacy is personal information. As mentioned earlier, in legal terms, privacy interests as the object of rights must be concrete and specific. This necessitates that the determination of privacy should not be overly subjective or broad; not all personal information can be classified as privacy. Personal information is a product of social

interaction, and its normal use and circulation in society is a prerequisite and foundation for social interaction. Some personal information needs to be known to others and falls within the scope of the right to information. From an economic efficiency perspective, not all personal information should be classified under the privacy category of personal control and concealment. Richard A. Posner pointed out that, on the one hand, taking measures to keep privacy information confidential generates costs, and on the other hand, the circulation of some information is necessary for the normal operation of the social economy [63]. Public access to this confidential information may also incur costs. The greater the transaction costs in both directions, the lower the efficiency of socio-economic development. Therefore, to ensure efficient economic development and maximize overall social welfare, the legal definition of privacy should not be overly subjective and broad [64].

Due to the dual relevance of personal information to individual dignity (or reputation) and its connection to the interests of the public, defining privacy should consider the constitutive elements from both the perspectives of the public and the individual. From a societal standpoint, whether privacy is disclosed or not should not affect normal societal operations. Privacy is information closely related to an individual's private life and has no direct connection to public interests. From an individual perspective, privacy concerns personal reputation and dignity. Once known by others, even without considering subsequent misuse, it can have a negative impact on an individual's mental well-being, dignity, and societal evaluation. Therefore, privacy has two constitutive elements: first, privacy is personal information not directly related to public interests; second, privacy is directly related to personal dignity and reputation, and it is private. It has a negative impact on the privacy subject's mental well-being, dignity, and societal evaluation when it's made public.

In terms of the extension of privacy, while inheriting Chinese traditional "yin si" perspective, the understanding of privacy should no longer be limited to the category of information related only to traditional "yin si", such as sexuality. It should evolve with the development of cultural, contemporary, and universal value orientations. Therefore, in the current cultural, contemporary, and widely accepted values in Chinese society, personal information related to one's physical and mental aspects, such as nude photos, sexual preferences, sexual orientation, romantic experiences, health related information, etc., are only relevant to specific individuals, generally unrelated to others and public interests. The protection of such personal information is related to human dignity and reputation. These types of personal information, concerning personal dignity and reputation, fall under the so-called legal sense of personal privacy.

Therefore, this article defines legal privacy as personal information directly related to the subject's reputation or dignity, without a direct connection to public or social interests. It includes but is not limited

to nude photos, body parts covered by clothing, health conditions, sexual orientation, and other personal information related to sexuality, as well as emotional experiences. This objective definition of privacy not only meets the specific and particular requirements for the protection of specific civil rights in law, but also balances the interests of individuals and the public, without adversely affecting the efficient development of the information society. It is essential to note that the legal scope of privacy is not static; its extension may change with the development of the times. However, it fundamentally remains various symbolic forms specific to individuals, aiming to uphold the reputation or dignity of the subject.

5 The Future of the Right to Privacy: Is It Necessary to Introduce Privacy Right in the Chinese Civil Code?

According to the legal concept of privacy inferred in this article, the right to privacy in law is the right of natural persons to privacy, namely, the right to personal reputation and dignity not being violated. The deduced right to privacy protects specific and clearly defined interests, meeting the basic requirements of legal rights and complying with the publicity requirements of the right to privacy in the legal context. This legal right to privacy encompasses two categories of interests: one is personal dignity, and the other is reputational interests. The first category of personal dignity can be protected by the general personality right in Article 990 of China's Civil Code. The second category of reputational interests is protected by Article 1024, which concerns the right to reputation. Both categories of interests protected by the right to privacy can be fully covered by existing the general personality right and the right to reputation. Given this, is there still a need for the introduction of the right to privacy in the Civil Code?

5.1 Difficulty in Effective Application of the Right to Privacy in Judicial Practice in China

The protection of privacy in China has undergone a process from constitutional protection to indirect protection through the general personality right and the right to reputation, and then to the transplantation of specific personality right related to privacy.

From the first introduction of the concept of privacy in Chinese law in 1982 to the formal establishment of the right to privacy, over two decades later, China has consistently categorized privacy as indirectly protected within the right to reputation, or protected using the general principles of civil law. In judicial practice, the Supreme People's Court of China has established, through judicial interpretations, that the protection of privacy can be achieved through the avenue of reputation rights. Article 101 of the General

Principles of Civil Law of 1986 states, “Citizens and legal persons enjoy the right to reputation. The personal dignity of citizens is protected by law. It is prohibited to harm the reputation of citizens and legal persons through insults, defamation, and other means.” Although this provision does not explicitly mention the concept of privacy, the Supreme People’s Court, in its judicial interpretation of 1988, stipulated that “publicizing others’ privacy in written or oral forms, fabricating facts to publicly degrade others’ personalities, as well as damaging others’ reputation through insults, defamation, or similar means, causing certain effects, shall be deemed as infringing upon the right to reputation of citizens.” Some scholars also argue that the provisions on reputation rights in the General Principles of Civil Law also encompass the content of privacy rights. It was not until the enactment of the Tort Liability Law that China officially recognized the right to privacy.

Furthermore, under the transplanting doctrine in China, the right to privacy, since its introduction into Chinese law, cannot be considered a concrete civil right in legal terms due to its unspecified protective interests and lack of defined boundaries, thus deviating from the legal system and logical framework of China regarding specific personality rights. The lack of a clear and unified definition of what constitutes privacy and the vague and unclear connotation and extension of the right to privacy in Chinese law has resulted in an unsettled and inconsistent determination of the scope of privacy in Chinese judicial practice for a long time. It also leads to the debate on “whether a right without boundaries can truly be considered a right”. And it directly results in the instability and difficulty in applying privacy right provisions and fails to meet the needs of judicial practice in China.

From the establishment of the privacy right in 2006 to 2020 the Chinese Civil Code enacted, in China, the right to privacy is often overshadowed by other specific personality rights, such as the right to reputation, right to portrait, right to name, and more recently, rules governing the protection of personal information, and only about 300 cases have been accepted under the sole cause of action of “privacy right disputes”. After the concept of privacy and the right to be privacy regulated in the Chinese Civil Code, from 2021 to 2024, the “privacy right disputes” cases are only about 200. The number of privacy right disputes in China is relatively low compared to the 8,975 disputes over the right to reputation, 3,272 disputes over the right to portrait, and 5,357 disputes over the general personality right. This contradicts the severe invasion of privacy phenomena reported in China’s judicial practice and the urgent need to strengthen privacy protection. It directly reflects the difficulty for rights holders to effectively utilize the “right to privacy” for legal protection. Currently, the introduction of the right to privacy in China’s legal system is merely a product or a bottle of mixed western generalized concepts and theories of privacy

rights and cultural infiltration and has not proven to be effective in practice.

5.2 Re-overview of Privacy Right Evolution and Its Obsolescence

The traditional concept of “privacy right” proposed by Warren and Brandeis as the “right to be let alone” or “right to non-interference” in the early 19th century has undergone significant evolution over a century. The concept of the right to privacy proposed by Warren and Brandeis, based on a specific historical context, is a product of the collision between two social structures and the old and new value systems during a period of transition [65]. As times evolved, the value of personal information has become widely recognized in the United States. With the changing landscape of information technology and values over time, the content of privacy rights has continually expanded, evolving into a “pocket (bundle of) rights” similar to the general personality right that protects personal freedom, privacy, and personal information. While, the information privacy aspect of this broad concept of rights can correspond to the current concept of the personal information right in Chinese law. The continental legal system and the common law system have developed different perspectives on privacy and privacy rights within distinct cultural contexts. The provisions in Article 8 of the European Convention on Human Rights and Fundamental Freedoms, as well as Articles 7-8 of the Charter of Fundamental Rights of the European Union, which emphasize the respect and protection of private and family life, have laid the foundation for considering privacy rights as fundamental rights protected within the continental legal system.

While privacy is highly emphasized and important all over the world, different countries have different ways of arranging privacy and the right to privacy in their laws. In French law (a civil law country), there is no explicit provision for a general right to personality. The right to respect for private life, as provided in Article 9 of the French Civil Code, is commonly considered as the right to privacy and serves as a fallback to protect personal dignity and freedom [66]. In 19th-century France, the right to privacy was traditionally regarded as part of an individual’s right to reputation [67]. Later, scholars proposed the “right to one’s image” theory, suggesting that privacy is the right of individuals to control their public image [68]. Some scholars argue that privacy rights have a freedom-oriented nature, granting individuals the freedom to choose their lifestyle according to their wishes and enjoy the right to be left alone [5].

In countries of the English legal tradition such as the UK, Germany, and Japan, where the concept of privacy right is not explicitly defined in law, privacy is protected through tort law, general personality rights, or other specific personality rights such as the right to reputation. For instance,

the UK still does not recognize privacy right, contending that tort law is sufficient for privacy protection [69]. In the UK, privacy is protected under common law causes of action and through the Data Protection Act, which was enacted to implement the EU Data Protection Directive of 1995, as well as the General Data Protection Regulation (GDPR) of 2018.

Additionally, In German law, there is no explicitly defined concept of privacy right. Privacy is protected through the development of the general personality right and the “private sphere” mechanism under Article 823, paragraph 1 of the German Civil Code. In Japan, influenced by German law, there is no independent system for personality right, and privacy is not recognized as an independent category of personality rights. Instead, personal privacy is indirectly protected through the right to reputation as stipulated in Article 710 of the Japanese Civil Code. In 2017, Japan implemented the “Personal Information Protection Act”, which also addresses privacy protection [70].

Therefore, in the United States, the concept of privacy rights, which initially emerged as the substantive personality right known as the “right to be let alone”, has undergone a century of development and transformed into an open, catch-all right encompassing both substantive personality rights and personal information rights. In civil law countries, privacy has always been protected by general personality rights or other specific personality rights. Under the broader context of evolving towards the protection of information privacy through personal information rights (personal data rights), the introduction of traditional specific personality right privacy rights has become meaningless.

Furthermore, through a comparative analysis of privacy protection legislation in leading countries worldwide, it is evident that in nations recognizing the general personality right, such as Germany and Japan, privacy right is not specifically protected as independent concrete personality right. On the contrary, in the United States and France, where the theory of the general personality right is not acknowledged, privacy right serves as a foundational protection for personal dignity and personal freedom [71]. Following this reasoning, homogeneous the privacy right and the general personality right may not need to coexist. In China, the general personality right is recognized in addition to other specific personality right like the right to reputation and the right to image, along with the protection of personal information and privacy (secrets) of residence and communication, all of which collectively cover scenarios for protecting individual privacy.

Therefore, in Chinese legal system, even if the cost is incurred to establish the right to privacy, there is a considerable risk that it is likely to be redundant and challenging to apply, potentially leading to continued overshadowing, ineffective and marginalization. There is no necessity to introduce a right to privacy in the Chinese Civil Code. These aspects precisely demonstrate the interdependence of

the privacy right. Privacy can be safeguarded by the right to privacy, to reputation, to image, to residence and communication secrecy, and relevant legal provisions on the protection of personal information.

All in all, starting from the etymology and semantics view of privacy, as well as the essential nature of privacy under the traditional Chinese “yin si” perspective, it is not difficult to derive a legal definition of privacy: legal privacy refers to personal information that is not directly related to public interests but is associated with individual dignity and reputation. Both the personal dignity and reputation interests can be well protected by the general personality right and the right to reputation, respectively. This can be proven by the practical situation in China, where the right to privacy is challenging to apply in judicial practice as discussed above. From a comparative legal perspective, among the world's countries, those that do not recognize “general personality right” often establish the privacy right as a comprehensive right. In contrast, countries recognizing “the general personality right” typically integrate privacy into the right to reputation or the protection of personal information. Therefore, in China, where “the general personality right” is acknowledged, and provisions for the right to reputation exist, it is sufficient to protect the two categories of privacy interests legally. In this context, the introduction of privacy right in the Civil Code of China is unnecessary. This indicates that the absence of privacy right in the earlier 1986 General Principles of the Civil Law of China was not a lack of respect for privacy or personality.

6 Conclusion

Privacy is closely related to personal dignity and reputation, representing Hegel's natural requirement of “becoming a person and respecting others as human beings”. The importance of privacy protection is beyond doubt. The essence of privacy lies in personal information, and the dual value attributes of personal information determine that it involves both individual dignity and the social public interest in the use and circulation of personal information in the era of big data. Currently, the influence of western privacy concepts on China's Civil Code has led to a highly subjective definition of privacy. According to this definition, any personal information that meets the subjective criterion of “not willing others to know” may be included in the scope of privacy and subject to strict control and protection. However, as an absolute right with global effects, privacy right is likely to result in excessive control over personal information, reducing the public interest in information use and weakening the collective interests of society. This not only contradicts the mainstream socialist values in China that aim to enhance public interest but also conflicts with the goals set out in The Fifth Plenary Session of the 18th CPC Central Committee to implement a big

data strategy and promote social and economic development. China's legal system should propose institutions that align with the country's historical cultural traditions, legal system, and the current state of social and economic development.

In view of this, this article advocates starting from the endogenous “yin si(隐私)” concept in the traditional Chinese historical and cultural context. In the current political and institutional background of social development, and in line with the mainstream values of the big data era, the concept of privacy in China's legal system should be reconstructed. In legal terms, privacy should be understood as personal information that is not directly related to social public interests but is closely related to individual dignity and reputation. Legal privacy is intimately related to the individual itself, i.e., it has a certain level of secrecy. On the other hand, other types of personal information have a social aspect, generated and needed in public life, such as social, political, economic, and cultural contexts.

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