

Research on the Particularity of the Application of the Imputation Principle in the Personal Information Protection Law of PRC

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Abstract

The introduction of the Law of the People's Republic of China on the Protection of Personal Information (hereinafter referred to as the Personal Information Protection Law) is a strong response to the unwavering defense of the right to self-determination of personal information in the era of the great development of China's digital economy. There are three prerequisites for the application of the imputation principle of the Personal Information Protection Law: the information processing subject is the Personal Information Processor; the information right subject is a natural person; and the tort liability is the basis of the claim. Therefore, only by clarifying the above three premises, especially the dichotomy of processor and controller in the concept of personal information processor and the single theory of processor, can the liability principle be applied accurately.

Keywords: Personal Information Protection Law of PRC, presumption of fault liability, Civil Code of PRC, personal information processors

1. Introduction

As one of the prerequisites for the application of the principle of presumption of responsibility for fault in the Personal Information Protection Law, the tort subject must be the Personal Information Processor. Only by clearly defining the concept of Personal Information Processor can the scope of the subject of the application of the presumption of fault liability be clarified. The concept of Personal Information Processor in China is largely borrowed from the controller-processor theory imported from Europe, which has had a non-negligible impact on the process of compiling the Civil Code of PRC (hereinafter referred to as the Civil Code) and the Personal Information Protection Law and has triggered a series of controversies.

2. Subject Element: Personal Information Processor

One of the prerequisites for the application of the imputation principle of the Personal Information Protection Law: the infringer must be a personal information processor, and the infringer who does not belong to the category of personal information processor does not apply the Personal Information Protection Law. The concept of personal information processor in China is largely derived from the dual responsibility subject system of personal information controller-processor in EU legislation. This system has exerted a noticeable influence in the legislative process of China's Civil Code and Personal Information Protection Law, and caused a series of disputes.¹ Before the promulgation of Personal Information Protection Law, the concept of personal information processor was never unified, and showed a certain process of change.

2.1 Legislative Evolution of the Concept of Personal Information Processor

Table 1. Replacement and evolution of the address of information processor in different laws, regulations or normative documents

Laws, regulations and normative documents	Time of introduction	Address of information processor
All Parts of the Civil Code (Draft) (First draft)	September 2018	Information collection person, information holding person
Civil Code of Personality Rights (Draft) (Second draft)	April 2019	Information collector, information holder
Civil Code (Draft)	December 2019	Information collector, information controller
Civil code	May 2020	Information processor
Personal Information Protection Law (Draft)	October 2020	Personal information processor

The concepts of information collector and information holder were used for the first time in Various Parts of the Civil Code (Draft) (first draft) promulgated in September 2018. As the subject of personal information processing usually includes two forms: organization and individual, in order to improve the accuracy of words, in April 2019, the Draft of Personality Rights of Civil Code (the second review draft) changed the information collection person and information holding person into information collector and information holder respectively. In December 2019, the Civil Code (Draft) changed the above-mentioned information holder to information controller. The information controller is mainly derived from the EU Directive 95 /46 /EC (October 1995).², and then continued to be used in the General Data Protection Regulation proposed by the European Union in 2012 and the General Data Protection Regulation adopted in 2016. Individuals' right to know is one of the typical examples of controller theory, which emphasizes that "information subjects can control the whereabouts of their collected data to a certain extent"³. By May 2020, the officially promulgated Civil Code once again combined information collector and information controller into information processor. For example, Article 1037 of the Civil Code states: "A natural person may consult or copy his personal information from an information processor according to law..." and Article 1038 states: "An information processor shall not disclose or tamper with the personal information it collects or stores..."

Later, in May 2020, China's Civil Code chose the title of information processor and abandoned the classification of information processor and information controller in the European Union. The reason is that there is no historical influence of the concept of information self-determination of European countries in China. (Jia Yao, 2021)⁴ It is worth noting that, since the word information of information processor does not limit the preposition of the literal meaning, it obviously includes personal information and information of legal persons and unincorporated organizations according to the literal meaning. The question is, does this mean that the relevant information protection provisions of the Civil Code protect the information rights of legal persons and unincorporated organizations?

The answer is no. Referring to the title of Chapter VI of the Civil Code on Personality Rights—Privacy Right and Protection of Personal Information and Personal information of natural persons is protected by law stipulated in Article 1034, we can find that both of them are expressed by personal information. This shows that the protection objects of the information protection clauses in the Civil Code are limited to individuals, and do not include legal persons, unincorporated organizations, etc. The Civil Code is called the subject of information processing, and the counterpart of the subject of personal information rights is not accurate. After all, the carrier forms of information are various and complicated, and not only natural persons, but also various organizations can generate information resources in their daily activities, and the information circulating in the society is by no means limited to personal information. The Personal Information Protection Law (Draft) promulgated in October, 2020 changed the relevant expression of information processor to personal information processor and continued to the Personal Information Protection Law finally promulgated in November, 2021. From then on, the concept of personal information processor was finally established.

Article 69 of Personal Information Protection Law puts forward for the first time that if a personal information processor damages the legitimate rights and interests of the information subject in the process of processing information, and the personal information processor cannot prove its fault-free, it shall be liable to the

information right holder for damages. This clause is the legal origin of personal information processor's fault presumption responsibility. In other words, this clause stipulates that the application of presumption of fault requires that the infringer should be a personal information processor instead of other subjects, otherwise other laws and regulations such as Article 995 or Article 1165 of the Civil Code should be applied, and the infringed person exercises the right to claim personal rights or infringement claims. Therefore, it can be confirmed that the personal information processor, as the subject of specific obligations, is one of the important prerequisites for applying the imputation principle of Article 69 of the Personal Information Protection Law.

2.2 Definition of Personal Information Processor

What elements are required to meet the constitutive requirements of personal information processor in the Personal Information Protection Law? Article 73 of the Law on the Protection of Personal Information states at the outset: "Personal information processors refer to organizations and individuals who independently decide the purpose and method of processing personal information." This means that, first of all, the personal information processor needs to meet the requirements of independently determining the purpose and method of processing, and the personal information processor who does not meet the conditions of autonomy does not fall within the scope of adjustment of the Personal Information Protection Law. There are two legal meanings here: the purpose of processing explains the motivation and purpose of personal information processors to process information, that is, why; the way of treatment explains the means, forms and behaviors of treatment, that is, how.

In the era of Big Data, personal information is frequently collected, stored and transferred, and personal information processors process information for different purposes, putting personal information rights and interests at unprecedented risks. For example, an e-commerce platform outlines personality portraits through automated decision-making techniques such as algorithms, and sets different commodity prices for different consumer groups — commonly known as big data killing. This behavior essentially dwarfs the unique human dignity of human beings, and reduces the subject of natural person who enjoys personal rights to things. To cope with the above ethical risks, the basic principle of purpose restriction is put forward in the relevant legislation of personal information protection.⁵ This principle is mainly composed of two parts: legality of purpose and validity of purpose. Legality of purpose requires that the personal information processing subject must process information legally. When the personal information processing subjects whose subjective purpose is illegal causes infringement, it should bear the legal responsibility to the infringed person, and it should also be recognized that it is outside the adjustment scope of the Personal Information Protection Law. (Lixin Yang, 2021) Validity of purpose requires that the information processing methods of the information processing subject must have the least impact on the rights and interests of the information subject among all the methods that can achieve the processing purpose.

As for the autonomy of information processing methods, different information processing methods affect the performance of personal information processors' obligations. For example, Article 25 of the Personal Information Protection Law stipulates that if a personal information processor discloses personal information, it needs to obtain the individual consent of the individual whose information is collected; as stipulated in Chapter III Rules for Cross-border Provision of Personal Information of the Law, if the personal information processor concerned transfers the personal information of the domestic subject abroad, the information processing subject needs to undertake additional obligations (it must obtain the security assessment certification of the national network information department, etc.).

Secondly, personal information processors need to meet the formal requirements of organizations and individuals, and the specific types can be divided into network service providers; Public institutions; Offline business entities. (Jia Yao, 2021) Some scholars believe that the fundamental reason why the Personal Information Protection Law uses organization, individual instead of the concept of natural person, legal person and unincorporated organization in the field of civil law is that the legislative purpose of legislators is not to regard the Personal Information Protection Law as a special law of the Civil Code, because the former borrows civil law, administrative law and other departmental regulations at the same time to realize all-round protection of the legitimate rights and interests of personal information. (Weiqiu Long, 2021) But in fact, the Civil Code also uses the concept of organization and individual many times.⁶ In addition, there is nothing wrong with collectively referring to legal person and unincorporated organization as organization. It is arbitrary for the Personal Information Protection Law to be regarded as a general or special law of the Civil Code just because whether it uses the words of organizations and individuals instead of natural persons, legal persons and unincorporated organizations in the field of civil law.

2.3 The Personal Information Protection Law Does Not Distinguish Between Personal Information Processor and Personal Information Controller

Does the information processing subject in China need to distinguish between personal information Controller and personal information Processor? As mentioned earlier, Chinese legislators no longer distinguish between

personal information controllers and processors. According to paragraphs 4 and 5 of Article 2 of the EU Directive on the Protection of Individuals Related to Personal Data Processing and the Free Flow of Data (Directive 95/46), respectively: Controller refers to the natural person, legal person, public institution, agency or any other entity that decides the purpose and mode of personal data processing alone or jointly with others; Processor refers to the natural person, legal person, public institution, agency or any other entity that processes personal data on behalf of the controller.

There are two main reasons for this distinction in the EU: First, in most cases of information infringement, it is often the personal information controller rather than the personal information processor who violates the data protection obligations stipulated in the information protection regulations. It can be seen that the personal information controller is the key actor in information processing activities; Secondly, the job function of the processor is limited. Generally, it receives the instructions of the controller to complete the data processing activities, and its subjective initiative is limited. (Christopher Kühler, 2008)

What kind of legal relationship between personal information controller and personal information processor is still inconclusive in academic circles. But it is clear that there is no employment relationship between personal information processor and personal information controller. If the personal information processor is regarded as the employer and the personal information controller is regarded as the employee, the personal information processor should be liable for damages according to the employer's vicarious liability after the personal information processor damages the rights and interests of the information right holder due to its own fault. However, according to Article 28, paragraph 10 of the European Data Protection Regulation, once the data processor violates the previous agreement and decides the way and purpose of data processing by itself, the processor should be regarded as the *de facto* controller. In other words, the controller and processor can be converted to each other under certain conditions, and they are not absolutely opposite. However, the legal relationship between employers and employees is usually stable and cannot be converted to each other. Therefore, the relationship between personal information controller and personal information processor should not be regarded as the relationship between employer and employee. Secondly, the two should not be the relationship between the agent and the principal, because the agent can engage in civil activities within the scope of the principal's authorization and build a civil relationship between the principal and the third party, while the personal information processor obviously does not enjoy the agency right. The agency relationship is incompatible with the characteristics that the information processing subject must be able to decide the way and purpose of information processing independently. Therefore, there is no agency relationship between the controller and the processor.

To sum up, in the EU personal data protection legislation, the processor and the controller are more similar to each other in a subordinate or submissive relationship, that is, the processor must follow the instructions issued by the controller on the purpose and method of personal data processing. (Christopher Kuner, Lee A. Bygrave & Christopher Docksey ed., 2020) This is similar to Article 992 of China's Civil Code. The trustee shall handle the entrusted affairs according to the instructions of the principal.

China's Personal Information Protection Law doesn't distinguish between controllers and processors like the European Union, which doesn't mean that there are no supporters to distinguish between controllers and processors in China. Scholars who support the distinction believe that when personal information rights and interests are infringed, if there is no binary distinction in legislation, the controller will become the only responsible subject, while the processor only needs to bear the liability for breach of contract to the controller (there is only a contractual relationship between the processor and the controller), and does not bear any liability to the third-party users, which is obviously contrary to the basic principles of honesty, trustworthiness and fairness in the Civil Code.⁷ The effective way to solve this dilemma is to divide the controller and the handler, so that the rights and obligations can be fairly divided between them.⁸

I don't agree with the above viewpoint. First of all, the above-mentioned view holds that the behavior that the controller of personal information bears the legal consequences to the third party and the processor is exempted from liability through the contract violates the principle of honesty and fairness in the Civil Code. Therefore, in order to embody the principle of honesty and fairness in the Civil Code, the Personal Information Protection Law should divide the controller and the processor, so that the rights and obligations can be fairly divided between them. In fact, it presupposes that the Personal Information Protection Law is a special law in the Civil Code. Whether the relationship between the Civil Code and the Personal Information Protection Law belongs to general law—special law is still open to question. Scholars who support the Personal Information Protection Law as a special law of the Civil Code believe that the Personal Information Protection Law has made a series of supplements and breakthroughs to the Civil Code, and the two should be a general law-special law relationship. (Liming Wang, 2021) When the two laws are in conflict with norms, the Personal Information Protection Law, as a special law, should be applied first. Opponents argue that: regarding Personal Information Processor as a

special law of the Civil Code is detrimental to the authority of the Civil Code as a basic civil law, which makes the integrated civil legal rights and obligations dispersed again; and the Personal Information Protection Law has both public and private law colors, such as the regulation on adjusting the rights and obligations of public authorities and general civil subjects in the field of administrative law.⁹ It even involves criminal regulation.¹⁰ Therefore, the Personal Information Protection Law cannot be regarded as a special law of the Civil Code. (Hanhua Zhou, 2020) Some scholars even think that if the private law rules in the Personal Information Protection Law conflict with those in the Civil Code, the private law rules in the Personal Information Protection Law, as a special rule, should be applied first. The most typical example is that the personal information processor infringes on the sensitive information of a natural person. Because the sensitive information is included in the personal information and there is no protection of special sensitive information in the Civil Code, the imputation principle of presumption of fault in the Personal Information Protection Law should be applied first instead of the general fault liability in tort liability in the Civil Code. Other normative conflicts should be properly adjusted in individual cases and cannot be generalized. (Xiaojian Zheng, 2021) To sum up, China's academic circles have no conclusion on the relationship between the Personal Information Protection Law and the Civil Code. Therefore, when the relevant provisions of the Personal Information Protection Law conflict with the basic principles of the Civil Code, it cannot be used as a reason to deny the independent legal value of the Personal Information Protection Law. This is similar to China's Civil Procedure Law, which stipulates the evidence system of whoever advocates gives evidence, while the Administrative Procedure Law stipulates the basic principle that "the administrative organ bears the burden of proof for the legality of its own administrative actions". Obviously, the basic principle of proof in the civil field cannot deny the value of the system of inversion of burden of proof in the administrative law field. The same is true between the Personal Information Protection Law and the Civil Code.

Furthermore, the proponents of the binary distinction method believe that distinguishing between personal information controllers and processors is helpful to avoid the exemption from liability by agreement between infringers, and this view is also difficult to hold. The purpose and method of personal information processing are determined by which subject, and which party should take orders from the other party to process personal information, which is just the internal legal relationship between the controller and the processor. (Xiao Cheng, 2021) According to the second paragraph of Article 465 of the Civil Code, the contractual agreement between the parties only has legal effect, and the contract only has legal force between the parties. Therefore, no matter how the internal rights and obligations of the controller and the handler are distributed, the infringed can choose one of their subjects to exercise the right of claim for tort liability, and then the infringers who undertake the compensation obligation can make internal recovery.

Finally, even in Europe, which advocates the distinction between the controller and the processor of personal information, the application of this distinction in judicial practice is also controversial. For example, in the Google-Spain case, the search engine should be recognized as the controller or the processor. As the actual operator of the search engine, Google has irreplaceable control over the processing methods and purposes of personal information, and should be the data controller. However, the European Court in this case held that "the operator of search engine, as the main body to decide the purpose and method of information processing, must actually exercise its power and ability within the scope of its duties, so as to make the information processing behavior conform to the requirements of EU Directive 95 /46 /EC (meet the requirements of controller)".¹¹ In addition, the European Court of Justice has also set a reactive obligation similar to the safe haven principle, that is, only when the data information processing subject is told by the information right subject that the former has damaged the latter's personal rights and interests, will the data information processing subject undertake the obligation to act, and from now on, it can be regarded as the controller. Therefore, the dualism of distinguishing personal information controllers and processors has been rated as outdated paradigm by some theorists. (Jiayou Shi, 2021) As the first personal information protection-related laws and regulations in China, which was born in 2021, it finally decided to unify the dualism of controller-processor with processor, which is in line with the mainstream legislative trend in the world.

To sum up, personal information processors refer to organizations and individuals that can legally and independently decide their information processing methods and purposes. The purpose and method of information processing is illegal, or the subject who decides the purpose and method of information processing according to the instructions of other subjects does not belong to the personal information processor. In addition, if the information processing subject conducts information processing activities according to the instructions of other subjects, it belongs to the trustee of the personal information processor. In judicial practice, the concepts of personal information co-processor and personal information processor's trustee are often confused. The core division standard is that there are at least two personal information processors in the personal information co-processor, but the trustee of the personal information processor is not the personal information processor, and only the entrusting party is the personal information processor.

3. Content Requirements: The Right to Claim Tort Liability

The personal information processor bears the tort liability, and needs to satisfy that the information infringement has caused actual damage. For information infringement that has not caused actual damage, the infringer may not exercise the right to claim tort liability, but may exercise the right to claim personal rights according to Article 995 of the Civil Code, and ask the infringer to take the responsibility of stopping the infringement, removing obstacles, returning the original, eliminating danger, eliminating influence, restoring reputation and making an apology. The Civil Code does not stipulate that the subject of the damaged personality right can exercise the right to claim the personality right only if it has caused actual damage. Otherwise, when the infringement is in the ongoing stage but has not yet caused the harmful result, the infringed person cannot wait until the harmful result occurs before requesting the infringer to stop the infringement. Not only the result of damage, but also the infringer's request to exercise the right of personal claim does not need to prove that the infringer is at fault (intentional or negligent). It is only necessary to prove that the infringer has committed the infringement and the causal relationship between the infringer's infringement and the risk of legitimate rights and interests of the victim.

Therefore, if the information right subject takes the right of claim for tort liability as the basis of claim, it can invoke the Civil Code or the Personal Information Protection Law to ask the infringer to bear tort liability; if the information right subject takes the right of claim for personality as the basis of claim, it can only invoke the relevant provisions of the Civil Code to ask the infringer to take the obligation of stopping infringement and removing obstacles.

4. Object Elements: The Most Important Thing to Protect Is the Information of the Natural Person Himself

Just as Article 1 of Japan's Personal Information Protection Law stipulates: "This law regulates the behavior of the government and enterprises in dealing with personal information." And Article 1 of the European Union GDPR stipulates: "These Regulations formulate rules for the protection of natural persons and the free flow of personal data related to personal data processing." The protection object of China's Personal Information Protection Law is only limited to the information of natural persons, and the data generated by the operation or management of any legal person or unincorporated organization are not protected by this Law.¹² Therefore, only when a natural person's personal information rights and interests are illegally infringed can the presumption of fault be applied.

Whether the presumption of fault is also applicable to the infringement of the personal information of the deceased. Some people think that the deceased, as a non-natural person, should not fall within the scope of this law. (Xianquan Liu & Yangyang He, 2022) Therefore, the presumption of fault liability is not applicable. Although I agree with the conclusion, I think it is inappropriate to completely exclude the protection of the personal information rights of the deceased from the protection scope of the Personal Information Protection Law, because Article 49 of the Law gives the close relatives of the deceased the right to consult, copy, correct and delete the relevant personal information of the deceased. However, when the above rights of close relatives are infringed, the tort liability standard of the Civil Code should be invoked, and the infringer should bear the general fault liability. The reason why the Personal Information Protection Law is not invoked is that close relatives' claims for damages are based on their own personal interests (not on the deceased), while the Personal Information Protection Law protects the subject of information rights and interests; second, the deceased is really not a natural person, so naturally, there is no presumption of fault liability applicable to Article 69. Article 49 of this law is equivalent to setting a connection path with Article 994 of the Civil Code, which can not only soothe the memorial feelings of the close relatives of the deceased, but also help to maintain the social ethics system. It is biased to think that the complete Personal Information Protection Law only protects natural persons and does not protect the personal information rights of the deceased.

References

- Jia Yao, (2021). On the Civil Liability of Personal Information Handlers. *Tsinghua Law*, (3).
- Lixin Yang, (2021). Rules and Application of Damage Compensation for Infringement on the Rights and Interests of Personal Information. *Journal of Shanghai Law School of Political Science and Technology (Rule of Law Series)*, (6).
- Weiqiu Long, (2021). *Interpretation of the Personal Information Protection Law of the People's Republic of China*. China Legal Publishing House.
- Christopher Kühler, (2008). *European Data Protection Law: Corporate Compliance and Control (2nd ed.)*. translated by Kuangye et al, Law Press, pp. 74.
- Liming Wang, (2021). Highlights and Innovations of the Personal Information Protection Law. *Journal of*

- Chongqing University of Posts and Telecommunications (Social Science Edition)*, (5).
- Hanhua Zhou, (2020). The Legal Positioning of Human Information Protection. *Studies in Law and Business*, (3), 54.
- Xiao Jian Zheng, (2021). On the Relationship Positioning and Normative Harmonization of the Personal Information Protection Law and the Civil Code. *Journal of Soochow University (Law Edition)*, (4), pp. 56.
- Xiao Cheng, (2021). On the Civil Liability of Joint Processors of Personal Information. *Jurist*, (6), pp. 21.
- Jiayou Shi, (2021). The Private Law Dimension of Personal Information Protection. *Comparative Law Studies*, (5), pp. 22.
- Christopher Kuner, Lee A. Bygrave & Christopher Docksey ed., (2020). *The EU General Data Protection Regulation (GDPR): A Commentary*, New York: Oxford University Press, pp. 146.
- Xianquan Liu, Yangyang He, (2022). Personal Information Protection Law Adjustment of the Elements of the Crime of Infringing on Citizens' Personal Information from the Perspective of the Law, *Journal of South China Normal University (Social Science Edition)*, (1).

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- ¹ For example, (1) Does the information processing subject in China need to distinguish between the controller and the processor, what are the reasons for supporting the distinction, and what are the reasons for not supporting the distinction? (2) The relationship between the concepts of personal information controller and personal information processor, etc.
- ² Directives of the European Parliament and the Council of the European Union on the protection of personal data in the processing of personal data and the free movement of personal data.
- ³ Francoise Gilbert, A Bird's-Eye View of Data Protection in Europe, 24 ABA GP Solo 31, 32–35 (2007).
- ⁴ However, although China has abandoned the classification of information processor and information controller, it is certain that the information processor currently used in the Personal Information Protection Law integrates the characteristics of information controller. As for why China only chose information processor and abandoned the concept of information controller, the detailed reasons are discussed later.
- ⁵ This principle is embodied in the Second Paragraph of Article 28 of the Personal Information Protection Law: Personal information processors may process sensitive personal information only if they have a specific purpose and sufficient necessity and take strict protective measures.
- ⁶ See Articles 243, 245 and 297 of the Civil Code.
- ⁷ As mentioned above, since the controller and the processor are similar to the entrustment relationship in civil law, according to the relevant provisions of civil law, as long as the infringement act is committed in the name of the client within the scope of the entrustment authority, the client shall bear the tort liability.
- ⁸ JD Law Institute, (2018). EU Data Charter: GDPR Review and Practice Guide, Law Press, pp. 93; Xie Yuanyang, (2019). The Normative Construction of Personal Information Self-Determination in the Draft Personality Rights of the Civil Code and Its Reflection, *Modern Jurisprudence*, (6), pp. 135.
- ⁹ For example, Chapter 3 of the Personal Information Protection Law: Rules for Cross-border Provision of Personal Information; and Chapter 6: Departments Performing Personal Information Protection Duties.
- ¹⁰ See Article 71 of the Personal Information Protection Law: Where a violation of the provisions of this Law constitutes an act of violating the administration of public security, a public security administrative penalty shall be imposed in accordance with law; Where a crime is constituted, criminal responsibility is to be pursued in accordance with law.
- ¹¹ CJEU, Judgment in Google Spain, C-131/12, EU:C:2014:317, paragraph 38.
- ¹² Article 2 of the Personal Information Protection Law: The personal information of natural persons shall be protected by law, and no organization or individual may infringe upon the personal information rights and interests of natural persons.

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