FRONTIERS OF LAW IN CHINA
VOL. 7 MARCH 2012 NO. 1
DOI 10.3868/s050-001-012-0007-4

ARTICLE

THE CONCEPTUAL BASIS OF PRIVACY STANDARDS IN CHINA AND ITS IMPLICATIONS FOR CHINA'S PRIVACY LAW

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China has one of the longest histories of civilization in the world. In ancient China, civil disputes were solved by moral principles of Confucianism, called li (礼). Therefore, at the time of the emergence of li, privacy was indirectly protected to some extent. However, li also restrained the legal privacy protection at that time. Moreover, the substantial meaning of traditional protection for privacy is quite different from that in modern society. In consequence, it is difficult to postulate that there was legal protection for privacy in ancient China, though privacy had been indirectly protected by the theory of li.

If the right to privacy is seen as a milestone in its evolution in modern society, the modern concept and protection of privacy emerged in China almost a century later than in some Western countries.[1] *The first consideration for the protection of privacy in China was a judicial interpretation by the Supreme Court in 1988.*[2] *Since then, China has been developing its own protection for privacy. This article is to explore privacy standards in both ancient and modern China with two main parts: (a) The first part discusses the privacy in ancient China, including traditional Chinese concepts of privacy, traditional Chinese protection for privacy, and its evaluation; (b) the second part examines the privacy standards and privacy protection in modern China.*

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[1] Guobin Zhu, *The Right to Privacy: An Emerging Right in Chinese Law*, 18 Statute L. Rev. 208, 208 (1997).

[2] The title of this judicial interpretation is the Opinions of the Supreme Court on Several Issues Concerning the Implementation of the General Principles of Civil Law of the PRC (for trial implementation) (1988).

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Privacy is one of the hotly-debated topics worldwide at present. This article examines privacy standards in both traditional and modern Chinese society. Its main aim is to consider how to effectively protect privacy in China.

I. PRIVACY IN ANCIENT CHINA

A. Traditional Definition of Privacy

The Chinese word for "privacy" is *yin-si* (阴私). *Yin-si* consists of two Chinese characters, i.e., *yin* (阴) and *si* (私). *Yin* means "hidden from view."[3] Usually, this is a word that possesses derogatory sense and means illegitimate sexual relationship. *Si* means "private" or "not want to disclose in public."[4] This word covers both "private" and "privacy."[5] "*Yin-si*" has been defined as an individual's shameful secret that individuals do not want to tell others, or to be disclosed to the public.[6] Strictly speaking, the meaning of *yin-si* only represents one aspect of the modern concept of privacy.

B. Traditional Protection for Privacy

Ancient Chinese law emphasized the significance of protecting government powers and social interests rather than protecting individual rights and civil matters.[7] Thus, the law was not formally divided into criminal law and civil law in ancient China. The law was constructed on the basis of a monolithic and comprehensive code that contained all types of rules, with criminal law as the backbone of the entire system.[8]

On the other hand, this is not to say that there was no civil protection in ancient China. The ancient Chinese legal system defined the duties and obligations of individuals, and this in turn indirectly protected the rights of the individuals.[9] The civil disputes were solved by the theory of *li*. Initially, *li* (ritual rules, etiquette) had been defined as the norms governing the conduct of royal family members and nobles in China.[10] Books of *li* were carefully kept in the hands of official historians, and the common people had no opportunity to accept

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[3] Zuoqiu Ming, 僖公十五年 (Xi Gong of the Chronicle of Zuo — Xi Gong 15th Year), 403– 386 BC (ed.), Thread-Binding Books Publishing House (Beijing), at 104 (2007).

[4] Qian Sima, 史记卷七, 项羽本纪 (Biography of Hsiang Yu in the Historical Records), 91 BC (ed.), vol. 7, Hai Chao Press (Beijing), at 75 (2008).

[5] Bonnie S. McDougall & Anders Hansson, *Chinese Concepts of Privacy*, Kegan Paul Int'l Ltd. (Australia), at 6 (2002).

[6] http://www.zdic.net/cd/ci/6/ZdicE9Zdic98ZdicB4264096.htm (last visited Mar. 8, 2011).

[7] Chenguang Wang & Xianchu Zhang (eds.), *Introduction to Chinese Law*, Sweet & Maxwell Asia (Hong Kong), at 7 (1997).

[8] Id. at 5.

[9] Laszlo Ladany, *Law and Legality in China: The Testament of a China-Watcher*, University of Hawaii Press (Honolulu), at 33 (1992).

[10] Wang & Zhang, fn. 7 at 3.

the teaching of *li*.[11] This phenomenon was not eliminated until the emergence of the systematic theory of *li*. The task of establishing a systematic theory of *li* was completed by Confucius in the Spring and Autumn periods (770 BC to 476 BC) and the early days of the Warring States periods (475 BC to 221 BC).[12]

The core of theory of *li* is to cultivate morality. In Confucians' view, both ideal social order and perfect human relations can be achieved on the basis of theory of *li* (morality). Confucians did believe that to lead the people "by virtue and keep them in order by the established morality (*li*), and they will keep their self-respect and come to you."[13] In addition, Confucius states that "not treat others as that you would not to be treated the same (己所不欲, 勿施于人)."[14] Obviously, based on these two famous statements, morality has been seen as the most effective means to govern a country and regulate civil matters in the theory of *li*. Confucius treated all people as equal human beings, and believed that some essential principles of *li* should be applicable to all people and to all human relationships.[15] Thus, the theory of *li* has two major functions: One is as a national code reflecting social change; and the other is to train personal character and encourage moral behavior. In order words, *li* influenced the social and state systems, and personal thoughts and behavior in ancient China.[16] In this respect, Confucius' theory of *li* had the same function as the Western concept of natural law, and was a set of ethical standards that regulated both social conducts and civil matters in ancient China.[17]

The protection of privacy (*yin-si*) was firstly stated by 论语 (The Analects of Confucius) in the early days of the Warring States periods. Confucius did state that "do not watch what is improper, do not listen to what is improper, do not speak improperly, and do not act improperly (非礼勿视, 非礼勿听, 非礼勿言, 非礼勿动)."[18] Confucius also stated that "to get and talk from gossip or hearsay is improper (道听而涂说, 德之弃也)."[19] Clearly, these two doctrines clearly restricted individual's behavior to invade other personal private lives. Furthermore, Confucius did believe that there is a border between family and outsiders, and that this border maintains the family space free from interference,

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[11] Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development*, Oxford University Press (New York), at 73 (1998).

[12] Id. at 89.

[13] Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature, and Development*, Kluwer L. Int'l (Boston), at 7 (1999).

[14] See Liu, fn. 11 at 93.

[15] See Liu, fn. 11 at 90.

[16] Kuihua Wang, *Chinese Commercial Law*, Oxford University Press (Oxford), at 4 (2000).

[17] See Liu, fn. 11 at 90.

[18] Confucius, 论语, 颜渊十二 (The Analects of Confucius, Yan Yuan 12th).

[19] Confucius, 论语, 阳货十七 (The Analects of Confucius, Yang Huo 17th).

reserves a right not to reveal family matters, and allows a close, intimate relationship that is distinct from the relationships with from outsiders.[20] All these doctrines, to some extent, protected the *yin-si* rights of individuals at that time. In addition, almost all famous Chinese ancient codes, such as *Tang Code* (唐律疏议 624 AD) and *Ming Code* (大明律 1397 AD), listed impiety as a major crime. This article prohibited reporting one's grandparents' or parents' crimes to the authorities, and cursing them.[21] Although the main object of punishing impiety was to consolidate social relationships based on the five major relationships of *li*, the crime of impiety indirectly prohibited people from reporting their grandparents' or parents' personal information to a third party.

It should be noted that the main aims of these doctrines and provisions were not to protect individual's personal privacy. The protection of privacy (*yin-si*) was only the by-product of implementing these doctrines and provisions. Moreover, breaches of *yin-si* were seen as a minor civil matter in ancient China. Usually, the state's legal system did not intervene in such matters, and minor civil disputes would be settled by society itself using its own mediatory methods at that time.[22] Also, based on the traditional meaning of *yin-si*, most Chinese people believed that matters concerned with *yin-si* were shameful, and they did not want them to be disclosed.[23] If the invasion were inevitable, they would rather ignore the invasion. Therefore, there are not any records of *yin-si* disputes recorded in writing in ancient China. In fact, the Chinese concept of *yin-si* was not an equivalent term for the modern concept of privacy. As Shin-yi Peng states, "at best, we can say that by emphasizing the family/kinship intimacy, some sort of ambiguous 'privacy rights' can be found in terms of maintaining family space free from outside interference."[24] Thus, it is difficult to conclude that there was legal protection for the right to privacy in ancient China, though privacy had been indirectly protected by *li*.

C. Theories to Explain the Insufficient Level of Privacy Protection in Ancient China

The possible reasons why the right to privacy (*yin-si*) was not legally

[20] Shinyi Peng, *Privacy and the Construction of Legal Meaning in Taiwan*, 37 Int'l Lawyer 1037, 1039 (2003).

[21] Hyung I. Kim, *Fundamental Legal Concepts of China and the West: A Comparative Study*, Kennikat Press (New York), at 98 (1981).

[22] Philip C. C. Huang, *Civil Justice in China: Representation and Practice in the Qing*, Stanford University Press (Stanford), at 10 (1996).

[23] See Jingchun Cao, *Protecting the Right to Privacy in China*, 36 Vict. U. Wellington L. Rev. 645, 647 (2005).

[24] See Peng, fn. 20 at 1039–40.

protected in ancient China are as follows:

1. Absolute Privilege of the Ruling Class. — In ancient Chinese society, Confucianism identified and stressed the five major relationships (emperor & citizen, father & son, husband & wife, elder brother & younger brother, friend & friend). Family relationship in ancient China consisted of "father & son," "husband & wife," "elder brother & younger brother." In the Chinese autocratic family system, Confucian doctrine laid heavy obligations on the son, wife and children.[25] Compared to the son, wife, and younger brother, the rights of father, husband, and elder brother were always absolute. It is thus clear that, in feudal China, the status of the master and the father, husband, and elder brother had the dominant position and absolute privilege over the slave, son, wife, and younger brother.[26] It was inevitable that the civil rights of individuals were largely weakened. The protection for the right to privacy (*yin-si*), however, would challenge the dominant position of the ruling class and the traditional social order at that time. As a consequence, the ruling class would not protect the right to privacy in ancient China.

2. Traditional Attitude to Civil Disputes. — As mentioned above, the core of theory of *li* is to cultivate morality. Therefore, the values that Confucianism cherished are co-operation and collaboration, hierarchy and harmony, peace and stability.[27] However, Confucian doctrine unduly stressed the importance of the functioning and the maintenance of the group. Any disputes would disturb the desire for social harmony, and any disturbance of this harmony was unacceptable at that time.[28] Therefore, in ancient China, almost every person tried to avoid civil disputes. It is thus clear that inevitable privacy issues, as the minor civil matters, had been solved by the society itself in ancient China. In consequence, it was impossible to ensure privacy rights in ancient Chinese society.

3. Traditional Sense of Face. — Face is a unique word in Chinese. Besides its original meaning, this term is a literal translation of the Chinese *mianzi* (面子) or *lian* (脸).[29] It has been argued that *mianzi* is "a reputation achieved in life through success and ostentation"; while *lian* "represents the confidence of society in the integrity of ego's moral character, the loss of which makes it difficult for one person to function properly within the community."[30] That is to say, in China, face is construed to mean one's social prestige and accumulated morality in the eyes of the community.[31] Losing face is losing honor and

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[25] Id. at 1039.

[26] See Kim, fn. 21 at 97.

[27] Chen Goh Bee, *Law without Lawyers, Justice without Courts: On Traditional Chinese Mediation*, Ashgate Publishing (London), at 8 (2002).

[28] Id. at 9.

[29] David Yau-fai Ho, *On the Concept of Face*, 81 Am. J. Sociol. 867, 867 (1976).

[30] Id. at 867–68.

[31] See Chen, fn. 27 at 52–53.

self-respect.[32] Therefore, it has been held that the principle of face is the Chinese equivalent of honor.[33] For a person, maintaining face is very important in Chinese social relations. Someone even postulated that "he would rather die than be humiliated (士可杀，而不可辱)."[34] As Pye stated that "the heavy use of shame as a social control mechanism from the time of early childhood tends to cause feelings of dependency and anxieties about self-esteem, which naturally produces self-consciousness about most social relationships."[35] Based on this, most Chinese people believed that matters concerned with *yin-si* were shameful, and they did not want their *yin-si* to be disclosed. The publicity of *yin-si* would mean the loss of their face. Therefore, concerning with face, especially moral face, provided an internal moral constraint that directed individuals' actions.[36] Thus, even if the invasion of their privacy was inevitable, they preferred to ignore the invasion.

4. Summary. — As discussed above, the indirect protection of privacy in ancient China was only one of the results of regulating the society by the ruling class. The theory of *li* indirectly protected privacy in ancient China, and *li* also restrained the right to privacy. When Chinese personal privacy was invaded, they would rather ignore the invasion if it were bearable.[37] If civil disputes were unavoidable, as mentioned above, the Chinese method to deal with them was conciliation or mediation. In other words, inevitable privacy issues, as with minor civil matters, had been solved by the society itself in ancient China. All these facts may disclose the reasons why the right to privacy (*yin-si*) was not legally protected in ancient China.

II. PRIVACY IN MODERN CHINA

A. Changes of Privacy in Contemporary China

It has been 30 years since Deng Xiaoping proposed the reform and opening up policy in China in 1978. During these past 30 years, China has been undergoing essential changes in every corner of the society. These changes can be reflected in economic, ideological and the media field.

First, China's economy is growing rapidly as a result of reform in China's

[32] See Ladany, fn. 9 at 23.

[33] See Chen, fn. 27 at 52.

[34] De Dai & Sheng Dai (eds.), 礼记，儒行四十一 (The Book of Rites, Ru Xing 41st), Jilin People's Publishing House (Changchun), at 425 (2005).

[35] See Chen, fn. 27 at 53.

[36] See Chen, fn. 27 at 54.

[37] See Cao, fn. 23 at 647.

economic structure, and the socialist market economy system replaces the traditional planned economy system. Under the traditional planned economy system, collective interests dominated because of ownership by the whole population. By contrast, according to the nature of market economy, the individual is regarded as an independent subject and individual interests. Moreover, one of the important measures of reform is to define the private ownership economy as an important component of socialist economy. Therefore, pursuing individual economic interests is no longer such a taboo in China. As a result, today, the individual has been regarded as an independent subject and encouraged to pursue individual interests.

Second, with the opening to the outside world, Western values have gradually permeated throughout the Chinese people in spite of the predominance of traditional values. Western values advocate individual personality and highly praise the development based on individual characteristics. With the introduction of Western values such as freedom and equality, Chinese begin to struggle for their due interests, which include the right to privacy. At the same time, the individual's quality has also been improved with the higher educational level. Besides the popularization of primary and secondary education, China increases the investment and enrolment in higher education. Also, increasing numbers of Chinese people and scholars are studying overseas in order to broaden their horizons and enhance their knowledge. Therefore, more and more Chinese people realize that they should respect other person's individual rights, such as the right to privacy.

Third, with the technology advancement, media have played an indispensable role in Chinese social life. In particular, the popularization of the Internet in the 21st century has transformed the Chinese lifestyle. Advanced technology and popularization of the Internet provide a medium for the changes of privacy ideas. In spite of the convenience brought by advanced technology and Internet, many privacy issues have arisen in new forms. Especially, the anonymity of online behavior compounds privacy invasion in China. Therefore, Chinese people begin to claim their interests of privacy.

B. Modern Definition of Privacy in China

With the reform and opening up, the Chinese conception of privacy is experiencing great changes. Based on the Western conception of privacy and the right to privacy, when the General Principles of the Civil Law (1986) came into force in China, some Chinese scholars began to consider the Chinese definitions of privacy and the right to privacy.

Some scholars consider the right to privacy is one aspect of the personal

rights. Xinbao Zhang states that "the right to privacy is a legal right, by which citizens' residences, inner world, financial situations, social relations, sexual life, and past and current affairs of purely personal nature they do not wish to divulge to the outside world are protected from any intrusion by others."[38] Lixin Yang believes that "the right to privacy is a right to keep insulated from publicity, enjoyed by natural persons only, under which they can dominate their personal information, private space and private activities."[39] Liming Wang, a civil law professor, proposes that "the right to privacy is a right of personality, enjoyed by a natural person, and he/she can dispose of all personal information, private activities and private areas which belong only to the person and have no relation to public interests."[40]

C. Civil Subjects Enjoying Privacy Protection

This section discusses the civil subjects who may enjoy privacy protection in modern China.

1. Natural Persons. — According to Chinese law, natural persons (citizens) and legal persons (enterprises) are the two basic types of civil subjects in China. Article 9 of the General Principle of Civil Law (GPCL) clearly states that "a citizen shall have the capacity for civil rights from birth to death and shall enjoy civil rights and take on civil obligations in accordance with the law." However, there are no definitions of "birth" and "death" in the GPCL.[41]

With reference to "birth," the prevalent view in China is that the separation of a living infant from the mother's body is the birth.[42] The capacity to have civil rights in China thus should start from the time of total separation of a living infant from the maternal body. In addition, it should be noted that neither the GPCL nor the Supreme Court views on the GPCL recognize the interest of the fetus.[43] As a consequence, it is clear that a fetus has neither legal rights nor civil rights under current Chinese law. Therefore, in China, a Chinese citizen has privacy rights and enjoys legal privacy protection after he or she is born.

Some Chinese legal scholars think that if the goal for protection of privacy is to protect the dignity and feelings of people, the dead have no feelings about the

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[38] Xinbao Zhang, 隐私权的法律保护 (Legal Protection of the Right to Privacy) (2nd ed.), The Mass Press (Beijing), at 7 (2004); See Zhu, fn. 1 at 209.

[39] Lixin Yang, 人格权法 (Law of Personality Rights), The Court Press (Beijing), at 305 (2006).

[40] Liming Wang, 人格权法新论 (Restatement of the Law of Personality Rights), Jilin People's Publishing House (Changchun), at 487 (1994); See Zhu, fn. 1 at 210.

[41] Guiguo Wang & John Mo (eds.), *Chinese Law*, The Hague, at 101 (1999).

[42] Id.

[43] See Chen, fn. 13 at 228.

disclosure of personal information, so it is not necessary to extend the protection to cover them.[44] However, personal information of the deceased cannot disappear after death, as Mark Littman pointed out that "man is a social animal, no human being can exist for long in total isolation from all others."[45] For example, if doctors release a patient's medical information after his death, the decedent's family members or friends may inevitably suffer discrimination. Hence, we should not ignore the privacy interests of those who are living. In 2001, the Interpretation of the Supreme Court on the Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts provides legal protection of privacy to the deceased person. Article 3 of the Interpretation clearly states that the relatives can sue illegal disclosure or use of the privacy of a deceased person or infringement upon the privacy by other means contrary to public interests or social morality. The author thus believes that the deceased enjoy privacy protection in China, which is not only to protect the reputation of the deceased, but also to adequately protect the privacy interests of those who are living. Consequently, in theory, a Chinese citizen has privacy rights and enjoys legal privacy protection from birth to death under contemporary Chinese law.

2. Legal Persons. — Another civil subject in China is the "legal person." The formal concept of legal person was officially introduced into the GPCL in 1986.[46] The legal position of legal persons in China is dealt with in Chapter 3 of the GPCL. Article 36 of the GPCL states that:

> A legal person shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations in accordance with the law. A legal person's capacity for civil rights and capacity for civil conduct shall begin when the legal person is established and shall end when the legal person terminates.

In modern Chinese law, a legal person and a natural person are equal in some aspects, and the legal person does not exercise those rights and undertake those liabilities that can only be executed by a natural person.[47] Two types of legal persons are provided by the GPCL, which are enterprise legal persons,[48] official organs, institutions and social organizations.[49]

At present, the prevalent view in China is that only a natural person has the

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[44] See Cao, fn. 23 at 654.

[45] Mark Littman, *A Report by Justice: Privacy and the Law*, Eastern Press (New York), at 4 (1970).

[46] See Wang & Mo, fn. 41 at 119.

[47] Id.

[48] General Principles of Civil Law of the PRC (1986), art. 2.

[49] Id. art. 3.

right to privacy and can enjoy privacy protection.[50] As Huixin Liang and Xinzhong Liao state that "personal perception is the origin of privacy, therefore only natural persons are able to enjoy privacy."[51] They believe that the confidential information of enterprise legal persons and other social organizations are trade secrets, and there is no connection between this confidential information and personal feelings.[52] Similarly, Lizhong Wang and Junxing Yang also emphasize the right to privacy is based on the emotions of natural persons.[53] They believe that enterprise legal persons or other organizations cannot enjoy the right to privacy on the basis that they do not have feelings or emotions, and the parallel right is that relating to trade secrets, which is a property right.[54] Therefore, at present, enterprise legal persons cannot enjoy privacy protection in China.

Other kinds of legal persons in China are official organs, institutions, and social organizations. The GPCL does not clearly define these legal persons. However, it is interpreted that the legal persons include those non-profit-seeking organs that are funded by the state, such as administrative, educational, health, or academic institutions.[55] Accordingly, Chinese scholars believe that such organizations' public character should preclude them from involving the law of privacy to protect their secrets.[56] Such organizations should be transparent, open, and accountable to the public. If the right to privacy of such organizations were ensured, the corruption would increase inevitably. It is thus clear that official organs, institutions, and social organizations (as legal persons) also do not enjoy the right to privacy in China. In summary, the majority of Chinese scholars believe only citizens (natural persons) can be the civil subjects of the right to privacy. Legal persons, however, seemingly have no right to enjoy privacy.

On the other hand, the author holds the objection that enterprise legal persons should enjoy privacy protection in China. As mentioned above, most Chinese scholars believe that an enterprise only has trade secrets. From a practical viewpoint, trade secrets can comprise any information that gives a business a competitive edge over competitors.[57] Obviously, the term "trade secret" includes kinds of business information. As Hyman Gross states that "any information may become a trade secret if it is of value in a business, is confidential, and is of

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[50] See Cao, fn. 23 at 652.

[51] http://www.zwmscp.com/list.asp?unid=4139 (last visited Mar. 8, 2011).

[52] Id.

[53] See Cao, fn. 23 at 652.

[54] Id.

[55] See Chen, fn. 13 at 234.

[56] See Cao, fn. 23 at 653.

[57] Robert C. Dorr & Christopher H. Munch, *Protecting Trade Secrets, Patents, Copyrights, and Trademarks* (2nd ed.), Wiley Law Publications (New York), at 45 (1995).

continuing usefulness."[58] In this regard, trade secret seems similar to privacy. However, it is not excusable for Chinese scholars to simply use the term "trade secret" as a substitute for privacy. Gross also pointed out that "trade secrets are parts of the business itself, not isolated matters in the course of its conduct ... a trade secret belongs to a particular business, not to a trade or industry."[59] Usually, there are two criteria of trade secrets: (1) deriving independent economic value, actually or potentially, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (2) is the civil subject that are reasonable under the circumstances to maintain its secrecy.[60]

Some information about a business may be publicly known, such as the amount of a bid submitted or the time when an important announcement is to be made; some information may not be publicly known, where it relates only to a single occurrence in the lifetime of the enterprise, such as an accident on one particular occasion.[61] All this information cannot be deemed as trade secrets. The disclosure of such information will be harmful to the enterprise, though legal persons do not have feelings or emotions. For example, an unsuccessful bid may affect the next bid, and a serious accident may influence the production of that enterprise. Therefore, similar to how an individual hopes to keep his personal information out of the public view, an organization also needs internal privacy to conduct its affairs without having to keep up a "public face."[62] That is to say, enterprise legal persons also need the right to decide when and to what extent their information should be made public. Therefore, legal person's privacy is important if a legal person is to play the role of independent and responsible agent that is assigned to them in democratic societies.[63]

As a consequence, in the author's view, privacy information differs from trade secrets. Privacy is the ability of an individual or group to keep their lives and personal affairs out of the public view. Privacy does not only include secrets but also other non-confidential information.[64] That is to say, not all information of an enterprise is a trade secret; some of it are the privacy of the enterprise legal persons. There are no legislation or legal documents in China to explain whether an enterprise has the right to privacy or to enjoy privacy protection in China. The author thus holds the opinion that enterprise legal persons are also civil subjects

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[58] Hyman Gross, *Privacy: Its Legal Protection*, Oceania Publications (New York), at 66 (1976).

[59] Id.

[60] See Dorr & Munch, fn. 57 at 45.

[61] See Gross, fn. 58 at 66.

[62] Alan F. Westin, *Privacy and Freedom*, Atheneum Publishers (New York), at 44 (1967).

[63] Id. at 42.

[64] See Cao, fn. 23 at 652.

entitled to enjoy privacy protection in modern China.

D. Statutory Protection for Privacy in Modern China

Compared to Western developed countries, modern China addresses privacy issues in different social, political and legal contexts. At present, most developed countries are experiencing greater centralization and coordination of governmental authority, even at the supranational level.[65] For example, from the Treaty of Rome (1957) to the Treaty on European Union (1992) signed in Maastricht, more than 240 European Commission directives have been designed to harmonize law cross Europe.[66] Unlike these developed countries, China mainly relies on the current laws, such as the Constitution and other legislation, to regulate the right to privacy. Therefore, inevitably, the protection of privacy in China is sporadic and fragmented in some particular areas. It follows to examines the protections for privacy in contemporary Chinese legislation in more details.

1. Chinese Constitution and Privacy Protection. — The Constitution (1982) is the most important legislation in China. It is the fundamental law of China and has supreme legal authority. Fundamental human rights are generally stated in Chapter 2 of the Constitution. There are two characters in those rights, which are important to comprehending the legal protection of privacy in China, as below:

First, the rights in the Constitution (1982) are generally protected only against private parties in China, such as the actions of social organizations or citizens. Almost all these constitutional rights do not mention or extend to unwarranted governmental actions. Only article 36 applies directly to both the government and private parties.[67] All other constitutional rights do not protect citizens against the invasion by official powers. Thus, it is not unusual that government invasion of privacy may emerge when the government acts toward a natural person in China.

Second, Chinese constitutional rights are generally *passive*. Someone believes that the Chinese Constitution is *positive* rather than *negative* on the basis that Chinese citizens' fundamental rights are granted by the Constitution, and the Constitution emphasizes their importance.[68] However, the Constitution does not restrain the government from taking certain actions. For example, unlawful body search is prohibited, except with the approval, or by the decision of, a procurator,

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[65] Fred H. Cate, *Privacy in the Information Age*, Brookings Institution Press (Washington D. C.), at 49 (1997).

[66] Id.

[67] Art. 36 of the Constitution of the PRC (1982*)* states that "No state organ, public organization, or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion."

[68] See Cao, fn. 23 at 659.

or by the decision of a court.[69] That is to say, when the governmental rights and the basic citizens' rights collide, the former will always prevail in China. Thus, compared to the governmental powers, the citizens' rights are *passive* in some aspects.

An assessment of constitutional rights is essential to any discussion of the privacy regulation in socialist China.[70] In fact, there is no clear constitutional protection of privacy right in China. However, articles 37–40 of the Constitution provide protection for privacy in China indirectly. At present, these articles are the constitutional basis for the legal protection of privacy in China, although these articles do not explicitly afford protection for any types of privacy.

Article 37 of the Constitution protects the freedom of Chinese citizens. Under article 37, freedom of Chinese citizens is inviolable; unlawful detention or deprivation or restriction of the citizens' freedom by any means is prohibited, and unlawful body search is also prohibited. Article 39 prohibits unlawful search of, or intrusion into, a citizen's residence. These two articles emphasize that all prohibitions do not include actions taken with the approval of a procurator or by decision of a court. Clearly, the protections offered by these two articles only protect privacy of body and privacy of territory. However, these protections are still significant. In the author's view, these two articles emphasize the significance of Chinese citizens' feelings. They try to protect Chinese citizens in their thoughts and emotions. At least, the result is that, to some extent, the invasion of privacy by private actions has been prohibited under articles 37 and 39 in China.

Article 38 of the Constitution protects personal dignity, which clearly states that Chinese citizens' personal dignity is inviolable and that insult, libel, false accusation, or false incrimination directed against Chinese citizens by any means will be prohibited.[71] In fact, in the domain of Chinese jurisdiction, personal dignity is a specialized phrase. Personal dignity can be understood to include the right to name, right to portrait, and the right to privacy. This is the general name for human rights in China. Thus, this provision is the ultimate source from which legislation on the protection of personal rights emanates. Moreover, privacy of written communication is also protected by article 40 of the Constitution.[72]

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[69] Art. 37 of the Constitution of the PRC (1982) states that "No citizen may be arrested except with the approval or by decision of a procuratorate or by decision of a court, and arrests must be made by a public security organ."

[70] See Cate, fn. 65 at 51.

[71] Art. 38 of the Constitution of the PRC (1982)

[72] Art. 40 of the Constitution of the PRC (1982) states that "The freedom and privacy of correspondence of citizens of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law."

2. Chinese Civil Law and Privacy Protection. — While articles 37, 38, 39 and 40 of the Constitution afford individuals limited protection, the GPCL also protects individuals against privacy intrusions. The GPCL regulates three types of torts: (1) Article 99 provides that Chinese citizens shall enjoy the right of personal name, and the interference with, usurpation of, and false representation of personal names shall be prohibited; (2) article 100 provides that Chinese citizens shall enjoy the right to portrait, and the use of a citizen's portrait for commercial purposes without his consent shall be prohibited; and (3) article 101 provides that Chinese citizens shall enjoy the right to reputation. The personality of citizens shall be protected by law, and the use of insults, libel, or other means to damage the reputation of citizens or legal persons shall be prohibited.[73]

In practice, there has been a degree of confusion in applying these provisions to the cases concerning privacy.[74] Thus, China's Supreme Court issued two judicial interpretations regarding the application of the GPCL to privacy in 1988 and 1993. In the Opinions on Several Questions Concerning the Implementation of the GPCL (1988), China's Supreme Court stated that: "If anyone propagates the privacy of any other person in writing or orally, or fakes acts to vilify the personality of other person overtly, or damages other person's reputation by ways of insulting and slandering, which result in a certain influence, such act shall be determined as an act infringing the citizen's right of reputation."[75]

In the Reply to Several Questions on Adjudicating Cases of the Rights of Reputation (1993), Reply 7 states that "Anyone who discloses another person's private information without authorization or, in written or verbal form, damages another person's reputation by publicizing that person's privacy shall be dealt in accordance with damaging the right of reputation of that person." Reply 9 states that: "Any person who causes damage of the reputation by insulting, libeling or disclosing the privacy of the person in the literary work based on real life or, in spite of not identifying the real name or address, has caused damage of the reputation of the person in the literary work based on that person or that person's story through any content of insult, libel or privacy disclosure in that literary work shall be deemed as damaging the right to reputation of that person."[76]

Since these two general judicial interpretations have been adopted, some privacy cases have been heard and judged on the basis of the right to reputation in China. Also the Interpretation of the Supreme Court Regarding Issues of Ascertaining the Liability of Compensation for Spiritual Damage for Tort (2001) states that "If someone infringes upon other's privacy or personality interests and

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[73] See fn. 48, art. 101.

[74] See Zhu, fn. 1 at 208, 211–12.

[75] Opinions of the Supreme Court on Several Issues Concerning the Implementation of the General Principles of Civil Law of the PRC (1988) (for trial implementation), Reply 140(1).

[76] Id.

the aggrieved party, taking tort as the cause to get compensation for spiritual damages, brings a suit to a court, the court shall accept it in accordance with the law."[77]

Another two torts do not recognize privacy exactly. Both the right to name (art. 99) and the right to portrait (art. 100) apply only to unauthorized commercial use of another person's name and portrait. If a person uses another's name or portrait for a purpose other than a commercial purpose, but the consequences of the use cause damage to the good name or reputation of another person or legal person, the latter can only sue the former if the action invaded the latter's right of reputation.[78] Similarly, if the unauthorized non-commercial use of a person's name or portrait does not constitute defamation or not cause damage to the person's reputation, the person whose portrait has been used without authority may not have sufficient grounds to sue the party making such use.[79] As a result, these two torts are obviously also inadequate to protect privacy.

In consequence, it is clear that both the GPCL and the Interpretation to the GPCL are inadequate for protecting privacy in China. The GPCL is too general, thus leaving much uncertainty to privacy protection in China. Chinese courts may assess these unanswered questions when they arise. However, this will inevitably require a long time. The courts will seldom have the opportunity to issue high-level decisions, because the potential plaintiffs are unwilling to spend large amounts of time and money on an uncertain cause of action.[80] Moreover, they also fear going to court, due to the fact that they may believe they will receive even more unwanted publicity.[81]

3. Other Protection. — In addition to the Constitution (1982) and the GPCL (1987), there are other laws and regulations regulating privacy in modern China. For example: (1) Tort Liability Law (2010) provides explicit protection to privacy for the first time in China. Article 2 of Tort Law clearly states that privacy right is one of the legal civil rights in China; (2) Law on Practicing Doctors (1988) requires that doctors should not divulge the privacy of patients during the course of medical practice;[82] (3) Labor Law (1995) prohibits discrimination in "employment, regardless of their ethnic community, race, sex, or religious belief";[83] (4) Insurance Law (1995) requires that "the insurer or

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[77] Interpretation of the Supreme Court Regarding the Issues of Ascertaining the Liability of Compensation for Spiritual Damage for Tort (2001), art. 1.

[78] See Wang & Mo, fn. 41 at 162.

[79] Id.

[80] Stacey Lulham, *What Is, and What Should Be, the Extent of New Zealand's New Tort of Breach of Privacy?* 11 Canterbury L. Rev. 91, 122 (2005).

[81] Id.

[82] Law on Practicing Doctors of the PRC (1988), art. 37(10).

[83] Labor Law of the PRC (1995), art. 12.

re-insurance underwriter should be obligated to keep confidential information about the operations and the property of the insured";[84] (5) Law on the People's Bank of China (1995) requires that the governor, deputy governors and other staff of the Bank should keep state secrets according to law and have the duty to protect the confidentiality of the banking institutions and the clients in relation to the performance of their functions;[85] (6) Criminal Procedure Law (1996) provides a fairly extensive array of privacy rights to the reporter, complainant, and criminal suspect; (7) Law on the Protection of Minors (2006) provides that "no organization or individual may disclose the personal secrets of minors";[86] (8) Article 2 of the Amendment Seven to the Criminal Law (2008) proposes to add a provision which may intensify the protection of privacy, by penalizing "personnel engaged in financial, telecommunications, communications, educational, and medical work units and the like who sell or unlawfully provide others the citizens' individual information that was obtained in carrying out their duties"[87] and so on.

4. Evaluation. — The protection of privacy in China relies on a variety of regulations, each of which applies only to a specific category. Most protections of privacy in Chinese legislation only prohibit actual disclosure, rather than the collection, use, or storage of individuals' personal information. The reality is that some protections of privacy in particular areas are only a byproduct of another legislative goal. Furthermore, it is suggested that privacy protection in China has been influenced by other values, such as the prevention of crime and freedom of expression. At present, in China, other values are more important than privacy interests. In addition, there is no judicial framework for resolving privacy disputes in China.

In summary, there are, at least, four defects concerning privacy protection in the current Chinese legislation. First, there is no precise protection of privacy in the Constitution of China. Without other supporting legislation, or a clear concept of what privacy is, the Constitution has not been used to protect privacy in the way it might be.[88] Second, all the Chinese constitutional rights apply only against the actions of individuals or private organizations, not the government. Compared to the Chinese governmental powers, privacy is still subordinate. Third, a number of laws in China recognize privacy protection in different forms. Although the GPCL recognizes some special types of privacy interests, none of these individual rights is able to offer adequate protection for the privacy of personal information. Most Chinese laws or provisions apply only to specific

[84] Insurance Law of the PRC (1995), art. 32.

[85] Law on the People's Bank of China of the PRC, art. 15.

[86] Law on the Protection of Minors of the PRC (2006), art. 39.

[87] The Standing Committee of the National People's Congress conducted the 1st reading of the 7th Amendment to the Criminal Law of the PRC (2009), art. 2.

[88] See Cao, fn. 23 at 660.

categories of privacy. Fourth, there is no Chinese legislation comprehensive enough to provide adequate privacy protection.

These loopholes in the protection of privacy in Chinese contemporary legislation reveal that the protection of privacy in China is a "fractured, episodic, record-targeted, patchwork of laws."[89] In fact, the understanding of the protection of privacy in China should lie in the understanding of what has not been done in Chinese legislation, rather than what has been done. However, the significance of protecting privacy does not lie in Chinese legislation at present. This leaves the majority of privacy issues without adequate legal protection.

E. Possible Theories to Explain the Insufficient Privacy Protection in Contemporary China

Based on the issues above, it is clear that contemporary Chinese legislation is not able to protect privacy effectively. What are the reasons for this social phenomenon? It follows to discuss the legal reality in socialist China. This can help to explore the internal reasons why current Chinese legislation is not able to efficiently protect privacy in China.

1. The Source of Contemporary Chinese Law. — Unlike the Chinese Nationalist Party (CNP),[90] which overthrew the Qing Dynasty but allowed the continuation of its legal order, the establishment of the People's Republic of China (PRC) was not only to end the CNP's political rule, it was also to dismantle the CNP's legal system and to abolish the CNP codes.[91] At that time, the former Soviet Union, as the first socialist country in the world, its legal system had evolved more than thirty years. China thus started to study the Soviet legal experience. Vyshinsky's theory is the most famous, as below:

> Law is a formal, normative expression of the will of the ruling class, as formulated and enforced by the state in the interests of that class. In a socialist state … the communist Party, as the representative of the ruling proletariat, should enjoy absolute control over the creation of positive law by the organs of the state. The party should also determine the form and content of these laws according to the requirements of its evolving program of economic and social development.[92]

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[89] Joann M. Wakana, *The Future of Online Privacy: A Proposal for International Legislation*, 26 Loy. L.A. Int'l & Comp. L. Rev. 151, 157 (2004).

[90] The Chinese Nationalist Party was established in the Mainland of China in 1912. It was organized by Sun Yat-sen after the Xinhai Revolution (辛亥革命). It was a major force in Chinese politics for several decades before 1949.

[91] See Chen, fn. 13 at 34.

[92] Perry Keller, *Sources of Order in Chinese Law*, 42 Am. J. Comp. L. 711, 720 (1994).

After systematic study of the Soviet experience, Mao Zedong and his fellow jurists accepted Vyshinsky's theory. Therefore, at the early stage of the PRC, Soviet legal theory, in particular the work of the Stalinist jurist and chief prosecutor Vyshinsky, had a decisive impact on the construction of Chinese socialist law.[93]

According to the Chinese adoption of the Soviet legal experience, the Communist Party of China (CPC) holds absolute authority over the determination of the content of the law, while the function of law is to express, in a positive, normative form, the current Party policy.[94] Moreover, law, as a weapon of class struggle, like the army, is used by the ruling class as a visible coercive force to "suppress its class enemies."[95] Chunju Shen, who was the first president of the Supreme Court, emphasized that socialist China's judicial system must actively serve its political goal.[96]

When Deng Xiaoping took over the leadership, the Cultural Revolution (which had lasted ten years) had pushed the Chinese economy to the edge of collapse.[97] Thus, in Deng's opinion, Chinese law had to "be used to establish the stability and order for economic development."[98] Moreover, Deng insisted that "there is a lot of legislative work to do… it is better to have some laws than none, and better to have them sooner than later." [99] Therefore, under Deng's leadership in the 1980s–1990s, numerous laws and administrative regulations were adopted to encourage foreign investment and domestic economic reform.[100] However, Deng's speech on law made it clear that that law should be only an instrument of party policy. That is to say, under Deng's leadership, the aim of party policy was transferred from "class struggle" to "economic construction."

In addition, it should be noted that since the establishment of the PRC, the old legal system have been replaced by the socialist legal system. However, legal culture and local norms cannot disappear easily, especially the influence of Confucianism in the current Chinese legal culture.

2. Chinese Attitude to Law. — It follows to discuss the Chinese views to law in the first thirty years of socialist China. This can help to explore the essence why the current Chinese legislation is not able to efficiently protect the privacy.

(a) Law — a Supplementary Means to Regulate Social Affairs. Since the

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[93] Id.

[94] Id. at 711, 721.

[95] Phillip M. Chen, *Law and Justice: The Legal System in China 2400 BC to 1960 AD*, Dunellen Publishing Com. (New York), at 84 (1973).

[96] Id. at 88.

[97] See Chen, fn. 13 at 41.

[98] Id.

[99] Id. at 43.

[100] Id. at 41.

establishment of the PRC, the most effective instrument to regulate social affairs in China has been the CPC.[101] Moreover, the governmental powers, the net of all kinds of social relations, and the rampant local protectionism often render law a secondary authority.[102] It thus has been argued that the Chinese communist is often just a mere tool of party policy in China.[103] As a consequence, it is inevitable that the effectiveness of legal provisions in the protection of privacy rights has been weakened in contemporary China.

(b) Mediation — Preferred More than Litigation. — It has also been argued that there is a general dislike or mistrust of the law amongst Chinese citizens on the basis of the factors, such as the influence of Confucian philosophy and the knowledge of the bribery of judges.[104] As mentioned above, most Chinese people believe the matters concerned with *yin-si* are shameful, and they do not want them to be disclosed. Thus, for the sake of "face," even if the invasion of their privacy is inevitable, they prefer to ignore the invasion rather than go to court. Mediation, as a traditional Chinese means of solving civil disputes, is still popular in China today. A number of privacy disputes in current China have been solved by the society itself through mediation. Hence, the wide use of mediation obviously restricts the effectiveness of privacy protection by law in modern China.

(c) Criminal Law — More Important and Effective than Other Laws. — According to the socialist legal theory, criminal law is the most powerful weapon of the ruling class to conduct class struggle.[105] Hence, criminal law had been deemed as the most important and effective law to "suppress class enemies" and to protect ruling class in the early stage of socialist China. By contrast, the Chinese civil law had been regarded as an important measure to handle internal disputes. However, the CPC also emphasized that there is no conflict of basic interest among the Chinese people.[106] This civil law demonstrates that its main function is to develop a socialist society rather than solve internal civil disputes in China. While this misguided concept of Chinese civil law was widely accepted, the significance of privacy protection has inevitably been ignored in China.

3. Understanding of Collective Interests in Socialist China. — In addition to the Chinese attitudes to law, the unique status of public property in China also hinders the development of privacy protection in China. The reforms and opening up since 1978 was seen as a watershed in ethical reflection concerning privacy in China. During that period (before 1978), China had a planned

[101] See Wang, fn. 17 at 37.
[102] See Wang & Zhang, fn. 8 at 14.
[103] See Chen, fn. 13.
[104] See Wang, fn. 16 at 38.
[105] See Chen, fn. 95.
[106] Id. at 86.

economy, and the entire country was devoted to pursuing the realization of communist society with great enthusiasm. In this scenario, collective/public interests were certainly given a high and exclusive priority.

In the socialist theory, socialist collective interests are the result of the Communist revolution, and they are also the foundation for the further development of socialist society and, as well, the source of state wealth and strength.[107] Therefore, traditional Chinese communists believed that only by protecting the collective interests, could the restoration of capitalism be prevented. For this reason, article 12 of the Constitution states the public property and the public interests of China are sacred and inviolable. Phillip M. Chen states that "The principle that public property and interests are 'sacred and inviolable' is a legal principle peculiar to socialist countries which are built on the foundation of public ownership."[108] Anyone who dared to pursue individual interests would be criticized by other people and would even be called an egoist which was against the trend of social development. In consequence, absolutely selfless thinking was the basic moral standard at that time.

However, at the same time as protecting public property and interest, socialist China ignored the significance of personal property and interest in some aspects. As mentioned above, the constitutional protection of private property and personal rights exists only under the circumstances that relevant offence is taken by private parties, such as social organizations or citizens' actions. Although the Chinese government emphasized that individual interests and the social public interest are closely integrated under the socialist system, the justification is that only by giving full protection to public interest can the individual be secure where his personal interests are concerned.[109] Thus, compared to the collective/public interest, all personal rights and interests are subordinate. It is totally in contrast to the legal principle of Western democracies that private property is sacred and cannot be violated.[110] Inevitably, this socialist feature hinders the development of privacy in China.

It should be noted that this situation has changed since 1978. With the reforms and opening up, China has transformed from a planned economy to a socialist market economy. China has more opportunities having access to the outside world. Economic development and broadened horizons bring about increasing social diversity, which promotes the Chinese people to value individual characteristics and interests. Gradually, the individual interests challenge the predominance of collective interests. In spite of increasing value of

[107] Id. at 123.
[108] Id. at 124.
[109] Id. at 126–27.
[110] Id. at 124.

individual interests, the long-term formed foundation of collective interests in Chinese moral standard cannot be changed. Consequently, individual interests and collective interests are deemed both important, but the collective interests still have comparative priority over individual interests.

In summary, it can be seen that there was no privacy protection before 1978 as the individual interests were overwhelmed by collective interests. Nevertheless, the individual privacy begins to be emphasized as a result of the increasing concern for individual interests after 1978 in spite of the dominance of collective interests.

4. Other Matters Affecting China's Approach. — Besides the reasons caused by socialist China itself, there are some other matters affecting China's approach to the protection of privacy. They are the difficulties in defining privacy, the variation and change in cultural values, and the difficulties of detection.

(a) Difficulties in Defining Privacy. — Privacy may be one of the most complex human rights to define. A difficulty is that the definitions of privacy vary widely according to the context and environment.[111] Privacy is a collection of related personal interests and expectations, rather than a single coherent concept.[112] When you ask a selection of people what privacy is, it is inevitable that you will get totally different answers. It depends on whom they are, where they come from, and even depend on their different religions. John Burrows thus states that "privacy is notoriously hard to define."[113] The Australian Law Reform Commission (ALRC) even pointed out that "the instances of invasions are so readily recognizable, but so disparate," that it concluded that "there was little hope of arriving at an all-purpose definition."[114] This difficulty of defining privacy also emerged in China. In consequence, the difficulties in defining privacy may affect China's approach to the protection of privacy.

(b) Difficulties of Detection. — The ALRC also pointed out that, based on the nature of privacy, "there exist considerable difficulties in identifying privacy invasions."[115] This also exists in China. For example, at present, devices of surveillance are being widely used in China. However, it is difficult to specify the precise details of secret surveillance in most cases. Usually, the detecting privacy invasions create two problems: First, it is difficult to prove that there is a need for protection; second, it is difficult to provide effective legal sanctions and

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[111] Carlo Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System*? IBFD, at 346 (2002).

[112] Carole McCartney, *Forensic Identification and Criminal Justice: Forensic Science, Justice and Risk*, Willan Publishing (Oxon), at 130 (2006).

[113] Stephen Todd (ed.), *The Law of Torts in New Zealand* (4th ed.), Thomson Brookers (Wellington), at 744 (2005).

[114] Australian Law Reform Commission, *Privacy*, 22nd Report, vol. 1, at 10 (1983).

[115] Id. at 11.

remedies.[116] Therefore, the author believes that these factors affect privacy protection in China as well.

5. Summary. — Legal development and the law in China started with the introduction and domination of a Chinese-style Marxist ideology.[117] There is a fundamental difference between the principle of Chinese socialist law, and the principle of law in the states governed by the rule of law, in their respective attitudes toward individual rights.[118] In Western legal systems, the agencies of the state are required to observe the laws in order to respect individual freedom.[119] As a result, all these features of Chinese society and law have mostly determined that there is no adequate protection for personal privacy in China.

III. THE DEVELOPMENT OF PRIVACY IN CONTEMPORARY CHINA

Based on the above analysis and according to China's national circumstances, although there is no adequate privacy protection regime in contemporary China, it can be inferred that the situation for privacy protection in China is expected to change in the future. Hence, the author explores the future of privacy protection in China in the following aspects.

A. The Trend of the Public Consciousness of Privacy in Chinese Society

The public consciousness of privacy will continue to be enhanced in China. In addition, the scope of privacy interests *per se* will be further expanded. First of all, public consciousness of privacy will be more widespread in future China. The current situation is that Chinese people are beginning to pay more attention to, and value privacy. As mentioned above, this social phenomenon can often be observed in the cities as a result of urbanization. The people coming from rural areas are not inclined to share their personal information with the others. At the same time, people also begin to respect and do not interfere with other personal privacy. Although privacy disputes rarely happen in rural areas nowadays, the idea of respecting privacy will gradually be spread from cities to rural areas, because rural persons who work in the cities will bring back the idea of respect

[116] Id.
[117] See Chen, fn. 13 at 55.
[118] See Chen, fn. 95 at 206.
[119] Id.

for privacy and that will gradually influence rural people's consciousness of privacy. As a result, the improved consciousness of the right to privacy in rural areas will be an inevitable trend in the future.

Moreover, it is a common thinking in China that there should be no secret within the family. That is to say there should be no privacy interests between husband and wife, and those parents are supposed to know everything about their minor children. Currently, a few Chinese people begin to express their desire of not sharing all the privacy with their family members. This phenomenon can especially be observed between husband and wife, parents and children. On the other hand, with the increasing economic independence in China, both of the spouses are likely to enjoy more individual freedom in marriage. Also, as mentioned above, relatively mature and well educated children will require their parents respect their privacy and not excessively interfere with their lives. At the same time, more and more parents are enlightened enough to respect their children's privacy. Therefore, it is apparent that the respect for the right to privacy will become very common within the family in the near future.

In addition, people aware of privacy and the right to privacy will be extended from the young age group to all age groups. At present, mainly the young people begin to value their privacy and claim the right to privacy in China, as most of them are well educated and are prone to accepting this value. With social development, people who advocate the respect for privacy will not be limited to the young age group; rather, all age groups would be expected to pay attention to the privacy in China.

Second, the scope of privacy interests *per se* will be further expanded in the future. As mentioned above, privacy today in China has already been expanded and is no longer restricted to *yin-si* (a shameful secret). The trend of the expansion is expected to continue in the future as a result of the increasing internationalization of China. As a populous country with surging economic development, it can be said that China has played an important role in the international community. In this scenario, Western ideas regarding privacy will continue to permeate throughout China, and gradually influence Chinese consciousness of privacy. Therefore, it is an inevitable trend that more and more Chinese people will be affected by Western values. All the personal information, including personal address, income, height, the educational background and so on, is likely to be included in privacy interests in the future.

B. The Trend of the Theoretical Basis of Privacy in Chinese Society

The theoretical basis of privacy will be influenced by Western values and is

expected to be infused into improved awareness of individual rights and interests in the future.

In China, the current theoretical research on privacy generally belongs to ethics because privacy mainly deals with the ethical relationship between people. At present, the traditional Chinese ethics still dominates the moral evaluation of, and moral thinking about social activities. As mentioned above, based on the theory of *li*, the traditional Chinese ethics can be demonstrated as "family standard" and "moral standard." The "family standard" refers to taking the family as a core of social activities. The family is the basis of society and the society is made up of each family. Within a family, a person is first regarded as a family member rather than an individual. Therefore, individual rights do not exist within a family, and individual interests should be subordinate to family interests. In this connection, the "family standard" is similar to "collective standard." All the social activities should be with the purpose of promoting collective interests rather than individual interests. The "moral standard" means that ethics is the basic factor for maintaining social order. China always cherishes harmony, and personal activities should be regulated by ethics. In this scenario, people should do what they are supposed to do according to moral standards, e.g., children must obey to their parents, wife must obey to her husband, and citizens must obey to their emperor. Otherwise, they will be criticized by the society. Although nowadays Chinese people are beginning to pay attention to individual interests, the dominance of traditional Chinese ethics still exists because this morality has remained in China for thousands of years.

As more and more privacy issues are emerging, on the one hand, Chinese scholars in ethics want to build up ethical theoretical basis for privacy and privacy rights; on the other hand, collective interests remain to be the supreme moral standard of evaluating personal activities. Hence, the current ethical research based on collective interests cannot be sufficient to provide theoretical support for the privacy protection in China. Western ethical research regards the individual rather than the collective as a starting point of social development, and thus fully recognizes privacy and the right to privacy. Accordingly, Western values place emphasis on individual rights and promote individual interests through the social development.

It can be concluded that the ethical research in China is likely to make a large adjustment to meet the new demands of privacy protection in the future. The scholars may emphasize individual interests and may advocate privacy and the right to privacy from both individual and collective perspectives. Consequently, this new moral evaluation will have a great effect upon traditional values, while the Chinese traditional values will continue to dominate the ethics for a long time.

C. Issues for Further Consideration

Based on the foregoing analysis of Chinese privacy protection, it is clear that, in China, more needs are to be done than merely relying on the fragmented mechanisms concerned mainly with other aims and policies, and only incidentally with privacy. Some further consideration can be made, as below:

First, it is necessary for China, which is moving toward greater democracy, to create the right to privacy under the Chinese legal system. As mentioned above, most privacy cases have been heard and judged on the basis of the right to reputation in China. In fact, the right to reputation cannot provide adequate protection to privacy. The differences between the invasion of privacy and other rights thus produce confusion and restrict the legal protection of privacy in China. The author believes that the establishment of the right to privacy in the Chinese legal system will eliminate this confusion and provide a systematic protection to privacy in China.

Second, it is also necessary to initiate legislation to establish effective information system to protect privacy in China. The EU Directive 95/46/EC proposes that the transfer personal data to a third country, whether in the processing or intended for the processing, and whether the source is from a public or private sector, should be permitted when the third country in question ensures an adequate level of protection.[120] It is clear that the lack of effective privacy protection in China will cause serious consequences. Both Chinese human rights and the relationship between China and other counties will be damaged. Therefore, if China takes part in the global information community and achieves its benefits fully, China must set up an effective privacy protection regime. Moreover, a professional privacy protection authority is needed to promote the implementation of privacy protection standards in China. In addition, based on the Western experience of privacy protection, abuse and harm to privacy can happen in both public and private sectors. Therefore, Chinese lawmakers must ensure legal privacy protection in both the public and private sectors.[121] Thus, the privacy protection authority thus must provide advice to Chinese NPC or government for considerations. The author believes that the right to privacy and the privacy protection regime may fill the gaps in privacy protection in China.

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[120] Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Journal of the European Communities, 23 Nov. 1995 no. L 281 (1995), art. 25.

[121] See Australian Law Reform Commission, fn. 114 at 299.

CONCLUSION

Based on the foregoing analysis, it is self-evident that privacy issues have become increasingly more important than ever in Chinese contemporary society. Chinese citizens need privacy. As Cao pointed out that "it is a concept that, though less developed, is not alien to Chinese society and culture."[122] On the other hand, the author believes that Chinese personal privacy protection should be legislated in order to provide adequate protection for it.

[122] See Cao, fn. 23 at 664.