

个人信息保护法律热点问题

《民法总则》中的隐私、个人信息和数据保护规定

2017年3月15日，第十二届全国人民代表大会第五次会议通过了《中华人民共和国民法总则》（简称“《民法总则》”）。《民法总则》是民事领域最基础的、框架性的立法，在我国民事立法史上具有里程碑式的意义。作为对数字时代的回应，《民法总则》对隐私、个人信息、数据保护进行了如下针对性的规定。

一、隐私权

1986年制定的《中华人民共和国民法通则》并未明确规定自然人的隐私权。根据随后颁布的司法解释¹，在司法实践中，侵犯隐私权的行为在达到一定要件后，认定为名誉权侵权。2009年出台的《中华人民共和国侵权责任法》（简称“《侵权责任法》”），第一次正式将隐私权作为一项独立的民事权利加以保护。而2014年出台的《最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定》，对利用网络侵害他人隐私权的行为做出了更为具体的规定。²《民法总

则》延续了《侵权责任法》和前述司法解释的规定，将隐私权作为一项独立民事权利加以规定。第110条第1款规定，“自然人享有生命权、身体权、健康权、姓名权、肖像权、名誉权、荣誉权、隐私权、婚姻自主权等权利”。

二、个人信息

《民法总则》第111条规定，“自然人的个人信息受法律保护。任何组织和个人需要获取他人个人信息的，应当依法取得并确保信息安全，不得非法收集、使用、加工、传输他人个人信息，不得非法买卖、提供或者公开他人个人信息。”

2016年7月5日公布的《民法总则》（一审稿草案）³中并未对个人信息保护作出规定。在对草案的审议和征求意见过程中，“有的常委会委员、部门、法学教学研究机构和社会公众提出，一段时间以来，非法获取、非法出售或者非法向他人提供公民个人信息的违法行为泛滥，社会危害严重，建议进一步强调对个人信息的保护。法律委员会经研究认为，个人信息权利是公民在现代信息社会享有的重要权利，明确对个人信息的保护对于保护公民的人格尊严，使公民免受非法侵扰，维护正常的社会

¹ 《关于贯彻执行〈中华人民共和国民法通则〉若干问题的意见（试行）》规定，以书面、口头等形式宣扬他人的隐私，或者捏造事实公然丑化他人人格，以及用侮辱、诽谤等方式损害他人名誉，造成一定影响的，应当认定为侵害公民名誉权的行为。

² 《最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定》第12条，“网络用户或者网络服务提供者利用网络公开自然人基因信息、病历资料、健康检查资料、犯罪记录、家庭住址、私人活动等个人隐私和其他个人信息，造成他人损

害，被侵权人请求其承担侵权责任的，人民法院应予支持。”

³ http://www.npc.gov.cn/npc/lfzt/rlyw/2016-07/05/content_1993427.htm

秩序具有现实意义。⁴”有鉴于此，2016年11月公布的《民法总则》（二审稿草案）加入了“自然人的个人信息受法律保护。任何组织和个人不得非法收集、使用、加工、传输个人信息，不得非法买卖、提供或者公开个人信息。”2017年公布的《民法总则》（四审草案稿）对上述规定进行了进一步补充，增加了“任何组织和个人应当确保依法取得的个人信息安全”的规定。在《民法总则》出台之前，《全国人大常委会关于加强网络信息保护的決定》、《中华人民共和国消费者权益保护法》、《中华人民共和国网络安全法》等法律以及一系列法规、部门规章已经对网络运营者、经营者的个人信息保护义务做出了规定。《民法总则》的出台进一步赋予了个人信息权利基本民事权利的地位。

三、数据

《民法总则》第127条规定“法律对数据、网络虚拟财产的保护有规定的，依照其规定。”2016年7月5日公布的《民法总则》（一审稿草案）曾将“数据信息”作为一种知识产权加以保护，但这一规定在理论上引起了争议，认为数据与知识产权有一定差别，前者是对事物属性的描述和记录，后者的核心是人的智慧成果。因此，《民法总则》（二

审稿草案）将数据从知识产权保护中分离出来，独立加以保护。然而，第127条将数据与虚拟财产并列，数据与虚拟财产究竟是什么关系、数据是否属于一种虚拟财产，目前尚无定论。

四、展望

《民法总则》出台前，对个人信息的保护主要通过侵犯公民个人信息入罪和行业主管机关对特定领域或性质的个人信息保护进行监管的方式实现。《民法总则》将个人信息权从隐私权中分离，确立了个人信息权的独立地位，体现了互联网和大数据时代加强个人信息和数据保护的需求。

《民法总则》的规定同时带来新的理论问题和实践挑战。隐私、个人信息和数据的具体内容如何认定、对这些权利的保护在司法实践之中将如何变化值得期待。例如，对数据的权属如何进行相应的认定和保护；又如，以往在隐私侵权诉讼中损害后果举证难、认定难、损害认定通常轻微等问题，是否能够通过将个人信息作为一项独立的民事权利加以保护解决，赋予权利人更多的救济可能，将是我们持续关注的问题。

⁴http://www.npc.gov.cn/npc/cwhhy/12jcw/2016-11/01/content_2000384.htm

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Protection of Personal Information

Provisions on Protection of Privacy, Personal Information and Data in the General Provisions of the Civil Law

On 15 March 2017, the Fifth Session of the 12th National People's Congress of the People's Republic of China adopted The General Provisions of the Civil Law of the People's Republic of China (hereinafter the "General Provisions of the Civil Law"). The General Provisions of the Civil Law is the most fundamental and framework legislation in civil law and is a milestone in the history of civil legislation in China. In response to the digital era, the General Provisions of the Civil Law now includes provisions on the protection of privacy, personal information and data.

1. Right to Privacy

The General Principles of the Civil Law of the People's Republic of China enacted in 1986 did not explicitly stipulate a natural person's right to privacy. In following judicial interpretations¹ and legal practices, where the infringement on privacy met certain criteria, it would constitute infringement on the rights of reputation. In order

to strengthen the protection to the right to privacy, the Tort Liability Law of the People's Republic of China ("**Tort Liability Law**") published in 2009, for the first time formally protects the right to privacy as an independent civil right. The Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks released in 2014 includes specific stipulations on the infringement on the right to privacy on networks.²The General Provisions of the Civil Law, continuing the stipulations in the Tort Law and aforementioned judicial interpretations, stipulates the right to privacy as an independent civil right. In the first paragraph of Article 110, a natural person among other rights, enjoys the rights of life, inviolability and integrity of person, health, name, likeness, reputation, honor, privacy,

¹ According to the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation), In case anyone disseminate the privacy of any other person in writing or orally, or fabricate the fact to defame the personality of other person overtly, or damages other person's reputation by ways of insulting and slandering, which has practical impact, such act constitutes act infringing the citizen's right of reputation.

² According to Article 12 of Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks, "where a network user or NSP discloses through network a natural person's individual privacy such as genetic information, medical records, health inspection materials, criminal records, home address, and private activities, or any other personal information, which causes damage to any other person, and the infringed party requests the assumption of tort liability by the network user or NSP, the people's court shall support such a request."

and marital autonomy.

2. Personal Information

Article 111 of the General Provisions of the Civil Law provides “the personal information of a natural person shall be protected by law. Any organization or individual which needs to obtain the personal information of other persons shall legally obtain and ensure the security of such information, and shall not illegally collect, use, process, or transmit the personal information of other persons, nor illegally buy, sell, provide, or publish the personal information of other persons.”

There was no provision on personal information protection in the General Provisions of the Civil Law (First Review Draft)³ released on July 5, 2016. During the draft deliberation process, some members of the Standing Committee and some government authorities, legal education and research institutions, and citizens pointed out that, illegally obtaining, selling or providing personal information to others has been a rampant problem for a long time, which has caused severe harm to the society, and suggested to further reinforce the protection of personal information. After research, the Legal Affairs Committee considered that the right to personal information is an important right of citizens in a modern information society. Explicit protection of personal information has practical application in the protection of personal dignity, protecting citizens from illegal disturbances and maintaining a normal social order.⁴ Therefore, the General Provisions of the Civil Law (Second Review Draft) published in November 2016 added that “the personal information of a natural person shall be protected by law. Any organization or individual shall not illegally collect, use, process, or transmit the personal

information of other persons, nor illegally buy, sell, provide, or publish the personal information of other persons.” In the General Provisions of the Civil Law (Forth Review Draft) published in 2017, the aforementioned stipulations were further supplemented and added that “any organization or individual shall ensure the security of information legally obtained.” Before the promulgation of the General Provisions of the Civil Law, a set of laws, regulations and rules, such as the Decision of the Standing Committee of the National People's Congress on Strengthening Information Protection on Networks, the Law of the People's Republic of China on the Protection of Consumer Rights and Interests and the Cybersecurity Law of the People's Republic of China, have provides network operators' obligations of personal information protection. The adoption General Provisions of the Civil Law further grants personal information right the position of a fundamental civil right.

3. Data

Article 127 of the General Provisions of the Civil Law provides that “where any laws provide for the protection of data and virtual property, such laws shall apply.” The General Provisions of the Civil Law (First Review Draft) published on July 5, 2016 has treated and protected “data information” as a type of intellectual property. However, this provision generated theoretical controversy. Data is considered different from intellectual property, as the former is description or record of characters of objects, while the nature of the latter is a person's intellectual achievement. Therefore, the General Provisions of the Civil Law (Second Review Draft) separates data from intellectual property and protects data independently. However, data and is provided in conjunction with intellectual property rights in Article 127, and it is unclear so far what the relationship is between data and network

³http://www.npc.gov.cn/npc/lfzt/rlyw/2016-07/05/content_1993427.htm

⁴http://www.npc.gov.cn/npc/cwhhy/12jcw/2016-11/01/content_2000384.htm

property and whether data shall be regarded as a kind of virtual property.

4. Prospect

Before the promulgation of the General Provisions of the Civil Law, personal information was mainly protected through the criminalization of selling or obtaining personal information as well as regulations on protection of personal information in certain industries or certain types of personal information by the relevant industrial regulatory authorities. The General Provisions of the Civil Law separates personal information rights from privacy rights, affirms the independent position of the right to personal information, and reflects the demand for the protection of personal information and data in an internet and big data era.

Meanwhile, the General Provisions of the Civil Law may also bring new theoretical questions and practical challenges. It remains to be seen how the relationships among privacy, personal information and data will be defined and how the protection of these rights will evolve in legal practice. We will continue to monitor and follow up on critical issues – for example how the ownership of data will be defined and protected, and whether problems in previous privacy tort litigations, such as the difficulties in proving and defining tort damages which are often minimized, would be better solved by treating the right to personal information as an independent civil right, and whether such protections of the right to personal information would enable more remedies when such rights are infringed.

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