

Realization of the Function of Basic Rights to Balance Society

— *Taking Personal Information Rights as an Example*

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Abstract: *The main function of basic rights is to defend against the state's public power. The traditional theory of basic rights constructs logic based on the dualistic framework of "state power and individual rights," and deals with the dualistic horizontal relationship between "the state and individuals." However, the increasing complexity of modern society has led to the emergence of different interests and needs within society and the formation of new social powers, resulting in an unequal relationship between private subjects. In the digital era, this phenomenon has become particularly prominent, evidenced by the rise of data-based power and the frequent and serious intrusion of personal information by private subjects. In this context, the value of basic rights should radiate within society and function as a balancing force. Taking the protection of personal information as an example, while innovating the idea of regulating society through basic rights, the state's obligation to protect personal information should be further strengthened. Meanwhile, the direct effect of personal information rights, which are basic human rights, on the private subjects of data-based power should be established, so as to realize their function in balancing the interests of all parties in society.*

Keywords: basic rights ♦ data-based power ♦ protection of personal information ♦ direct effect

The theory of basic rights constructs logic based on the dualistic framework of "the state and individuals". It mainly deals with the relationship between the state and individuals and serves to prevent the misuse of state's public power. In the process, no social relationship is involved. Although some breakthroughs have been made in its development, such as the introduction of private relationships and the development of the Theory of the Effect of Basic Rights on Private Relationships, it is difficult to effectively respond to certain demands of social change due to the constraints of the

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traditional dualistic framework.¹ In the digital age, the rise of social power represented by data-based power has posed more severe challenges to the traditional theories and framework of basic rights, thus requiring further development and innovation to intervene in society and incorporate it into the scope of regulation for the realization of its function to balance society.² This paper aims, based on the review of the theoretical evolution of basic rights, to analyze the new challenges in the digital era to explore its functional orientation in current society and thus promote the innovation of the theoretical framework system and the enrichment of contents. Moreover, from the personal information rights, which are basic rights opposite to data-based power, it would explore the specific ways to realize the function of basic rights to balance society.

I. New Developments in the Theory of Basic Rights: Demands for Social Regulation

The basic rights are the product of modern constitutionalism and the constitutional express of “natural rights”. Since its origin, the connotation of basic rights has been continuously enriched, and the function of basic rights has also been undergoing constant transformation in response to changes in the times. It is bound to encounter more and more threats in modern society, and even more severe when it comes to the digital age. In this case, the theoretical study should keep abreast of the times, and develop a theory of basic rights that is oriented towards society, in response to new challenges arising from the development of the times.

A. The evolution of the traditional theory of basic rights: State-centered theory takes root

Based on the Liberalist Theory which views the state-society relationship as dualistic, Modern Constitutional Theory arose in the West. In other words, there is a direct line from the public sphere to the private sphere. Society can achieve self-governance by means of rationality, whereas the state is the sole public sphere and the subject of power. As the primary form for the constitution to play its role, the basic rights have their functions confined to the vertical relationship of “the state and individuals”, i.e., regulating and controlling state behavior, and preventing the state’s public power from intervening in society and infringing on individual rights. Correspondingly, the basic rights stipulated in the early Western constitutions mainly focused on the right to freedom, emphasizing the prevention of state intervention, and only required the state to assume negative obligations of non-infringement.³

However, the drawbacks caused by the laissez-faire concept advocated by early liberalism emerged in the late 19th century. This period saw multiple economic crises

1. Li Haiping had made related exposition. See Li Haiping, “The Direct Effect of Basic Rights on the Public Subjects of Social Power,” *Political Science and Law* 10 (2018).

2. Li Zhongxia has been devoted to exploring the social functions of basic rights for social integration. The function of the Constitution should focus on regulating society for smooth social transformation. Li Zhongxia, “The Social Functions of Basic Rights,” *The Jurists* 5 (2014); Li Zhongxia, “The Social Mechanism and Chinese Model of Constitutional Functional Transformation,” *Chinese Journal of Law* 2 (2022).

3. Zhang Xiang, *The Normative Construction of Basic Rights* (Revised Edition) (Beijing: Law Press · China, 2017), 46.

triggering social unrest.⁴ The self-governance of society encountered difficulties that were hard to overcome. To tackle this issue, the concept of Welfare Socialism was in the making and grew popular. The Welfare State took shape, providing democratic legitimacy for its intervention in society by increasing political democratization.⁵ Under this trend, the concept of binary opposition between the state and society began to change, and a new understanding and discussion of the relationship between the state and society emerged. The binary confrontation between the state and society was diluted, and more emphasis was placed on mutual cooperation between the state and society, as well as the proactive role of the state in safeguarding personal interests.⁶ Thus, basic rights are no longer just defense rights to prevent state intervention, but they also possess social attributes and functions such as beneficial rights, which necessitate active assistance from the state in the process of achieving basic rights. The positive protection obligation expands the scope and effectiveness of basic rights from simply guarding against the state's public power to incorporating private relations. By regulating the basic rights between private subjects other than "the state and individuals," the Theory of the Effect of Basic Rights on Private Relationships began to take shape. In this regard, Germany and the United States developed different classical influential theories around the world. In Germany, the Theory of the Effect of Basic Rights on Private Relationships emphasizes the indirect effect of basic rights in regulating private relations, which is divided into the indirect effect of objective value order and the indirect effect of the state obligation to protect. The former takes the dual attributes of basic rights (subjective rights and objective value order) as the premise of distinction. It comes down to civil law with basic rights as the objective value order, to realize the restriction of basic rights to the individuals (including only judicial acts) intermediated by the general articles of civil law. The latter takes the protective orders and obligations required by basic rights to the state as the basis for application of basic rights between private subjects, and extends the intermediary for the private application of basic rights from general civil law provisions to all civil law norms (including both legislative and judicial acts). The United States proposed the Act of State Theory for the application of basic rights by the private. This theory explicitly required the "nationality" of the object of basic rights, that is, if basic rights want to intervene in private relations, it must be premised on the existence of "state behavior". Only when the activities of private subjects perform government functions or the state is deeply involved in private activities or a private activity is regarded as an act encouraged or authorized by the state, it can be included in the scope of regulation of basic rights.⁷ Although they are all theories about the effect of basic rights on private subjects, Germany has been extensively involved in the relationship of private subjects, taking

4. Li Xiuqun, *A Study on the Effectiveness of Basic Rights in Constitution* (Beijing: China University of Political Science and Law Press, 2009), 43.

5. Li Zhongxia, "Transformation of Constitutional Functions in the Governance of Risk Society," *Journal of National Prosecutors College* 6 (2020).

6. Zhang Xiang, *The Normative Construction of Basic Rights* (Revised Edition) (Beijing: Law Press · China, 2017), 46.

7. *Ibid.*, 54-55; Li Xiuqun, *A Study on the Effectiveness of Basic Rights in Constitution* (Beijing: China University of Political Science and Law Press, 2009), 156-162.

basic rights as the objective value order or the safeguard for human dignity, the highest value; whereas the United States underscores the relationship between private behaviors and state power, and targets the state power behind private behaviors. Despite the differences, both of them belong to the Theory of the Effect of Basic Rights on Private Relationships in a state-centered paradigm.⁸ The theoretical construction under this paradigm has not yet broken away from the social basis of the dualistic “state-society” opposition and the logical framework of dualistic “state power — individual rights.” It regards state power as the only form of power, emphasizes the nationality of the object of basic rights, and denies the direct effect of basic rights on the private. “Although the third-party effect of the basic rights occurs in the private law, it is a constraint on the subject of public power.”⁹ In the “private — state — private” relationship, the state is centered as the medium for basic rights to function in the private relationship. Therefore, even though the traditional theory of basic rights has made a breakthrough in its development and began to intervene in private relations, its deep — rooted state — centered concept has not been shaken. The state remains the only object on which basic rights have the direct effect.

B. The challenge for the traditional theory of basic rights: The rise of social power

At the beginning of constitutionalism, the dualistic “state — society” opposition was theoretically simplified into the separation of the political system and economic system, with the latter as a symptom of the whole civil society.¹⁰ However, in the wake of the growing social complexity, the social structure has deviated from its original unity, and society gives rise to multiple interests and value demands, resulting in increasing differentiation and conflict within society. There are mainly three manifestations:¹¹ First, there is an inter-system conflict caused by the functional expansion of social subsystems. Second, multiple “centers of social power” spring up along with the partial recurrence of the upper/lower layered structure in the society. It may put everyone under the control of an invisible social power and fail to grant autonomy. Nobuyoshi Ashibe, a Japanese jurist, indicated, “Along with the higher-level capitalist development, many private organizations such as corporations, labor organizations, economic organizations, and functional organizations that have huge power and are similar to the state are threatening the human rights of ordinary people. Besides, in recent years, the environmental hazards caused by urbanization and industrialization and the infringement of privacy rights by mass media in the information society have

8. Li Haiping, “On the Paradigm Transformation of the Effect of Basic Rights on Private Relationship,” *China Legal Science* 2 (2022).

9. Zhang Xiang, *The Normative Construction of Basic Rights (Revised Edition)* (Beijing: Law Press · China, 2017), 238.

10. Li Zhongxia, “The Social Mechanism and Chinese Model of Constitutional Functional Transformation,” *Chinese Journal of Law* 2 (2022).

11. Li Zhongxia, for the three main manifestations that social differences and conflicts aggravate due to the increase of social complexity, *ibid.*

frequently occurred and emerged as major social problems.”¹² The political system and the state’s public power are no longer the only potential violators of basic rights. In the 18th and 19th centuries, the constitution focused on unleashing the political power of the nation-state while effectively limiting that power. Now, the new constitution targets the release of various social energies (the economy in particular, as well as science, technology, medicine, and the new media) and effectively limits their destructive effects.¹³ Third, in the context of a risk society, there seem to be more and more risks that are difficult to predict and estimate in various fields, and higher and higher systemic risks caused by private subjects, while weaker and weaker ability individuals have to cope with risk.

It was in this context that the Theory of Social Constitutionalism emerged, advocating restrictions on the expansion and infringement of individual basic rights by other social subsystems (social power) in addition to the political system (state’s public power). It is the social public power that first gained the attention of the researchers on the Theory of Social Constitutionalism. Since the 1960s, various social organizations have been started up with the “community revolution” sweeping the world, playing a key role in various public affairs. These social organizations (non-ruling political parties, people’s organizations, industry organizations, intermediary organizations, public welfare or charitable organizations, academic and cultural organizations, religious groups, grassroots self-governing organizations, etc.) have the innate attribute of publicness. The main goal is to achieve public interest within a certain range. With distinct advantages in politics, economy, society, culture, information, etc., they enjoy de facto dominance over other private subjects with specific or unspecified majorities, i.e., social public power that is different from state’s public power.¹⁴ In addition to state’s public power, this social public power also poses an increasingly serious threat to the basic rights of citizens. For this point, some scholars preliminarily proposed a new constitutional theory on regulating and controlling social public power and protecting individual basic rights.¹⁵

The social public power, as well as the social “private” power, emerged from social development and social differentiation. The uneven distribution of social resources has broken down the equal personal relationships in traditional society. Certain private subjects who possess significant resources are no longer engaging in social activities on an equal footing with other private subjects. Instead, they are imposing their will on weaker private subjects through the exercise of their power, which is based on their advantageous position. This has resulted in violations of basic rights between unequal private subjects. In this regard, a preliminary response is made with the Theory of the Effect of Basic Rights on Private Relationships in the legal field. However,

12. Nobuyoshi Ashibe, *The Constitution* (6th Edition), revised by Takahashi Kazuki, translated by Lin Laifan, Ling Weici and Long Xuanli (Beijing: Tsinghua University Press, 2018), 83.

13. Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, translated Lu Yufeng, proofread by Ji Hailong (Beijing: Central Compilation & Translation Press, 2016), 1.

14. Li Haiping, “The Direct Effect of Basic Rights on the Public Subjects of Social Power,” *Political Science and Law* 10 (2018).

15. *Ibid.*

with the constant development of computer and Internet technology, a digital society that transcends time and space, different from the traditional physical space, has taken shape. Citizens have a second digital identity outside of the real world and do various social activities in the virtual world. The companies or organizations represented by various types of commercial Internet platforms, featuring advantages in manpower, technology, knowledge reserves, infrastructure, and financial resources, have a superior and strong position far beyond that of private subjects. Moreover, the openness of the Internet means that these platforms have extensive and great influence, which is even no less than the influence of state power in a sense. Consequently, structural and persistent inequality has come into being, and the development of related commercial activities has produced unpredictable systemic risks. Different from the above-mentioned social organizations, these commercial Internet platforms target not the publicness and the public interests when these were created, but the commercial nature and the private interests, which remain unchanged, although they have been gradually endowed with some public functions and have a certain degree of publicness in the process of operation. As a result, the private power of society in its true sense has taken form and has become another potential source of risk for violating basic rights.

In this way, the increasing intra-social differentiation and conflicts pose a great challenge to the traditional theory of basic rights. However, the Theory of the Effect of Basic Rights on Private Relationships fails to properly deal with the threats from society itself. It is suggested that the state intervene in society more actively by virtue of its power of political decision and integrate the relationship among the state, the society, and individuals via basic rights, so as to function in regulating and balancing the society. It can be further specific as a concern for violations of basic rights between private subjects in structurally persistent unequal status. In the digital age, the multiple attributes of personal information, the multiplicity of interest subjects involved in personal information, the complexity and risk of the personal information process, and the disparity between the information subjects and the information processors, etc., make the protection of personal information possess strong social attributes. It is an entry path to see the new theory of basic rights. What follows focuses on the personal information rights in the sense of basic rights, and discusses how basic rights should actively function in balancing and correcting the threat of private data-based power, a typical social power, in addition to state's public power.

II. Personal Information Rights as Basic Rights

As we all know, the basic rights proclaimed in the constitution have no full list limited by cognitive competence and legislative technique, as well as the change of time. As a new right in the digital age, personal information rights are not stipulated in the constitution, but this does not mean that it cannot be included in the protection domain of the constitution. It is necessary to elevate individual rights to the status of basic rights and allocate a specific space for them. These rights should be considered as basic rights that are recognized by the constitution, even if they are not explicitly listed.

A. The necessity of basic rights intervening in the protection of personal information

1. The rise of data-based power

With the advent of the era of big data and the development of various information technologies, the resource attributes of personal information have become clear. Personal information, once generated for the individual, has become separated from the individual in the social public sphere and is to be collected and utilized by information processors. There are mainly two categories of information processors: public bodies represented by the government and other organs of public power that utilize personal information to improve administrative efficiency and governance ability in exercising official powers, so as to better achieve the goal and value pursuit of public management and public service; and commercial subjects represented by the Internet platforms that create huge property value in the commercial use of large quantities of personal information in the form of data sets. In the process of collecting and utilizing personal information, the two categories may infringe on the rights of information subjects. According to traditional law theories, the exercising of public power based on collecting and utilizing personal information by the government and other public authorities should be regulated by basic power, while the processing of personal information by commercial subjects such as Internet platforms should be under the regulation of the law. However, these commercial subjects have influence no less than the state's public power in processing personal information, resulting in the emergence of an unequal structure in social upper/lower strata and the development of private data-based power. Two types of data-based power have been developed in the era of big data: the "public data-based power" possessed by state organs and other organizations exercising public functions in data processing; the "quasi-data-based power" that large private institutions possess based on their data sources and technologies.¹⁶ In light of the nature of the subjects, the two types can be generalized as public data-based power and private data-based power. No matter how the theory of basic rights develops, the function of guarding against "power" remains unchanged. The issue of protecting personal information has moved to the level of basic rights, mainly to counter the threat of "data-based power." In addition to public data-based power, private data-based power should be regulated by basic rights as well.

In the traditional theory of basic rights, the state is the only source of power, and the state's public power is the only type of power. However, German sociologist Max Weber considered that power does not refer only to the state's public power, and the standard of "power" can be reached as long as certain conditions are met. According to Weber, power means any opportunity to enforce one's will despite opposition in a social relationship, whatever the basis of this opportunity.¹⁷ According to the definition, the essence of power can be analyzed in the following levels: First, power is a social relationship, which needs to play a role in social interaction. It can occur between

16. Wang Xixin, "Obligation of State Protection on Personal Information and Exposition," *China Legal Science* 1 (2021).

17. Max Weber, *Economy and Society* (vol. 1), translated by Lin Rongyuan (Beijing: The Commercial Press, 1997), 81.

any subjects involved in any type of interaction, no matter the nature of the subject, whether it is public or private. Second, power is unidirectional, and the two parties are in an unequal position. The subject of power can exert coercive influence or control over others only by virtue of his own will, and demand others to obey. Third, a certain basis authorized by laws or public power or provided by actual resource advantages is required. In the process of social development and differentiation, a new social power is born, which is the private data-based power in the personal information process.

Private data-based power must first and foremost be a form of power that meets the characteristics of power. According to the above criteria, the various commercial Internet platforms in the digital age have become the holders of power. These platforms are controlled by Internet companies targeting not the publicness and the public interests when these were created, but the commercial nature and the private interests, which remain unchanged. However, they have been gradually endowed with some public functions and have a certain degree of publicness in the process of operation. First of all, compared with ordinary private subjects, Internet platforms have absolute advantages in manpower, technology, knowledge reserves, basic equipment, information, financial resources, etc., showing great disparity and providing a solid basis for the platform to enjoy and exercise power. Second, with these resource advantages, the platforms have de facto unilateral force and control and even mastered “quasi-legislative power,” “quasi-executive power” and “quasi-judicial power.”¹⁸ Ordinary private subjects can only obey without resistance, embodied in the various commercial agreements in the platforms. Users are generally required to check the relevant package agreement before registering and using various software platforms, and once checked, it is regarded as accepting all articles of agreement. Otherwise, the software will not be available. As a result, the behaviors on the platform are bound by these agreements and are subject to the unilateral control of the platform. Among the private powers controlled by the platforms, it is the power to arbitrarily collect, analyze, and utilize ordinary private subjects’ personal data that is the most extensive and typical, i.e., the private data-based power.

Further, certain conditions are required for private data-based power controlled by Internet platforms to be regulated by the basic rights and achieve the same effect as public power (direct effect, to be detailed below). According to the standard of public power, both “power” and “publicness” are prerequisites. Here, “publicness” has two meanings: the publicness of the power subject and nature, as well as the publicness of the function and the pursuit of public interests. Private data-based power should meet the demands of the second meaning of “publicness.” In the operation of various Internet platforms, more and more subjects, both private subjects and public power subjects, have been involved, expanding the business scope in all aspects of social life. Many Internet platforms have become key public infrastructure and essential places for the public to participate in public activities and express personal opinions closely related to public interests. For example, social media platforms (e.g., Weibo, WeChat)

18. Ma Changshan, “The Fourth-Generation Human Rights and its Guarantee in the Context of Smart Society,” *China Legal Science* 5 (2019); Liu Quan, “The Publicness of Online Platforms and its Realization — From the Perspective of Legal Regulation of E-commerce Platforms,” *Chinese Journal of Law* 2 (2020).

and various search engines serve as important windows for the public to get information and express opinions, as well as important channels for public power subjects to exercise their functions and powers. Commodity trading platforms such as Taobao and JD.com provide channels for judicial auctions. Besides, publicness itself implies a requirement for the universality and continuity of influence. In terms of universality, the various Internet platforms' activities involve information retrieval, commercial transactions, finance, entertainment, social contact, communication, education, medical care, and other fields, embracing almost all the civil life of society. With the development of the Internet and its ubiquitousness in daily life, the public inevitably relies on a wide variety of Internet platforms to have access to the modern digital society. As far as continuity is concerned, as long as citizens use software platforms, their personal data will be continuously collected, analyzed, and utilized. It is different from the accidental, purpose-based behavior of power, with no possibility of avoidance. As such, the relationship between Internet platforms and ordinary private subjects has been continuously unequal. The above two aspects make private data-based power widely influential, capable of taking continuous control over the majority of people and achieving an effect similar to or even beyond the state's public power.

In conclusion, based on huge resource advantages, the continuous and extensive right to arbitrarily collect, process, and utilize the personal data/information of ordinary private subjects¹⁹ in personal information processing by the platforms has become the private data-based power in the sense of the constitution. So, personal information rights, in the sense of basic rights, should be developed so they can be regulated.

2. Risks of processing and utilizing personal information

The collection and use of personal information existed long before the digital age when personal information (e.g., name, ID card number, telephone number, home address, portrait, property, medical records) was collected, kept, analyzed, and utilized by public and private subjects such as governments and enterprises. However, at that time, personal information was relatively limited in type and sources. Traditional methods of information collection and processing still posed obstacles to obtaining and disseminating personal information, resulting in limited processing and application of personal data. The provisions on specific rights such as the right to name, reputation, privacy, and portrait, together with the relevant norms of tort law, were sufficient to provide adequate protection for personal information. The significant tension between the protection and utilization of personal information had not yet emerged. However, with the continuous development of various information technologies, great changes have taken place in the emergence, collection, storage, processing, and utilization of personal information. In the 1960s and 1970s, when computer technology emerged, people gradually moved away from the traditional approach of relying on individuals to actively submit or manually collect and organize personal information,

19. The paper does not distinguish between the personal data rights and the personal information rights. The platforms generally process data, thus called private data power. However, the opposite concept of rights is expressed as personal information rights, which is used in the paper.

as well as relying on paper documents to store such information. The personal information, previously recorded manually or on paper, could be stored in computers as binary code (0 and 1), enabling its digital conversion into “personal data”. Personal information is becoming wider in scope and more diverse in variety, covering the traditional information that can identify the individual identity and the various information that can identify the individual identity combined with other information. As time goes on, computer technology continues to develop, and information technologies such as the Internet have become popular, making the collection, storage, processing, and utilization of personal data more and more simple, convenient, rapid, and extensive. For example, Cookies technology and various sensors can automatically collect and store personal information, which greatly improves the efficiency of information collection and storage. After entering the digital era, the application of big data, cloud computing, and other information technologies has made the collection, storage, processing, and transmission of personal data unprecedentedly easy and convenient. “The collection, storage, transfer, and use of personal data in the era of big data has been an irreversible trend in the daily life of every natural person.”²⁰

In this context, the complete collection, scale processing, automatic processing, and deep algorithm analysis of personal information are on the rise. Coupled with more and more risks of leakage and abuse in the process of processing and utilizing personal information with the advent of the risk society, many new problems come up, such as negative social evaluation and fraud caused by information disclosure and demeaning remarks on personality due to faulty digital portraits. These risks have the following characteristics: First, it is difficult to accurately predict the risks, such as information disclosure and information abuse in processing and utilizing personal information. Second, it is difficult to predict and control the consequences of risks. It is often difficult to predict the consequences and losses caused by the disclosure and abuse of personal information, which might result in more serious consequences. Third, there is a wide range of risks to be processed, which may include all unspecified individuals in the scale processing. Fourth, the risks are highly complex, involving the use of big data, algorithms, artificial intelligence, and other information technologies. Fifth, the ability of private subjects, such as Internet platforms, to create systemic risks in processing and utilizing personal information has been significantly enhanced. Therefore, in the digital age, the risk of infringement on personal information has become a systematic, comprehensive, and public risk beyond the control of individuals. It is difficult for individuals who only possess limited rationality to control and deal with it effectively only by decentralized and individualized decision-making.²¹

The research on the protection of personal information starts from civil law. Civil law scholars advocate that personal information should be regarded as the object of civil rights to create the personal information right which opposes the absoluteness,

20. Cheng Xiao, “On Personal Data Rights in the Era of Big Data,” *Social Sciences in China* 3 (2018).

21. Wang Xixin, “Three-layer Structure and Protection Mechanism of Personal Information Rights,” *Modern Law Science* 5 (2021).

exclusivity, and domination of non-specific subjects.²² Moreover, the *Civil Code of the People's Republic of China* makes corresponding articles on the protection of personal information in the compilation of personality rights. However, both the sociality of personal information and the characteristics of the risks in processing and utilization challenge the simple path of private law regulation. The protection of personal information is complicated, aimed at not only the protection of an individual's interests as the information subjects but also the balance among the interests of the information subjects and the information processors (including the individual, the society, and the state). The path of protecting personal information extends from the simple private law protection path to the public law protection path, and then to the comprehensive protection path. Different from the negotiation and autonomy of will based on the rights of equal subjects in private law, the path of public law can only be developed on the basis and bond of basic rights, the sociality of personal information, and the risk of processing and utilization also provide the basis for the introduction of basic rights.

B. The constitutional recognition of personal information rights in the sense of basic rights

1. The personal information rights or the right to protection of personal information

At present, scholars in constitutional law have not yet reached a consensus based on the construction and the expression of rights of the protection of personal information in constitutional law. In the early-stage research on the protection of personal information, some scholars proposed that “protecting personal information rights should draw on the mode of basic rights and balance the legal right structure between relevant rights and powers.”²³ Professor Wang Xixin, who first systematically discussed the protection of personal information from the dimension of basic rights in constitutional law, argued that the constitutional basis of protection of personal information is the state obligation in the constitution. This obligation corresponds to the basic right to “protection of personal information,” which is the value basis and constitutional basis for the state to fulfill its protection obligation, rather than the exclusive and dominant “personal information rights” in the sense of civil law.²⁴ Professor Zhang Xiang put forward “personal information rights” which can be proved as a “bundle of basic rights” in academic theory, and indicated that the “bundle of basic rights” referred to in “personal information rights” of this nature is the use of the concept of “bundle of rights” in the sense of the constitutional rights basis for the protection of personal information, rather than referring to the collection of legal rights related to the process-

22. Yang Lixin, “Personal Information: Legal Interests or Civil Rights — An Interpretation of the ‘Personal Information’ stipulated in Article 111 of the General Principles of the Civil Law of the People's Republic of China,” *Legal Forum* 1 (2018). Besides, the right to self-determination of personal information and the “inform — consent” mechanism also embody this view.

23. Sun Ping, “Mode of Basic Rights for Systematically Making Legislation for Protecting Personal Information,” *Law Science* 4 (2016).

24. Wang Xixin, “Obligation of State Protection on Personal Information and Exposition,” *China Legal Science* 1 (2021).

ing of personal information.²⁵

The framework of the “right to protection of personal information — state protection obligation” focuses on the system construction of the *Personal Information Protection Law of the People’s Republic of China*. It is emphasized that although the state’s fulfillment of the obligation to protect individuals in the processing of personal information can play a good role in guidance, integration, and evaluation,²⁶ some defects in some aspects exist. First, the concept of the “right to protection of personal information” is easily confused with the current functional system of basic rights based on the dual nature of “subjective rights and objective value order” of basic rights. Under this functional system, the duty of state protection derives from the objective value order function of basic rights. In the framework of the “right to protection of personal information — state protection obligation,” basic rights, as a passive defense function of subjective rights, are also included to comprehensively encompass the connotation of the right to protection of personal information.²⁷ It may cause some degree of confusion. Second, the emphasis on the construction of the legal system results in the macroscopic construction direction and the lack of further discussion on the specific content and the way of realization, making it difficult to play a fine role of regulation and guidance.

As Professor Zhang Xiang said, in the era of the Internet and big data, maybe it’s not about the emergence of new “basic rights on the Internet,” “data-based power or personal information rights,” but rather that all basic rights are faced with Internet-based, data-based or information-based scenarios.²⁸ All basic rights, including traditional basic rights, may be passively associated with the personal information rights constructed from the doctrine of the *Constitution* under information-based scenarios.²⁹ Therefore, on the premise of understanding “personal information rights” with the nature of the “bundle of basic rights,” personal information rights as basic rights are clarified in constitutional jurisprudence. However, it is easier to understand and more operable to include different basic rights articles in specific protection and to make a multi-level protection structure of differentiation.³⁰ Professor Zhang Xiang’s point of view is adopted in the paper and the “personal information rights” with the nature of “basic rights bundle” is used as a unified expression.

2. The regulation basis, protection scope, and functional orientation of personal information rights

(1) Regulation basis

The personal information rights, as new rights, are not explicitly stipulated in

25. Zhang Xiang, “The Constitution of Personal Information Rights: Reflection on the Theory of Distinct Protection and the Theory of Right to Control,” *Global Law Review* 1 (2022).

26. Wang Xixin, “Obligation of State Protection on Personal Information and Exposition,” *China Legal Science* 1 (2021).

27. *Ibid.*

28. Zhang Xiang, “The Constitution of Personal Information Rights: Reflection on the Theory of Distinct Protection and the Theory of Right to Control,” *Global Law Review* 1 (2022).

29. *Ibid.*

30. *Ibid.*

the *Constitution*. Although it is not practical to amend the *Constitution* at the present stage, personal information can be included in the protection of basic rights via constitutional interpretation, which is also the practice of most countries. First, human rights articles can provide space for the protection of personal information. As Clause 3 of Article 33 of the *Constitution of the People's Republic of China* states, "The state shall respect and protect human rights." This general article has long been regarded as a shelter for rights not enumerated in the *Constitution*,³¹ and the human rights article is the first article in Chapter II — Basic Rights and Obligations of Citizens, of the *Constitution*, providing a new link to the interpretation of the whole chapter³² and playing the role of command and influence in content and system. Personal information involves multiple rights and interests, such as personal dignity, privacy, and peace of life, making it self-evident to be included in the protection of human rights. Additionally, the new situation in the protection of personal information mentioned above also requires the state to assume the dual obligations of respect and protection in this issue, which is precisely in line with the requirements of the human rights articles. Second, the existing basic rights articles can provide detailed normative guidelines for the protection of personal information. Although the human rights articles provide a shelter for the protection of personal information, they are too macroscopic and abstract to provide practical solutions. As mentioned above, in information-based scenarios, several basic rights may be related to personal information rights. Personal information involves multiple interests, such as individual personality, privacy, and freedom and confidentiality of communication. It can be further included in the protection scope of the following basic rights articles. (1) The personal dignity. According to Article 38 of the *Constitution*, "The personal dignity of citizens of the People's Republic of China shall not be violated. It is prohibited to use any means to insult, libel, or falsely accuse citizens." In addition to personal information such as name, portrait, privacy, and other obvious personal interests, the personal interests contained in personal information may also be reflected in other forms supported by various information technologies. Some scholars have generalized them into individual autonomy (freedom), identity interests (correct identification), and non-discrimination (equality) interests derived from human dignity.³³ Individual autonomy (freedom) means that data subjects cannot lose principal status in personal data processing, and are required to have control over their personal data to independently decide matters related to the personal data processing, at least including: the right to be informed of the collection, processing, and use of their personal data; to create, construct and define themselves by showcasing personal data of their free will; not to be guided, strengthened or even manipulated

31. Han Dayuan, "Normative Analysis of 'Human Rights Articles' in Constitutional Text," *The Jurist* 4 (2004); Zhang Weiwei, "Human Rights Articles: A 'Home' for Rights not Enumerated in the Constitution," *Law Science Review* 1 (2011); Lin Laifan and Ji Yanmin, "Human Rights Protection: The Meaning As a Principle," *Studies in Law and Business* 4 (2005).

32. Zhang Xiang, "The Constitution of Personal Information Rights: Reflection on the Theory of Distinct Protection and the Theory of Right to Control," *Global Law Review* 1 (2022).

33. Gao Fuping, "The Protection of Personal Information: From Personal Control to Social Control," *Chinese Journal of Law* 3 (2018): 88. Zhang Xinbao takes a similar view. Zhang Xinbao, "On the Structure of Personal Information Interests," *Peking University Law Journal* 5 (2021).

by the analysis and use of their personal data, or affect their freedom of choice and behavior; to refuse to automate the collection, processing, analysis and decision-making of personal data and to prevent their own free will from being ignored and treated only as an object; not to be monitored by the presence of personality profile, etc. The identity interests (correct identification) mean that the personal data of the data subjects should be comprehensive and accurate to highly coordinate and unify the digital personality and the natural personality as much as possible. For example, the personality profile of the data subjects should be reflected as truly as possible to prevent the differentiation or even distortion of the natural personality from resulting in personality degradation. Non-discrimination (equality) means that data subjects are not treated unfairly due to differences in personal data disclosed in some aspects, such as social sorting, algorithmic discrimination, etc. There should be no dispute regarding the inclusion of protection of personal information under the personal dignity clause. The inclusion of the protection of personal information under the article, as well as personal dignity, should be uncontroversial. (2) The freedom and confidentiality of communication. As stipulated in Article 40 of the *Constitution*, “Freedom and confidentiality of communication of citizens of the People’s Republic of China shall be protected by law.” According to ordinary rules, information formed in daily communication by individuals can naturally be included in the scope of protection of the above articles. In practice, the connection between the above articles and the protection of personal information has been affirmed in drafting the *Personal Information Protection Law of the People’s Republic of China*, and mentioned in the report of the *Constitution and Law Committee of the National People’s Congress on the deliberation of the Personal Information Protection Law of the People’s Republic of China (Draft)*: “Some members of the Standing Committee, the public, and the experts have pointed out that the *Constitution* stipulates that ‘The state shall respect and protect human rights.’; ‘The personal dignity of citizens of the People’s Republic of China shall not be violated.’ and ‘Freedom and confidentiality of communication of citizens of the People’s Republic of China shall be protected by law.’ The enactment and implementation of this law are of great significance to the protection of citizens’ personal dignity and other rights and interests. It is suggested that ‘as per the Constitution’ be added to Article 1 of the second deliberation draft to enact this law. After deliberation, the *Constitution and Law Committee of the NPC* agrees with the above opinions and recommends the adoption.”³⁴

In addition to the aforementioned rights and interests, property interests also arise from personal information in the data era. These property interests include not only the minuscule value of individual and scattered personal information but also the substantial property interests derived from the extensive and profound utilization of big data, including personal information, by information processors. However, due to the restriction of personality attribute of personal data to property attribute, the limitation of the specific practice of property rights in private law, and the convergence of

34. “Report of the Constitution and Law Committee of the National People’s Congress on the Deliberation of the Personal Information Protection Law of the People’s Republic of China (Draft)”, accessed June 17, 2023, <http://www.npc.gov.cn/npc/c30834/202108/a528d76d41c44f33980eaffe0e329ffe.shtml>.

property value in personal data, the property interests based on personal data cannot be included in the scope of protecting private property rights in the *Constitution*. They can only be realized with the help of state-owned paths based on the relevant articles of socialist public property.³⁵

(2) Protection scope

Before the personal information rights are mentioned and demonstrated at the constitutional level, the personal information rights of civil nature have always been in a dominant position. However, as private law, civil law can only adjust the legal relations among equal subjects but hardly covers all the contents of the protection of personal information. In the sense of basic rights, personal information rights are required to take into account all possible sources of risk to provide comprehensive protection for individuals. Specifically, what the personal information rights should guard against is the infringement of data-based power, which has a persistent and unequal relationship with the information subjects, including the following two types: First, the private data-based power represented by commercial organizations such as data enterprises based on Internet platforms. As mentioned above, Internet platforms, based on their resource advantage, already possess the same private data-based power as the state's public power in the processing of personal information. It may cause domination and oppression of the information subjects, thus infringing on their rights and interests. Second, the public data-based power represented by the public power subjects, dominated by state organs, who mainly perform public functions, including various organizations that provide public management and services. To better implement public administration and provide public services, the government and such subjects collect large quantities of personal information about citizens, including personal identity, family relations, work conditions, healthcare, education, labor security, tax payment, credit status, and law-abiding conditions. These basically cover all aspects of daily social life and form multiple large databases. As the original object of basic rights, the infringement risk of state's public power should be paid enough attention. In addition to the threats from the two types of data-based power, the cross-border flow of data is inevitable in globalization. Therefore, the information subjects will be infringed by extraterritorial information processors, which should also be included in the protection scope of personal information rights. In conclusion, personal information rights, in the sense of basic rights, protect the information subjects from being infringed on by the traditional state's public power and regulate infringements from social private power and extraterritorial information processors to make comprehensive and systematic protection for individuals.

(3) Functional system

In line with the traditional theory of basic rights, based on the dual nature of basic

35. In view of the research topic and length, the author of this paper elaborates on this issue in another article. See Ma Kangfeng, "Realization and Distribution of Personal Data Property Interests," *Journal of Anhui University (Philosophy and Social Sciences)* 2 (2023).

rights³⁶, basic rights play a role in the function of the defense rights and the function of state protection. However, in the protection of personal information, the two functions cannot achieve full coverage of protection purposes in the face of the increasingly powerful private data-based power.

Initially, the theory of basic rights adjusted the “state-private” relationship only through the function of defense rights. Later on, the scope of adjustment expanded to the “private — state-private” relationship through the function of state protection, in which the essence is dealing with the “private — private” relationship in private law mediated by the state. With social development, this “private — private” relationship has many different manifestations. First, the conflict of basic rights among equal private subjects or the maintenance of basic rights value, e.g., the Lüth Case and the “marital agreement case” in Germany in 2001 which was the first indirect effect on basic rights between private individuals in Germany; Second, the infringement of basic rights among unequal private subjects individually or accidentally, such as the “Guarantee Case” of Germany in 1993;³⁷ Third, the infringement of basic rights among private subjects in persistent inequality, such as the protection of personal information. With the rise of social private power, the “private — state — private” relationship has been further concretized into the “private — state — social private power subject” relationship. Since no distinction between the above situations was made under the function of state protection, the Theory of the Effect of Basic Rights on Private Relationships under the function of state protection cannot properly cope with the relationship between private persons and social private power subjects that are equal in form but rather unequal in effect. To better deal with the new relationship developed among the private subjects in society, basic rights should be involved in society more actively and develop the function of balancing society.

In conclusion, personal information rights in the basic rights should develop the function of balancing society in addition to the functions of defense rights and the state protection. However, this function is mainly from certain situations in the private relationship of basic rights, so the focus is limited on emphasizing the basic rights be more active in society to correct the relationship among unequal private subjects, but not on developing a new functional system. Its functions can play a role only by means of the functions of both the defense rights and the active protection of basic rights, with some contents to be supplemented and modified. In particular, the function of the subjective defense right is required to incorporate the state’s public power and private data-based power. In addition to the traditional function, state protection should, in combination with the specific protection of personal information, update the protection mode and enhance the protection intensity.

36. Since the introduction of the theory of dual nature of basic rights, the academic community adopts the distinction of “subjective rights and objective value order”. However, some scholars have raised doubts, and put forward the dichotomy of “right to defense and right to protection”. Zhang Xiang, “The Dual Nature of Basic Rights,” *Chinese Journal of Law* 3 (2005). Li Haiping, “State Protection of Basic Rights: From Objective Value to Subjective Rights,” *Chinese Journal of Law* 4 (2021).

37. As for the cases mentioned above, see Li Xiuqun, *A Study on the Effectiveness of Basic Rights in Constitution* (Beijing: China University of Political Science and Law Press, 2009), 132-136.

III. The Practices of Basic Rights to Balance Society in the Protection of Personal Information

Law is the sum of regulations that govern social relationships and needs to develop with social changes. In the digital society, the differentiation and the various value pursuits in the processing and use of personal information of the state, social subjects, and individuals, the complex risks in the processing and use of personal information, and the threat posed by the new “Leviathan” of the Internet platforms with private data-based power require basic rights to actively get involved in the digital society, and bring it within the scope of regulation, to maintain the social balance. The basic theories of modern constitution and the framework, content, and function orientation of basic rights need to be developed and innovated accordingly to make effective responses.

A. The innovation of regulation concept and framework: the transition from a dualistic relationship to a tridimensional relationship

To meet the increasingly diverse interests and value needs in modern society and cope with complex social relations, social subsystems with various functions are gradually generated within the society and operate independently with their specific communication codes and media.³⁸ Other social subsystems outside the political system have thrived as well to pool enormous social energy and generate new social powers, infringing on individual freedom. Correspondingly, social subjects outside the state are playing an increasingly important role in the daily lives of citizens. As for the constitution and theory of basic rights, it means that the objects should not be limited to the state with public power, and the society should be under unified regulation. On this basis, the relationship dealt with by the *Constitution* needs to be developed from the dualistic plane relationship of “individual (society) — state” to the tridimensional relationship of “individual — society — state”, including the relationship between individuals, the two-way relationship between individual and society, the double-sided relationship between society and state, and the relationship between the individual and the state.³⁹ The traditional dualistic framework of “state power — individual rights” should be expanded to the tridimensional framework of “individual rights — social power — state power.”⁴⁰ The basic rights should no longer be limited to preventing the infringement of individual freedom by the political system but should focus on regulating society, maintaining the functional differentiation of social subsystems, and preventing the danger of “borderless differentiation” caused by the internal expansion

38. Niklas Luhmann, *Rechtssoziologie*, translated by Bin Kai and Zhao Chunyan (Shanghai: Shanghai People’s Publishing House, 2013), 185-191.

39. Li Zhongxia, “Transformation of Constitutional Functions in the Governance of Risk Society,” *Journal of National Prosecutors College* 6 (2020).

40. Ma Changshan also pointed out: “In the digital age, the dual structure of state/society, public power/private rights has been replaced by the triadic structure of public power, social power and private rights.” Ma Changshan, “The Fourth-Generation Human Rights and its Guarantee in the Context of Smart Society,” *China Legal Science* 5 (2019).

of social subsystems.⁴¹ Specifically, emphasis should be placed on the direct prevention of social power, preventing the danger of “borderless differentiation” that may be triggered by social power.

The private data-based power mentioned above is a typical representative of social power. With the development of various information technologies, the Internet has long been a technical means and a social subsystem with closed operation and open cognition, to achieve self-foundation and self-limitation via code.⁴² But this one-way code operation intensifies the systematic expansion,⁴³ which makes it possible that the subjects of private data-based power with the Internet platform as the main place of power impose power infringement. Specifically, the private subjects of data-based power impose their will on the information subjects in a continuously unequal position with the help of code operation, resulting in the violation of their personal information rights. In this regard, the *Constitution* should be more deeply and directly involved in the adjustment of social relations. On the one hand, the state should further strengthen the protection obligation of basic rights as required by the objective value order, prohibit insufficient protection, and realize the comprehensive protection of personal information by means of constantly updating legislation. On the other hand, the singular thinking that deals with emerging problems only by improving the traditional theory should be abandoned, actively breaking through the traditional dualistic framework of basic rights and endeavoring to make some breakthroughs in some key aspects. For example, as data private power exists in reality, whether basic rights should be adjusted directly or the relationship between private subjects in the persistent unequal status must be adjusted via the media has become an unavoidable problem in the theory of constitutional basic rights.

B. The strengthening of the state protection obligation

As stated, large-scale electronic processing of personal information leads to unpredictable risks of personal information disclosure and abuse, and individuals with limited rationality cannot effectively control and deal with these risks. On this basis, the state protection obligation derived from the objective value order of basic rights objectively requires the state to establish a corresponding risk prevention mechanism. Prevention has always been a means of public power, generally limited to the traditional areas of deterring illegal activities and resisting dangers at first, but in the context of increasing social complexity and social self-regulation failure, there was also a trend of expansion and direction change towards such fields as medicine and environment with wide social impact to avoid undesirable situations.⁴⁴ With the increasing risks of personal information processing and utilization caused by the prevalence of

41. Li Zhongxia, “Transformation of Constitutional Functions in the Governance of Risk Society,” *Journal of National Prosecutors College* 6 (2020). About the social function of basic rights, see Li Zhongxia, “The Social Functions of Basic Rights,” *The Jurist* 5 (2014).

42. Lian Xueqing, “Internet Constitutionalism: A New Theory of Freedom of Speech Protection in Domain Name Dispute Resolution,” *Journal of East China University of Political Science and Law (ECUPL Journal)* 6 (2018).

43. *Ibid.*

44. Liu Gang, *Risk Regulation: German Theory and Practice* (Beijing: Law Press · China, 2012), 111-118.

computers, the Internet, and other information technologies, the issue of protecting personal information has become part of the risk prevention field as well. Different from the means of post-event relief in civil law, prevention emphasizes nipping something in the bud. Specifically, in the field of protection of personal information, the concept of protecting personal information should run through the whole process of processing and utilizing personal information, and minimize the risk of personal information disclosure and misuse.

In terms of risk prevention, it is necessary to strengthen the risk prevention and response in personal information processing and utilization. First, the protection of personal information should adopt the path of comprehensive regulation, with a focus on the coordination of public law protection and private law protection. At this stage, attention should be paid to the relationship between the *Civil Code of the People's Republic of China* and the *Personal Information Protection Law of the People's Republic of China*. The *Personal Information Protection Law of the People's Republic of China* is not a special civil law of the *Civil Code of the People's Republic of China*, nor can both be regarded as basic law. Due to the obvious differences in the adjustment range and adjustment method, the two shall be separately applied or mutually complemented and referred to according to the actual situation.⁴⁵ For example, in the background of the rise of the private subjects of data-based power, the value requirements of basic rights should be directly involved in the information processing relationship between seemingly equal private subjects. We should rely on the path of consultation based on equality in civil law and use public power to comprehensively control the risks in the process and utilization of personal information to prevent discrimination, injustice, and other behaviors. Some provisions of the *Civil Code of the People's Republic of China* may not be applicable anymore. It should be supplemented by the *Personal Information Protection Law of the People's Republic of China*. Second, the path of administrative regulation should be further emphasized and improved. Compared with individuals with limited rationality, administrative regulation has professional and information advantages, efficiency advantages in preventing and dealing with systematic infringement, and functional advantages in shaping general rules in the protection of personal information. It can better deal with various risks in the process of personal information process and utilization,⁴⁶ and balance the interests of all parties. Since the Standing Committee of the National People's Congress in China adopted the Decision on Strengthening Protection of Online Information in 2012, China has begun to try to guard against, curb, and punish illegal and criminal behaviors related to personal

45. Cheng Xiao, "The Relationship of the Civil Code of the People's Republic of China and Personal Information Protection Law of the People's Republic of China," *Science of Law (Journal of Northwest University of Political Science and Law)* 3 (2022). Wang Liming and Zhou Hanhua have also discussed the relationship between the Civil Code of the People's Republic of China and the Personal Information Protection Law of the People's Republic of China. Wang Liming, "The Applicable Relationship Between the Personal Information Protection Law of the People's Republic of China and the Civil Code of the People's Republic of China," *Huxiang Law Review* 1 (2021); Zhou Hanhua, "The Legal Position of the Protection of Personal Information," *Studies in Law and Business* 3 (2020).

46. Kong Xiangwen, "On the Path of Administrative Regulation for the Protection of Personal Information," *Administrative Law Review* 1 (2022).

electronic information by administrative means.⁴⁷ Although the *Cybersecurity Law of the People's Republic of China* (Effective June 1, 2017) does not refer to personal information, protection of personal information as an important part of cybersecurity can also be included. As stipulated by Clause 1 of Article 8, "The national cyberspace authorities shall be responsible for the overall planning and coordination of cybersecurity work and relevant supervision and administration tasks. The State Council departments for telecommunications, public security, and other relevant organs shall be responsible for cybersecurity protection, supervision, and management tasks within the scope of their responsibilities, in accordance with the provisions of this law and other relevant laws and administrative regulations." According to Clause 1, Article 60 of the *Personal Information Protection Law of the People's Republic of China*, "The national cyberspace department shall be responsible for the overall planning and coordination of protection of personal information and related supervision and administration. The relevant departments of the State Council shall, in accordance with this Law and other relevant laws and administrative regulations, be responsible for the protection of personal information and related supervision and administration within the scope of their respective duties." Thus, China has been exploring the administrative regulation path of protecting personal information and has initially formed a mode of overall coordination by the national cyberspace department, with the cooperation of relevant departments of the State Council. In the face of risks in processing and utilizing personal information, dynamic protection of personal information rights as basic rights should be carried out in combination with its uncertain characteristics, and regulatory concepts and measures should be updated in time to improve the flexibility of regulatory means, realize dynamic protection, and better play the role of administrative regulation in the protection of personal information.⁴⁸ For example, when a large-scale data leak occurs, temporary measures can be taken more quickly and severely than usual to minimize the risk caused by information leakage. Third, the concept of Privacy by Design is introduced to realize the protection of personal information by design. The basic rights link the legal system with other social subsystems by means of structural coupling and convert the information from other social subsystems into the legal system.⁴⁹ The concept of Privacy by Design emphasizes embedding privacy as a default setting into the design in a preventative rather than remedial way. According to this concept, the requirements of personal information rights, as basic rights, should be embedded into the system by design and code at the beginning, so as to become the default rules for the operation of the Internet system. It provides pre-emptive and life-cycle protection for personal information and protects the interests of information

47. Article 10 of the *Decision on Strengthening Protection of Online Information* (Decision) adopted by the Standing Committee of the National People's Congress in China stipulates that the "authorities must take technical or other necessary measures to prevent, stop and deal with illegal and criminal activities relating to online information, including obtaining personal digital information through stealing or other unlawful means, or selling or illegally providing information to others."

48. On the administrative regulation of risks and the dynamic protection of basic rights, see Wang Guisong, "Risk Administration and the Dynamic Protection of Basic Rights," *Studies in Law and Business* 4 (2022).

49. Li Zhongxia, "The Social Functions of Basic Rights," *The Jurist* 5 (2014).

subjects and information processors to achieve a win-win situation for all parties.⁵⁰ Fourth, the risk prevention obligation of information processors is further emphasized. Through the collection, processing, and utilization of personal information, personal information processors obtain huge benefits and greatly increase the risk of personal information being leaked and abused. Whether it is from the perspective of benefit acquisition or responsibility allocation, they should assume corresponding risk prevention obligations. The processing and utilization of personal information by the state's public power, such as the government, is generally limited by its legitimate authority and should follow the authority and procedures prescribed by law, which can avoid relevant risks to a certain extent. In contrast, the risk prevention obligations of private data-based power subjects such as Internet platforms should be further emphasized. On the one hand, the risk prevention obligation should be stipulated through legislation, and on the other hand, the implementation of the risk prevention obligation should be urged by administrative supervision and other means. Currently, the *Personal Information Protection Law of the People's Republic of China* has already involved this field,⁵¹ and should be further clarified through the formulation of specific rules for implementation in the future.

C. The promotion of Theory of the Effect of Basic Rights on Private Relationships: The direct effect on the private subjects of data-based power

1. Traditional paths of regulating the private subjects of data-based power and their limitations

In the traditional theory of basic rights, scholars have incorporated the regulation of the private subjects of data-based power into the institutional protection, the organizational and procedural protection, and the infringement prevention obligations required by the objective value order of basic rights. These measures focus on the construction of the rights-obligations relationship between the “individual — information processor,” the organization and program design for the guarantee and auxiliary systems required for the implementation of the state protection obligations, and the creation of a legal order environment in which individuals are not infringed by data-based power through the construction of preventive mechanisms and the coordi-

50. About the protection of personal information by design, see Zheng Zhifeng, “The Protection of Personal Information by Design,” *Journal of East China University of Political Science and Law (ECUPL Journal)* 6 (2018); Zhang Jihong, “Research on the Mechanism of the Protection of Personal Information by Design,” *Science of Law (Journal of Northwest University of Political Science and Law)* 3 (2022); Xu Ke, “The Scientific and Technological Dimension of Personal Information Governance,” *Oriental Law* 5 (2021).

51. As stipulated in Article 51 of the *Personal Information Protection Law of the People's Republic of China*, “Personal information processors shall take the following measures to ensure that their personal information processing activities are in compliance with laws and administrative regulations based on the purpose and means of processing, the categories of personal information to be processed, the impact on personal rights and interests, and the potential security risks, among others, and shall prevent unauthorized access to, as well as breach, tampering or loss of any personal information: (1) formulating internal management system and operational procedures; (2) implementing classified management of personal information; (3) adopting corresponding security technical measures such as encryption and de-identification; (4) reasonably determining the operational authority of personal information processing, and regularly conducting safety education and training for practitioners; (5) formulating contingent plans for personal information security emergencies and organizing the implementation of such plans; and (6) other measures as provided by laws and administrative regulations.”

nation of legal responsibilities.⁵² The purpose is to build a constitutional basis and provide a general and macroscopic plan for the legal system of the *Personal Information Protection Law of the People's Republic of China*. No regulation of the private subjects of data-based power is offered with other more specific and targeted solutions.

Beyond that, the above-mentioned German Theory of the Effect of Basic Rights on Private Relationships and the American theory of state act can also be used to deal with the relationship between the private subjects of data-based power and the information subjects. However, these theories ignore the rise of social power and keep them restricted in the dualistic framework of “state power — individual rights,” emphasizing that the direct object of basic rights is limited to the state (public power). Even if the relationship between private subjects is dealt with, it can only be carried out by means of the state. In this regard, some scholars have summarized it as a “Theory of the Effect of Basic Rights on Private Relationship in State-centered Paradigm,” and pointed out that it is a theoretical attempt to respond to the issue that “threats to basic rights come not only from the state but also from powerful private subjects.” However, influenced by the inertial paradigm, although existing theories admit the reality that social power threatens basic rights, they deny the direct effect of basic rights on private subjects in theoretical construction. Therefore, it has its defects and deficiencies, such as the inconsistency between theory and practice, the mismatching between the purposes and the means, and the ineffective response to legal changes.⁵³ In the protection of personal information, it is mainly reflected in the following aspects: First, there is no direct constitutional basis for proving the effect of personal information rights in the sense of basic rights on private data-based power subjects, so the state is required to serve as a medium. Second, it is impossible to cover all links in the protection of personal information. The protection of personal information is a complex issue requiring joint efforts of the state, society, and other parties, which can be realized by legislation, justice, self-regulation of enterprise, and social regulation. However, the indirect effect theory of objective value order and the theory of state acts only involve the protection of judicial links, excluding the protection of legislation. Although the theory of indirect effectiveness of state protection obligation includes all aspects of legislation and judicature, its application in judicature depends on whether the information subjects sue or not. In other words, only when the information subjects choose to seek relief from the court can it be protected. Furthermore, since the theory of state obligation emphasizes the restriction of only the court among state organs, it makes the social institutions of dispute adjudication, such as civil mediation and arbitration, lack the basis to apply basic rights to private subjects. Third, it is impossible to clearly explain and properly arrange the dominant position of the private subjects of data-based power, thus being unable to provide a strong theoretical basis and interpretation basis for some provisions of the existing law (further explained below). Fourth, as for the more special, clear-cut, and settled relationship of “individ-

52. Wang Xixin, “Obligation of State Protection on Personal Information and Exposition,” *China Legal Science* 1 (2021).

53. Li Haiping, “On the Paradigm Transformation of the Effect of Basic Rights on Private Relationship,” *China Legal Science* 2 (2022).

ual rights — state power — social power,” the scope and conditions of application of basic rights in the private world are not further defined, which is likely to result in generalization and confusion in the practical application.

2. The applicable premise and superiority of the direct effect of basic rights on the private subjects of data-based power

Faced with the rising social power, especially the typical private data-based power, basic rights should be more deeply and directly involved in the handling of social relations, giving play to the function of basic rights to balance society and realize the balance of interests of all parties. Specifically in the field of protection of personal information, it is necessary to establish the direct effect of basic rights on private data-based power, a typical social power.

First, the premise of the direct effect of basic rights on the private subjects of data-based power lies in the definition of private data-based power. In the protection of personal information, it is further concretized into the energy requirements for information processing subjects such as Internet platforms. As per the above definition, not all Internet platforms can meet the standards of the private subjects of data-based power. Only when the main business involves personal information processing and meets the conditions of possessing enormous potentiality, providing important Internet services, having a large number of users and a huge scale of data processing, can an Internet platform with certain publicity be defined as the private subjects of data-based power are subject to a greater duty of care and protection. Special provisions of the *Personal Information Protection Law of the People's Republic of China* are made on the obligations to be fulfilled by personal information processors who provide important Internet platform services, have a large number of users, and have complex business types. Some provisions of the *Standard GB/T 35273-2020 on Information Security Technology — Personal Information Security Specification* are more detailed. In Article 11, “Personal Information (PI) security management requirements for organizations,” it is stipulated that an organization meeting any of the following conditions shall set up a full-time post and a department dedicated to PI security work: (1) Main business involves the processing of PI, and the number of employees exceeds 200; (2) Processes the PI of more than 1,000,000 individuals, or is estimated to process the PI of more than 1,000,000 individuals in 12 months; (3) Processes the sensitive PI of more than 100,000 individuals.” This is a request for higher protection of personal information for some personal information processing subjects with private data-based power. The private subjects of data-based power can be defined in a more detailed and specific way in accordance with the above standards in subsequent legislation, as the basic premise of the application of the direct effect of basic rights on the private subjects of data-based power.

Second, establishing the direct effect of basic rights on the private subjects of data-based power has its own theoretical and practical advantages: (1) the direct effect of basic rights on the private subjects of data-based power is consistent with the essence of basic rights. The existence of power means that there may be abuse. The meaning of basic rights is to prevent the infringement of all forms of power, and the defense

against private data-based power should also be the connotation and essence of basic rights. (2) The direct effect of basic rights on the subjects of private data-based power is a direct response to the rise of social power, which straightens out the relationship between “individual rights and social power” and provides a direct constitutional basis for the application of basic rights among individuals, without the need for transformation through the media of the state. It can also control the legislative, judicial, and other protection links. On this basis, it can break through the limitation in the traditional dualistic framework that the regulation of the private subjects of data-based power can only be included in the state-mediated protection measures derived from the objective value of basic rights. Subjective defense rights, such as the state’s public power, are developed to have a direct regulatory effect on the processing of personal information on the private subjects of data-based power such as Internet platforms. It is no longer necessary to use the state as the medium through the national protection function to transform. In this way, information subjects can directly claim their basic rights to the private subjects of data-based power, have their effects on data private rights, and strengthen the emphasis on and requirements for the private subjects of data-based power not to wantonly infringe upon the personal information rights of data subjects, to build a complete framework for information subjects to prevent the private subjects of data-based power from violating their personal information rights, and provide more comprehensive protection. On the other hand, it can provide the constitutional basis for some provisions in the existing *Personal Information Protection Law of the People’s Republic of China*, straighten out the legislative logic, and make legal operations. For example, certain provisions in the general provisions, personal information processing rules, and obligations of personal information processors in the *Personal Information Protection Law of the People’s Republic of China* make no distinction between public power subjects such as the state and the private subjects such as Internet platforms, but unified requirements. According to Article 5, “Personal information shall be processed according to law when it is necessary, with justified reason, and in good faith...”; Clause 2, Article 6, “The collection of personal information shall be limited to the minimum scope required by the purpose of processing, and personal information shall not be collected excessively”; Article 7, “The principles of openness and transparency shall be observed in the processing of personal information...”; Article 17, “A personal information processor shall, before processing personal information, fulfill the obligation of full disclosure”; Article 24, “Personal information processors using personal information for automated decision making shall ensure the transparency of the decision making and the fairness and impartiality of the results, and shall not apply unreasonable differential treatment to individuals in terms of transaction prices and other transaction conditions.” These articles involve the principle of necessity and the principle of minimum infringement required by the principle of proportionality, the obligation of openness, transparency, and notification required by the principle of due process, and the obligation of fairness, justice, and prohibition of discrimination required by the principle of equal protection. As per tradition, Internet platforms as private subjects should not have to undertake these obligations under public law. Besides, the obligation of personal information processors to take various

measures to ensure personal information rights also breaks the contractual relationship between private subjects, embodying the strong logic of public law regulation. It can be seen that in the process of formulating laws, legislators have realized that Internet platforms as private subjects have private data-based power similar to the state's public power in processing personal information. The corresponding arrangements have been made, so that many provisions on the protection of personal information have been stained with the color of public law. The direct effect of basic rights on the private subjects of data-based power is an effective response to this phenomenon in constitutional theory, which can provide a fundamental legal basis.

3. The specific operations of the direct effect of basic rights on the private subjects of data-based power

First, the way in which basic rights act on the private subjects of data-based power needs to be limited. After all, data private power subjects are private subjects, and the data private power they possess is only a kind of *de facto* power. There is still a certain gap between them and the state's public power in terms of energy. The action mode of basic rights on the effect of national public power cannot be directly applied, so specific arrangements should be made in the concrete construction. According to the prevailing theory of the dual nature of basic rights, the private subjects of data-based power need to undertake the dual obligations of not wantonly violating basic rights as subjective rights and actively promoting the realization of basic rights as an objective value order. Given the "private" nature of private data-based power, both of these obligations should be mitigated. From the perspective of the mechanism by which basic rights play a role, although based on its status as the subject of "power," it is required to follow the requirements of the state's public power, such as the principle of proportionality, the principle of due process, the principle of equal protection, etc. in public law. It should be differentiated in the specific operation mechanism. The intensity of public law obligations undertaken by social power information processors, such as the principle of proportionality and the principle of due process, is proportionately weakened, and a gradient order of obligation intensity is formed.⁵⁴ The application of the principle of proportionality "should change from minimizing intervention to harmonizing the freedom of equality for all,"⁵⁵ to correct the unequal status of both sides and realize the dynamic balance of interests. For example, the state's public power organ processing personal information should mainly comply with the provisions of the law and carry out within the scope of statutory authority. However, for the private subjects of data-based power, the requirements on the purpose and scope of processing should be relaxed to avoid excessively rigid control, and the regulation should be focused on processing behavior. The requirements for compliance with due process should be limited primarily to the degree of notification, justification, and provision of necessary remedies, rather than total control and relief, as in the case of the state.

54. Li Haiping, "Reflection and Reconstruction of the Theory of State Protection Obligation of Personal Information," *Chinese Journal of Law* 1 (2023).

55. Yang Dengjie, "Effects of Basic Rights Between Individuals: Direct or Indirect?" *Peking University Law Journal* 2 (2022).

Second, the direct effect of basic rights on the private subjects of data-based power can be realized by the concrete system. The most straightforward indicator of the direct effect of basic rights on specific systems is whether the violation by a certain subject can be included in the constitutional remedy procedure, such as filing a constitutional lawsuit against the subject that has committed the violation and directly applying constitutional norms to make judgments. Although China has not established a constitutional litigation system, since the report to the 19th CPC National Congress proposed to “promote constitutional censorship,” the academic research and practice system has been continuously promoted. In particular, record censorship has made great progress, serving as a key starting point to promote the construction of constitutional censorship. Future regulation of the private subjects of data-based power could also be operated through specific mechanisms for constitutional censorship. For example, the private subjects of data-based power, such as Internet platforms, may be required to transfer platform rules concerning the processing of personal information formulated by them to the corresponding supervision department for the protection of personal information for filing for censorship.

4. The existence space of the direct effect of basic rights on the private subjects of data-based power

There is a gap between the theoretical basis and the doctrinal existence space for the direct effect of basic rights on private data-based power. “Power does not necessarily result in public power; it can also be exercised by private subjects, i.e., private power. The dichotomy of public power and private rights, based on the dichotomy of state and society, has become increasingly unadaptable to the new changes in the Internet era.”⁵⁶ Meanwhile, “people with power are prone to abuse of power, which is a long-lasting experience.”⁵⁷ Therefore, the meaning of basic rights must not be limited to the defense against the infringement of state’s public power, but should be protected against all powers that may infringe upon individual freedom and rights to a certain extent. This is the connotation and essence of basic rights.⁵⁸ For the defense against state power, the traditional theories aim to realize this by establishing the effect of basic rights on state power. Following this logic, as for the defense against social power, establishing the effect of basic rights on social power should be the basic orientation to solve the problem.⁵⁹ According to the above analysis, Internet platforms possess private data-based power, and the private power has reached the public nature of public power to some extent. Meanwhile, it has a broad and continuous influence, generating a strong force no less than the state, and can be included in the scope of basic rights

56. Liu Quan, “The Publicness of Online Platforms and its Realization — From the Perspective of Legal Regulation of E-commerce Platforms,” *Chinese Journal of Law* 2 (2020).

57. Montesquieu, *The Spirit of Laws*, vol. 1, translated by Zhang Yanshen (Beijing: The Commercial Press, 1997), 154.

58. Li Haiping discussed this and extended the normative subject of basic rights from social public power to social power in his works. Li Haiping, “The Direct Effect of Basic Rights on the Public Subjects of Social Power,” *Political Science and Law* 10 (2018); Li Haiping, “On the Paradigm Transformation of the Effect of Basic Rights in Private Relationship,” *China Legal Science* 2 (2022).

59. Li Haiping, “On the Paradigm Transformation of the Effect of Basic Rights in Private Relationship,” *China Legal Science* 2 (2022).

regulation in the *Constitution*. The latter half of paragraph 13 of the Preamble of the *Constitution of the People's Republic of China*, Clause 4 of Article 5 of the General Principles, and Article 51 of Chapter II — Basic Rights and Obligations of Citizens, which stipulate that private subjects “abide by the *Constitution*” and general provisions on the restriction of basic rights of citizens, indicate that basic rights can have binding force on the behavior of private subjects and the relationships between private subjects, which, in essence, contains the normative connotation that basic rights have the direct effect on private subjects and can provide a sufficient constitutional basis for the effect of basic rights on private persons.⁶⁰

Conclusion

The development and innovation of theory of basic rights is a dynamic issue that remains in the spotlight for scholars. The new social phenomena emerging in the digital age bring new challenges to the traditional theory of basic rights and provide a new driving force and direction for its development. The rise of private data-based power and the complexity of protecting personal information are typical cases of the growing complexity of society, the emergence of differentiated and conflicting interests within society, and the rapid development of various societal subsystems, making requirements and calls for the function of basic rights to balance society. The paper has just made a preliminary discussion of the issue, and more in-depth and specific research should be made in the future by combining the latest results of theory of basic rights, the latest trend in protecting personal information, and the latest arrangement in constitutional censorship.

(Translated by *XU Chao*)

60. For more detailed discussion, Li Haiping, “The Direct Effect of Basic Rights on the Public Subjects of Social Power,” *Political Science and Law* 10 (2018); Li Haiping, “On the Paradigm Transformation of the Effect of Basic Rights in Private Relationship,” *China Legal Science* 2 (2022).