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# Privacy and personal data protection in China: An update for the year end 2009

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## ABSTRACT

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### Keywords:

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This paper explores developments in privacy and data protection regulation in China. It argues that, since China is an emerging global economic power, the combination of domestic social economic development, international trade and economic exchange will encourage China to observe international standards of privacy and personal data protection in its future regulatory response.

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## 1. Introduction

Protection of privacy and personal data has special significance in China. On the one hand, it reflects the economic demand in an increasingly globalized marketplace; on the other, it shows the people's increasing privacy awareness. In January 2008, Shanghai metro rail company apologized to two lovers for privacy invasion after a video clip copied from a metro station's closed circuit television (CCTV) system was posted on the Internet. The video showed the two lovers in a prolonged hugs and kisses as three voices speaking in the local Shanghai dialect can be heard in the background laughing and making vulgar sexual comments. It was later disclosed that the three "commentators" were the staff of metro rail company.<sup>1</sup> Many people complained online about the ubiquity and abuse of CCTV in public

places, such as banks, airports, railway stations.<sup>2</sup> Regrettably, China is yet to establish a comprehensive and coherent protection system for privacy and personal data in China, despite a few patchwork developments in law or in practices.

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## 2. Legislative framework

The Chinese Constitution provides that no organization or individual may, on any ground, infringe on citizens' freedom of privacy of correspondence, except that public security or prosecutorial organs are permitted to censor correspondence in accordance with the procedures prescribed by law for the purpose of safeguarding State security or investigating crimes.<sup>3</sup> Therefore, the Chinese Constitution acknowledges

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<sup>1</sup> See "Shanghai Metro Apologized to the Lovers Caught on Tape", *Oriental Morning*, January 23, 2008, available at <<http://society.people.com.cn/GB/1062/6809132.html>>.

<sup>2</sup> In a 2006 case, a high-school principal in Shanghai showed a video clip of two students kissing in a classroom. The teenage couple, humiliated by the incident, launched a lawsuit for invasion of privacy. They lost their court action, but won considerable public sympathy.

<sup>3</sup> See Article 40 of Chinese Constitution (1982).

the privacy of communications, but does not address the protection of privacy or personal data generally.

The *General Principles of the Civil Law* sets out the legal basis for civil rights protection but does not stipulate privacy as an independent right.<sup>4</sup> According to the judicial interpretations made by the Supreme People's Court, breach of privacy may be treated as defamation. The cases in which a person discloses personal secrets, either orally or in writing, or fabricates facts to publicly vilify the individual's personal dignity, or damages reputation by such means as insults and defamation of others, with resulting negative impact, shall be treated as an invasion of the right of reputation.<sup>5</sup>

Invasions of residence privacy and communication privacy are crimes under the 1997 Chinese *Criminal Law*.<sup>6</sup> Illegal physical searching of individuals or their residences or wrongful intrusion into such residences, can lead to sentences of up to three years in prison, or criminal detention. Infringement of the citizens right of freedom of communication by hiding, destroying, or illegally opening others' letters can, if the case is serious, lead to sentences of up to one year in prison or criminal detention.

A new amendment to the Criminal Law brings privacy protection to a new level. The amendment, which entered into force from February 28, 2009, imposes criminal liability on persons who misappropriate personal information during the course of performing their professional duties. Both private sector and governmental agency personnel who misappropriate a citizen's personal data are subject to the penalty. This applies to personnel of government agencies or in financial, telecommunications, transportation, educational and medical institutions who sell or illegally provide to others a citizen's personal information acquired in course of performance of their duties or provision of services. In serious cases, this can lead to sentences of imprisonment for up to three years, imposition of a fine (as a single penalty or concurrently with other penalties), or detention. The amendment can also make an enterprise or a supervisor in an enterprise ("management personnel with direct responsibility") liable for such misappropriations that are conducted by the enterprise.<sup>7</sup> This new amendment encourages companies in the financial, telecommunications, transportation, educational and medical sectors to establish internal procedures to prevent misappropriations of personal data and to undertake employee educational efforts to foster awareness of handling customers' personal data with appropriate care.

In addition to the general laws, a few specific laws, to certain extent, address the issue of privacy protection. The *Law on the Protection of Minors* (1991) provides that no organization or individual may disclose the personal secrets of

minors and with regard to cases involving crimes committed by minors, the names, home addresses and photos of such minors as well as other information which can be used to deduce who they are, may not be disclosed, before the judgment, in news reports, films, television programs and in any other openly circulated publications.<sup>8</sup>

The *Law on the Identity Card of Residents* (2003) stipulates that no organization or individual has the right to check or hold a citizen's identity card except for the police, who are required to keep confidential any personal data obtained from the identity cards. Failure to register for an identity card, forging or otherwise altering a residence registration, or assuming another person's registration are all prohibited by law and punishable by fines. The law also mandates that citizens use the cards for such events as opening a bank account, purchasing flight tickets, and registering a marriage.

The *Regulations on Publication of Governmental Information*, enacted by the State Council on April 5, 2007 and entered into force from May 1, 2008, prohibit any administrative organ from publishing the governmental information that involves State secrets, trade secrets or personal privacy.

The *Lottery Administration Regulations*, effective as of July 1, 2009, provide that lottery issuance, sale, agent organizations or any others who acquire from professions or businesses the personal information of the lottery winner shall keep the winner's personal information secret.<sup>9</sup>

### 3. Judicial developments

The Chinese court system, short of the codified stipulations, has made a series of break-through decisions to define privacy in law. These pioneer decisions may have an impact on future legislation.

#### 3.1. Voluntary public figures

In September 2009, the final decision made by the Guangzhou Intermediate People's Court in the Yang Lijuan case put an end to the legal proceeding but opened a new chapter for the media saga of a crazy fan. Yang Lijuan had been a fanatic fan of Andy Lau, a famous singer and movie star in Hong Kong, for 12 years. In March 2007, Yang Lijuan and her parents embarked on a "star-chasing" trip to Hong Kong in the hope of meeting Andy Lau personally. The trip ended tragically. Yang Lijuan's father committed suicide in Hong Kong. Yang's story became sensational news under full media coverage. Yang later sued Southern Weekend, a leading weekly newspaper, for publishing a defamatory article against her and her family. After losing the case at the District People's Court, Yang appealed to Guangzhou Intermediate People's Court. In

<sup>4</sup> See Article 101 of the General Principles of the Civil Law (1986). Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.

<sup>5</sup> See 1998 "Opinions on Several Questions concerning the Implementation of the 'General Principles of Civil Law'".

<sup>6</sup> See Article 245-246 of the Criminal Law.

<sup>7</sup> See Amendment Seven to the Criminal Law, passed by the Standing Committee of the National People's Congress on February 28, 2009.

<sup>8</sup> See Article 30 of the Law on the Protection of Minors.

<sup>9</sup> Interestingly, the highest lottery winning amount appeared in China after the Lottery Administration Registration entered into force. In October 2009, Chinese Welfare Lottery opened up a winning amount of RMB Yuan 359,900,000 million (approximately USD 52,704,028.08). It was disclosed that the winner was a group of people from An Yang, a city of Henan Province. The local lottery administration, based on the Regulations, resisted the social pressure on publicizing the identity of the winner.

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