

# Research on the Path of Criminal Law Regulation for the Protection of Data Legal Interests

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## ABSTRACT

In the face of the emerging new types of crimes in the digital economy era, criminal law, as a fallback link in the legal regulatory system, should respond accordingly. Therefore, the weakening of the principle of legality of crimes and punishments brought about by the operation of the digital economy should not be understood as an absolute negative value, and should be re-examined in conjunction with the logic of digital economy operation. At present, the regulation of data itself in China's criminal law is still limited to the carrier and material entity of data - traditional computer information systems. The recognition of data legal interests still remains at the level of the actual legal interests reflected behind the data (such as property and personality legal interests). In the current situation where various legal interests may be reflected in the data, it is necessary to strengthen the overall attention to the data itself and promote targeted legislation for the protection of data legal interests. Only then can the digital economy achieve significant and healthy development under the protection of the "last line of defense" criminal law, while also being more in line with the concept of "strict but not severe" criminal law.

## KEYWORDS

Data Law; Interest; Data Crime; Information Privacy; Computer Information System.

## 1. FOREWORD

The report of the two sessions in 2023 points out that the National Data Bureau should be set up to coordinate and promote the construction of the data basic system, coordinate the integration, sharing, development and utilization of data resources, and promote the planning and construction of digital China, digital economy and digital society. "Digital economy" in full swing, the present to strengthen the management of the data itself and overall planning is the trend of The Times, how to better let the digital economy on the orbit of the rule of law better organized not blind development, is related to the development direction of digital economy itself, and related to whether people can safely enjoy dividends in the blue ocean of digital economy.

## 2. THE BOUNDARY OF THE DATA METHOD AND INTEREST

Data method can be independent of personal information security to become a new recognition of the law, criminal law data method boundary how to define, clear its boundary, it is necessary to distinguish the "data" and "information", "personal information" and "privacy", in the current Chinese legislation system, data and information does have a certain division, "data safety" in article 3 "data in this law, refers to any electronic or other ways of information records." Actually is the integration

of information and data said, more in line with our" broad understanding "of data, from the overall protection and regulation of all" information value "data and the behavior of the data, in a sense, the law of public law significance, he defined the data as" valuable ", for what is valuable, which value more data, are for detailed explanation, its more emphasis is on the regulation of data as a whole, and the direction. The personal information protection act as a special law in the data to extract personal information, special protection, personal information should be "identification", article one hundred and twenty-seven of the civil code [data, network virtual property protection] law on data, network virtual property protection, in accordance with the provisions, is the data, virtual property and provisions for "other civil rights", in this case, the data mainly reflects is its property interests. It can be seen that the difference between data and information is not only in the nature of relevant laws, but also in the use of relevant terms. The word "information" should reflect the direct correlation with the information content, and the data includes all information and the carrier of information.

About "privacy" and "personal information", the current law in the civil code of the first established privacy for a civil rights, its positioning for the category of personality right, in the context of the current legislation, privacy and personal information right is cross parallel relationship, personal information and privacy cross area, also for the privacy right category. In our common sense cognition, privacy is not be processed, information and privacy of the cross privacy "information privacy" is understood as part of personal information, is reluctant to know the private information, essentially belongs to the category of private personal information, so on the protection, it should correspond to the privacy, namely negatively, passively, is prohibitive legal norms point to areas.

The scope of "data", "information", "personal information" and "privacy" lies in the difference in the overall cognition of data legal interests, And the need to protect the various legal benefits reflected in the form of data is also increasing, But in the current field of criminal law, It is still under the nature of data, such as property interests, personality interests as the object for special protection, Where criminal legislation lags behind theoretical research, For example, at this stage is still in the infringement of the computer information system under the relevant judicial interpretation, New challenges are also increasing in practice, And like the crime of "infringement on citizens' personal information" since the increase, Has become a "cover charge" for a growing number of similar crimes, In the case of imperfect legislation for data law benefits, The application of this "analogy" will haunt the judiciary, Only the legislation of adding overall protection of data legal interests or the targeted crackdown of other charges, In order the other charges can be punished, It can also improve the penal system.

### **3. DOCTRINAL DIVERGENCE OF DATA LEGAL INTEREST PROTECTION**

As for whether the data state itself can become independent of the security of personal information, there is still a great controversy in the academic circle, especially in the field of criminal law. Specifically, it is mainly divided into the attachment theory of data legal interest and the independence theory of data legal interest.

#### **3.1. Data Legal Interest Dependency Theory**

The dependence of data legal benefit believes that data legal interests itself can be attached to the interests of data information, data property, and data order legal interest, while data legal interests can only be reflected under the relevant legal interest. In essence, the crime of data itself is the specific existing legal interest behind the data.

One thing, Data information legal benefit theory, Data and information security in the field of criminal law equals the personal information security, In this case, A trespass can be convicted of trespassing into a computer information system, But in the case of breaking away from the trespass, It can only

constitute the crime of violating citizens' personal information, Data other than identifiable personal information is not strictly protected; at the same time, Conflicting with the tendencies of existing legislation, Under the legal theory of data information method, Data legal interest is not only reflected in the crime of violating citizens' personal information, Also reflected in the computer system security crimes, some network crimes, If the security of data and information is equated with the content security of personal information, The need for the existence of other data crimes is also subject to scrutiny.

Second, the data property law theory, the data itself condenses the data creators, with the same value as items property properties, namely the destruction of the computer system is equal to intentionally destroy property, in the Supreme People's Procuratorate 37 guiding case "zhang theft", the network domain name data endowed by the judicial organs with legal property, zhang use technology crack Chen auction income domain name binding account and password, and the domain name data transfer for all their behavior constitute theft. Under this theory, the data itself as part of the property rights, its sharing, liquidity, at the same time, also provides the basis for the abstract dangerous behavior legislation, certain property rights itself has "exclusive", will make simple trespass constitutes a crime, such as theft of "transfer", once makes the data owner itself for data control risk, will trigger the regulation of criminal law. Finally, the most important thing is the repetition of repetition and judicial dilemma, the first is theft and intrusion of computer information system, a breach of social management order category, a in the category of infringement of property, this is not just a problem of law competition, still exist after the connotation of data rights itself, more diverse forms, will inevitably form under the data property rights theory for the challenge of the whole rule system.

Third, the legal interest theory of data order, which is just the opposite of the above. Order uses its very grand legal interest as the standard of crime. For the infringement of data itself, the infringement is the computer system data security operation management order and network security management order, but it is easy to expand the crime.

### **3.2. Data Legal Interest Independent Theory**

Although there are still differences in the independence of data method, They are the multivariate data method benefit independent theory and the new independent theory, The pluralistic and independent theory holds that, Data method interests is still combined based on multiple method interests, The author prefers the data legal benefits of the combination of personality rights and property rights, That is, in addition to the public data, All the data have the dual legal interest of personality and property, Although some people criticize that some of the terms become "empty", But there is no denying that, It is the intensity of legal protection between different charges, In order to make the judicial time more reasonable for the conviction and sentencing, There will be no imbalance of major legal interest protection, But there are nominal "data benefits", This theory is more like the traditional method protection mode of data mechanism.

Independent new data method, the content of the data method have a whole understanding and do the analysis of the whole, some scholars summarized "data three security", namely data confidentiality, integrity, availability is the new rights of data, among them, the confidentiality is mainly in order to protect the data itself in the case of unauthorized use is prohibited, which to some extent reflects the data mentioned in the paper has the property attribute the exclusive characteristics, but the confidentiality itself is limited protection, with certain exceptions. Integrity means that the data is not compromised or modified at will. Availability means that the right holder can obtain the use information in a timely and effective manner. The study of the principle of sex data can make us considering the overall understanding of the data, the legislation technology and the forming the legislative proposal should be fully considering the influence of the current legislative system, is in the traditional law of the nature of the data under the form of judicial interpretation, or directly to data rights and interests as the center, form the reorganization of the existing legislative system.

From the present, China's legislature is not independent data legal for criminal legislation project planning, more is through the way of judicial interpretation, or amendment, involving the traditional legal field of regulation, but can not be ignored, data rights increasingly become a whole a long-term influence on traditional legal field, and more and more cases show that the data rights form of diversity has made the traditional crime of meaning reflect or not enough to make people understand.

#### **4. IMPROVE THE REGULATION OF DATA CRIMES**

When exploring and perfecting data crime, It is necessary to study the existing provisions of the criminal law based on cybercrime, First, the crime of illegal intrusion into computer information system and destroying computer information system, which was added in 1997, These remain essentially limited to the "physical" level, Until in 2015, Amendment 9 of the Criminal Law removed the subject restriction of the crime of violating citizens' personal information, At the same time, strengthen the nature of the public order in "cyberspace", The 2020 Criminal Law Amendment 11 has slowed down, On the one hand, the previous cover provisions have indeed been effective, When using order as a legal interest, It will certainly make the legal interest protection even broader, on the other hand, The new legal interests pay attention to but are not blind, For example, in the crime of dangerous operation, "tampering, concealment and destruction of relevant data and information", It is also the cases appearing in the practice that promote the legislation.

The relevant data crimes in the Criminal Law: first, the crime against the entity system; including the crime of illegally intruding, controlling, destroying the computer information system and providing programs and tools to invade and illegally control the computer system. This kind of behavior is aimed at the "trespass" itself, and the legal interests violated are mainly reflected in the special security of specific fields behind these charges. Therefore, these crimes do not start from the data itself or the information itself, but mainly from the perspective of specific order. The second is the crime of "data" itself " illegally obtaining computer information system data; the third is the information crime, the most prominent is the crime of infringing citizens' personal information, and the information crime against specific fields. In this way, it can be seen that the system of criminal law system for data crime in China is roughly: systematic crime, data crime and information crime. The crime against "information" is a special crime against "data", which cannot be identified as a special crime against "information", so the criminal law against "data" can be used to regulate it. The utilization rate of the crime of infringing citizens' personal information is high, and personal information and data are distinguished by "identity identification". In addition, if the relevant data also bears copyright intellectual property, it should be dealt with as intellectual property related crimes.

Criminal law under the guidance of the principle of protection, should be clear oneself want to protect the law of what, is worth protection, the current society, under the influence of preventive thought of criminal law, after a bit "worth protection" is the top priority, namely the consequences must be greater than the possible infringement of criminal law protection, the best, which is not only the requirement of the proportional principle of administrative law, the proportional principle should also be sacred principle, not only in making, but also reflected in the implementation.

Under the development of digital economy, both the platform and the algorithm are oriented to the data itself. In this regard, compared with algorithms and platforms, data, as an indispensable premise for the operation of digital economy, should become a legal benefit worth the protection of criminal law. However, the Criminal Law of China is currently specially used for the protection of data, only article 285 is the crime of illegally obtaining the data of the computer information system, and the establishment requirement of the crime is to obtain the data in the computer information system. If the storage carrier of the data is not the computer information system, the effective protection of the criminal law cannot be obtained. This legislative logic only focuses on virtuality and ignores the independent value of data beyond the computer information system itself. In addition, this article does

not have the ability to protect data utilization. Therefore, in order to deal with the cyber crime in the era of digital economy, we must focus on the whole process of data flow, grasp the data legal interests as the center, and then delimit the responsibility with the specific categories of legal interests.

The separate attribution of data legal interests and the affirmation of independent value do not mean that the modesty of criminal law is impaired. First of all, the "data" in data method should have the independent attribute of traditional social production factors. When data is regarded as the digital expression of traditional factors of production, the value of data is ancillary and dependent on the endorsement of the value of traditional factors of production. Therefore, the infringement of data at this time is essentially the infringement of traditional factors of production. It is only necessary to be covered by the data legal benefits when the data with independent value is infringed. Secondly, the protection of data security should be focused on the protection of data flow. Because, the static value of data is mostly related to its confidentiality and integrity, and it itself cannot produce considerable economic benefits. Therefore, the criminal acts of illegal data interception and illegal use of data should be focused on cracking.

Accordingly, the following adjustments can be made to the current criminal law norms: First, the section of "crime of endangering data security" is independently set up and placed under Chapter 6. Second, article 285 of the Criminal Law stipulates that the crime of illegally invading the computer information system should cancel the restriction on special fields, and the behavior of invading the computer information system in special fields should be classified as the type of heavier punishment, and the statutory punishment should be raised. Third, the "computer information system" in the crime of illegally obtaining computer information system data is deleted, and the crime is placed under the section of "crime of endangering data security". Fourth, the provision of the second paragraph of the crime of destroying the computer information system is deleted, and the crime of illegal modification, addition and deletion of data is independently set up in the "crime of endangering data security" section. Fifth, in the section of "crime of endangering data security", add the crime of obstructing data circulation and the crime of illegal use of data, and set a statutory punishment of more than three years, to focus on the crimes that seriously endanger the safety and efficiency of data circulation.

To accelerate the promotion of illegal provision, utilization and destructive acts, article 285 of the Criminal Law is still the crime of illegally obtaining computer information system data and illegally controlling computer information system, which is to protect the traditional legal interests represented by the legislation at that time, mainly property rights and interests. With the prominence of the independent value of data rights and interests, the misconduct of the data itself will make the data owner or user have the same sense of crisis as the property is looted.

"Get + profit", on the current criminal law evaluation, is basically a single evaluation for illegal access, it may have to provide profit behavior "don't have the possibility of" consideration, because after all, 77% of the case for profit mode, however, we can't default after providing profit behavior is inevitable event and then not to evaluation, in today's digital society, more to "provide profit" to obtain the purpose of mind, under the subjective motivation behavior pattern, hit the focus should be on providing behavior, rather than simple evaluation for behavior. Moreover, if it is not provided for the purpose of profit, such as the personal information provided to others after obtaining, if the crime of infringing citizens' personal information constitutes and competes with the provision behavior, it will be dealt with in accordance with this special law, so as to ensure the coverage of the protection of legal interests.

"Illegal use of data", the illegal use of actually essentially and "illegal" behavior has the same effect, in practice, the use of behavior itself will be diluted by subsequent related crime, lead to the judicial practice basic only pay attention to the subsequent crime conviction, and ignored the use of behavior itself. If subsequent crime did not meet the criminal standard, but for the use of behavior itself has been defined for the public, the penalty can rise sharply, at this stage we will consider the current data rights and interests of the public acceptance to not to penalty, however, like "help information network

crime", when someone more and more drill "use" behavior, the harm to collective law is increasingly serious.

"Damage data", article 286 of the Criminal Law "crime of destroying computer information system" paragraph 2 aims to protect the normal operation of computer information system, rather than regulating the behavior of destroying data. The Supreme People's Court issued in 2020 145 guiding case although think "did not cause network system function material damage or its normal operation" the destruction of data behavior does not constitute the crime of destroying computer information system, but the case itself also shows that practice is not damage to the computer information system but data damage cases. However, it should be noted that, with the embodiment of the value of data and the development of technology, the risk of data damage separated from the system is also increasing, and the importance and protection of some data can be separated from the value of the computer system itself to carry out effective legal interest protection.

So, we need to comb privacy crime, personal information crime, data crime, the connection between the computer information system crime, do cohesion between different legal priorities, at the same time pay attention to the cohesion between departments, especially the data safety law, the personal information protection law, in the background of the personal information protection law has introduced, the scope of personal information should be consistent, will not have the identification of personal information excluded, as data protection. In this way, the basic boundary between data crime and personal information crime is clarified. Clarify the red line of data control and processing to ensure that it can create more value in this era of increasingly large digital economy. The most afraid of the commercial society is uncertainty, "legal punishment", and remove the fog of the fuzzy zone to maximize the governance efficiency. Criminal law for the definition of data, information has lagged behind the relevant law research, although considering the lag of punishment laws, but the digital society has arrived, China has become the world's second largest digital economy, digital law of independent value increasingly apparent, all kinds, all field of data crime increasingly novel and frequent, how to from the overall grasp, regulation, is the trend of The Times.

## REFERENCES

- [1] ChengXiao.On the Relationship between Personal Information Rights and Privacy Rights[J].Contemporary Law, 2022,36(04):59-71.
- [2] PengChengxin.How to eliminate the fundamental contradiction of data utilization: based on the legal clarification of privacy, information, and data[J].Exploration and Competition,2020,(02):79-85+158-159+161.
- [3] Wang Yuan, Huang Daoli, Yang Songru.Research on the Nature and Attribution of Data Rights[J].Scientific Management Research,2017,35(05):37-40+55.DOI:10.19445/j.cnki.15-1103/g3.2017.05.010.
- [4] Jiang Tao, Han Chen.The dilemma and solution of criminal law regulation of cybercrime in the digital economy era[J].Journal of Soochow University (Philosophy and Social Sciences Edition),2023,44(01):57-69.DOI:10.19563/j.cnki.sdzs.2023.01.006.
- [5] Sun Guoxiang. Penetration and restraint of criminal justice in the digital economy era[J].Journal of the National Prosecutor's College,2024,32(03):32-48.
- [6] XiongBo.The Establishment of Legal Interests in Data State Security and the Adjustment of Criminal Law[J].Contemporary Law,2023,37(01):70-82.