

Children's Right to Personal Information towards Public Law

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Abstract

Children's personal information rights have both public and private law attributes. However, in the digital age, the protection of children's personal information in the mode of private law has been weakened. Children's right to personal information is gradually moving towards public law, and its right attribute should be a constitutional right. As a constitutional right, children's personal information right is more focused on the state's active protection obligation.

Keywords

Digital Age; Children's Right to Personal Information; Constitutional Right.

1. Introduction

According to the Regulations on the Protection of Children's Personal Information Online issued by the Cyberspace Administration of China, "children" specifically refers to minors under the age of 14. With the application of AI technology, the popularization of 5G and the arrival of the meta-universe, the age of children's access to the Internet is earlier in the digital era, which increases the risk of children's personal information. In August 2022, China Internet Network Information Center (CNNIC) officially released the 50th Statistical Report on the Development of Internet in China, which showed that the proportion of children under 10 years old online increased from 3.1% in December 2020 to 4.2% [1]. This shows that the intervention of the digital age to children is strengthened, and children begin to step into the digital age at an earlier and earlier age. Therefore, personal information processors will pay more attention to the collection of children's personal information, which is accompanied by information leakage and even the phenomenon of infringement of children's rights and interests. Children are limited by their young minds and do not have the ability to identify risks, which leads to their lack of network literacy and easy to be "clamped" by network behavior. In addition, in the digital era, the violation of children's personal information is more hidden, and it is more difficult to seek legal relief for the violation. It is urgent to clarify the legal attribute of children's right to personal information, and extend the right to the state's protection obligation to provide more comprehensive protection for children.

2. The Concept of Children's Right to Personal Information

Children's right to personal information refers to the rights and interests of children and their parents or other guardians to their personal information. Specifically, it includes the right to know, the right to consent, the right to change, and the right to delete children's personal information. Among them, the right of consent, as the most important sub-right of children's personal information rights, is also the legitimate basis for network operators to process children's personal information. At present, under the legislation of children's personal information in China, it is an important problem to realize the integration of the right to protect children's personal information and the current law. Therefore, it is necessary to use the principle of legal hermeneutics to make a reasonable positioning of the right attribute of children's personal information right. As public law is constantly involved in private law, it is

the key to protect children's personal information right to distinguish and analyze the legal attributes of children's personal information right based on the perspective of public and private law.

3. The Protection Mode of Private Law is Weakened in the Digital Age

In the face of the deepening of children's personal information infringement, China's Civil Code has formed a group of private law norms. For example, Article 111 of the General Provisions, "Protection of Privacy and Personal Information" of Chapter 6 of the Personality Rights and part of the provisions of the tort liability (such as the general provisions of tort liability, Internet tort liability, etc.). As a private right, the main function of children's personal information right is to prevent other civil subjects from infringing on children's personal information, that is, without the consent of children's parents or guardians, no one can collect, use or process their personal information. However, in recent years, as the number of violations of children's personal information rights increases, the relief of private rights can not provide a complete guarantee for children's right to personal information.

First of all, children living in the digital age are not faced with ordinary civil agents, but sometimes even powerful and organized information processing institutions [2]. At this time, it is difficult for parents or other guardians of children to seek "equal" private law relief. Secondly, the dynamic processing of children's personal information in the digital age is often complicated. In the process of participating in the Internet, children are subject to age and lack of risk awareness, which makes it difficult for them to make the right choice. As a result, children avoid self-help and are unable to seek active private remedies. Finally, in the digital age, violations are highly technical and hidden, and the child's party has insufficient ability to provide evidence, so the two parties are far from each other in the lawsuit. In March 2021, the Yuhang District Procuratorate of Hangzhou, Zhejiang Province, settled a civil public interest lawsuit against a domestic short video company for infringing children's personal information through mediation. In this case, the company processed children's personal information without obtaining the express consent of the children's guardian [3], which caused serious consequences to the unspecified children. It can be seen that private rights alone cannot fully protect the infringement of children's personal information rights, and public interest litigation can make up for the shortcomings of private law to a certain extent because of the intervention of public power (prosecutors). These new situations show that the relief of private rights is limited by the "equality" of private law, and the protection of children's personal information rights is not complete. Whether it is the guardianship of children by parents, the protection of personal information by personal information processors, or even the supervision of public authorities over children's personal information processors, public law needs to put forward higher protection.

4. Children's Right to Personal Information from the Perspective of Public Law

With the promulgation of the Personal Information Protection Law and the revision of the Minor Protection Law, the legal protection system of children's personal information with public law has been formed. Children's personal information rights are increasingly mature in the field of public law, and the attributes of public law are also shown. When it comes to the effect in the field of public law, the dimension of constitution cannot be ignored. I believe that children's right to personal information is a constitutional right for the following three reasons.

4.1. Children's Right to Personal Information Contains the Constitutional Value of Children's Personal Dignity

Indeed, the digital age has transformed the expression of human dignity. Information has become a constitutive element that cannot be separated by individuals. It is the natural expression of individual nature, social role and personality characteristics, as well as the embodiment of personal dignity and subject value [4]. In the digital age, children's right to personal information is their minimum freedom of expression and privacy. It contains the constitutional value of children's human dignity, which is the legitimate demand of children in the digital age, and also the reaffirmation of human dignity in the new era. In December 2013, the United Nations adopted resolution 68/167 on the right to privacy in the digital Age (A/RES/68/167). It states that rights that people had in traditional times, including the right to privacy, should also be protected on the Internet. At the same time, privacy, especially in digital communications, should be respected and protected. In the digital age, children's right to personal information has been integrated with personal dignity, which can be regarded as the development of the constitutional value of human dignity.

4.2. Children's Right to Personal Information is An Extension of the Right to Existence and Development in the Digital Age

In the new context of the digital age, people are increasingly dependent on information, and gradually peel away the role of natural person and turn to the role configuration of "information person". Facing the indisputable fact that the rights of "information person" are constantly violated, we should turn our attention to children as "Digital Vulnerable Groups". The essential feature of Digital Vulnerable Groups is the vulnerability of the right to subsistence and development, and the aforementioned risks are derived from this vulnerability. As the object of rights, children's personal information is the basic premise for children to participate in digital life. As one of the subjects of personal information rights, children enjoy the right of informed consent, which is also limited by this. The biological existence of human beings determines the form of human social existence to a large extent. Children living in the digital age are different from children in the traditional age and relatively independent from adults. Their relative independence is reflected in the unique spiritual pursuit of children, which is the age characteristics of children determined by the biological existence [5]. Therefore, children's indispensable need to participate in the Internet will inevitably affect the minimum freedom of expression of children in the cyberspace, which is related to their survival and development to a certain extent. The independent existence of children's right to personal information is based on this independence, which can be regarded as the extension of the right to existence and the right to development in the digital era.

4.3. Children's Right to Personal Information has its Constitutional Basis

Finally, from the standpoint of legal hermeneutics, we can find the constitutional basis for children's personal information right. According to the "constitutional view of the fundamental law", children's personal information right as a constitutional right needs to find a basis in the constitution. This is because constitutional rights are an objective value system, citizens only enjoy the rights within the scope of the constitution, but it does not exclude other rights extending from a fundamental value body [6]. At the same time, Statute law countries also need to use supreme law to limit "judge-made law". From a comparative constitutional perspective, Article 49 of the Dominican Republic's Constitution stipulates that "The enjoyment of these liberties shall be exercised respecting the right to honor and to privacy as well as the dignity and morale of people, especially the protection of youth and children, in accordance with the law and the public order". "These freedoms" include the right to information in paragraph 1 of that article and may be considered to directly define the child's right to personal information.

In the present Constitution of China, it is not possible to find the explicit stipulation of "child's personal information right" directly. However, it is not possible to ignore the existence of legal interpretation because of this narrow understanding. According to this, Article 38 of our current Constitution stipulates that citizens' human dignity is inviolable, and Article 49 stipulates that children are protected by the state. These two articles establish the fundamental values of the national community, namely the protection of the rights of children. It includes children's right to personal information with constitutional value of personal dignity, which can be regarded as the constitutional basis for children's right to personal information in China. Children's personal information right as a constitutional right, on the one hand, is the public right that citizens can request the state public power to act. On the other hand, it imposes an active protection obligation on the State. According to the "duty of protection of basic Rights of the State", the state's inaction and non-intervention can not directly guarantee the realization of rights, and the appropriate limitation of the state's public power should be emphasized [7]. This means that the state also needs to actively protect children's personal information rights, especially children based on the special subject, its national obligations should be more strict than other right subjects.

5. Conclusion

In conclusion, although children's personal information rights are both private law and public law, they belong to both private law rights and constitutional rights, but the digital era should emphasize more on the attribute of constitutional rights. This requires the state to take into account the inherent value of constitutional rights in the process of interpreting and applying private law, so as not to infringe on children's personal information rights. In other words, while advocating the protection of children's personal information by private law, we should also pay attention to the protection of children's personal information right by public law.

References

- [1] China Internet Network Information Center. The 50th Statistical Report on China's Internet Development[R]. Beijing: China Internet Network Information Center, 2022.
- [2] Wang Xixin. State's Obligation of Personal Information Protection [J]. China Legal Science, 2021(01): 145-166.
- [3] Fan Yuehong, Hu Tao. Strengthening the Network Protection of Children's Personal Information [N]. Procuratorial Daily, 2021.3.18.
- [4] Ma Changshan, 'The Fourth Generation of Human Rights' under the Background of Smart Society and Its Protection[J]. China Legal Science, 2019 (05):5-24.
- [5] Gong Xianghe, Human Rights Law [M]. Beijing: Peking University Press, 2013:222.
- [6] Xia Zhenglin. From Basic Rights to Constitutional Rights [M]. Beijing: Law Press, 2018:41.
- [7] Go KOYAMA, Translated by Wu Dong-ho and Cui Dong-ri. Legal theory of the Protection of Fundamental Rights [M]. Beijing: China University of Political Science and Law Press, 2021:2-13.
- [8] Zhang Hong. Fundamental Rights and Private Law [M]. Beijing: Law Press, 2010:49.