

Constitutional Protection of Personal Information Right under the Background of Big Data

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Abstract: *With the rapid development of computer and information technology, big data has penetrated into all aspects of social life, under the background of economic globalization, the big data flow of information covers many matters such as human life behavior and social behavior, but the rapid development of big data is not without harm. On the one hand, big data has greatly facilitated human life, and on the other hand, it is also very easy to lead to the infringement and abuse of personal information of information subjects, the most powerful evidence is that in recent years there have been numerous incidents of leakage and abuse of personal information.*

Keywords: *Big Data, Right To Personal Information, Misuse Of Information, Legal System, Constitutional Protection*

1. Introduction

Both nationally and internationally, the topic of "big data" has become the center of public conversation. Data has become an indispensable part of today's society, and the personal information of each citizen has become the core data content of "big data" ^[1]. China, as a country with a huge network scale and network user group, enjoys the convenience of big data for social development, but also faces a huge risk of personal information being misused, which makes everyone greatly hope that their personal information can be protected, and personal information protection has become an unavoidable topic. However, at present, the research on this aspect in China is more focused on the field of Civil Law, Criminal Law and Administrative Law, and there is relatively little research on the field of constitutional protection of personal information rights, while the Constitution, as the fundamental law of the country, can not only provide the basis for sectoral legislation, but also regulate and limit public power ^[2]. Based on this, it is necessary to re-examine the legal aspects of personal information protection from the constitutional level. The protection of personal information under constitutional regulation can make up for the shortcomings of our current legal system and provide a solid foundation and strong guarantee for the realization of the protection of the right to personal information. At the same time, how to safeguard the rights of citizens' personal information while maintaining state power and taking into account the public interest of society, enhance the awareness of the subjects of public power to respect and protect citizens' personal information, and build a comprehensive and effective legal framework for the rights of personal information is the common problem we face.

2. Overview analysis of the right to personal information

2.1 Definition of the right to personal information in the era of "big data"

In the traditional Civil Law, the right of personal information refers to the right of citizens to control, dominate and exclude their own personal information in accordance with relevant laws and regulations; specifically, it covers the right to decide, inquire, delete, keep confidential, block, correct and receive remuneration for personal information. However, with the development of society, the traditional definition of the right to personal information can no longer meet the needs of rights protection, and the concept and scope of the right to personal information should be redefined or expanded on the basis of the traditional one under the background of the era of big data. And the first is to clarify what big data is. Generally speaking, big data refers to the technology that uses algorithm technology to collect, store, analyze and process huge information data of social life, and extract useful information to serve the needs

of production and life. Therefore, the "big data" era refers to the era when big data technology has become universal and extensive in all aspects of society.

How does the wave of "big data" affect the right to personal information? In China's current legal system, the Cybersecurity Law specifies the connotation and concept of citizens' personal information rights in article 76, and citizens' personal information refers to information recorded through electronic technology or other methods, independently or in combination with other information that can identify individuals, and its scope covers name, gender, date of birth, certificate number, household registration address, contact information, biometric information, etc. According to the provisions of this article, the meaning of personal information in the era of big data can be deduced, that is, it includes the connotation that individuals can accurately identify their identity based on other information obtained in various ways, and also covers the extension of information obtained after technological processing and higher value commercial information, of course, it also includes personal information itself^[3].

From this, the specific connotation of the right to personal information in the era of "big data" can be deduced, including the right of citizens to accurately identify their citizenship based on the combination of other information obtained in various ways, and also the right of citizens to control information of higher value after processing by information technology, as well as the right of citizens to dominate personal information itself.

2.2 Discernment between the right to personal information and the right to privacy

The purpose of accurately distinguishing between the right to personal information and the right to privacy is to more independently and effectively protect the two laws, and the reason for the difference is that there are many commonalities in the connotation of the two, which has caused certain applicable obstacles to legislation and judicial practice. In terms of their legislative value orientations, the former includes freedom of information and human dignity, while the latter only emphasizes human dignity^[4]. According to the views of some scholars, although the right to personal information overlaps with the right to privacy in terms of objects and conflicts in terms of consequences, the right to personal privacy still exists side by side as a specific personality right with the right to privacy, both in the attributes of rights (the former contains personality and property rights, the latter is mainly personality rights), the content of rights (the former emphasizes the free disposal of information, the latter focuses on the privacy of information), and the object of rights (there is a certain intersection between the two here, but the former is only a form of expression of the latter), the modalities of protection (the former focus on prevention, more applicable to compensation for property damage, the latter emphasizes relief, and applies compensation for moral damage) are very different^[5]. Some scholars believe that the right to privacy is more passively defensive, that is, only when the right holder's right to privacy is faced with the possibility of illegal infringement or has been infringed, the right holder has the right to exercise the right; the right to personal information, on the other hand, is a combination of the right to access, supplement, correct, delete and block^[6]; and in the latest European Union legislation on personal information protection, two specific rights to be forgotten and to be portable have been added. It can be seen that, unlike the right to privacy, the right to personal information does not have a precondition for the right to be in danger or infringed in the process of exercising the right, so it also shows its positive rights characteristics^[7].

In order to solve the problem of overlapping legal protection of personal information rights and traditional privacy rights, it is necessary to improve the legal interpretation and applicable rules of the two. It is not appropriate to include the right to personal information in the category of rights of specific personality rights, because specific personality rights have their own independent and definite connotations and extensions, and the right to personal information obviously does not meet the requirements of the certainty of extension, and its extension will change according to the times and circumstances. When the rights to name, privacy, and portrait rights in specific personality rights intersect with the scope of protection of personal information rights, there is no necessity to clearly delineate the boundary of protection between the two as long as the above rights can be effectively protected. Therefore, personal information should be excluded from the scope of specific personality rights, and established as a framework right, leaving room for the extension of subsequent continuous development and change, and avoiding omissions and lags^[8].

2.3 The importance of the right to personal information in the era of "big data"

In today's society, in the context of globalization and the era of big data, with the rapid development

of the Internet industry and computer information technology, the production and life of the people have long been inseparable from the network industry and the information industry, and the convenience and change brought by technological development should be affirmed, but at the same time, the high risks brought by it to the security of citizens' personal information cannot be ignored.

With the development and improvement of various functions of mobile phones, it has realized most of the physical needs of people's life and even production processes, and mobile phones have become an indispensable necessity for everyone. However, the prerequisite of using the powerful functions of the mobile terminal is to be in a state of networking, if the mobile phone is the heart of the human body, the network is the blood of the human body, and its importance can be imagined. But there are great drawbacks to the use of the network, that is, all traces of the user's use of the network will be analyzed and processed by big data storage. At the same time, due to the maturity and penetration of the Internet industry, many merchants often use big data technology to analyze the user's consumption behavior and preferences and other personal information in order to accurately locate the target customers among the massive users, in this case, it will inevitably infringe on the user's right to know and the right to personal information, and even easily lead to a wide range of personal information security incidents ^[4].

In recent years, the frequent cases of infringement and abuse of personal information are warning society that the era of big data has brought great threats to citizens' personal information rights, and the solution to the root cause lies in strengthening the protection of personal information in legislation. Only by establishing and improving legislation on personal information security can the abuse of personal information be reduced and the public's personal information be valued and protected as much as possible. Therefore, it is important and urgent to improve personal information legislation to protect the rights and interests of the public.

3. Analysis of the problems and causes for the protection of personal information

3.1 The problem of misusing personal information

Undoubtedly, citizens' personal information has a high commercial value to market subjects, and the profit-seeking nature of market subjects will easily lead them to do whatever they can in collecting and using valuable personal information. Data reuse is a means of utilizing the value of personal information, and it is also the significance of big data that can lead an era. However, one of the ways to reuse the data is to provide the data to the third party subjects in need, including data sharing, paid authorization and other reuse modes. However, most of the information subjects do not know about the sharing and authorization of the information, or they know about it but not their real subjective will. For example, in real life, the standard terms of common monopoly platforms on the use of personal information, due to the large number of contents and unchangeability, lead to most information subjects being forced to authorize or transfer rights for the purpose of using the service, at which time the user's personal information rights are undoubtedly infringed ^[9].

Another way to use personal information is the compulsory push of the website or platform, the information subject is like an emperor dressed in new clothes when using network services, walking naked in front of the network service provider, the network service provider is clear about the browsing content and time, consumption habits and preferences, location information and even IP address of the information subject. Internet service providers usually collect, analyze and process user information, and then place corresponding advertisements according to users' needs and preferences, so as to achieve their profit-making purposes. If a network service provider wants to use the user's personal information, the collection of information is an inevitable procedural prerequisite. In recent years, users are compulsively required to open their permissions, including recording, video recording, calling, sending messages, reading address book, etc., and are forced to fill in their names, contact information, ID numbers and other sensitive personal information at the beginning of using various software, APPs, and small programs, but according to relevant surveys, the information and permissions required by network service providers do not all reach the state that the related applications cannot be used without authorization, which will lead to network service providers holding more personal information of users that is not valuable to them but may be valuable to others, which will undoubtedly lead to the abuse and infringement of personal information ^[9].

Therefore, from the current situation, the data security situation is not optimistic, especially in terms of personal information protection. The development of technology is a double-edged sword, although it has brought great convenience to the production and life of society, but it has also produced a large

number of security risks, including the infringement of personal information. There is no doubt that criminal responsibility should be borne for the wanton abuse of citizens' personal information, but if we want to fundamentally solve or reduce the hidden dangers of information security under big data, and form a delicate balance between the value of personal information and the value of technological development, we must pay more attention to the problem of abuse of personal information. In the future, in terms of legislation related to personal information, it is also necessary to reasonably distinguish between personal information and personal privacy, and at the same time, we should adhere to the guiding ideology of equality of interests, establish a correct concept of privacy, focus on preventing the abuse of personal information, formulate and improve relevant laws and regulations, legislate cautiously, and strengthen legislative convergence.

3.2 Analysis of the causes of the abuse of personal information

3.2.1 The complete legal protection system is not yet perfect

In China's existing legal system, if you directly search for "personal information", whether in laws and regulations or in legislative and judicial interpretations, the number of provisions that directly stipulate this is sparse, and even if it is summed up, the number is very limited. Although the Personal Information Protection Law has been promulgated, a complete legal protection system has not yet been formed, and the content of the law is relatively general, and effective legal guidelines have not been issued in practice. In addition, the scope of application of laws and regulations is different, which leads to the complexity of the application of laws and regulations in practice, and it is difficult to form a systematic operation specification. With the continuous development of information technology, the integration of traditional industry and information technology has become more and more profound, and the legal issues arising in society have become more and more complicated. Because of the complexity and specificity of these problems, which are difficult to measure these issues by a universal standard, and considering the different characteristics of remedies for victims, different solutions must be provided for different situations^[10].

3.2.2 Insufficient legislation on the subjects of public power

According to the analysis of the above reasons, it can be concluded that it is not only the private rights subjects that cause the risk of infringement of personal information, and the insufficient regulation of public power subjects is also one of the reasons for the abuse of personal information, but as mentioned above, the legal protection of personal information rights in china's current laws and regulations mainly focuses on the regulation of private subjects. However, the threat of infringement and misuse of personal information brought about by big data is also widely present in the process of collection and use of personal information by subjects of public power, coupled with the disparity in status between public and private subjects themselves, if we still rely solely on the existing laws and regulations, we are bound to be unable to cope with or regulate the infringement of personal information rights by subjects of public power. In addition, even if some provisions of the current laws and regulations regulate the infringement of the right to personal information by public power, there are still problems such as general legal provisions and scattered distribution of provisions, resulting in legal provisions not being able to solve the problem of infringing personal information rights well, so that it cannot truly and effectively regulate the subject of public power. All in all, China's current laws and regulations on the protection of personal information cannot well solve the problem of citizens' personal information being infringed under big data. Therefore, in order to properly solve the problem of insufficient legal protection of personal information under big data, we should pay equal attention to the legal regulation of private rights subjects and public power subjects, so as to more comprehensively protect citizens' personal information rights.

3.2.3 The Lack of right to personal information

Although China has promulgated the Personal Information Protection Law, and there are some provisions on the protection of personal information in the current legal system, however, in China's current laws and regulations, there is no such clear legal provision that citizens have the right to personal information, but adopt the principled statement that the law protect the personal information of citizens, and the right to personal information has not yet been included into the scope of citizens' legal rights, not to mention the specific content of the right to personal information.

Citizens' right to personal information as a loophole in the current legal system, especially in the absence of our Constitution, is one of the reasons why citizens' personal information cannot be effectively protected by law. Because the right to personal information has not been written into China's Constitution, the subordinate law on the protection of citizens' personal information rights, led by the civil legal system,

cannot be effectively implemented due to the impact of the fundamental law. Considering the concept of balancing the protection and use of personal information, China needs to legally protect personal information when the interests of individuals are balanced with the interests of enterprises and the public interests. Therefore, it is necessary to clarify the right to personal information through legislative norms for three reasons: Firstly, there are corresponding legal provisions on the protection of personal information in the Personal Information Protection Law, the Cybersecurity Law, and the Civil Law and Criminal Law, so the explicit provision of the right to personal information is conducive to the clarification and definition of individual information; the second is to clarify that the right to personal information will make a better independent distinction between this right and the right to privacy, and then give the right holder the statutory right to claim to protect its own rights and interests; the third is to clarify in the legislation that the right to personal information is a common practice for the protection of human rights in the world ^[11].

4. The necessity and feasibility of constitutionalizing the right to personal information

4.1 The necessity of constitutionalizing the right to personal information

As we can see from the above analysis, under the tide of big data, the meaning and scope of personal information right are changing with each passing day. The repeated infringement and abuse of personal information lead to the protection of citizens' personal information becoming more and more important, but at the same time, the lack of regulation in the civil and criminal fields makes this problem worse. Therefore, it is necessary to determine the important status of citizens' personal information right as a basic right in the Constitution, it can not only promote the implementation of personal information protection by the subordinate law, but also provide a legal basis for the legal protection of personal information.

4.2 The feasibility of constitutionalizing the right to personal information

According to the research of Chinese scholar Yuting Ma, she puts forward the following three suggestions for the legal protection of Chinese citizens' personal information from the perspective of the Constitution: First of all, clarifying in the Constitution the important position of citizens' personal dignity in personal rights, and at the same time, clarifying that personal dignity is the constitutional basis for citizens' personal information rights; secondly, the sectoral law on the protection of citizens' personal information can be formulated to refine and specify the legal protection of personal information; thirdly, we should attach importance to the role and function of the unconstitutional review system in the constitutional protection of citizens' personal information rights. According to the view of scholar Zhiwen Sun, he believes that the constitutionalization of citizens' personal information rights can be realized by adding the right to personal information to the scope of basic rights in the Constitution, and to guide other subordinate laws on the protection of citizens' personal information to optimize and improve legal norms, so that acting in this way is not only suitable for China's current specific national conditions, but also plays a more active role in the protection of citizens' personal information.

We can also learn from the constitutional practice of citizens' right to personal information abroad. In the historical process of legal protection of citizens' personal information, there has been an almost completely opposite contradiction between "private rights first" and "information freedom" from beginning to end. At the same time, this contradiction is also the core problem that countries and regions in the world have to face in the legislative protection of personal information. Based on the differences between many factors in various countries and regions, two legislative protection modes of "private rights first" and "freedom of information" have finally been formed in the world. Combined with international legislative trends and China's specific national conditions, China's legal protection of citizens' personal information rights should be focused on private rights and protected by the Constitution, so as to realize citizens' free disposal of their own personal information; at the same time, the cost of breaking the law and committing crimes by criminals who infringe upon or abuse other people's personal information should also be increased, and both the subjects of public power and the subjects of private rights should be included in the scope of legal regulations such as the Personal Information Protection Law ^[13].

5. Analysis of the Approach of Constitutional Protection of the Right to Personal Information

5.1 Completing the legal protection system for personal information

First of all, in the legislative process, the status of personal information should be established on the basis of the Constitution. Article 1 of the Personal Information Protection Law is that this law is enacted in accordance with the Constitution. The words "in accordance with the Constitution" were added in the process of the third instance, which shows that China has raised the protection of personal information to the fundamental status of the country, which is consistent with the relevant provisions of the Constitution and emphasizes the respect and protection of human rights by the state.

Secondly, the Personal Information Protection Law, as the core departmental law for the legal protection of personal information, stipulates that the state should establish and improve the personal information protection system, but the law is only the beginning, and relevant supporting implementation rules should be promulgated as soon as possible so that personal information can be truly protected^[12]. Because there are three reasons: one is that the law cannot cover all specific rights, and more specific laws and regulations should be issued to refine and improve specific rights; the second is that the collection, use and even protection of personal information are extremely technical, and it is difficult to effectively adjust the technical rules only through the law; the third is that big data technology is in a period of rapid development, the collection and use of personal information and even the types of information are constantly updated and iterated, and the Personal Information Protection Law needs to be relatively stable, so laws and regulations that are synchronized with technological development or can meet the requirements of the norms should be formulated to achieve comprehensive protection of personal information^[13]. It is not enough to rely on Personal Information Protection Law alone, and the key to the legal protection of personal information should lie in the establishment of a mature and perfect legal system with the Personal Information Protection Law as the core.

5.2 Establishing a system of laws and regulations that combines the protection of public law with the protection of private law

For the legal protection of personal information, whether it should be regulated by private law or public law is a problem worth discussing. Through reading relevant materials show that public law has occupied an important place in the protection of personal information in the European Union legislation^[14]. Before the promulgation of the Personal Information Protection Law, some scholars suggested in the draft proposal that a system could be established in which subjects that profits from the collection and use of personal information should declare to the relevant departments before collecting citizens' personal information. In short, the subject should register with and obtain approval from the competent government authorities before the information is collected^[14]. But in both China and the European Union, the vast majority of scholars have a negative attitude towards such a way of emphasizing administrative intervention. They believe that: Firstly, the European Union has tried the declaration system in the practice of legal protection of personal information, but the system has long been criticized for the high risk of personal information leakage and the high cost of implementation; Secondly, the relationship between information subjects and entities using personal information is regulated by civil legal relations, and even if the government participates in the process of information collection and use, it should be regulated by the same type of law.

However, the above proposition does not take into account the background of the era facing the protection of personal information, as mentioned earlier, in the context of the era of big data, the private space left by the subject of public power to individuals is getting narrower and narrower. In the eyes of the public, the subject of public power has become the big brother of personal information collection and use (Big Brother), the government in order to ensure the scientific and efficient management of the introduction of big data technology, in this case, the collection and use of citizens' personal information is inevitable. The government has become the biggest source of threats to the security of personal information. Moreover, the public law protection of personal information emphasized in this article is not to strengthen the public power of the government, but to require that the behavior and process of the government collecting and using citizens' personal information should be subject to higher standards. Therefore, public law protection should be regarded as the cornerstone of the legal protection of citizens' personal information, and then combined with private law protection in various fields, a unified legal protection system for citizens' personal information should be constructed for public law protection and private law protection. Moreover, only under the premise of achieving the coordination and unification of the two, can the rights and interests of personal information subjects in China be fully protected^[15].

5.3 Strengthening the status of the right to personal information in the Constitution

Looking at the legislative and judicial experience of foreign countries on the protection of personal information, it is not difficult to see that there are certain commonalities in legislation in various countries and regions, that is, the protection of personal information is included in the scope of basic rights in the Constitution, and take this as the beginning of constructing relevant legal system. Based on this, China can learn from the legislative experience abroad, determine the basic right positioning of personal information right in the Constitution and strengthen this positioning of the basic right, and use this as a starting point to build a legal system for the protection of personal information that conforms to China's national conditions ^[15].

As one of the basic rights of the Constitution, the right to personal information can be determined on the basis of the provisions of human rights and personal dignity, and the first paragraph of these two provisions can be used as the premise of the legal norms of personal information to deduce the right to personal information as a basic right. At the same time, combined with the basic rights in the Constitution, such as the right to personal freedom, the right to freedom and secrets of communication, and the right to housing, on the one hand, it will provide a favorable reference significance for the definition of the connotation of the right to personal information, and on the other hand, it will also provide basic legal norms for the right to personal information to become a basic right in the Constitution and strengthen the status of the right to personal information in the Constitution.

According to the views of some scholars, they believed that the right to personal information should be directly written into the Constitution as a basic right, but based on the experience from abroad and the current construction of China's current legal system, there is no need to use the method of amending the Constitution to determine the constitutional status of the right to personal information. There are three reasons: Firstly, drawing on the legislative experience of foreign countries, including the United States, Japan, Germany and other countries, the above-mentioned countries have not determined the right to personal information as the basic right of individuals through the way of stipulating in the Constitution, and more commonly, the constitutional status of the right to personal information is demonstrated by legal argumentation and legal deduction, and then the introduction of departmental laws specifically protects the right to personal information, and according to the effect of practical feedback, good practical results have been achieved; secondly, there are detailed provisions on basic rights in China's current Constitution, which provide sufficient provisions and normative guarantees for the derivation and argument that the right to personal information is a basic right of the Constitution; thirdly, as the mother law of all laws and regulations in our country, the Constitution should not be changed at any time, and it is also necessary to take into account the high costs and complicated procedures faced by amending the Constitution, and it is not appropriate that the constitution will be amended just because of the establishment of a single right ^[15].

6. Conclusion

In summary, the right to personal information of Chinese citizens is still in an disadvantageous situation such as the lack of clear rights content, the lack of sound laws and regulations, and the difficulty of implementing legislative protection, and exploring the constitutionalization of the right to personal information will solve or improve the above problems to a certain extent. At the same time, clarifying and strengthening citizens' personal information rights occupies an important position in the Constitution as a basic right, and will play an important role in building a legal protection system of personal information with the Constitution as the basis for protection, departmental laws as the means of protection, and other laws and regulations as supplements ^[3]. By establishing and strengthening personal information protection legislation in a constitutionalized manner, it is conducive to truly realizing the effective protection of citizens' personal information rights in the era of big data.

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