

Research on Legal Protection of Consumers' Personal Information From the Perspective of Public Interest Litigation

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Abstract

In the era of big data, consumers' personal information security is facing severe challenges and risks. Therefore, it is urgent and important to strengthen the protection of consumers' personal information. In the personal information leakage incident of consumers, the victims are unspecified groups, and the number of consumers who have suffered losses and the actual losses of ordinary consumers is uncertain. By filing consumer civil public interest litigation, consumers can be effectively encouraged to defend their rights through litigation, which increases the cost of offense and avails the prevention of illegal behaviors. However, there are still many problems in public interest litigation of consumers' personal information protection. Firstly, it is difficult to distinguish the subject of infringement and its internal responsibility allocation. Secondly, the level of evidence collection means of procuratorial organs can't match the needs of the investigation, which disadvantages prosecutors compared with the powerful objects of evidence collection. Thirdly, the problems of jurisdiction confirmation and low efficiency on the referral of jurisdiction have not been solved. Fourthly, the overlapping of laws has caused the judge's discretion to be too wide. Fifthly, the standard of remedies for infringement is unclear. Based on those above, this paper puts forward some suggestions on public interest litigation of consumers' personal information from five aspects: positioning the subject of infringement, standardizing jurisdiction, strengthening investigation and evidence collection, perfecting legal responsibility and clarifying the application of law.

Keywords: consumer, public interest litigation, protection of personal information

With the development of the big data era, a large number of personal information of natural person is collected and used illegally. At the same time, they are faced with the risk of illegal trading and leakage. According to the data of the "Survey Report on the Protection of the Rights and Interests of Chinese Netizens (2021)", 78.2% of netizens' personal identity information has been leaked, and 82.3% of netizens think that the disclosure of personal information has affected their daily life. However, the protection measures of consumers' personal information are seriously lacking. Many operators illegally use consumers' information, and engage them in illegal activities. Their actions have violated the criminal law and been punished by criminal law. However, in addition to criminal penalties for illegal businesses, it is also necessary to protect consumers' rights and interests through civil litigation. However, due to the unequal status between consumers and business operators, the high cost of right-defending and other factors, many consumers will not choose legal means to safeguard their legitimate rights and interests after suffering from the illegal disclosure of personal information.

In April 2021, the Supreme People's Procuratorate issued 11 typical cases in which procuratorial organs filed public interest litigation for personal information protection, which further improved the protection of citizens' personal information through public interest litigation. Article 70 of the *Personal Information Protection Law of the People's Republic of China* (hereinafter referred to as "*Personal Information Protection Law*"), which came into effect on November 1, 2021, clearly stipulates that personal information protection should be included in the legal field of procuratorial public interest litigation, which provides a new path for consumers to protect personal information and safeguard their legitimate rights and interests. Based on this, this paper will analyze the dilemma of protecting consumers' personal information and the deficiency of remedies from the legal angle, and provide suggestions for the legal protection of consumers' personal information from the perspective of public interest litigation.

1. The Necessity of Public Interest Litigation of Consumers' Personal Information Protection

1.1 Personal Information Processors, as Obligatory Subjects, Lack Industry Self-Regulation

Personal information processors, as obligatory subjects, lack industry self-regulation. It is often seen that the Internet industry takes advantage of its dominant position to infringe on consumers' personal information rights. In the era of big data, information is a resource for competition between enterprises and has a certain commercial value, which is also one of the important factors why Internet enterprises are keen to collect consumers' personal information. By screening, processing, and reusing consumers' personal information to target customers accurately and conducting targeted marketing, enterprises can obtain a broader market share and more economic interest. Enterprises exchange the consumers' personal information they have with each other to maximize their economic interest and don't take the initiative to protect the personal information provided by consumers. There are even organizations that specialize in collecting, processing, and trading information and transferring the information they collect to others for the paid. Some Internet practitioners lack industry self-regulation, which is an important factor in infringing consumers' personal information rights.

1.2 Private Interest Remedy Cannot Protect Consumers' Personal Information Rights and Interests Effectively

First of all, in the era of big data, information processors and consumers, that is, information subjects are in an unequal position. It is difficult for consumers to realize that their information rights have been damaged. Operators, especially network operators, illegally obtain consumers' personal information through network technology and other means. However, the majority of consumers lack the concept of rights of personal information do not know whether their personal information is illegally collected and used by operators, and the consequences of their personal information leakage. Secondly, the cost of offence of personal information processors is low while the cost of protecting consumers' rights is high. Even if consumers are aware that their personal information rights and interests have been infringed, they rarely file litigation to protect their rights. In addition, personal information is hidden in the era of big data, and can be collected and deleted at a high speed, which leads to the difficulty of providing evidence for consumers in the process of litigation. Finally, even if consumers file litigation, the illegal cost of personal information processors is minimal in the private interest remedy, making it difficult to serve as a disciplinary measure. In the case of private interest remedy, it is difficult to discipline the law breakers.

1.3 Consumers' Personal Information Has Public Welfare Attribute and Belongs to the Scope of Public Interest Litigation

In the era of big data, personal information presents a more obvious public welfare attribute. Firstly, in the process of collecting personal information by state organs, enterprises and relevant administrative departments, it is no longer limited to a specific fixed group, but is aimed at an unspecified majority. For example, during the epidemic prevention and control period, consumers are required to upload personal information such as ID card, home address, and travel code, when shopping for drugs in pharmacies or online. Secondly, in the digital economy environment, consumers' personal information is extremely functional and valuable, and is a competitive means of production for many enterprises. In this regard, consumers' personal information also has certain attributes of public goods. Thirdly, personal information is also the basis and tool of social management. Personal information can help administrative departments to better know the basic situation of the collective and society, and formulate exclusive plans on this basis. In addition, consumers' personal information also belongs to the scope of public interest litigation. The *Civil Procedure Law of the People's Republic of China* stipulates that procuratorial organs can file administrative public interest litigation and civil public interest litigation in accordance with the law. The *Personal Information Protection Law* stipulates that the protection of personal information shall be included in the legal scope of procuratorial public interest litigation.

2. Problems in Public Interest Litigation of Consumers' Personal information Protection

2.1 Difficulties in Determining the Subject of Infringement Position and Internal Responsibility Allocation

Consumers' personal information leakage cases are often handled by various subjects in multiple fields, and it is difficult to determine the subject position and to presume the internal responsibility allocation. According to Article 70 of the *Personal Information Protection Law*, the proper defendant in public interest litigation of personal information protection refers to a personal information processor who violates the law by processing personal information and infringing the rights and interests of numerous individuals. The definition of a personal information processor is provided in Article 73, Paragraph 1 of the *Personal Information Protection Law*: "An organization or individual that autonomously determines the purpose of processing and means". It is thus clear that the *Personal Information Protection Law* does not limit the scope of defendants, but stipulates that all

personal information processors can be proper defendants. At the same time, Article 69 of the *Personal Information Protection Law* also stipulates personal information infringement liability and damage compensation liability, but it only preliminarily defines the identification standards of infringement liability and damage compensation liability. How to clarify the distribution of interests among multiple subjects involved in specific cases is still a difficult problem.

In infringement cases of consumers' personal information, the subjects involved in multiple links of personal information collection, and processing are all within the scope of personal information processors and may all become the subjects of infringement. In judicial practice, in addition to the more common operators, proper defendants sometimes involve the supervision and regulation departments and even public security organs that have a large number of consumers' personal information. Therefore, in the process of public interest litigation of consumers' personal information, the problem of how to determine the specific infringers and how to clarify the distribution of interests among each liability party to determine the compensation liability needs to be solved urgently.

2.2 Difficulties in the Jurisdiction of Public Interest Litigation of Consumers' Personal Information

In public interest litigation of consumers' personal information, the cross-regional litigation subject and the inefficient process of transferring cases cause jurisdiction problems. Illegal acts of consumers' personal information may span multiple counties, cities and even provinces, and the jurisdiction provisions of various procuratorial public interest litigation are inconsistent. In the case of multiple administrative organs having jurisdiction, when the procuratorial organs confirm their jurisdiction, how to choose a more suitable administrative organ needs to be solved urgently. At the same time, the problem of referral of clues due to the different locations between the victims and the illegal operators has not yet been clarified. How to deal with the situation that the clues are not referred in time or the relevant departments are not accepted in time after the clues are referred still needs to formulate unified standards for implementation. According to the relevant provisions of the *Civil Procedure Law of the People's Republic of China*, the public interest litigation filed by the local government shall be transferred to the jurisdiction of the provincial procuratorate. Although procuratorial organs that refer cases provide assistance and convenience in the investigation and evidence collection, different jurisdictions can affect the efficiency of handling cases (Dong, C.-C., 2020). If there is no reasonable assessment mechanism, the referral efficiency shall be low, public interest litigation shall also be affected, and the effectiveness of supervision shall be difficult to achieve.

2.3 Difficulties in Evidence Collection for Public Interest Litigation of Consumers' Personal Information

The professionalism of the public interest litigation of consumers' personal information protection and the imperfect internal means of the procuratorial organs cause difficulties in evidence collection. In terms of evidence collection means, because personal information infringement is associated with high-tech such as the Internet, artificial intelligence, and presents the characteristics of cross-region, mass-related and whole chain, the procuratorial organ needs matching investigation and verification means to discover, collect, fix and identify relevant evidence. In practice, it mainly depends on the criminal investigation means of public security organs or asking the Internet platform for help. It is difficult for procuratorial organs to collect evidence from relevant organs, institutions and personnel, which affects the quality and efficiency of cases (Liu, J.-P., & Wang, Z.-J., 2021). In terms of evidence collection objects, the defendants of public interest litigation of consumers' personal information protection often involve network technology, among which there are many leading enterprises with strong financial resources in the Internet field. When they are equipped with a strong lawyer team and rich technical experience, the procuratorial organ is relatively easy to be at a disadvantage position, which is not conducive to the subsequent supervision and evidence collection.

2.4 Difficulties in the Law Applicable to Public Interest Litigation of Consumers' Personal Information

The same infringement triggered multiple legal adjustments, leading to difficulties in the application of the law, and a wider discretionary power of law enforcement officials. There is more than one law regulating consumers' personal information protection in China, including the *Personal Information Protection Law*, *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* and *Data Security Law of the People's Republic of China*, etc. The provisions of these three laws on administrative penalties for infringing consumers' personal information vary greatly, among which the *Personal Information Protection Law* imposes the strongest penalties. Based on the principle that the special law is superior to the general law, consumers' personal information protection is preferred to the *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* followed by the *Personal Information Protection Law*. However, in judicial practice, the same illegal act is likely to violate the provisions of multiple laws at the same time, that is, multiple

legal adjustments can be applied. However, the differences in the provisions of different laws on the same content lead to the greater discretionary power of judges. For example, on the issue of administrative penalties, the different grasp of penalties scale by local law enforcement agencies is prone to produce significantly different results, in the absence of a uniform standard.

2.5 Difficulties in Defining Losses Caused by Infringement of Personal Information and Unclear Criteria for the Damage Compensation

In public interest litigation of consumers' personal information protection, it is difficult to define losses caused by infringement of personal information, and there is no clear evaluation method for the identification and benchmark of damages, which makes it difficult to show the compensation effect of public interest litigation. Both the *Personal Information Protection Law* and the *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* clarify the right of prosecution of procuratorial organs and consumer organizations as the subject of public interest litigation at the legal level. However, there is still no unified standard in current judicial practice on how to identify the damages of the infringed parties in specific cases and how to determine the amount of compensation. According to Article 69 of the *Personal Information Protection Law*, the identification of consumer losses and compensation liability, as well as other litigation requests such as cessation of infringements, removal of obstacles, and elimination of dangers, all require judicial practice to propose appropriate identification standards and technical solutions.

3. Suggestions on Improving Public Interest Litigation of Consumers' Personal Information Protection

3.1 Positioning the Subject of Infringement From the Algorithm Operation Process

To know the human infringement behind the algorithm, it is necessary to master the behavior of relevant human beings during the operation of the algorithm and judge whether it is illegal (He, X.-X.). For vendors, the algorithm may be flawed by the deliberate establishment of unclear, subjective or underhanded review systems to preserve their rights to shelve, distribute and update applications at will. For data providers, the act of grabbing users' personal data without their consent shall be subject to negative legal evaluation; For the algorithm application platform, as the medium to present the algorithm to the user, it has the obligation to review and supervise. When the platform is negligent to act and allow the algorithm infringement platform to produce infringement damages, it shall also be identified as the subject of infringement.

3.2 Centralized Designation of Jurisdiction and Standardized Jurisdiction by Forum Level in Parallel to Solve Jurisdictional Problems

Since the pilot reform of cross-administrative division procuratorates in 2014, China has formed a new litigation pattern of cross-administrative division procuratorates dealing with special cases such as environmental resources, food and drug safety. This has broadened their scope of mind and accumulated experience in the handling of public interest litigation of personal information.

It is suggested that the field of public interest litigation of consumer personal information should learn from experience and centralized designation of jurisdiction and standardized jurisdiction by forum level in parallel. On the one hand, the basic people's courts have jurisdiction over public interest litigation cases concerning consumers' personal information, and when necessary, public interest litigation cases concerning personal information with significant impact are under the jurisdiction of intermediate courts or higher. In this way, it can play the advantages of the basic-level procuratorial organs, which can provide the best solution for the exploration and practice of public interest litigation of consumers' personal information based on their rich experience in handling cases and the more substantial number of prosecutors and judicial resources. They also avoid the increase in litigation costs caused by the elevation of level jurisdiction, which is more conducive to the value of public interest litigation (Shao, J., 2021).

On the other hand, it is suggested that the jurisdiction should be delimited according to the geographical distribution of the personal information infringed in the case, the degree of damages to the public interest and other factors. The corresponding centralized designation of cross-administrative division procuratorial organs and judicial organs should be set up. The cases that may have local protection and cross-regional influence should be included in the jurisdiction of the cross-administrative division procuratorial organs in the second instance or in cases and the operating procedures for establishing centralized designation of jurisdiction should be explored.

3.3 Multi-Channel to Improve the Ability of Investigation and Evidence Collection in Public Interest Litigation of Consumers' Personal Information Protection

Consumer personal information cases are highly specialized and technical, especially in the context of the

Internet, where the subjects collecting and processing consumers' personal information are usually the leading enterprises in various fields and have technological advantages. This brings many difficulties to the investigation and evidence collection of public interest litigation of consumers' personal information cases. In this regard, it is suggested that procuratorial public interest litigation should actively expand the channel of clues and the means of investigation and evidence collection.

In terms of clues collection, prosecutors can pay attention to the relevant social hot spots, such as mining clues related to the case according to the online enterprise information query platform, and investigating the list of application software for illegal collection of personal information issued by the Cyberspace Administration of China, and investigate the illegal act of public interest litigation. For clues found in criminal cases, the overall flow chart of personal information involved in the case can be sorted out from the case file, focusing on the behavior and internal connection of personal information processors in various parts, such as the collection and exchange of personal information, in order to identify the illegal subjects and clarify their responsibilities (Xu, Y., & Zhang, M.-M., 2021).

In terms of evidence collection means, the traditional means such as inquiry, query and investigation have limitations and cannot adapt to the professionalism and technicality of consumer personal information cases. The approach suggested in Article 36 of the *Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates* could be focused, such as organizing the participation of prosecutors and technicians and persons with expertise in the investigation and evidence collection process with technical assistance. Specifically, it is possible to start by inviting experts and technologists, such as the establishment of a network technology expert support team, the engagement of computer experts to hold hearings, and the summary of expert opinions after internal discussions, to assist and improve the mechanism for handling cases. Second, it may also actively seek to cooperate with large Internet enterprises to collect evidence and introduce third-party evaluation organizations. Of course, the personnel handling a case themselves need to have a certain understanding and reserves of the relevant knowledge. They can overcome practical problems, and seek common progress and overall improvement, through the organization of special training for relevant personnel, the exchange of experience and seminars on the handling of consumers' personal information cases.

3.4 Clarify the Compensation Standard and Improve the Legal Liability in Public Interest Litigation of Consumers' Personal Information Protection

It is suggested to clarify and improve the liability clauses in consumers' personal information protection public interest litigation from the following two aspects. Firstly, for the losing party in the personal information protection public interest litigation, its damage compensation liability and other obligations such as making a formal apology and compulsory deletion of personal information should be clarified.

First of all, for the way of damage compensation, it should be based on the reasonable expenses of the prosecution subject to filing public interest litigation, and exclude punitive damages liability. The reasons are as follows. Firstly, concerning the provisions of punitive damages, the existing laws in China mainly address the field of private interest litigation and do not apply to public interest litigation. The inherent logic of this initiative is that in private interest litigation such as infringement of consumer rights or environmental pollution, there are a large number of victims, but the losses are low, and the costs of safeguarding rights are high, which leads to the lack of motivation for victims to safeguard the rights. The system of punitive damages in individual private actions was established to safeguard the rights of such victims and also to prevent the infringing party from escaping liability and avoiding recidivism (Zhang, X.-B., & Lai, C.-Y., 2021). However, consumers' personal information public interest litigation is mainly prosecuted by the people's procuratorate or relevant organizations, there is no reason to introduce a punitive damages system as mentioned above. Secondly, in view of the scope of the amount of damages, it should be limited to reasonable expenses such as attorney's fee, transportation fee and appraisal fee incurred by the prosecution subject to filing the public interest litigation. On the one hand, it can make the compensation standard clearer and make it more operable and uniform in law enforcement. On the other hand, it can also transfer the economic burden of public interest litigation to a certain extent and enhance the enthusiasm of related subjects to carry out public interest litigation activities, thus promoting and encouraging the practice and value of public interest litigation and strengthening the protection of consumers' personal information.

Secondly, for other ways of liability, the losing party in public interest litigation of consumer personal information shall be compelled to perform the obligations stipulated in the *Personal Information Protection Law* requested by the prosecution subject. There have been relevant cases at the practical level. The first case of criminal incidental civil public interest litigation for infringement of citizens' personal information occurred in

Beijing in 2021. The procuratorial organ, on behalf of the public interest, demanded the infringer undertake the responsibility of apology, elimination of danger and compensation for losses. In addition, in accordance with the obligations under the *Personal Information Protection Law*, the losing party may be requested to perform obligations such as compulsory deletion of relevant personal information, compulsory correction, supplement of relevant personal information, and explanation of its rules for handling personal information.

For the subjects who do not cooperate with the relevant organs for investigation and verification, it is suggested that reasonable liability clauses be added. At present, *the Judicial Interpretation on Procuratorial Public Interest Litigation* does not stipulate the legal responsibility that obstructs the investigation and evidence collection subjects, and the lack of guarantee on coercive power is not conducive to the implementation and effectiveness of public interest litigation. It is suggested that the appropriate coercive power of the procuratorial organs in such cases be clarified by law, with specific reference to the relevant provisions of the *Civil Procedure Law* in which the court has the power to impose penalties such as fines on subjects who do not fulfill their relevant obligations. In this way, to a certain extent, promote the cooperation of large enterprises with the investigation and verification, which are the processors of personal information and have technical advantages to ensure the smooth commencement of public interest litigation.

3.5 Clarify the Scope and Order of Legal Application in the Field of Public Interest Litigation of Personal Information

At present, there are many laws to protect consumers' personal information in China, such as the *Personal Information Protection Law*, *Civil Code*, *Law of the People's Republic of China on the Protection of Consumer Rights and Interests*, *Data Security Law of the People's Republic of China* (Wang, L.-M., & Ding, X.-D., 2021). Therefore, it is necessary to deal with the relationship and distinction between these laws and regulations that provide different rules for the protection of consumers' personal information and have different aspects of concern. Specifically, when there is an inconsistency in the scope of adjustment between the *Civil Code* and *the Personal Information Protection Law*, the provisions of the *Personal Information Protection Law*, as a special law, should be applied. While in key areas such as cross-border data circulation and information infrastructure, particular attention should be paid to the connection between the *Personal Information Protection Law*, and the *Cybersecurity Law of the People's Republic of China*, and the *Data Security Law of the People's Republic of China*, which are the basic laws of the rule of law system of network information.

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