

# Research on the Determination of the Capacity for Consent in the Processing of Minors' Personal Information

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**Abstract:** In contemporary society, where digital platforms and smart terminals are highly prevalent, minors have become an important group in the online circulation of personal information. They frequently expose their personal information in scenarios such as online games, social media, and online education. Once personal information is improperly collected, utilized, or abused, it will cause irreversible damage to the current and future personality development, social evaluation, and property interests of minors. The Personal Information Protection Law takes “informed consent” as the core legal basis. In the context of minors, the existence and scope of “consent ability” directly affect the legal structure and responsibility allocation of personal information processing. Article 31 of China’s “Personal Information Protection Law” stipulates that when processing personal information of minors under the age of 14, the consent of their guardians must be obtained, and such information should be classified as sensitive personal information. This strengthens the special protection of this group in the system. However, from the normative structure, on the one hand, the legislation adopts “14 years old” as the formal dividing line, which is different from the capacity system of civil law; on the other hand, there is a lack of clear regulations on under what conditions minors themselves have independent consent ability, and theoretical discussions mostly focus on the guardian consent rule, while giving little attention to the consent ability of minors themselves. In this context, from the cross-disciplinary perspective of civil law and personal information protection law, this paper systematically explores the criteria for determining the consent ability in the processing of minors’ personal information and its functions. This not only helps clarify the system relationship between consent ability, capacity, and intention ability, but also helps to build a more refined framework for protecting minors’ personal information at the legislative and judicial levels. This paper intends to take the consent ability as the core analytical object, in the comparative law perspective, to sort out its dual functions and determination model, and then, in combination with the current law of our country, propose an institutional construction plan with “14 years old + intention ability” as the axis, supplemented by the allocation of burden of proof and dynamic determination mechanism.

**Keywords:** Minors; Personal information processing; Capacity for consent; Personal information protection law; Informed consent; Capacity of understanding; Rules for guardians’ consent

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## **1. The Concept and dual functions of minors' capacity for consent**

### **1.1. The independence of the ability to consent and its structural elements**

In the Personal Information Protection Law, consent is not merely a licensing act; it is the core mechanism that provides a legal basis for data processing activities <sup>[1]</sup>. Regarding minors, their ability to independently make a consent cannot be simply judged by the general civil capacity. Instead, the relative independence of consent ability in the field of information law should be recognized <sup>[2]</sup>.

From a structural perspective, consent ability encompasses at least three elements: first, the ability to understand information, which is the ability to form a basic understanding of the processing purpose, category, and potential consequences; second, the ability to judge risks, which is the ability to compare and weigh different options and make a preference choice; third, the ability to form and express one's true will, which is the ability to form and express one's true intentions under controllable external pressure. These three elements highly overlap with the meaning ability in civil law, but due to the technicality and complexity of data processing, higher requirements are presented <sup>[3]</sup>.

### **1.2. The dual functions of the ability to consent, namely the negative and positive ones**

The consent capacity of minors has dual dimensions of negative protection and positive autonomy: The negative function refers to using the consent capacity as the "threshold" to activate the guardian's proxy mechanism, through legal stipulation to deny the independent consent right of minors, introducing the guardian as a risk filter to compensate for the vulnerability of minors' cognitive abilities; The positive function refers to confirming the status of minors as the subject of information self-determination, as their cognitive development progresses, moderately acknowledging their consent capacity to avoid suppressing the cultivation of their information autonomy due to excessive intervention by "parentalism" <sup>[4]</sup>. The core of this institutional design lies in dynamically balancing the tension between the two, not only preventing technological infringement but also ensuring the development of personality.

## **2. The recognition model of minors' capacity for consent from the perspective of comparative law**

### **2.1. The dual standard of "formal age + substantive ability"**

Representative of continental legal systems such as Germany, Switzerland, and Japan, these countries generally adopt a model of "formal age threshold + substantive capability review" for the determination of consent capacity. "Germany focuses on '16 years old + understanding ability', meaning that once a certain age is reached, it is presumed that the individual has the capacity for information consent, unless it can be proven in a specific case that they lack the necessary understanding ability; Switzerland uses the 'judgment ability + age reference' model, where 'judgment ability' is regarded as the substantive core of consent capacity, and then uses age as an important reference factor; Japan adopts the 'intention ability + age reference' approach, regarding the consent for personal information processing as a unilateral legal act that is adapted to age and intelligence."

The common feature of these models is as follows: On the one hand, through formal age standards, predictability and operability are achieved, providing clear behavioral guidance for information processors and guardians; on the other hand, by introducing substantive elements such as understanding ability and

judgment ability, there is room for correction of the formal standards in individual cases, thus taking into account individual differences <sup>[5]</sup>. This provides an important reference for China when constructing rules for determining the consent capacity of minors.

## **2.2. Connection with the civil capacity system**

Comparative experience also indicates that the consent capacity system in personal information processing is not isolated but is consistent with the capacity and intention capacity systems in each country's civil law. For example, the consent of minors is regarded as a unilateral legal act that is compatible with age and intelligence, making it subject to the general rules of civil law in nature. At the same time, in special laws, age boundaries, risk levels, etc., are detailed to achieve coordination between general law and special law.

This approach suggests that the construction of consent capacity should be based on the capacity system of the Civil Code, by introducing the concept of "consent capacity" as a special concept, to domain-specificize and concretize the general rules of capacity, rather than establishing a completely parallel system from scratch <sup>[6]</sup>. Only under this premise can people avoid standard conflicts and application chaos between capacity and consent capacity.

## **3. The legal regulatory status and issues of minors' consent capacity for personal information in China**

### **3.1. Regulatory structure: Standard of 14 years old and guardians' consent**

Chinese legislators have classified the personal information of minors under the age of 14 as sensitive personal information. In Article 31 of the "Personal Information Protection Law", it is clearly stipulated that the processing of such information must obtain the consent of the guardian. At the same time, specific handling rules have been formulated <sup>[7]</sup>. The "Law on the Protection of Minors" and the "Regulations on the Protection of Children's Personal Information on the Internet" have also repeated or refined this requirement in the online scenario, forming the basic regulatory framework for the protection of children's personal information in China.

This regulatory structure, through strict guardianship consent rules, implements high-intensity protection for the processing of personal information of minors under the age of 14, aiming to make up for their insufficient information protection awareness and discrimination ability. However, at the same time, the current law does not directly answer two important questions: First, within what scope do minors over 14 years old have the independent consent qualification; second, under what circumstances can minors under 14 years old be recognized as having limited consent capacity and directly participate in the decision-making of personal information processing <sup>[8]</sup>.

### **3.2. Incompatibility with the age-based capacity standards of the civil code**

The Civil Code adopts two age thresholds of "eight years old" and "eighteen years old", dividing natural persons into persons without civil capacity, persons with limited civil capacity, and persons with full civil capacity. In contrast, the Personal Information Protection Law and its supporting regulations take "fourteen years old" as the core node, constructing a relatively independent age stratification system, and do not provide systematic connection rules with the capacity system at the clause level <sup>[9]</sup>.

This normative "displacement" leads to two types of problems in practice: Firstly, for minors aged eight

to fourteen, they are already considered as persons with limited civil capacity in civil law and can carry out civil legal acts that are appropriate to their age and intelligence. However, in the Personal Information Protection Law, they are all regarded as objects that require consent from guardians, which poses risks of excessive protection and rights compression; Secondly, for minors aged fourteen to eighteen, they are still considered as persons with limited civil capacity in civil law, but in the field of personal information processing, they are generally regarded as having independent consent capabilities, which may not match their actual understanding level.

### **3.3. Absence of consent capacity and judicial recognition dilemmas**

In the absence of clear standards for consent ability at the regulatory level, judicial practice in handling disputes over minors' personal information often takes whether the consent of the guardian has been obtained as the main criterion for determining the legality. In the first case of a civil public interest lawsuit for the protection of minors' online information in the country, the court emphasized that information processors must obtain the consent of the guardian for the processing of the personal information of minors under the age of 14<sup>[10]</sup>. However, it did not further discuss whether the minors themselves have a certain degree of consent ability and the validity of their expressions of will.

This leads to two consequences: On the one hand, the subjectivity of minors in information processing decisions is further weakened, and their opinions are often absorbed or submerged in the consent of the guardian<sup>[11]</sup>; on the other hand, when there is a conflict between the guardian's consent and the true will of the minors, the court lacks a clear regulatory basis to assess the consent ability of the minors and accordingly adjust the balance structure. In the long run, this is not conducive to forming a protection model oriented towards the self-determination of minors' information.

## **4. Establishing the framework for recognizing “fourteen years old + capacity for understanding”**

### **4.1. Determining the concept based on capacity for understanding**

Given that the term “consent ability” is not used in our civil law, the construction of the consent ability system in information law should be based on the concept of capacity for understanding in civil law. In the field of personal information processing, the consent ability of minors can be defined as: minors have the ability to understand and judge the purpose, method, scope, and basic risks of personal information processing to a sufficient extent, and can make a true expression of their thoughts and behaviors based on this. Under this definition, the consent of minors as a single legal act that is appropriate to their age and intelligence should be valid based on the fact that they possess the corresponding capacity for understanding, rather than mechanically relying on age as the sole criterion. However, for the sake of predictability and safety, using only the substantive capacity for understanding as the standard is not sufficient to guide daily practice. Therefore, it is necessary to introduce a binary recognition framework of “fourteen years old + capacity for understanding” above the system of behavioral capacity.

### **4.2. The basic structure of “fourteen years old + capacity for understanding”**

The author believes that the capacity for consent of minors in our country should adopt the composite standard of “fourteen years old + capacity for understanding”, that is, a formal age threshold of fourteen

should be set, and a comprehensive judgment should be made based on the specific capacity for understanding in individual cases. Under this framework, the following basic rules can be constructed:

First, for minors under fourteen years old, it is generally presumed that they do not have the ability to give independent consent, and information processing must obtain the consent of the guardian. However, in low-risk and simple processing behaviors, the validity of their daily and small-scale consent behavior can be limitedly recognized on the basis of the general authorization or broad permission of the guardian <sup>[12]</sup>.

Second, for minors over fourteen years old, it is generally presumed that they have the capacity for consent. Information processing can be based on their own consent to be legal; however, in processing behaviors involving highly sensitive information, complex algorithm analysis, or significant impact on interests, the consent of the guardian should be jointly agreed upon or at least be informed to achieve risk mitigation <sup>[13]</sup>.

Third, in individual cases, if there is obvious evidence indicating that minors lack the necessary understanding and judgment ability in specific circumstances, the form of age presumption can be broken, and the validity of their consent can be denied through the examination of substantive capacity for understanding, and a guardian substitute decision mechanism can be introduced.

## **5. Burden of proof and verification mechanism: The procedural construction of consent ability recognition**

### **5.1. Dual verification obligations of information processors**

In terms of the allocation of the burden of proof, some studies suggest that information processors have the dual verification obligations of “age verification + understanding ability guarantee” regarding the consent capacity of minors in the processing of their personal information <sup>[14]</sup>. The former requires them to reasonably confirm through technical and procedural means whether the service recipients have reached the legal age threshold, such as through multiple methods like ID card verification, parent binding, and bank card real-name authentication; the latter requires them to adopt language and forms that are easy for minors to understand when presenting the notification content, and reserve reasonable time and paths for them to make decisions together with their guardians <sup>[15]</sup>.

In terms of legal consequences, generally, the responsibility for proving that the reasonable verification obligations have been fulfilled should be placed on the information processor: if they cannot prove that they have taken sufficient measures to verify the age of the service recipients and the identity of the guardians, then it should be presumed that the consent procedure is flawed, and they should bear the corresponding responsibility. This allocation of the burden of proof helps to prevent the determination of consent capacity from sliding towards the path of unilateral shifting of the risks to the guardians.

### **5.2. Allocation of proof burden for denying age presumption**

On the other hand, within the dual structure of “14 years old + capacity for understanding”, the formal age criterion has a presumptive effect in principle: minors who have reached the age of 14 are presumed to have the capacity for consent, while those under 14 are presumed to lack such capacity. On this basis, if one wishes to deny this presumption, the party making the denial should bear the corresponding burden of proof.

Specifically, when the information processor claims that the legal age standard does not apply, and believes that a specific minor has reached the age threshold but clearly lacks the capacity for understanding,

thereby attempting to exclude the validity of their consent, they should provide contrary evidence, such as a clear statement from the guardian, a medical diagnosis, or obvious misleading evidence, etc. Conversely, if the guardian claims that a minor under 14 years old has sufficient capacity for understanding in certain circumstances to support consent, in order to expand their autonomy space, they should bear the burden of proof to demonstrate that the risk of the processing behavior is extremely low and the minor fully understands the consequences of the behavior.

This “who asserts, who proves” structure respects the formal function of age presumption while providing a procedural basis for individual cases to deviate, and is conducive to achieving a fine balance between protection and autonomy.

## 6. Conclusion

The issue of the capacity for consent in the processing of minors’ personal information lies at the intersection of the theory of legal capacity in civil law and the “informed consent” structure of personal information protection laws. Its normative design not only involves the negative protection of vulnerable subjects but also concerns the positive empowerment of them as subjects of information self-determination rights. The current domestic law, while strengthening special protection for minors under the age of 14 through the 14-year-old standard and the consent rule of guardians, has not yet clearly constructed the concept of minors’ capacity for consent and its system connection with the capacity system, resulting in the phenomenon of over-reliance on the consent of guardians while neglecting the subjectivity of minors in practice.

With the dual support of comparative legal experience and local legal resources, adopting the composite determination framework of “14 years old + understanding ability” is expected to become a feasible path for building the system of minors’ capacity for consent in China. On this basis, by clarifying the concept structure of consent capacity, constructing the coordination relationship between the form age presumption and the substantive understanding ability review, and configuring the dual verification obligations of information processors and the burden of proof for negating the age presumption in the procedure, it is possible to achieve a relative balance between protecting minors from information risks and respecting their gradually increasing self-determination of will, thereby promoting the institutional transformation of minors’ personal information protection in China from “substitutional protection” to “participatory protection.”

## Disclosure statement

The author declares no conflict of interest.

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