

Analysis of Right to Be Forgotten - with a Comment on the Article 36.2 of China's "Tort Law"

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Abstract: The implementation of the European Union's "personal data protection rules" in 2012 makes the European a pioneer in the protection of personal information. Meanwhile, the decision of Spanish court that Google should delete the personal information of the citizens who appealed has also drawn attention to the "right to be forgotten". China is still at its initial stage in the protection of personal information, and the emerging "right to be forgotten" is not specified in law. What is the relationship among right to be forgotten, right of information self-determination and right of privacy? How to apply it in practice? Can the article 36.2 of "China's Tort Law" be the legal basis for right to be forgotten? These are all the issues deserve discussion.

Keywords: Right to be forgotten; Right of information self-determination; Right of privacy

1. Introduction

As a pioneer in the protection of personal information, European Union formulated the "general rules for data protection" in 2012, which clearly defined the right to be forgotten, and put forward its applicable areas in article 17. This is the first time that the right to be forgotten was officially defined as legal provision, representing a milestone in the development. This year, the European court cited the relevant contents of article 17 to support the appeal of Spanish citizens that Google should delete some personal information, which marks the emerging right to be forgotten has gotten support from cases in EU countries.

1.1. The Concept of Right to be Forgotten

With the arrival of the network information era, how to protect personal information in modern society has become a hot topic. On the basis of admitting personal management of their own information, management right is divided into several parts according to details, and it is summarized from the generation, distribution, dissemination and eradication, leading to different specific rights.

"Right to be forgotten" is "right to delete personal information", also called "right to forgot", "right to delete" and "right to oblivion"[1], referring to the new right generated in the section in which personal information is deleted in order to protect and emphasize the personal information management. "Right to be forgotten", one of the four pillars to protect personal information in the network era, is a new right in the modern information society [2]. The right to be forgotten is a new right caused by fast development of network technology and

the rapid dissemination of information. Because this right has not yet formed a generally accepted concept in the academic community, so both its connotation and boundary is unclear.

1.2. The Right to be Forgotten in a Comparative Perspective

The legislation and theoretical discussion in every country generally consider that the right to be forgotten is part of personal information right [3] or the expansion of the right of privacy, referring that individuals can control (mainly refers to delete behavior) the information affecting their reputation and identity on the Internet. Some Chinese scholars define it as: Based on the privacy autonomy, the owner of personal information can always ask the collector, publisher and indexers of personal information to delete all kinds of personal digital traces left in the information network, so as to be forgotten by others [4]. And right to be forgotten also can be defined as that information subject has the right to control, collect, store and use personal information, and they can request information controller to delete personal information and stop spreading when legal and promised reasons appear [5]. Definition of the right to be forgotten in the article 17 of "general rules for data protection" or draft written by European Commission is also worth discussing, because this definition is more detailed and it should be considered as the basis of the law of the right to be forgotten.

(1) Case of Google Spain introduction

Google Spain hurled right to be forgotten into the spotlight. A Spanish citizen Mr. Mario Costeja Gonzalez (Mr. Gonzalez for short) asked Google to clear up some of the links to private information on the web.

These links are to a report in a newspaper published in Spain in 1998, which is about Mr. Gonzalez want to auction his house because of debt. Until November 2009, when Mr. Gonzalez searched his name with Google, he found the information is still on the Internet. He thought he had paid off the debt, and this outdated information would affect his reputation, so he appealed La Agencia Española de Protección de Datos (AEPD) to delete the data. AEPD asked Google to remove these links from searching page in July 2010, and Google appealed to the Spanish court. At last, the court's trial supported the man's claim, asking Google to delete the relevant searching results.

(2) Argentina actress sued Yahoo and Google

Coincidentally, the star Virginia Da Cunha, sued Yahoo and Google in Argentina, asking them to delete all links to her nude photos. Virginia posted her photos on social networks, but later she regretted. She wanted to withdraw these photos, but Yahoo and Google did not agree with the requirement. So Virginia sued these two companies, claiming they had infringed her personal dignity. The court also supported Virginia's appeal based on the privacy protection, asking Yahoo and Google to delete the photo links.

(3) Summary

These two cases are most representative in the practice of the right to be forgotten. The first case shows that court supports that overdue personal information can be controlled by information subjects. And the second case shows that court supports that information subjects can control the information they published, including transmission and deletion of information. These all show that the modern society takes more and more attention to the protection of personal information. At the same time, the sentences show the attitude of EU in the protection of personal data, making EU a pioneer of personal data protection. There is still so much controversy, and the core of the problem is how to apply right to be forgotten, a new right emerging in information age, and how to define the nature and boundary of this right.

2. The Concept of the Right to be Forgotten

2.1. Related Concepts

(1) Personal information, which is the object of the right to be forgotten

Personal information [6] is also known as personal data [7], personal privacy, and so on. The object of the protection of the right to be forgotten is the personal information. According to the article 4.2 of the draft of "2012/72, 73 of the personal protection of personal data processing and the free flow" written by European Union, "personal data is any information related to the subject" [8]. That is, any personal data can be identified in the Internet can become the object of the right to be forgotten, a special

personality right, which is the object of right of personal informational self-determination. It contains both the specific information related to personal identity and relevant content of personal privacy, so the object range of the right to be forgotten can be unified with the concept of personal information. And personal information content is rich, referring to all the information, materials and news, such as height, weight, income, life experience, family number and illness experience.

(2) Right of privacy and right to be forgotten

Universal Declaration of Human Rights agreed by the United Nations in 1948 defines right of privacy as "any person's private life, family, home, and communication shall not be interfered and his honor and reputation shall not be attacked. Each person shall have the right to get legal protection against such interference or attack." In comparison, there is also no right of privacy in German civil code. But in 1959, Federal Supreme Court confirmed that the civil code to protect the "general personality right", which includes the right of portrait, name, privacy, and so on. Article 9 in French civil code prescribes privacy life should not be infringed. The United States is the first country to propose privacy, known as "right to not be disturbed". Privacy law in the United States is more developed, but the boundary of right of privacy is hard to be defined. The meaning of the right of privacy may be related to access or disclosure of information, the body privacy, ownership or control right and right of information self-determination. Later, the United States confirmed the general constitutional right to privacy independent of Fourth and Fifth Amendments through the case of *Griswold v. Connecticut*, bringing right of privacy into the category of basic human rights. American scholars also think right of privacy means that a person has the right to decide whether his information can be open to the public in any case.

China's "Tort Law" formally incorporated right of privacy into the legislation to protect. Professor Zhang Xinbao defined right of privacy as "Privacy right is a kind of personality right, which protects private life information away from intrusion, knowledge, collection, use and disclosure of information. The subject of this right can decide the degree in which their private life can be intervened, publicity of private life and range and intensity of publicity [11]. In the information age, the protection of the right of privacy should be expanded, not only in the privacy of private life, but also in the personal information mentioned above. Only incorporate personal information in the privacy protection, can the goal of privacy right be achieved. In the information age, the privacy right should be extended so the natural person has the right to decide the scope and extent of the information disclosure.

(3) Right of informational self-determination and right to be forgotten

The concept of right of information self-determination originates from a series of cases relating to right of information self-determination in German court, of which "the case of census archive" in German in 1983 is most significant. The concept of right of information self-determination appeared in the judgment, describing necessity, basis and concept of this right. It thought "all personal data should be kept from unlimited collection, storage, use and delivery under the condition of modern data processing". The protection of right of information self-determination is based on the protection of general personality rights and human resources, showing that each person has the right to determine the delivery or use of their information. In China's laws, general personality right is also a very wide range of content, including the right of information self-determination. In Japan's laws, there is a similar concept "right to control the personal information".

Personal information protection is a complete dynamic process, and right of information self-determination also should be dynamic and positive, which including of various stages of personal information protection. In particular, it means the information subject's control and choice of their own information that citizens can decide when, where, and how the information to be collected, stored, processed and utilized [12]. Informational self-determination in Internet era refers to all Identified or identifiable data information relating to the user's personality interest formed by communication technology in cyberspace.

The right to be forgotten is to protect the right of personal information, which is a part of the right of self-determination, that is, the individual has the right to delete the information posted on the Internet. There is no doubt that right to be forgotten is the subordinate concept of right of information self-determination, and the essence of right to be forgotten is the right of self-determination.

2.2. Can Right of Information Self-determination be Included in Privacy Right?

In academia, some scholars believe that personal information is different from the right of privacy, which should become a new right [13], and as a part of right of information self-determination, right to be forgotten also should be considered as a new right. In the comparison method, it is generally considered that the right to be forgotten is the extension of the right of privacy. The theory of information data control is instead of that of information secret reservation to guarantee the collection, use and transfer of personal data. The main goal and logical premise of individual information protection is to protect right of privacy, so modern personal information protection should also be incorporated in the right of privacy. As an important part of right of information self-

determination, the original intention of right to be forgotten is also to protect right of privacy, although it is the right of personal information protection in the network era. On the other hand, right of privacy and right to be forgotten are same in essence by comparison.

Firstly, from the view of object, the object of the right to be forgotten is the personal data, which not only contains personal information, but also some information that has been publicly disclosed. In the case of "Spain vs Google", the litigant requested the Google to delete the information that had been reported several years ago. The objects protected by right of privacy are private information, private activity and private space [14]. As we can see, the scope of right of privacy is more widely than that of the right to be forgotten. Although it is different from the traditional definition of the right of privacy, but it should still be considered as the expansion of private information protected by right of privacy. The concept of right of privacy is a dynamic development process, which should not be confined to the old definition. So in the information age, it should be considered that private information protected by right of privacy contains the personal information has been released. Secondly, from the nature of the right, although the right to be forgotten may have economic benefits for the litigants, as a part of right of information self-determination, it still belongs to the category of the right of personality. In the academia, it has been fully discussed, so it will not be repeated here. Finally, from the content of the rights, the right of privacy is mainly to protect the peace and personal secret of personal life not to be announced. Person can decide their life, also can control their life. It is more like control right which cannot be infringed by any person or organization. With control right, litigant can collect, store, transmit and change information relating to themselves according to their own will. The right to be forgotten is to protect the individual's right to decide their own information, that is to decide whether their own information should be open and how the extend should be, which is a part of the right of privacy, so personal information protection should be incorporated into the framework of the right of privacy[16].

In a word, with the development of the Internet society, the content of the right to privacy in the information age should be more extensive. The traditional right of privacy is static and negative, while right of privacy in modern time should be dynamic and positive. Incorporating right of information self-determination to the framework for the protection of the right to privacy not only can save the cost of legislation, but also can meet the requirements for the protection of information subject in modern society, finding the current law basis for right of information self-determination, also right to be forgotten.

The right to be forgotten is a concept discussed and put into practice in the European Union (EU) and Argentina

since 2006. The issue has arisen from desires of individuals to "determine the development of their life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past." There has been controversy about the practicality of establishing a right to be forgotten to the status of an international human right in respect to access to information, due in part to the vagueness of current rulings attempting to implement such a right. There are concerns about its impact on the right to freedom of expression, its interaction with the right to privacy, and whether creating a right to be forgotten would decrease the quality of the Internet through censorship and a re-writing of history, and opposing concerns about problems such as revenge porn sites appearing in search engine listings for a person's name, or references to petty crimes committed many years ago indefinitely remaining an unduly prominent part of a person's footprint.

3. Application of the Right to be Forgotten in China - with a Comment on the Article 36.2 of China's "Tort Law"

China has nearly 40 laws, 30 regulations and more than 200 regulations related to the protection of personal information [17], and the right to be forgotten is a new right appearing in information age. Although the Chinese government has included the protection of personal information in the legislative plan [18], there is no clear definition in the current law of China. Due to the limitations and lag of the law itself, the new "right to be forgotten" is not stipulated in the China's law. However, the regulation about internet infringement deletion in the article 36.2 of China's "Tort Law" is same as the content of right to be forgotten, so it can be considered as the basis of the right to be forgotten in "Tort Law".

At the legal level, the embryonic form of the right to be forgotten can be recognized in China's "Tort Law", "If a user commits a tort using the network service, the infringed has the right to notify the network service provider to take the necessary measures such as deleting, shielding, breaking the link and so on. If the network service providers do not take measures in time after receiving the notice, it shall be jointly and severally liable for any additional harm with the network user." The clear legislative intent of article 36.2 of China's "Tort Law" is assuming the responsibility of network service providers against the torts under network environment. It has a lot in common with Article 17 of "personal data protection law" in Europe. Article 13 and 14 of new judicial interpretation adds the relevant provisions of Article 36.

Article 36.1 in "Tort Law" should be considered as general clause applicable to network infringement, while Article 36.2 aims at the requirements of persons that

network service providers should delete, shield and disconnect the link. Article 36.2 gives persons two parts of rights. The first is that they can request the network service provider to delete, shield or disconnect the link; the second is that they can sue for damages caused by the omission of network service providers. It is generally said that in the application of the article 36.2 of China's "Tort Law", responsibility principle should apply the principle of fault liability [20], with which I agree much, but it won't be discussed here because of the limited space. Its general elements should use the "four requirement theory", including fact of damages, causality and fault. But according to Article 36.2 of China's "Tort Law", the infringement upon right to be forgotten has another special element—notification, which means that one should notify the network service providers first, asking them to delete, shield or disconnect the link. The regulation of Article 36.2 is very simple, and there is no detailed provision in for the important element "notification" in judicial interpretation. So what's the degree when the notification is considered to reach the standard? Will network service providers be notified by mail, e-mail or phone call? In civil law, the "notification" is not new, which is usually regarded as a special element for breach of contract or a tort. General notification takes Article 11 in China's "contract law" as standard. Therefore, I think written form can be chosen in "Tort Law" referring to Article 11 in "contract law". If "right to be forgotten" is infringed, network service providers not only need to remove a large number of links in the site, but also need to assume compensation liability for damage, which is of much obligation. That means the "notification" is a watershed. If no necessary steps are taken at the moment, network service provider will be affirmed to have fault, and since then, network service providers and network users shall bear joint liability extended loss. So laws must regulate "notification" this element, requesting that litigant giving written notice to network service providers. Only in this way, can rights and duties of both parties be balanced, considering the profits of both parties.

4. Conclusion

With the rapid development of network information communication technology, the security of personal information has risen to an important position, so right to be forgotten is emerging. Compared to the EU at the forefront, regulations of right to be forgotten are vague, so it is necessary to incorporate individual information protection to future legislative plan as an important content. The right to be forgotten is a new, but the purpose, object and the connotation of this right can all be incorporated into right of privacy. So it should be regarded as the extent of right of privacy. In application, the relevant provisions of the right of privacy should be applied. Although

the Article 36.2 of China's "Tort Law" can be considered as the law basis of right to be forgotten, this clause is too simple. There is no detailed provision about the elements of right to be forgotten and the scope of compensation for damages is not identified. It brings many problems to the application of the right to be forgotten in practice. We can gradually improve the content of the right to be forgotten according to the problems in practice. Detailed provisions can not only protect the rights of individuals, but also can prevent the abuse of rights, protecting the freedom of speech of media and other citizens.

References

- [1] Conley C ,the Right to Delete, in AAAI Spring Symposium Series (North America 2010)
- [2] Gooper Mitchell-Rekput , search engine liability under the libe data regulation proposal: interpreting third party responsibilities as informed by google spain , Georgetown Journal of international Law ,861
- [3] Napoleon Xanthoulis , The Right to Oblivion in the Information Age: a Human-right Based Approach ,US-CHINA LAW REVIEW ,Vol.10:84
- [4] Chen Changyi, The Right to Be Forgotten-A Good Tool for Interests War in Europe and America, Law and Life, July 2014
- [5] Peng Zhiyuan, A Look at Right to Be Forgotten, Journal of North University of China(Social Science Edition), 30 (1) in 2014
- [6] Zhou Hanhua, Several Issues for Personal Information Protection Lawmaking, Research on Forefront Issues of Personal Information, Beijing: Law Press,2006
- [7] Xie Yongzhi,Legislative Study on Data Protection Act, People's Court Press,Page 1, July 2013
- [8] Wu Yan, Discussion on "Right to Be Forgotten" in Network Information Age -from the View of Personal Data Protection in EU, Library Theory and Practice, 2013(11)
- [9] He Xuxu,Right of Information Self-Determination in Comparison, Journal of Comparative Law, 2013(2)
- [10] Yang Lixin, Several Issues on Privacy and Its Protection , People's Procuratorial Monthly, August 28, 2000
- [11] Zhang Xinbao, The legal Protection of Privacy , Masses Publishing House ,Page 12,2004
- [12] Yao Yuerong, The Forming of Right of Information Self-Determination in China as a Basis Right, Political Science and Law 2012(4)
- [13] Wang Liming,The Position of Personal Information Right in the Law of Personality Right , Journal of Soochow University, 2012(6)
- [14] Article 4.25 of Draft of the Civil Code (First Draft), 2002
- [15] Zhou Hanhua, Research on Forefront Issues of Personal Information , Law Press, Page 146, October 2006
- [16] Wang Quandi, Zhao Limei,On the legal prevention to the rights of privacy in network space, Law Forum ,2002(2)
- [17] Shao Guosong,"The Right to be Forgotten" :A New Proposal for Personal Data Protection, Social Sciences in Nanjing, 2013(2)
- [18] Liu He, Several Basic Issues of China's Informationization, Electric Power Information and Communication Technology , 2002.1(1)
- [19] Yang Ming, Interpretation and Extension of Clause 36 of Tort Law, Journal of the East China University of Politics & Law, 2010(3)
- [20] Gao Shengping, Legislative Issues and Classic Case of tort law of the People ' s Republic of China, Peking University Press, Page 440-441,2010