THE RIGHT TO BE FORGOTTEN AND ITS RAMIFICATIONS IN TAIWAN, CHINA AND JAPAN

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The Google Spain Judgment from the Court of Justice of European Union on the right to be forgotten (RTBF) in 2014 has generated enormous echo all over the globe. To examine the normative influence of EU as well as how RTBF is unfolded in regions where values of privacy differ, the RTBF cases in Taiwan, China and Japan are presented and compared. Though still preliminary, this short article found that to successfully claim RTBF in jurisdictions where the concept is still novel, if not strange, emphasis on the harm of the privacy is essential.

Today, connected devices and internet have filled up almost every moment of our life. All of us leave countless footprints in the world of internet at each second. Nevertheless, compared to human beings, who have the inherent functioning of forgetting what has been put into our minds, the internet never forgets. Yet we, people live in the real world, do not always welcome people's learning of our past through the sometimes timeless internet, that we ourselves might want to forget.

On May 13, 2014, the Court of Justice of the European Union (hereafter: the CJEU) announced its judgment on Case C-131/12, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) (hereafter: the *Google Spain* Judgment)[1]. The Judgment further elaborated on the scope of Data Protection Directive (Directive 95/46/EC)[2] , and was deemed to have set up "the right to be forgotten" by the media[3]. According to the judgment, when the processing of a certain piece of data related to a data subject becomes "*inadequate, irrelevant or no longer relevant, or excessive*" in the course of time, the operator of the search engine then bears the obligation, upon the request from the data subject, to consider the interests involved in the each case, such as the interest of the general public in having access to that information upon a search relating to the data subject's name, and to decide if it should erase information and links concerned in the list of results in the case.

Within 5 months after the *Google Spain* Judgment, Google received more than 18,000 requests in United Kingdom alone and 145,000 in the whole Europe, to delete related information from the search results (2,9000 requests in Germany and 2,5000 in France).[4] Currently, for anyone who wishes to exercise his or her "right to be forgotten" as reckoned by the CJEU, he or she has to go through several layers of "guidance" and come to the page where one can eventually file out the application. [5]

In addition, other search engines such as Bing also starts to provide similar service on their web pages for European residents to apply for their names removed from the search results.[6] Moreover, discussion over the right to be forgotten has emerged in all over the world, including the U.S.[7] , Canada[8], Japan[9] ,Hong King[10] , Taiwan and other non-EU zones. Local case, for example, has also taken place in Taiwan and other non-EU jurisdictions, where individuals requested the search engine operator to delete certain links in the search results after typing in his name.[11]

Between 2015 till present, a number of cases related RTBF emerged in Asian countries such as Taiwan, China and Japan. It is interesting to see how the normative power of EU manifests itself in the form of other than legislation, but also in the form of "live" jurisprudence thanks to the facilitation of internet and globalization. In this short article, three cases are chosen respectively to represent the current development of RTBF in the abovementioned Asian jurisdictions. To conduct a more wholesome analysis, the legislative frameworks of these countries shall also be considered. Nevertheless, due to the limit of length, the present article focuses on presenting an overall picture of the influence of the 2014 *Google Spain* Judgment in jurisdictions outside EU-zone by highlighting the most recent cases.

1. RTBF CASE IN TAIWAN

After the *Google Spain* Judgment, a comparable case has also taken place in the Taiwanese Courts. In October 2008, the *Liberty Times* (a major local media outlet) has reported news with titles such as "*Shi Jiang-Xin Not Board Member of MiDiYa*" and "*Financially-related to Mafia, Head of MiDiYa Involve in Baseball Fraud*". The news coverage mainly reported on the prosecutor's investigation on Mr. Shi Yu-Zhe (original name: Shi Jian-Xin)'s alleged involvement in the illegal bates and related fraud on professional baseball games in Taiwan.[12] Yet, as regarding to Mr. Shi' being accused of committing fraud in this specific case, he has been declared not guilty by the High Court of Taiwan in January, 2013.[13]

Later, in the Civil Affair Judgment Case Su Zi No. 2976 of Taiwan Taipei District Court, Mr. Shi, the plaintiff of this case, made several claims could be classified as the exercising of the right to be forgotten. In his claims, Mr. Shi indicated that if an internet user uses "Shi Jiang-Xin" as keyword to search within the search engine product "Google Search" of Google International LLC registered in Taiwan, a number of pages where the content of the abovementioned *Liberty Times* news coverage was reposted as well as more pages containing malicious defamation content based on the news coverage would show up in the search results.

Mr Shi thus requested the defendant, the Google International LLC, to first remove all the search results as listed in the appendix of his claim, which showed up after typing in the name of "Shi Jiang-Xin" as the keyword in the Google Search, and to secondly remove the suggested keywords "Shi Jiang-Xin Fraud Baseball" on the web page of "http ://www .google .com .tw". For those claims, the plaintiff has cited the judgments from the CJEU, Tokyo Court in Japan, and Article 184, 213, 195 of Civil Code of Taiwan and Article 7, 8 ,9 of Consumer Protection Law as the bases of his claims.

In an earlier court proceeding of this case, the Taipei District Court decided in its judgment announced on January 16, 2015, that the defendant is not the subject who committed torts acts. In supporting its reasoning, the District Court noted, that "*it is possible to use Google Search in Taiwan. But it cannot be concluded, accordingly, that the data was collected and organized within our country (Taiwan). Therefore, the defendant (Google International LLC), who is registered in our country, cannot be deemed as competent at and responsible for managing the Google Search engine, just due to the mere*

1 Case C-131/12 Google Spain SL, Google Inc.v Agencia Española de Protección de Datos (AEPD), Mario Costeja González" [2014] ECLI:EU:C:2014:317
2 European Parliament and of the Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] O. J.L 281/31
3 Alan Travis & C. Arthur, 'EU court backs "right to be forgotten": Google must amend results on request.' *The Guardian* (London, 13 May 2014) < https://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-eu-court-google-search-results > accessed 25 May 2017
4 'Britons ask Google to delete 60,000 links under "right to be forgotten"' *The Guardian* (London, 12 October 2014) <http://www.theguardian.com/technology/2014/oct/12/google-60000-links-right-to-be-forgotten-britons> accessed 25 May 2017
5 'Remove information from Google' (Google) <https://support.google.com/websearch/troubleshooter/3111061> accessed 2 May 2017
6 'Request to Block Bing Search Results In Europe' (Bing) <https://www.bing.com/webmaster/tools/eu-privacy-request> accessed 25 May 2017
7 'Debate: Should The U.S. Adopt The 'Right To Be Forgotten' Online?' *National Public Radio* (Washington, 18 March 2015) <http://www.npr.org/2015/03/18/393643901/debate-should-the-u-s-adopt-the-right-to-be-forgotten-online> accessed 25 May 2017
8 Andre Mayer, 'Right to be forgotten': How Canada could adopt similar law for online privacy' *CBC News* (Ottawa, 16 June 2014) <http://www.cbc.ca/news/technology/right-to-be-forgotten-how-canada-could-adopt-similar-law-for-online-privacy-1.2676880> accessed 25 May 2017
9 Wasurarerukenri mitomerarerudekeka Google Kensatsukekka Yihoukette notoutouseiha' *The San Kei Shimbun* (Tokyo, 29 October 2014) <http://www.sankei.com/economy/news/141029/ecn1410290004-n1.html> accessed 25 May 2017
10 'Yin Si ZhuanYuan Yu Tui Bei Yi Wang Quan You Da Yan Lun Ji Xin Wen Zi You' *Inmediahk* (Hong Kong, 16 April 2015) <http://www.inmediahk.net/node/1033436> accessed 25 May 2017
11 See for example, Judgment of Civil Affairs, No. 2976 Year 2014, Taiwan Taipei District Court
12 'Shi Jian Xin You Qiu Bei Google Yi Wang Bai Su' Apple Daily (Taipei, 22 January 2015) <http://www.appledaily.com.tw/appledaily/article/headline/20150122/36343190/> accessed 25 May 2017
13 'MiYaDu Jia Qiu An Shi Jian Xin Wu Zui Que Ding' Yahoo News (Taipei 22 January 2013) https://tw.news.yahoo.com/%E7%B1%B3%E8%BF%AA%E4%BA%9E%E5%81%87-%E7%90%83%E6%A1%88-%E6%96%BD%E5%BB%BA%E6%96%B0%E7%84%A1%E7%BD%AA%E7%A2%BA%E5%AE%9A-095841449--mlb.html accessed 25 May 2017

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fact that Google Search engine is available for being used in Taiwan."

Based on the abovementioned reasoning, the District Court does not consider the defendant as the manager nor sales representative of Google Search engine. In addition, the Court does not reckon Article 184, Article 191-1 of the Civil Code, nor Article 7-9 of the Consumer Protection Act as legitimate basis for the plaintiff's claims, on the grounds that the interests safeguarded by the Consumer Protection Act does not cover the right of fame nor the right to privacy.

Moreover, the plaintiff further requested to add Google Inc. as one of the co-defendants. The claim was first dismissed by the District Court, yet later approved by the Taiwan High Court.[14] The case is therefore now under re-trial at the District Court.

In the abovementioned judgment of Taipei District Court, the reasoning of "*the defendant (Google International LLC), who is registered in our country, cannot be deemed as competent and responsible for in managing the Google Search engine, just due to the mere fact that Google Search engine is available for being used in Taiwan*", is clearly different from that of CJEU in the *Google Spain* Judgment, where the CJEU gave a much broader interpretation of "establishment" under the Article 4 of Data Protection Directive. Yet, since the case is currently under retrial at the District Court, more observations needs to be make after the case come to conclusion in the future. [15]

2. DEVELOPMENT IN CHINA

Slightly after the *Google Spain* Judgement, there emerged also a case in People Republic of China. With more than 700 million netizen in the whole country[16], how the PRC jurisprudence reacts to the right to be delisted as developed by the CJEU certainly receives great attention. For the purpose of this article, this part of the development of RTBF in PRC will focus only on the most recent case. [17]

14 Taiwan High Court Ruling 2015 Kang Zi No.491
15 Interim Decision of Civil Affairs, No. 31 Su Geng Yi Year 2017, Taiwan Taipei District Court
16 Statistical Report on Internet Development in China, Chinese Internet Network Information Center, https://cnnic.com.cn/IDR/ReportDownloads/201611/P020161114573409551742.pdf accessed 25 May 2017
17 For a more comprehensive discussion on the possible concept of RTBF in China before prior to 2015, See: Mei Ning Yan, 'Protecting the Right to be Forgotten: Is Mainland China Ready?' [2015] 3 EDPL 190

The case can essentially be traced back to February, 2015, when the plaintiff, Mr. Ren started to find out some undesirable search results about himself appear on the search engine run by the defendant, Baidu Netcom Science and Technology (Beijing) Co.,Ltd (hereafter: Baidu), which is the biggest internet search engine-runner in China. The search results at issue implied a certain degree of association between the plaintiff and Tao's Education, a training institution located in Wuxi city. According to the plaintiff, Tao's Education has undesirable reputations such as being accused of committing fraud.

Mr. Ren works in the field of management training sector with the specialties of human resource management and corporate management. During the trial, Mr. Ren submitted a piece of written evidence of an "Agreement on Dissolving Employment Countract", which showed Mr. Ren and Dao Ya Shuan Commerce & Trade Co.,Ltd "voluntarily" to dissolve the employment relationship after consultation, on the ground that after the Dao Ya Shuan Commerce & Trade Co.,Ltd retained Mr. Ren, they found out through Baidu search engine that phrases such as "Wuxi Tao's Education Ren XX" were displayed. Since the job that Tao was hired to do requires high level of credibility, both parties "voluntarily" dissolved the employment relationship because Tao's Education was said as a "liar company" and even called as a "cult" by some people.

Relying on the bases of right to name, right of fame, and the general application of right to personality, the plaintiff requested Baidu to delete related search results and related links such as "the Tao's Education Ren XX", "Wuxi Tao's Education Ren XX". [18]

In the delivery of the first instance judgment from the Haidian District Court, the Court pointed out the core legal issues of the present case are about the technical model of the "related search" and the legitimacy of this service. The Court further divided its analysis into two parts. The first part concerned about the factual judgment on whether the displayed phrases by the "related search" service is artificially intervened by Baidu, whereas the second part centered on if the technical model of the "related search" and its corresponding service model had violated the right to name, right of fame, and "the right to be forgotten" in the general application of the right to personality as claimed by the plaintiff.

In terms of the first question, the Court found that Baidu did not intervened with the search results due to the reasons that the examination conducted by the Court showed each time the displayed search results vary, corresponding to the testimony of Baidu that these search results are displayed on the basis of the frequency of certain phrases being searched in a defined period of time in the past.

18 Civil Judgment of People's Court of Haidian District, Beijing, No. (2015)Hai Min Chu 17417

E-conférence, droit à l'oubli en Europe et au-delà
E-conference Right To Be Forgotten in Europe and beyond
PART 3 : THE RIGHT TO BE FORGOTTEN BEYOND THE EU

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In the second part of the analysis, the Court first concluded that since there is no human intervention in the case, the core question is left to whether the technical model of the "related search" and its corresponding service model had invaded interests as claimed by the plaintiff. In its analysis, the Court first found that six phrases at issue, "Tao's Education Ren XX", "WuXi Education Ren XX", "Tao's Ren XX", "Tao's super learning method", "super fast leaning method", "super learning method", as shown by the Baidu search engine, did not contain any negative connotation, no matter in the format or in the substance. In light of these facts, the Court then accordingly found that there is no infringement to the right of fame, since there is no defamation in the present case. Furthermore, the Court also decided that since there is no misuse of the name, there is no violation to the right of name, either.

Most importantly, in deciding whether there exists the general application of right to personality, the Court made it clear that since there is no categories of rights such as "the right to be forgotten" in China, it cannot be the lawful source for legal protection. The Haidian District Court further elaborated, that the general application of the right to personality requires a legitimacy test for the interest at issue as well as a necessity test for its protection. The Court then recalled that since Mr. Ren was not a minor nor a person with limited capacity when he cooperated with the Tao's Education, there is no legal foundation for the exceptional protection. Accordingly, the Court decided that there is no legitimacy nor necessity for legal protection for the interests "to be forgotten"(to be deleted) as claimed by the plaintiff. After six months, the second instance upheld the decision by the Haidian Distrct Court, without much alteration of its reasoning.

3. INFLUENCES ON JAPAN

In addition to Mandarin-speaking jurisdictions such as Taiwan and Japan, several cases related to the right to be forgotten also appeared in Japan between 2014 and 2015. As Professor Shizuo Fujiwara rightly noted in his analysis published on the e-conference of blogdroiteuropeen yesterday, one of the most exciting developments in 2017 is that the Supreme Court of Japan completed its review in January on the original judgment of No. 17 from Saitama District Court in June 27, 2015.

The plaintiff of this case was arrested for having prostitution offered by minor in exchange for remuneration.[19] In 2012, the plaintiff found out that 49 search results related to the abovementioned event, would show up after typing in the plaintiff's address and name in the Google search. Therefore, the plaintiff filed the claim against the Google Inc. in the U.S.A., which administer and run the Google search website, requesting it to delete those search results on the ground for protecting the personality right of those who had crime history and are going through the rehabilitation process.

To counter the plaintiff's claim, Google has argued the same reason that it provided in the *Google Spain* Judgment, that the search results are the outcomes of processing of algorithms by computer, which is without human intervention. In addition, Google pointed out that the case at present involved the information regarding prostitution offered by minor in exchange for remuneration, which fell into the categories of the information with significant public interests. The revealing of this information should thus be within the limit of minor invasion towards the plaintiff's right.

For its deliberations, the Saitama District Court first considered the meaning and necessity of revealing the plaintiff's record of being arrested in the search results. In its assessment, the District Court pointed out that having prostitution offered by minor in exchange for remuneration is a severely criticized crime regardless in Japan or internationally. In light of the considerations of future possible victims as well as their parents, and the concerns of the society on this issue, it is undoubtedly beneficial to the general "right to know" of the society and thus is of public interest. The court further mentioned that, however, what is not shown in the search results, is that the plaintiff was sentenced to 50,000 yen fine and live peacefully with his wife. Furthermore, how the story happened and how it was later unfolded was not shown in the search results, but only the record of plaintiff's being arrested and related reportage.

The Saitama District Court thus reckoned that the plaintiff was entitled to his request. Nevertheless, the High

19 According to Article 2 of the Japanese *Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children*, the term «child» used in this Act shall mean a person under 18 years of age.

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Court of Tokyo later overruled the judgment of the Saitama District Court, in the belief that the removal of the search results will compromise freedom of speech as well as the right to know. [20]

Moreover, the Supreme Court of Japan upheld the decision of the High Court of Tokyo. In its deliberation on 31st January, 2017, the Supreme Court of Japan further provided the criteria for the search engine runner to assess upon receiving the request of data subject regarding the removal of certain content in the search results, if these results disclose things such as reportages that covers facts belong to the privacy of the requester. The criteria have been noted by Professor Shizuo Fujiwara rightly in his contribution, "*Current situation of discussions on Right to be forgotten in Japan*", published on the e-conference of blogdroiteuropeen.

4. CONCLUDING OBSERVATIONS

As many previous presenters of the e-conference have noted, the development of RTBF in the past 20 years, has evolved from the very early discussions in the nineties, to the early legal design in the 2012 GDPR proposal, to the 2014 *Google Spain* Judgment, to and eventually, the present impacts unfolded all over the world.

In terms of the representative cases chosen in this article, interesting ramification are observed from positions chosen by the judicial agencies in non-EU zones. In Taiwan, despite the reference quoted towards both the *Google Spain* Judgment and the Japanese RTBF case, the Taipei District Court has chosen to bypass the issue by the façade of using formalities criteria blocking substantial deliberations of the case. In China, on the contrary, the Courts (both the first and second instance) clearly expressed their decisions that the RTBF, for the Chinese judiciary, is yet only a right recognized by EU, and there will hardly be any protection offered if one base his or her claim solely by this "interest". Last but not the least, RTBF was firstly recognized by the confirmation of a lower court in Japan, but eventually denied by the Supreme Court of Japan, who did not use the wording of RTBF but provided a set of concrete criteria for the internet engine search runner to weigh against regarding the requests of deletion of certain search results from the users, when the facts at issue are related to privacy.

As presented in the *Google Spain* Judgment, and later cases all over the globe, the conflicts that emerge in those cases of "the right to be delisted" are among freedom of speech, right to information from the public on the one hand, and personality rights, values of privacy and data protections on the other side. Interestingly, for the failure of the resorting to RTBF in China, one might see it as a result of the absence of discourse on the privacy violation, as compared to the case in Japan. Furthermore, from all the three cases chosen, it can also be observed that despite the impacts that have been arose by the *Google Spain* Judgment, the value of privacy that varies locally so far still has greater influence on jurisdictions outsides Europe concerning the development of RTBF.

In the age of big data are facilitated by the trends of Internet of Things, unprecedented data is being produced at every second, of which a great deal is related to identifiable individuals. From the perspective of informational autonomy, individuals' right to control their own data shall be undoubtedly recognized. This should a universal scenario.

As Viktor Mayer-Schönberger pointed out in his famous Delete: The Virtue of Forgetting in the Digital Age, in the digitalized age, forgetting has become an exception to memorizing. As the cases suggest, the assessment of each case of the right to be forgotten relies significantly on ad hoc evaluations. As a matter of facts, RTBF is still developing both within and outsides EU, name it the 2017 CJEU judgment on Lecce or the case that still await the reconsideration by the district court in Taiwan. However, in terms of legal certainty and its impacts on the search engine business runner or internet archivers all over the world, a set of more predictable (and perhaps simpler as well) criteria for both the enterprises and the court, are still we need to strike a balance between the enteral memories of the internet and human needs for privacy.

20 Wasurarerukenri"Mitomezu kensukukekkano Sukujoyouseiwokyakka Tokyokousai' T*he Japan Newspaper Publishers & Editors Association* (Tokyo, 28 July 2016) <http://www.press-net.or.jp/news/headline/160712_10268.html> accessed 25 May 2017