

On the Construction of Chinese Legislation Path Concerning Data Protection -- The Introduction of the Right of Data Portability

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Abstract: The significance of data protection has urged Chinese legislators to improve defectives concerning current data protection legislation. Traditionally, “people orientation” spirit argues that private interests would be inferior to public interests and property rights would be inferior to human rights. Under these circumstances, there is a confusion to equate definition of information and data. Furthermore, data’s legitimacy property feature would not be acknowledged by legislation because the content in data concerning human right outweighs. Other defectives are concerned with unbalanced controlling force distribution and the lack of ex-territorial effect. The former is on account of Chinese political socialism and the latter is concerned with strategy to acquire global fame. After numerous empirical analyses and investigations, Chinese legislators have found that there is high integrating degree between current defectives and introduction of data portability regime. As for practical approaches, it is rational to introduce this regime into property chapter of civil code; the definition of data and its attributes should be clearly explained; introduction should be based on local situation step by step; provisional exemption should be imposed to small enterprises and poverty areas due to their limited resources to afford liability.

1. Introduction

The outbreak of pandemic has accelerated digitized social life and economic activities. Specifically, people acquire their nucleic-acid testing reports from online applications; industrial transmission from physical stores to virtual stores gradually popularizes; the storage of client information shifts from documents to cloud database. Under these circumstances, the scale of data is unprecedented and the abuse of them would impose destructive effects on human beings. Governments, institutions, and the public around the world have realized the significance of data protection via the means of data protection campaigns and legislation. For instance, the *2018 General Data Protection Regulation* (hereafter GDPR) has formally explained the conception of data portability right [1]. In recent years, Chinese government also realized the importance of data and devote itself to the protection of national data security, data personality and data portability. Furthermore, the introduction of data portability right is also a controversial topic due to uncertainty of its function.

This essay would argue that it is rational to introduce the data portability right to Chinese law. Firstly, the current defectives of Chinese data legislation would be discussed. Then, the underlying reasons or essence would be seen through apparent defectives. Furthermore, the main point is concerned with integrating degree between introduction of data portability and current defectives. Finally, the main point is about how to introduce the regime of data portability right.

2. Defectives of Chinese data legislation

With the increasing of frequency of internet communication and activities, the scale of data has reached a peak and more importance has been attached to state sovereignty, enterprises economic interests and personal rights for Chinese academic community and legislators. Under this

circumstance, China takes an active role in promoting series of data protection legislation. For instance, the implement of *Data Security Law of the People's Republic of China* [2] and *Personal Information Protection Law of the People's Republic of China* [3]. Although those laws have paid attention to the initial defectives of Chinese data protection legislation with an expectation to settle down them. Consequently, fundamental defectives are still existed, but the improvement of current defectives and reflection of new laws' innovation spirits are worthy of praise and acknowledgement.

2.1 Confusion to definition of data and information

Previously, substantive law, such as article 111 of the *General Principles of Civil Law* [4], have emphasized the significance of information protection and the potential legal liability for infringement to personal information. In practices, the information is mainly conveyed via electronic data and those data act as the reflection of personal information on the surface. Additionally, there is not direct definition to "data" on context of the *General Principles of Civil Law* but article 127 has introduced conception of data with a vague expression of "stipulation of relevant articles", which mislead inappropriate reference to articles concerning personal information. Regarding to this reference, academic community and practitioner would naturally deny the distinguishing points and regard data and information as the same thing. Consequently, the boundary of those two conceptions appears more obscure and more people would conflate date with information.

Even if in the *Civil Code of the People's Republic of China*, [5] there is no direct conception to explain what the essence of data is. Similarly, it creates certain linkage between data and information. Specifically, article 1034 of this legislation has stipulated that personal information recorded electronically or other formats, which indicates relationship between data and information as carrier and content. This relationship is not enough to equate data and information because the scope of information is far more boarder than data; data is one of modes of transmission of information. Essentially, the underlying rationality of the confusion between data and information is concerned with the vague expression of "stipulation of relevant articles" reserved.

2.2 Ignorance to property feature of data

Initially, data is exclusively regarded as a reflection of personality because it generates from individual's behavior in daily working and life. As discussed above, data acts as a crucial tool to convey information and stipulation of Chinese legislation potentially creates the artificial linkage to equate data and information. Under this logic, data naturally has strong involvement with privacy, reputation, and human dignity. Similarly, Beverley argued that the right connected with data protection is a kind of personality right exclusively, which was named after personality sole theory. [6] Moreover, the vague expression of "citation to relevant articles" is prevent discussing possibility of data' s feature as property and the approaches to deal with data.

Essentially, data has indispensable connections with economic activities and contains transferable value in wake of judgement from a rational natural personal. In view of these connections, foreign scholar Kerber held a firm opinion that the right connected with data was the property right, which could be summarized as property sole theory. [7] Long Weiqiu proposed a dual theory that data right should be a comprehensive right containing characteristic of personality in analogy with new right of intellectual property. [8] As Long noted, there was consensus achieved that the feature of property should be acknowledged at least; but the conflict between "dual theory" and "property sole theory" could be laid aside temporarily. This consensus is generated from the judgement of contemporary trend of digital economic, living, and judicial proceedings.

Firstly, practice and history has made a choice that the data should be recognized as property, and it could be transferable and portable because we are currently living in an era of global communication. Additionally, the acknowledgement to property feature of data could provide firm legal basis for judicial adjudications. The main obstacles to deal with internet civil cases is that Virtual property, such as virtual currency, game ID account and their derivatives, could not be define properly. Specifically, in the case of Tencent vs DD373 [9], it has claimed for 40 million damages because this platform selling the original game ID account and its derivatives to second-hand buyer.

Tencent argue the ID account is masses of digital code and Tencent has ownership to them. Some data originated should also be controlled and reserved by Tencent during the proceedings of borrowing account to users for daily shopping, playing and other online activities. Under this circumstance, the users only have the usage right, but they are recognized of ownership of their game ID account and the derivatives such as game currency. And the selling behavior of DD373 platform is injuring their legitimate rights and interests to reserve these data as data operators and controllers. However, Guang Zhou Specialized Internet Dispute Court has refuted Tencent's argument and rejects the claims. During the process of game playing and other online activities, users have invested excessive money, energy, and time into this account. Essentially, the usage right could not be compatible with high concentration of expenditure and a firm ownership for users is the main drive for efforts and investment fairly. Although data's property nature lacks direct legal basis, the attorney of DD373 has cited lots of cases law and academic essays to prove this nature. With regarding to the legal justice of game users, judge acknowledges the theory concerning data transaction and its property nature and calls for an advanced legislation to respond to data' property nature in the future.

2.3 Unbalanced controlling force distribution

Traditionally, state has played a leading role in the field of data protection. For instance, the articles of *Data Security Law of the People's Republic of China* are focusing on state public authorities' supervision and regulation to data operators. Relevant standards concerning data categories and data classification are formulated by administrative authorities such as Cyberspace Administration of China. For the sake of nationality and sovereignty, those administrative authorities would check and final approve cross-border data transfer if there is no sensitivity information. Once certain sensitivity information exists or injuring behaviors to national security appears, public authorities would impose administrative monetary fines and coercive measures to stop leakage of sensitivity information. Additionally, the victims of data injuries would seek for a justified award via an adjudication method from national courts. Overall, the involvement of state appears to be too frequency because it acts as rules constitutes, auditors for cross-border data transfer, judge to secure justified award and law-executors under different stages and conditions.

Similarly, enterprises' involvement on data protecting is only inferior to the priority of state involvement because it is the main supervision object for state's administrative authorities. Enterprises have controlled large scales of consumers data, user data and could data on internet and they are restored, processed, and operated under enterprises' database or final computer terminals. Once those crucial data is leaked to market without any restriction, it would be abused by criminals and people with ulterior motives, which would impose irreversible destruction to social harmony, decline of market and personal interests. Moreover, enterprises would be motivated by its market nature to seek for foreseeable profits from data forgetting its responsibility as data operator, receiver, and preserver. Overall, the strategic position for enterprises and its greedy for money force state to impose stricter regulation and supervision to enterprises date activities.

Under the whole legislation, the involvement of individuals appears too weak. For instance, the right of data subject had never been stipulated in contextually background of formal law. Even in some judicial explanations or local regulations, the data right of individuals remains to be covered up this blank. Essentially, the controlling force of data subject should be ranked equally because it acts as a foundation of generating personal data and partial composition of economic, industrial, and national security data. However, the right of data subject has potentially been weakened by squeezing out of state's power and enterprises' power in the practice of legislation and work of data protection.

2.4 Lack of ex-territorial effect

China realized the importance of data sovereignty and announced the data security law to regulate Chinese MNEs' data export behavior via severe restriction to data operator ex-ante. Although this legislation could be regarded as a milestone for whole development history of Chinese data

protection. However, it lacks a direct supervision to MNEs as data receiver who is domiciled in ex-territorial area of China. Under these circumstances, MNEs' responsibility appears to be too vague that they could escape penalties easily. [10] Additionally, victims of data injuries could only claim for damages to MNEs as data receiver grounding that the harmful behavior of data exporting could be attributed to MNEs as data receiver, which increase burden of proof for victims.

3. The underlying reasons for legislation defectives

The underlying reasons for Chinese data protection could be investigated from the perspective of legal values, the feature of political design or social system. Moreover, it should also consider from an international field to check the influence of external environment.

3.1 Legal value of people orientation

Chinese legislation has a traditional legal value named after "people orientation". Initially, this value means that legislation should be more focused on the comprehensive development of general people, which reflects a kind of respect to the public's economic, political, and cultural interests. With the emergence of private ownership, value concerning "people orientation" has gradually emphasized the protection to private individual' interests other than public interests. Additionally, there is a hierarchy of private interests that substantial, and monetary interests should be inferior to human rights, which is equivalent to that individual's property interests could not develop at the expense of individual's personality right. This is the spirit of kindheartedness in Confucian culture, which fit into purpose and principle the Communist Party to serve the people wholeheartedly.

Under the influence of people orientation, the Chinese legislation theme concerning personal information and privacy protection is antecedent to data protection due to its representation of human dignity, reputation, and personality. Despite part property feature for data, this property part should be ignored and regarded as personality. Additionally, the structure of personality protection would expand its horizon groundings that data could be contained into the scope of information or equate themselves. Consequently, Chinese legislator was blinded by the mentality to pursuit achievement of human personality and ignorance to the difference between data and information from the perspective of format, scope, and content. More importantly, they would rather not acknowledge property feature of data right.

3.2 Strong state force under socialist system

China is one of most typical socialist countries on the world. Under the political design of socialist system, the public select its own representatives constituting of people's congress at all levels, which finally decides a National People's Congress. Then, the State Council, center of public administrative authority, is appointed by National People's Congress and the State Council decides subordinate administrative authority. The result is that establishment of doctrine of "democratic centralism". Specifically, power is concentrated on the hand of state and its public administrative authority. Compared with traditional power concentration in the era of feudal society, this power concentration is based on public's democratic willingness and practical selecting efforts. This concentration is only a kind of format to settle down issues with higher efficiency, proper resources like concentration of resources in strategic policy, important industry, and critical situation. Essentially, the public' power has never been lost anything and they just hide under the protection and shelter of "outwear" of state power. Just take data security as an example, it is one of the most crucial dimensions for national sovereignty and safety, which means that data should be controlled and concentrated under state power. Under this circumstance, the state power could only afford general aspect of national data security and social harmony with ignorance to huge value of individual's data property right.

However, the public's awareness to data property right has been awakening since the market prosperous gradually become mature under policy of reform and opening the public. More importantly, they could not accept this indirect power format of representing too much their power

and rights. Therefore, there is a strong need for them to acquire direct data rights or power in new legislation, which increases their motivation to act as real subject of right.

3.3 The strategic to acquire global reputation

The underlying reason for Chinese current legislation to take ignorant to responsibility of MNEs as data receiver is a strategic to acquire good reputation around international community. In data exporting process, MNEs as data receiver could be divided into two categories more detailly: subsidiary of Chinese MNEs and other states' data receiver. [11] The former could be regulated by State security law naturally due to nationality connection with China, but the latter could not be regulated due to the nonexistence of nationality connection or parent-subsidiary relationship. Assuming there is a boarder range of jurisdiction, more criticisms, or arguments that Chinese legislation exercises long arms jurisdiction to invade other state's data sovereignty would be imposed to China; more fears about the growth of Chinese new hegemonism would be advertised around the world and undermined the fame of China, which made the legislator hesitating or confused.

Even though certain interests of Chinese nationals, companies have suffered from invasion, legislator of State Security Law would not extend the range of law's applicability because the word "interests" is too vague. Furthermore, the infringement of certain interests would only be recognized as an excuse because no law to do a detailed explanation to the word "interests". Consequently, the legislators would avoid stipulating the responsibility of MNEs as data receiver because it would potentially involve in other state's sovereignty affairs. It is time to make concessions on these sensitive issues due to worries to spreading of Chinese threat theory and significance of preserving Chinese international reputation. Under these circumstances, there is strong need to introduce a new mechanism that could regulate MNEs as data receiver during data exporting process.

4. Data portability's integrating degree to defectives

Essentially, data portability right means data subject, who is the carrier of data or its creator, should be deemed to have the right to transmit the data from initial data controller to another data controller. [12] Under these circumstances, data subject or individuals have stronger controlling force to the data; the data transaction or transfer implicates the characteristic of right in rem, which is where strengths of data portability lie.

4.1 Controlling force for individuals

The introduction of data portability is designed to deal with these unbalanced power distributions and confer more power to data subjects. Essentially, data have two basic orientations: one is to be stored and protected under given space, which is like the process of cellaring and needs to be monitored and preserved by its owner. Another orientation is sharing and circulating, which is like a process of wine-tasting and good treasures should be utilized by entirety to prevent rotten or perish. Assuming that the data was heavily controlled by state via imposing a higher standard to export data for the sake of national security, only the top entities could meet with those standards, and they would cause the issues of monopoly because its competitors had been suffering from failure of approval and pressure of policy. A return of power to the data subject made the individuals to decide of data exporting and prevent the threat of monopoly with more date flowing to those smaller and more innovative companies.

Once the controlling force of data subject could be increased to appropriate level, they do not need to prove its identification of victims of data injuries in tort law system, or even its loss on certain interests in accord with the abstract doctrine "related interests" in state security law.

Thus, data subject or individuals exercised the right of data portability and directly request data receiver to transfer data to enterprises which they thought to be reliable. Overall, the introduction of data portability is a revolution concerning transformation from weak victims to legal-authorized right master.

4.2 The characteristic of data portability re real right

Compare to the theory to emphasize data's personality characteristic, data portability right re real right could be more flexible. On assumption of data personality exclusively, data could not be transferred from its initial data operators to others. Additionally, it had been reserved permanently when individuals had performed some behaviors on data operator's platform naturally. For instance, a person would leave out some footprints with surfing on google and google would act as initial data operator. Subsequently, this person asked for google to transfer its data to others, which would be rejected based on assumption that data is not transferable due to its personality characteristic. It is undeniable that the data had been locked tightly to google with individuals' autonomy to generate data naturally.

On the contrary, the introduction of portability right recognizes the data essence is property. Essentially, it is a natural process for property used, transferred, and traded by its owner freely. Under these circumstances, data portability right allows the data to be transferred from data operators to new MNEs as data receiver who are appointed by data subjects, which accelerates the dynamic circulation of data and prevents it from static restriction imposed by data operators.

4.3 Boarder ex-territorial protection to MNEs as data receivers

When an injury from MNEs happened in the foreign jurisdiction, the victims appear too much helpless to seek for relief due to territorial scope of legislation. Under this circumstance, data subjects need to strictly prove its identification of victims in accordance with tort law in foreign jurisdiction. Even if the composition of four elements concerning injuries, damages, and connection and negligence had been succeed, the resources wasted into complicated proving process is not compatible with final amount and format of compensations. Specifically, remedies for personality injuries would still be restricted in a very narrow aspect of tort liability of fine, stopping injuries.

However, the introduction of data portability right recognized that the data property characteristic, which broaden its context. Accordingly, remedies targeted at MNEs as data receiver are transition of data to other reliable data receivers. It is a general right acknowledged by a lot of foreign legislation such General Data protection act in European. Under this circumstance, portability right acts as common global principle and natural human rights. Once it comes into the current Chinese legislation, its ex-territorial effects could be expended with such a gentle approach, which is the introduction or localization of a common global practice or principle. It is of rationality without depletion to global reputation.

Overall, the introduction of data portability right could confer more freedom for individual; Additionally, this right recognizes data's property essence, which accelerate date circulation and provide boarder remedies beyond personality reliefs regimes. Finally, it could also extend ex-territorial effects for Chinese legislation to regulate MNEs as data receiver.

5. The practical approaches to introduce data portability right

5.1 Introduction to the chapter of property in Civil Code

The introduction of data portability right should be rooted into the legal hierarchy of substantive law, which makes this right become more persuasive and authoritative with most formal and sacred format. Initially, there are some relevant cases law attempting to make indirect reference to data portability right to settle down disputes such as "Mobile number portability" and "cross-border data transfer". [13] However, its function to explain this regime is restricted and lacks systematic logic to introduce it. Some fragmentary characteristics of data portability, such as the duty of data receiver, could be investigated from also stipulation local regulations in advanced areas of Shanghai, Shenzhen. Thus, it is history and practice to make a choose of legal hierarchy of direct substantive law, which provides comprehensive and systematic explanation compared with other legal hierarchies.

Additionally, data portability should be introduced into the legal divisions of civil law. Firstly, the legal divisions of data portability could not be the anti-unfair competition law. It is undeniable that data portability would be an effective tool for individuals to cope with enterprises and it would break the deadlock of enterprises' data monopoly. However, the contextually background of this right is broader than narrow expatiation of fighting for monopoly. Essentially, it involves the relationship between state, individuals, and enterprises. Moreover, it is concerned with certain right and duty with apparent property and personality feature, which is the core value of civil law. Thus, it is compatible to broader scope of data portability with stipulating the definition and other relevance of data portability into civil law divisions.

As for the detailed approaches, civil code would provide an overall guidance and some important conception. The duty, right, liability and reliefs should be posed into the data security law or personal information law in accord with the judgement of property right or personality right. Similar choice would also influence the specialized chapters for civil code, neither in chapter of property right or chapters of dignity and personality. The author thinks that data portability right should be introduced the property chapters of civil code. More importantly, specialized legislation would prefer the data security law.

5.2 Clarity on attributes of data portability

Essentially, data portability should have a clear application scope. Specifically, anonymous data should be excluded from the scope of this right. Additionally, processing data, such as back-end server code, also need to impose on exception lists because those kinds of data generate from data operator without directly personal connection. For instance, in the case of Tencent vs DD373, the original code for operating and back-end server code were acknowledged ownership of Tencent company. Thus, a rational data subject, would not ask for the transition of those data.

More importantly, there would be a specific situation of shared ownership when these data could be involved with third parties. Under this circumstance, the application of data portability should acquire the agreement of third parties simultaneously. Another situation is implied consent of two parties under valid contract clauses.

Finally, GDPR has emphasized the data should be capable for identification, which means that data should be structured commonly used, machine-readable. Assuming that technologies are not enough to deal with these data, the application of data portability would come into nothing or meaningless technological obstacles.

Overall, the Clarity on attribution of data portability means that legislation could confer absolute right for individuals to transfer data with their names and other recognizable identification, such as age, race and occupation; processing data and anonymous data should belong to the data operators and it could prevent the application of data portability; the data could not be identified by technologies should also be excluded; The data involved with third party should be regarded as shared ownership and application of data portability should acquire agreement based on third party also.

5.3 Provisional exemption to liability of data portability

The introduction of data portability right should be followed step by step, which means that some areas or enterprises should be granted the right to exempt their duty from legislation of data portability because the local economy level or economic resources are still not mature enough.

In a macroscopic view, China has border territory of 9.6 million square kilometers and 34 provincial administration regions, 661 cities and 1347 counties. Different areas of China have its own economic level, political environment, and culture background. Under this circumstance, it is not every area having conditions to introduce the most authentic data portability right, which means localization is crucial. For instance, Article 20 of subsection there in GDPR [14] has stipulated exception situations of public authorities' administrative data collecting. It means that the administrative authorities would reserve crucial public information and prevent the application of data portability due to the consideration of national security interests. However, there is an

administrative affairs disclosure duty in China. Especially in big city like Beijing, political environment to create honest and upright government appears more strategic and significant. Under this circumstance, it is rational to make adjustment to stipulation of GDPR in advanced area and permit the usage of data portability even faced with administrative disclosure. Overall, this adjustment is a proceeding of localization to foreign legislation in wake of vertical areas.

In a microcosmic view, the enterprises, object of data portability, could be divided into small and micro business, mid-size enterprises and big enterprises plus state owned enterprises. Under this circumstance, the capacity of economic power or resources also differs, which finally influence the compliance capability to law. During the stage to introduce and spread new regime of data portability, localization and adjustment to data portability means that legislation should have layers and classify different types of enterprises. The expectation is reducing the expenditure for small companies to comply with stipulation of law. This adjustment is also a proceeding of localization to foreign legislation in wake of horizontal classification.

6. Conclusion

In conclusion, data protection is an important topic related to national sovereignty and corporate economic interests, which urges Chinese legislators to make great efforts to improve current legislation and settle down its defectives. Essentially, the milestone significance of data security law and progress on data protection legislation are admirable but the defectives are still existed. Under the influence of Confusion culture named people orientation, current Chinese legislation still equates the concept of data and information no acknowledging the specialized feature of property for data. Additionally, unbalanced power distribution and lack of ex territorial effect are the defectives caused by socialism regime and global strategic to acquire fame. The introduction of data portability is beneficial for clarifying the difference between data and information, acknowledging the property essence, and stimulating self-awareness of data protection.

As for the approaches, there is impossibility to exhaust the choice and only some practical methods would be illustrated. Essentially, they reflect authors' subjective explanation and analysis with limitation form unique background, which remains to be corrected and amend by peer's review. Those approaches seemly include three aspects: data portability right should be introduced into property chapter of civil code; the definition of data and its attributes should be clearly explained; exemption should be imposed to small enterprises and poverty areas due to their limited resources to afford liability. However, this exemption is provisional since it is a short term strategic to satisfy the need of data portability's localization step by step.

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