

## The Protection of Privacy in the Disclosure of Judicial Documents

HE Xiaobin<sup>[a],\*</sup>

<sup>[a]</sup>China University of Political Science and Law, Institute for Human Rights, Beijing, China.

\*Corresponding author.

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### Abstract

In the reforming of the judicial system, the online publication of judicial documents takes the lead and has become an important achievement, as privacy protection has become an important concern. However, the online judicial documents are faced with great challenges. On the one hand, it fails to distinguish between judicial democracy, forming rules and judicial unification, resulting in the theoretical conflicts between disclosure and privacy protection. On the other hand, it cannot reflect the differentiated disclosure needs of different types of cases. Considering the protection of privacy in the publication of judicial documents, the publicity should be distinguished according to the type of cases, and stipulated by the NPC in the form of law to resolve the concerns of privacy protection.

**Key words:** Publicity of judicial instruments; Judicial democracy; Privacy protection; Case-based disclosure

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### INTRODUCTION

Since the Constitution of 1954, the principle of judicial openness has been established in China's legal system. Regrettably, for a long period of time, neither the current Constitution nor the procedure law provided the specific content, such as the form, content, and procedures of

disclosure. In 1999, the Supreme People's Court first proposed the reform of the adjudication instruments, and formulated "Administrative Measures for the Publication of Adjudication Documents" in 2000, which established the principle of selective publication to the public, and corresponded to different publication methods, such as newspapers, bulletins and the Internet, by distinguishing between cases of significant impact, typical and guiding cases and daily cases. Since then, the Supreme People's Court has formulated three "Regulations on the Disclosure of Judicial Documents by the People's Court on the Internet" in the year of 2010, 2013 and 2016.

In the process of the public reform of the judicial documents, there are concerns about whether disclosure will violate the right to privacy. Some scholars believe that although the online disclosure of judicial documents is conducive to judicial justice, it will shake the legitimacy of judicial disclosure if the privacy of the relevant subjects is not properly protected. (Huang, 2012) Some scholars further blame the high privacy risk because of the disclosure on the Internet which is different from previous paper publications. It has to be acknowledged that these challenges are not unreasonable within the framework of the existing system of disclosure of judicial documents. This paper intends to focus on the privacy protection in the disclosure of judicial documents in the context of China law.

### 1. MISREADING OF NON-DISCLOSURE: PROTECTION BASED ON PRIVACY?

We often mistake some undisclosed situations as the protection of privacy, but this is not the case. "Regulations on the Disclosure of Judicial Documents by the People's Court on the Internet" (hereinafter referred to as "Regulations") article 4 provides five non-disclosure cases, including those involving state secrets, juvenile delinquency, Mediation settlement, divorce or cases

involving the upbringing and guardianship of minor children. Among them, state secrets and mediation does not involve the protection of privacy, while cases involving divorce and juvenile crimes are considered to be non-disclosure due to privacy violations.

### 1.1 Divorce Cases

Is it to protect privacy that the divorce case is not public? Some people believe that one of the differences between family disputes and ordinary civil cases is that the former is deeply connected with privacy, and divorce is a private matter between husband and wife, and does not harm the interests of the public and other unspecified third parties. (Zhan, 2007) They attempt to define the marriage situation as privacy, and support the non-disclosure of divorce cases for privacy protection. However, marriage does not just matter to the both parties of the marriage. Love is the freedom of both parties, but marriage is a social act. The reason why the modern state regulates marriage is not to fulfill love. Love does not require the confirmation of the state. The inclusion of marriage in national legal system is based on the significance to the country and society. The marriage system concerns a series of issues such as spouse rights, division of labor, and child support, etc. In German, the Federal Constitutional Court confirmed that private life as a whole does not have the right to absolute protection, and that citizens are members of society and subject to social constraints. Although divorce proceedings relate to the private life of the spouse, these records are not completely isolated from external review. (Zhang, 2001)

Article 134 of China's Civil Procedure Law establishes two types of non-disclosure of civil cases. Paragraph 1 establishes legal non-disclosure of cases involving state secrets and personal privacy, and Paragraph 2 establishes divorce cases and cases involving trade secrets that are not disclosed on application. It can be seen that legislators distinguish between divorce cases and cases involving personal privacy. These two cases do not always coincide. Some divorce cases may involve privacy information, but some cases have nothing to do with privacy. In this context, the non-disclosure of divorce cases is not due to the need for privacy protection.

### 1.2 Juvenile Crime Cases

Article 274 of China's Criminal Procedure Law stipulates that in the case of juvenile crimes under the age of eighteen, the trial shall be conducted in private. However, with the consent of the defendant and his legal representative, the defendant's school and the minor protection organization may send representatives to the trial. In order to further protect the rights of minors, Article 275 also stipulates that criminal records shall be sealed for those who is under eighteen at the time of the crime and are sentenced to a term of five years or less.

It is obviously a misunderstanding to interpret the case of a minor crime in private as privacy protection. There is also the need for a fair trial in juvenile crime cases. The fact that a defendant is a minor does not mean that he or she will be able to obtain a fair trial (Bazon, 1999). The reason why schools and juvenile protection organizations can participate in court hearings with the permission of the defendant and his legal representative is that the right of a minor defendant to a fair trial is guaranteed through limited publicity.

In fact, the main reason for juvenile crime cases not to be made public is to guarantee the social return of minors. Article 40 of Convention on the Rights of the Child stipulates that the treatment for children in the criminal trial should take into account the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. The starting point of this policy is not the individual rights of minors, but a comprehensive measurement based on the public interest of society. This is distinctly different from the explanation based on privacy. The enjoyment of the right to privacy does not differ due to factors such as age, and the interpretation based on the right to privacy can only be based on the theory of penal retribution. That is, because the circumstances of crime are worse and the harm to society is greater, as a punishment, the law waives the protection of its privacy. Conceptually, social return is more in line with modern human rights concepts.

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## 2. CONFLICTS BETWEEN DISCLOSURE AND PRIVACY PROTECTION

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### 2.1 Three Different Disclosure Theory

There are many advantages of judicial documents disclosure, including the education of the rule of law, the display of judicial results, and the provision of legal research resources. Generally speaking, the core functions of the disclosure are mainly divided into three theories of judicial democracy, formation rules, and judicial unification. The design of disclosure needs to be based on one of the theories in combination with the specific national legal system. One of the important reasons why disclosure conflicts with the protection of privacy is that it fails to distinguish the important role of different disclosure purposes.

One of the theories supporting disclosure of judicial documents is judicial democracy. Although the disclosure of judicial documents cannot directly exert legal influence on judicial trials, it protects the public's right to information and supervision, and achieve justice through independent trial. This theory is particularly evident in traditional civil law countries. On the one hand, civil law countries show a strong sense of authoritarianism in the process of judicial trials and the power-driven

characteristic. (Long, 2001) For example, judges lead the litigation process, collecting evidence according to their powers and free from the principle of debate. At the same time, civil law countries are mostly normative lawsuits, the professionalism of the application and interpretation of laws, and the closed nature of the judicial process, which easily lead to public distrust of professional judges. So, civil law countries add democratic factors to the design of their judicial systems, with the intention of balancing judges' power with greater openness.

Another important theory of disclosure is the formation of rules. Especially in case law countries, the judge's analysis of the case will become the basis for future judges in similar cases. Only when the process of legal interpretation and legal reasoning are disclosed to the public can a common understanding of legal rules be formed, and the rules can become universal code of conduct. In this sense, the disclosure of judicial documents in fact plays the role of legal disclosure.

In addition, the theory of disclosure also includes judicial unity. Whether in statutory law or case law countries, different judges may come to different conclusions in the same case, even if they apply the same legal norms. In the process of judging, judges need to experience two thrilling leaps—the induction of case facts and the interpretation of legal norms. Compared with abstract legal provisions, the advantage of disclosure is that judicial documents record the process of judges' factual induction and legal interpretation, which can be a detailed operating procedure to guide other judges.

The above three open theories are given different weights in different countries, and are closely related to the situation of state power. In United States, the Federalists used the judiciary to restrict “the most dangerous department”. The reason is that the legislature may make wrong decisions because of passion and impulse of democracy, and the judiciary will be relatively neutral. From this perspective, the main purpose of the disclosure in United States is not judicial democracy, because one function of the judiciary is anti-majority tyranny.

Of course, with the gradual integration of case law and statutory law, the disclosure of judicial documents in various countries no longer pursues a single goal. Traditional statutory law countries have increasingly paid attention to the important role of precedent in judicial adjudication. However, the above three theoretical divisions still have double meanings. First, the background of judicial documents disclosure is related to the national power structure, and the design of specific disclosure is biased towards different theories. Second, in the context of integration of legal systems, different theories of disclosure can still serve the construction of disclosure.

## 2.2 Disadvantages of Content-Based Disclosure

Content-based Disclosure refers to the decision based on specific information about cases. The content-based disclosure in China is manifested in two levels in terms of institutional norms. First, the three major procedural laws have established the embryonic form of content-based disclosure, and generally established that the cases involving state secrets and personal privacy are legally closed. The second is the provisions of Articles 4, Article 8, and Article 10 of the Regulations on specific disclosures. Among them, Articles 8 and 10 detail cases that should be treated anonymously, as well as the information that should be deleted when the judicial documents are published.

First of all, through the operation of anonymous processing and deletion of personal information, the purpose of privacy protection cannot be achieved. Especially in the era of big data, the online disclosure can still restore the details of the case by combining with other data information. In the context of digital life, the advancement of massive data collection and algorithm technology has made personal data portraits more and more accurate, and anonymous technology and other technical means are difficult to overcome the reverse identification. This means that in the era of big data, simply hide the name, delete personal address, name and other personal information cannot achieve the purpose of privacy protection.

Second, for content-based disclosure, its regulations are complex and confusing, which makes decisions on whether public or not taking up too much judicial resources. In addition, studies have shown that personal information processing in the disclosure is not standardized. (Ma, 2016) Much of this should be attributed to complex disclosure requirements.

More importantly, content-based disclosure faces structural difficulties. The power of disclosure is left to the judge, which increases the chance for the system to challenge the judge's conscience. When privacy is difficult to define clearly and depends on the discretion of judges, cases that really require judicial supervision through publicity may be refused on the grounds of privacy protection. In the system that regard judicial democracy as the main value pursuit, it will greatly weaken the value of disclosure.

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## 3. THE REFORM FOR CASE-BASED DISCLOSURE

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### 3.1 Construction of Case-Based Disclosure

Case-based disclosure refers to different disclosure in criminal, administrative, civil litigation. Among them, there is a fundamental difference between civil and criminal judgments. The function of civil judgment

is dispute settlement. As a kind of private interest distribution, civil cases will not affect the interest of other members of society. At the same time, both parties in a civil case have equal legal status, and neither party has an absolute advantage over the other, which means both parties have a basis for fair negotiation. In 1976, the German “ Civil Procedure Law “ is modified to allow the parties to abandon public trial. Some people thought that it violated the principle of public trial as stipulated in the international human rights conventions and the constitution. However, the amendment committee’s view is contrary to this. (Qiu, 1996)

The disclosure in criminal cases represents another kind of logic. The need for disclosure largely stems from the need to balance public power with judicial democracy. In criminal cases, the strengths of the two sides are very different. Criminal coercive measures and technical reconnaissance methods put citizens’ rights in a dangerous situation. Supervision in criminal cases is not just for the protection of the rights in certain cases, but also to cope with the great threat to the rights of all members of society.

Administrative litigation is different from civil litigation and criminal litigation. Administrative litigation has three functions: dispute resolution, rights relief and supervision of administration. Although the law does not prioritize the three functions, it is theoretically believed that the function of dispute resolution is primary. (He, 2016) In general, the executive as a defendant does not have the right to privacy. And from article 12 of Administrative Procedure Law about the scope of the administrative case, it has little effect on the plaintiff’s privacy.

In general, from civil cases to administrative cases and to criminal cases, the scope of disclosure should be gradually expanded, and there are differences in the pursuit of the purpose of disclosure. First, cases involving privacy content decreased, civil cases mainly involving private matters, and administrative cases and criminal cases involving public issue. Second, the threat to citizens’ rights is growing. Civil cases only involving property issues and administrative cases involving property rights and personal liberty, while criminal cases involve property, person, and even life. Third, in terms of uniformity of adjudication, different parties have different pursuits of interests. The agreement reached by the parties based on their own interests may not be of reference value to other dispute subjects, but different judgment in familiar criminal case are intolerable.

### 3.2 Procedures in Reforming of Case-Based Disclosure

The protection of the right to privacy in the disclosure concerns the legitimacy of it, because the right to privacy

as a civil right cannot be arbitrarily restricted or deprived. In 2017, the Huai’an District People’s Court of Huai’an City, announced the information of four defendants who raped and molested minors based on the documents issued by the Huaiyin District Political and Legal Committee. The public content includes names, ID numbers, photos, age, gender, and cause. This type of disclosure has clearly exceeded the purpose to be achieved by the disclosure of judicial documents.

One important of disclosure is judicial democracy, so it’s obviously inappropriate for the court to formulate rules that supervise itself. Judicial disclosure is not just court’s power, but also its statutory duties; supervision of judicial behavior is not just court’s self-monitoring, but also supervision by People’s Congress and other state organs. Second, various types of “decisions” formulated by the Supreme People’s Court on judicial disclosure are vague, and it is difficult to find authorization or legal basis in the Constitution, the Legislative Law, or the Procedural Law. Finally, in order to realize the ideal construction of judicial disclosure, it is necessary to coordinate the substantive law and procedural law, legislation and judicial interpretations. Other subjects cannot complete the above tasks, except the National People’s Congress.

Therefore, it is obvious that the main body for formulating the rules for judicial disclosure should not be the Supreme People’s Court or local government, let alone take the form of “decision”. It is necessary amend laws, such as the Organic Law of the People’s Court or the Procedural Law, to realize the goal of privacy protection.

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