

## Original Paper

# The Proof and Development of the Right to Be Forgotten in Civil Code

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### Abstract

*Contemporary Chinese rights of personality law are in a period of perfection. The Personal Rights section of the Civil Code provides the ideological basis of law for other legislation on the rights of personality in China, and the newly released Personal Information Protection Law provides relevant provisions for the privacy issues involved in personal information. The legislation related to personality rights in China should respond to the needs of people's personality rights in the Internet era and introduce laws to some rights that have emerged with the development of the Internet. In other words, based on confirming the general personality rights and personal information protection, we should protect the emerging rights such as "the right to be forgotten". In this regard, based on the existing judicial and legislative practices, it is necessary to argue that the right to be forgotten is an independent form of right and to explore the legislative way forward for the right to be forgotten, to contribute to the effective protection of personality rights and personal information.*

### Keywords

*right to be forgotten, right to delete, personal information protection, rights mechanisms*

### 1. Introduction

The right to be forgotten originated in France and is known as the "right of oblivion". The right of oblivion was first associated with criminal law and refers to the right of a criminal to request that the fact about he has committed a crime not be disclosed after his release from prison. The presence of negative information is undoubtedly detrimental to people's lives. However, with the development of Internet technology, people are leaving more and more information on the Internet. On the one hand, the development of the Internet allows people to access information quickly, but on the other hand, it can also make our information overly accessible and memorized. Humans may forget something as time passes, but the network stores our information, and some information that is detrimental to us

personally is hard to delete, bringing negative impacts to our daily life. So it is difficult for us to get rid of this negative information.

Therefore, at the beginning of this century, the right to be forgotten came to the field of civil law. The first document where the right to be forgotten appeared was the 2012 European Commission's submission of the *Uniform Data Protection Regulation-European Commission Recommendation 2012*, which specifies the right to be forgotten in Article 17, the title is "Right to be forgotten and to erasure". In 2016, the EU formally established the right to be forgotten in the *General Data Protection Regulation*. Since then, the right to be forgotten has entered a new development process. Many countries have added provisions related to the right to be forgotten to their national laws under the influence of the *General Data Protection Regulation*. The EU and the legislation of these countries have laid the foundation for other legislation on the right to be forgotten.

In this era of the increasing importance of the Internet, information on the Internet is often related to personal image, and negative information can degrade our personality. Therefore, the right to be forgotten is an important right about personality. Rights originate from human needs, and the purpose of rights is to meet people's legitimate needs and maintain human dignity. With the rapid development of China's economy and society, new social phenomena will be created, people will have new needs and demands for rights. The systematic recognition of the right to be forgotten in the Civil Code can enhance the status of the right to be forgotten, which is conducive to people's protection of their rights and interests. To explore how to establish the system about the right to be forgotten in the Civil Code, this paper will analyze the necessity of the right to be forgotten in light of overseas legislation. This paper will also analyze the importance of the right to be forgotten, and then discuss how the right to be forgotten should enter into the system of personality law. Finally, the author plans to make legislative suggestions to promote the protection of personality rights.

## **2. The Source and Meaning of the Right to be Forgotten**

### *2.1 Reflections Arising from the Case*

Regarding the right to be forgotten, there is a famous case in China. Plaintiff Ren Jiayu is a practitioner in the field of human resources management, business management, and other management science. He has worked at Wuxi Tao Biotechnology Co., Ltd. since July 1, 2014, in the field relevant to education, and then terminated his employment relationship with the company. In April 2015, Ren Jiayu entered the Baidu search page and found that the search results showed he was still associated with this company. Ren Jiayu claimed that because Tao's education has a bad reputation in the industry so if students search for Ren Jiayu's name and see the search results, they will misunderstand him. He argued that the search engine's actions violated his right to reputation, his right to name, and his "right to be forgotten" as a general personality right. He demanded that Baidu should disconnect the search links for the keywords in question, apologize and compensate for economic losses. Baidu argued that the "related search" service provided by Baidu only objectively reflected the information-related status

when searching for his name, and did not violate Ren Jiayu's civil rights.

Concerning the "right to be forgotten" involved in the case, the court of first instance held that there is no statutory right called "right to be forgotten" in the current law of China, and the "right to be forgotten" is only covered in the foreign laws and jurisprudence. The "right to be forgotten" is only covered in foreign laws and jurisprudence, but it cannot be a source of legal protection for such rights in China. The plaintiff's interest in this case, which should be "forgotten", is not justified and necessary for legal protection. So it should not become a legitimate legal interest for the protection of infringement. The court does not support the claim that the interest is protected by the so-called "right to be forgotten" in general personality rights. Then, Mr. Ren appealed against the first instance judgment. The court of the second instance held that the interest of this part of personal information on the network could not be classified into the existing type of personality rights protection in China, but could only seek for protecting from the perspective of general personality rights. But because the interest claimed by Mr. Ren does not have the legitimacy and the need for legal protection, it should not become a legitimate legal interest for infringement protection. Therefore, Mr. Ren's claim for the so-called "right to be forgotten" based on general personality rights should be rejected.

In summary, in 2015, the court held that Mr. Ren's claim lacked legal basis and that the "right to be forgotten" had not yet entered Chinese law. Legislation is first needed before protect the right to be forgotten. Information on the Internet can be considered permanent, and it is hard to completely delete personal information once it has appeared on the Internet. The pattern of human forgetting has been replaced by the eternal memory of digital information, the relationship between forgetting and remembering has been reversed. So people are in the dilemma of constantly "repeating memory" and "difficult to forget". The development of information technology has also brought many troubles and risks to people, and the existence of the right to be forgotten has alleviated this danger.

This case gives us a lot to think about, as the judge found that deleting Mr. Ren's information would affect the public's right to know the relevant information. The public has the right to know about Mr. Ren's employment history, so Mr. Ren's claim to remove the relevant links was not justified and necessary. The exercise of the right to be forgotten involves weighing interests between the public's right to know and the plaintiff's right to be forgotten. This issue was also involved in the Google v. Gonzalez case. In the following arguments, the author will present views on this issue.

## *2.2 The Origin of the Right to Be Forgotten and the Current Status of Legislation*

The right to be forgotten originated in the case of Google v. Gonzalez. In 1998, a Spanish newspaper published an auction listing from the Ministry of Labor and Social Affairs listing properties to be recovered for debt, including one property belonging to Mario Costeja Gonzalez. By 2006, the newspaper began publishing on the web. By this time Gonzalez had been released from his debts. Gonzalez discovered that his name appeared in the announcement of a compulsory auction of his property, an activity that he believed the information was out of date and the information was no longer valid and that its continued retention would be damaging to his reputation. He asked the newspaper to

remove the information. However, the newspaper refused his request, so Gonzalez turned to Google for help. He asked Google to delete the information online. But things were not going well. After seeking help from multiple sources to no avail, Gonzalez filed a lawsuit. There was a huge controversy surrounding how to judge the case, and the Spanish National High Court requested a ruling from the European Court of Justice. The European Court of Justice has held that once a person's data is no longer necessary, the individual can request its deletion. And Google, as a search engine operator, should be regarded as a data controller within the scope of application of the European Data Protection Directive and was responsible for the information on web pages with personal data posted by third parties. Google was obliged to eliminate it. The outcome of this case laid the groundwork for the subsequent explicit establishment of the right to be forgotten in the Uniform Data Protection Regulation.

In 2014, when announced the ruling, the concept of the "right to be forgotten" was introduced to the public as a right to personal information. The right to be forgotten was frequently mentioned in cases in Europe and the United States. In fact, the right to be forgotten sprang up in Europe as early as the 1990s when the European Union mentioned in its European Data Protection Directive in 1995 that citizens could request the deletion of useless data to protect personal information. Later on, there were legislative activities on the right to be forgotten in England and France. In March 2014, the *General Data Protection Regulation* was amended and stipulated that the data subject has the right to any known third party to remove all copies and links to personal information that may have some negative influence.

In addition to Europe, acts about the right to be forgotten also exist in the United States. Unlike Europe, the right to be forgotten has experienced a rocky development process in the United States. The U.S. Constitution provides the public with freedom of speech and freedom of the press, so the right to be forgotten is considered an infringement of this right. Even with the difficulties, in 2013, California Governor Jerry Brown signed California Senate Bill 568, known as the "Eraser Act". The bill requires well-known social networking sites, including Facebook and Twitter, to allow minors to delete personal information that would negatively affect them online. The purpose of this is to prevent teenagers from having to face a lot of trouble in the future from the traces left behind online due to their youthful ignorance and lack of awareness of online precautions.

The right of oblivion in France in the 20th century is the foundation of the modern civil sense of the right to be forgotten. As mentioned before, the right of oblivion is usually used for criminals to request the deletion of their criminal records in the public domain after they have served their sentences. So they can have an equal opportunity to develop in social life and be better re-socialized. It can be seen that the right of oblivion is to facilitate the socialization of criminals by deleting their criminal records, and this internal logic is highly similar to the "right to be forgotten". The right to be forgotten allows people to delete "information from the past that may lead to lower social evaluation". By deleting the information, they can protect their lives from such information and protect their benefits, for example,

their reputation. The right to be forgotten and the right of oblivion has a similar conceptual core. Both rights limit the dissemination of negative information about individuals from the past, which, because it is not easy to dissipate and may affect the perpetrator for years or even a lifetime. We can interpret the right to be forgotten by referring to the criminal law maxim “no more attention to one thing”. A person has already been “punished” for past misconduct or statements, and continuing to keep this information on a public online platform will make the perpetrator to live in the shadow of others’ negative opinions for a long time, which is a kind of punishment. Deleting such information not only gives the perpetrator a chance to start a new life but also protects his or her personality rights. From perspective about value comparison, most of the time the value to society of continuing to retain that data is no greater than deleting them. The right to be forgotten exists to protect the rights of individuals by imposing some reasonable restrictions on freedom of speech and press on the Internet. This is precisely why the right to be forgotten exists.

### *2.3 The Status of the Right to be Forgotten*

Does the “right to be forgotten” constitute a new type of right of personality? Before exploring this question, it is necessary to briefly review traditional personality rights and compare the “right to be forgotten” with traditional personality rights to conclude. Wang Limin believes that human dignity is the primary value of the codification of human rights, and the maintenance of human dignity is an inevitable requirement to adapt to the real demand for the protection of human rights in the era of the Internet, high technology, and big data. The fundamental value of general personality rights lies in the protection of human dignity as a means to achieve the independence and free development of the personality.

The right to be forgotten sets its sights on the online sphere, and the right to be forgotten broadly refers to the right of an individual to request the deletion of personally relevant information stored on the network or to terminate the indexing, access, and other further processing of this information. This information is often outdated, and its continued retention can lead to lower social evaluation of data subjects, which can affect the individual’s future development by making people bound by this information. The purpose of the general right of personality reveals that the right to be forgotten certainly belongs to the category of personality rights.

The right to be forgotten gives us the right to decide whether to keep the information or not, and is a manifestation of the freedom of information. If a person has the right to information, he should not only have the right to upload information but also the right to delete it and enjoy the freedom to dispose of it. The information subject is fully guaranteed the unfettered use of information through the complete self-determination of the information, thus highlighting the protection of personal freedom.

Personality rights can be divided into general personality rights and specific personality rights. It should be clear that the right to be forgotten is not a general personality right, but a specific personality right. The relationship between general and specific personality rights is similar to that between general law and special law. General personality rights provide a kind of overall protection and relief when

specific personality is not applicable. The right to be forgotten is subordinate to the specific personality right of personal information. This shall be a kind of information self-determination. The right to be forgotten is the right to govern, decide and protect personal information, and its content can be fully covered by the right to personal information.

### **3. The Necessity of Introducing the Right to Be Forgotten into the Civil Code**

The right to be forgotten, as an emerging right, wants to enter the civil code, and it has to be argued from two perspectives: the reasons for introducing this right and the value of this right.

#### *3.1 Reasons for Introducing the Right to be Forgotten*

The Internet has become massively popular in China, and the statistical bulletin of the National Economic and Social Development of the People's Republic of China for 2021 released by the National Bureau of Statistics shows that the number of people accessing the Internet in China in 2021 was 1.032 billion, including 1.029 billion people accessing the Internet by cellphones. The Internet penetration rate was 73.0%, among which the Internet penetration rate in rural areas was 57.6%. As of December 2022, the number of Chinese Internet users reached 1.067 billion. The problem of forgetting brought about by such a massive volume of networks has become an important issue in the information age.

With the rapid development of the Internet in China, people will have new needs and rights claims regarding the protection of personal information. In the newly implemented Personal Information Protection Law, there is a provision similar to the "right to be forgotten". Article 47 of the Personal Information Protection Law adopts an enumeration approach, stipulating that "the personal information processor shall take the initiative to delete personal information under one of the following circumstances; if the personal information processor fails to delete, the individual has the right to request deletion". However, it is still flawed as far as the grounds for deletion are concerned, the list of circumstances is too narrow, and the potential abuse of the exercise of the right to be forgotten is not regulated. Therefore, from the perspective of China's current legislation on the right to be forgotten, although the Personal Information Protection Law opens the right to request the deletion of personal information to protect the personality rights of the information subject, this provision does not go far enough, and the right to be forgotten is absent except for this provision.

The right to be forgotten is not only a ordinary legal right but also has the nature of a fundamental and human right. Since the European Union's European Data Protection Directive in 1995, the right to be forgotten has been systematically studied and promoted in various countries on a lasting basis. The *General Data Protection Regulation* (GDPR), introduced in November 2012, formally added the "right to be forgotten and deleted" in Article 17, recognizing the right of information subjects, especially minors, to delete their information.

#### *3.2 The Value of the Right to Be Forgotten*

Combined with the previous discussion of the origin of the right to be forgotten, it is clear that the emergence of the right to be forgotten is inevitable. As access to information becomes more and more

convenient, we have access to more and more information, and a great deal of our information appears on the Internet. Technology about data collection and storage technologies such as search engines have increased the uncertainty of information subjects in control of their own information. Once our personal information is on the Internet, it is difficult to control it. 1978 French Privacy Law provides the right of oblivion to protect the privacy of perpetrators, and the negative information that is difficult for us to delete today is like a criminal record from hundreds of years ago, except that the information we have access to now is not only criminals but also includes debt records and other information that can adversely affect us. Therefore, the right to be forgotten is bound to emerge along with technological development, and there is a value and need for the right to be forgotten.

Second, the right to be forgotten has a social basis. In the data era, there are numerous cases of infringement of personal privacy, and the demand of the public for their private information to be forgotten in the data era is higher than in any other period. The right to be forgotten reflects society's pursuit of the ultimate goal of human beings, because the process of establishing the right is the improvement of the means of protecting personal data, and then the ultimate goal of protecting human interests. Moreover, in the current evolving society, where the retention of outdated information hinders the progress of the society, the demand for the protection of these rights responds to the development of society. Some may argue that providing for the right to be forgotten is a manifestation of the generalization of rights and would allow the public power to interfere too much in our lives. But from another perspective, the emergence of new rights indicates a general rise in civil rights awareness and a social phenomenon in which people favor the use of rights to justify their demands or claims.

To sum up, with the relevant experience already provided by extraterritorial legislative examples, China can continue to optimize the legislation on the right to be forgotten based on Article 47 of the Personal Information Protection Law and protect the right to be forgotten within a reasonable degree and scope.

#### **4. The Systematic Unfolding of the Right to Be Forgotten in the Law of Personality Rights**

If we want to introduce the right to be forgotten into the personality rights section of the Civil Code, we need clarify three points. The first is the difference between the right to be forgotten and the right to erasure. The right to be forgotten and the right to erasure are highly similar, and we need clarify the boundaries and connections between the two rights. The right cannot exercise without limitations, and we also need to understand how to resolve the public interest and personal interest if there is a conflict when exercising the right to be forgotten. After finally solving the above-mentioned problems that affect the right to be forgotten in the personality rights section of the Civil Code, we can advance the legislative concept of the right to be forgotten.

##### *4.1 Basic Concept Analysis: The Right to Delete and the Right to Be Forgotten*

In academic research, the right to be forgotten and the right to erasure are two ambiguous and easily misused concepts, both of which can be used to describe the public's right to limit the dissemination and use of personal information. The right of deletion is stipulated in Article 1073 of the Civil Code: "If

a natural person finds that his personal information is processed in violation of the provisions of laws and administrative regulations or the agreement be among the parties, he has the right to request the processor of the information to delete it on time.” The right of deletion allows the information subject to request the processor of personal information to delete the personal information under certain circumstances.

The right to be forgotten is a right designed by the law for information subjects to respond to information that has gotten out of control. Information subjects can use information removal and recycling as a means to provide a remedy path for personal information protection in cases where the personal information that has been legally disclosed is outdated, irrelevant, inaccurate, and would negatively affect the individual. Scholars have observed and thought about the relationship between the right to erasure and the right to be forgotten from different perspectives and different opinions. At present, there are three theories. Some scholars believe that the two rights are the same, while others believe that they are different. Other scholars have argued that there is a partial overlap between these two rights. The author believes that the right to be forgotten and the right to delete are inextricably linked, and the two can neither be separated nor fully equated.

The right to be forgotten needs to be compared with the right to erasure. Generally speaking, both can be used to protect personal information. The right to be forgotten is an emerging right compared to the right to erasure, which focuses on the deletion of information that adversely affects individuals. The right to erasure aims at information that is not legal at the point of collection and use. The right to be forgotten, on the other hand, refers to the information collected, used, processed, and transmitted on a legal basis, which transformed into “outdated, irrelevant, harmful, and inaccurate” information due to the passage of time. Article 43 of the Network Security Law and Article 1037 and Article 1195, of the Civil Code all provide for the right to delete personal information. And Article 47 of the Personal Information Protection Law is similar to the right to delete.

In summary, based on the concept of the right to be forgotten, the right construction of the right to be forgotten is very clear. The subject of the right is the data subject and the subject of the obligation is the data controller or data processor. The object of this right is the information published in a legal form, about itself real but irrelevant (or no longer relevant), outdated, one-sided or beyond the purpose of collection and processing. It can be said that the right to be forgotten is a further right than the right to erasure, and the right to be forgotten imposes higher requirements for the protection of personal information. The existence of the right to erasure provides the basis for establishing the “right to be forgotten” in the law related to personality rights. Based on the above mentioned right to erasure, the right to be forgotten can be developed in the law related to personality rights.

#### *4.2 Conflict Resolution between the Right to Be Forgotten and the Right to Know*

The root of the conflict between the right to be forgotten and the right to know is the conflict between individual interests and public interests. Public interests are the combination of the interests of several members, the common interests of most people in society, mainly including education, medical care,



scientific research, and other contents that are closely related to our lives. This information is related to all aspects of our life, and to protect our rights and interests, the data owner cannot exercise the right to be forgotten. It can be said that the creation of the right to be forgotten is the product of balancing individual interests and public interests.

The exercise of the right to be forgotten by the information subject may affect the public's right to know and the freedom of speech and press. In rulings C-507/17 and C-136/17, the CJEU repeatedly emphasized that it is important to note that "the protection of personal data is not an absolute right, but should take into account its social function and be balanced with other fundamental rights in order to comply with the principle of proportionality" and to "balance the right to privacy and personal data protection and the freedom of information of Internet users".

In order to achieve this, the requirements for the exercise of the right to be forgotten need to be clarified and limited to a certain extent. First, it is important to clarify under what conditions the exercise of the right to be forgotten would be detrimental to the public interest. We should apply the principle of proportionality here to determine when data preservation based on the public interest constitutes a restriction on the exercise of the right to be forgotten by the data subject. The court or other authority will need to weigh whether the ends sought to be achieved by limiting the right to be forgotten are compatible with the means of limiting the right to be forgotten. If it's suitable, the individual data subject can exercise the right to be forgotten, which would prevent those who control the data from violating the right to personal information under the pretext of public interest.

Second, we need to know who should review whether the information subject can exercise the right to be forgotten. If the information platform has the right to review, the information platform will play the role of a "judge". This will also increase the burden on the operation of the information platform. How to choose the appropriate subject for review is an issue worth studying. If courts deal with all requests for data deletion, it may increase the workload of the court. The author believes that data regulators can be appropriately introduced to review the personal information of users. If the user's claim is clearly in the public interest, the data supervisory authority should inform the user that the information needs to be confirmed by the court before it can be deleted. If the user's reasonable right to be forgotten is not satisfied, the user may also seek relief by filing a court action.

Finally, restrictions on the right to be forgotten are essential. Ex parte review alone cannot fully guarantee the public's right to information and freedom of expression, and the requested party should be given the opportunity to defend itself in individual reviews. The exercise of rights cannot lack supervision, and government supervision is an important source of justification for private regulation. It is suggested that specific government agencies be assigned to review the right-to-be-forgotten decisions of interconnected companies providing online services, and that exemplary cases be made public to continuously regulate the criteria for weighing interests. We cannot take a one-sided view of the issue, and in addition to clearly defining the right to be forgotten, we must also define the rights to information, participation, and remedies associated with it.

#### *4.3 Legislative Proposal of the Right to Be Forgotten*

The legislative concept of the right to be forgotten should adhere to the principle of proportionality as the core. But if we only use the principle of proportionality as the judgment standard, it will be a little abstract and may lead to the improper expansion or narrowing of the scope of the right to be forgotten. Therefore, it is necessary to construct more specific evaluation criteria for the right to be forgotten. For example, we can judge it by some typical situations. We need to extract specific rules from the principles, which will not only provide concrete guidance for people to exercise the right to be forgotten but also improve the efficiency of the judgement.

In the author's opinion, the criteria for the use of the right to be forgotten should be formulated from three perspectives: the subject of information, the content of information, and the time of information release. If the subject of the information is a public figure, their words and actions will cause public concern or may even influence public interest. So, we should restrict the public figure's right to be forgotten. Conversely, if the subject of the information is ordinary people who have little or no impact on the public interest, their exercise of the right to be forgotten should be supported. The content of the information refers to whether the information is private or public. If the content is more closely related to the public interest and has certain social values, it is more difficult to apply the right to be forgotten. In contrast, the right to be forgotten can be applied to more private information, such as personal contact information and financial status. The last condition is the length of time that the information has been published. Much information is time-sensitive, and if some time has passed, the value of the information decreases. The core of the right to be forgotten is the request to remove outdated, negatively impacting information. If the value of the information has declined significantly and its continued retention will not bring public interest, the information subject may request the deletion of such information. The author believes that by combining the above three points, the right-to-be-forgotten regulations can be better formulated to protect people's personal information and human dignity.

### **5. Conclusion**

In the previous discussion, the author starts with the case of the right to be forgotten in China and analyzes the origin of the right to be forgotten and the position of the right to be forgotten in the legal system. Subsequently, the author discusses the rationality and value of the right to be forgotten, thus establishing the need for the right to be forgotten to enter the civil code. After solving the theoretical problems, the author presents insights on how to sort out the relationship between the right to be forgotten and the right to erasure, how to solve the conflict between personal interests and public interests, and gives legislative suggestions on the right to be forgotten.

The life of law is experience, not logic. As people pay more attention to the right to personal information, there will be more and more disputes about the right to be forgotten in judicial practice, which will provide case references for the improvement of the right to be forgotten. We should draw

general rules and accumulate judicial experience from each judicial case to better face such disputes. In the context of the rapid development of network technology, people naturally have new and higher level needs for personal information protection and personality rights. China's personality rights legislation should respond to the new needs and expectations of the people by systematically recognizing the right to be forgotten. Specifically, the system of personality law should be built with the right to be forgotten as the core, this means on the basis of the right to be forgotten, the right to know, the right to privacy, and the freedom of expression should be regulated respectively. The establishment of the right to be forgotten and the full realization of citizens' human rights constitutes a relationship between the means and the end, and the "forgetting" gives more human dignity.

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