

# Chinese Localization of the Right to Be Forgotten

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**Abstract:** The right to be forgotten is a new trending right that originated from the European Union and is transferring to China. To break down the Bentham's panopticon of comprehensive digital memory, it is necessary for China to adopt the right to be forgotten. While the Chinese legal framework of personal information has not been completed yet, the Draft of Personal Information Law implies a focus on duties of controllers and interests of minors. By analysing possible legal attributes of the right to be forgotten, it can be noted that typifying the right to be forgotten is essential, but the problem of exercising limitation and of the asymmetric information market have not been solved. To tackle these problems, one solution is to specify the requirements of the government, the organization and the information subject with balance; the other is to perfect the right to be forgotten referring to the Informed Consent Principle and complement other principles to support the entire personal information protection system.

**Keywords:** the right to be forgotten; China; asymmetric information market; Informed Consent Principle

In 2014, the European Court of Justice (ECJ) entitled a Spanish citizen the right to make his old bankruptcy records forgotten from the Internet and ordered Google Spain to adopt measures to de-index personal data.<sup>2</sup> This event marked the establishment of the right to be forgotten and enabled individuals in the European Union (EU) to require search engines to clear out links containing personal data. In 2019, the ECJ added that Google assumed no obligation to practice the European right to be forgotten worldwide,<sup>3</sup> which restricted the territorial scope of the right to be forgotten within the EU.

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2 Infocuria-Case-Law of the Court of Justice. (2014). *Google Spain SL v. Agencia Española De Protección De Datos*. [online] Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN>.

3 Infocuria-Case-Law of the Court of Justice. (2019). *Google v. CNIL Case C-507/17*. [online] Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=218105&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6915504>

Although the right to be forgotten mainly takes effect in the EU, it has far-reaching influence globally, including upon China. Therefore, this paper aims to assess the Chinese adoption of the right to be forgotten, to reflect on legislative problems and to put suggestions forward.

## Reasons for Chinese Adoption of the Right to be Forgotten

### Narrow and Broad Right to Be Forgotten

David Lindsay explains that the right to be forgotten is “reserved for a right to have online personal data removed, or to have access to that data restricted... and incorporates rights relating to the removal of data from search indexes and digital archives.”<sup>4</sup>

Nonetheless, the generalized right to be forgotten goes well beyond the narrow form established by the ECJ. The legal sense of “to be forgotten” first appeared in criminal law. Take the UK Rehabilitation of Offenders Act 1974, for example. Offenders who committed misdemeanours and performed well in prison could have their criminal records expunged upon the completion of their sentences. Additionally, the right to deletion,<sup>5</sup> a passive right, may also be considered as part of the right to be forgotten in a broad sense. The main differences between the right to deletion and the narrow right to be forgotten lie in the conditions of exercise, the forms of exercise and the degrees

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4 See Normann Witzleb (2014). *Emerging challenges in privacy law: comparative perspectives*. Cambridge, United Kingdom: Cambridge University Press.

5 According to Organization for Economic Cooperation and Development (“OECD”), the right to deletion provides individuals to “challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.” Oecd.org. (2013). *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data - OECD*. [online] Available at: <https://www.oecd.org/internet/ieconomy/oecdguidelinesonthe-protectionofprivacyandtransborderflowsofpersonaldata.htm> [Accessed 27 Nov. 2019]. Also, Cac.gov.cn. (2012). *Cyberspace Administration of China: Decision of the Standing Committee of the National People’s Congress on Strengthening Network Information Protection*. [online] Available at: [http://www.cac.gov.cn/2012-12/29/c\\_133353262.htm](http://www.cac.gov.cn/2012-12/29/c_133353262.htm) [Accessed 27 Nov. 2019]. Article 8 provides the definition of the right to deletion: “Where a citizen finds any network information that discloses his or her personal identity, spreads personal privacy or infringes upon his or her lawful rights and interests, or is disturbed by commercial electronic information, he or she shall have the right to ask the Internet service provider to delete the relevant information or take other necessary measures to stop it.”

of implementation.<sup>6</sup> The connotation of the right to be forgotten is still in the stage of being enriched and developed. For instance, scholars in the United States once set the right to obscurity,<sup>7</sup> which makes information difficult to find through a series of complex technologies rather than directly erase or block information, to avoid the risk that the European right to be forgotten is unconstitutional. Due to the various forms of the right to be forgotten, this paper will distinguish between the broad and the narrow right to be forgotten for examination.

### China's Necessity to Adopt the Narrow Right to Be Forgotten

China has in fact already implemented the right to deletion,<sup>8</sup> in the broad sense of the right to be forgotten. This shows that realistic demands of the broad right to be forgotten have been embodied in the legislation. Thus, the question is this: "Why is it necessary for China to adopt the narrow right to be forgotten?"

The rationale starts with the human instinct to forget. Human beings have been accustomed to forget as time flies, but digitalization makes it possible for all information to be stored in the digital index, motivating people's ability to remember to a permanent extent.

As Mayer-Schonberger claimed,<sup>9</sup> information in the digital index is associated with power. It is "accessible, durable and comprehensive." Indeed, data subjects lose their power to control personal information because everyone can approach it. Wide accessibility and long duration of digital information generate Mathew Effects between the information rich and information poor, even negating the latter's perception of their past. Comprehensive digital memory would impound people in Bentham's panopticon, where they have no idea whether their utterance is accessed. As a result, they have to

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6 From the perspective of conditions of exercise, the right to be deletion requires the data subject to provide evidence that the data controller violates laws, regulations or agreements, while the exercise of the narrow right to be forgotten is to prove that the personal information are inadequate, irrelevant and harmful, and that the data to be forgotten does not harm the public interests. From the perspective of the forms of exercise, the right to deletion is a passive right when the individual's rights and interests are infringed, while the narrow right to be forgotten is an active right that an individual can exercise spontaneously. From the perspective of the degrees of implementation, the right to deletion requires the data controller to completely wipe out the original data, while the narrow right to be forgotten only requires the data controller to prevent others from accessing the personal information.

7 See Selinger, E. and Woodrow, H. (2014). *Obscurity and Privacy. Routledge Companion to Philosophy of Technology.*

8 *Supra* note 4.

9 See Viktor Mayer-Schönberger (2011). *Delete: the virtue of forgetting in the digital age.* Princeton (New Jersey): Princeton University.

assume the worst situation that whatever they post on the Internet has already been accessed. Internet users are aware they are “living with a historical record” and take care of “how they talk, how they interact, what they offer of themselves to others.”<sup>10</sup> The demise of forgetting could alter the whole society to a censored society which has a chilling effect on free expression.

Unfortunately, Chinese Internet users, numbering 854 million as of 2019,<sup>11</sup> are now facing Bentham’s panopticon due to the rising populist sentiment and nationalist sentiment in the recent decade.

As Liu Xiaolong described, China’s Internet populism is a result of drastic social transformation, lack of political trust, growth of emotions of resentment, and cyberspace-revelry catharsis.<sup>12</sup> The unfortunate and the poor always have a louder voice in public opinion, because they constitute a large population and are more easily to elicit resonance. Expressing hostility to the elite is a way for them to unite and search for common topics. They like to accuse the elite without distinguishing wrong and right, thus causing a Tacitus Effect: if the subject involved is elite, to speak the truth or to lie, to do good or to do evil, is to be regarded as lying and doing evil. People like to uncover the elite’s past, searching for any tiny trace, in order to vent their anger through criticisms. For example, in 2020, Mars Q, a famous debater who graduated from the Chinese University of Hong Kong, was exposed to deliver an inappropriate speech in 2013, at the time of Occupy Central.<sup>13</sup> However, back then, she just expressed her anger about misinterpretation by mainlanders by saying they used menopausal-woman logic. If the elite has a right to be forgotten, they will not be afraid to freely express their opinions about public issues and to promote social progress. The narrow right to be forgotten will guarantee the elite’s safety of free expression and help them escape from Bentham’s panopticon.

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10 Personal democracy.com. (2013). *Personal Democracy Forum 2007 | Personal Democracy Forum*. [online] Available at: <https://personaldemocracy.com/conferences/nyc/2007> [Accessed 27 Nov. 2019].

11 China Internet Network Information Centre. (2019), *Statistical Report on Internet Development in China*. [online] Available at: <http://www.cac.gov.cn/2019zt/44/index.htm> [Accessed 12 May. 2020].

12 See Liu, X. (2019). Multiple Causes and Network Aggregation: The Mechanism of the Generation of China’s current Internet Populism. *Theory and Reform*, (4), pp.47–57.

13 Occupy Central was an occupation protest, which took place in Central, Hong Kong and lasted from 15 October 2011 to 11 September 2012. The Occupy movement is an international protest movement against social and economic inequality. Its primary goal is to make society’s economic structure and power relations more fair. Available at: [https://en.wikipedia.org/wiki/Occupy\\_Central\\_\(2011%E2%80%932012\)](https://en.wikipedia.org/wiki/Occupy_Central_(2011%E2%80%932012)), [Accessed 9 July. 2020].

Because of rising nationalism, tracing personal history is not only for the elite, but also for common people. Lots of “Big Reports” referring to “unpatriotic” people have emerged in recent years.<sup>14</sup> Patriotism could become a tool for personal revenge, even though the accused person conducted no unpatriotic behaviours. For instance, in 2018 Chen Yifa, a popular live-broadcast host, was reported to have joked about the Nanjing Massacre in 2016, before she was well known. Nationalist reports prevent free discussions of social problems, deteriorate the democratic atmosphere and appeal to hatred. Therefore, the narrow right to be forgotten is a remedy to confront soaring personal reports.

Considering the function of the narrow right to be forgotten to secure free voices and hold back nationalist reports, it is necessary for China to adopt the right to be forgotten.

### Chinese Legal Framework of the Right to be Forgotten

As mentioned in part 1, the right to be forgotten should allow people to freely express and prevent private reports of “unpatriotic” speeches. This section will assess what the current Chinese legal structure of the right to be forgotten is and see whether it is well-rounded.

Chinese Constitutional Law established the norm of the right to information protection in two Articles regarding human rights and the right to personal dignity. Article 33 claims “the state respects and protects human rights,” which empowers people to protect personal information based on the nature of human beings. Furthermore, Article 38 provides “the personal dignity of citizens of the People’s Republic of China is inviolable,” which permits people to claim personal dignity of information self-determination. Based on the constitutional value, Sun Ping proposed that the personal information right should be set as a fundamental right to prevent the infringement of personal information by power and adjust the structure of law and power.<sup>15</sup>

Nevertheless, Chinese lawmakers concentrate more on the government as a supervisor in relation to the information subject and the enterprise controller, ignoring the need for restrictions of its own information-using behaviour regarding administrative

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14 See Mei, X. (2019). *Big Report Era Is Coming*. [online]. Available at: <http://www.21join.com/index.php?m=content&c=index&a=show&catid=9&id=1458>, [Accessed 12 May, 2020].

15 See Sun, P. (2016). Systematically Construction of Legislation about Personal Information Protection in a Fundamental Right Model. *Law Science*, 4, pp.67–68.

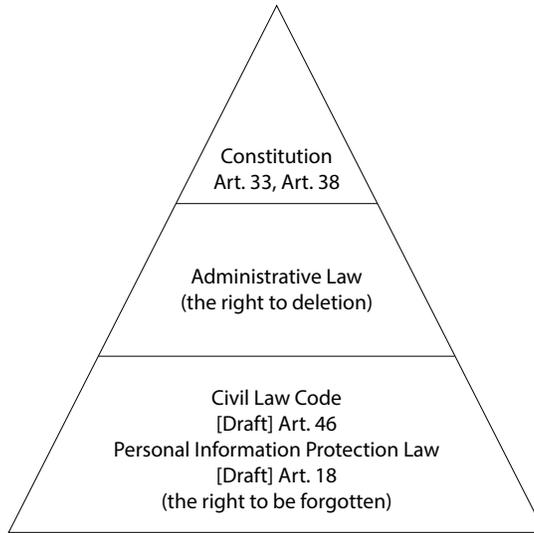


Figure 1. The Legal Structure of the Right to Be Forgotten.

regulations. For example, the lawmakers regulate the right to deletion in *Decision of the Standing Committee of the National People's Congress on Strengthening Network Information Protection*,<sup>16</sup> governing enterprise information controllers without governing the administration itself.

Additionally, Chinese civil legislation highlights the adoption of the right to be forgotten. In 2017, the draft of the personality right part in the Chinese Civil Code regulated a right in Article 46 resembling the right to be forgotten.<sup>17</sup> On Sept 10, 2018, the coming Personal Information Protection Law Draft also recognized the right to be forgotten in Article 18: "With the satisfaction of the statutory or prescribed conditions, the information subject can request the information processor to unconditionally

16 *Supra* note 4.

17 See Law-lib.com. (2020). *Civil code of National People's Congress of China*. [online] Available at: [http://www.law-lib.com/law/law\\_view.asp?id=689068](http://www.law-lib.com/law/law_view.asp?id=689068) [Accessed 28 May. 2020]. "Under any of the following circumstances, a natural person may, according to law, require the information holder to take such necessary measures as deleting his/her personal information in a timely manner: (1) the information holder illegally collects or uses his personal information; (2) information holders hold information that infringes upon their legitimate rights and interests; (3) there is an expiration of the information storage period prescribed by laws and administrative regulations; (4) it is no longer necessary for the information holder to hold his personal information according to the specific purpose for which the information is collected or used; (5) other circumstances as provided for by laws or administrative rules and regulations or with justifiable reasons."

disconnect any link with the personal information and destroy the copies of the personal information.”

The precondition of Article 18 in the Draft is incomplete and ambiguous. On one hand, the draft did not mention any clear statutory conditions of implementation of the right to be forgotten. Perhaps it is because the draft is not a developed thought. On the other hand, and more importantly, it implies that the information subject and the information processor could prescribe the conditions of exercising the right to be forgotten in the agreement, which could give information subjects more space to apply the right to be forgotten.

Moreover, the expert proposal gives an insight into the whole scale of the Chinese right to be forgotten.<sup>18</sup> First, it distinguishes between information practitioners of platform service and search engine, and it delegates more notification obligation to the former. Furthermore, it is particularly concerned about interests of minors and writes clear requirements about this in the text of expert proposal. Therefore, it is suggested that information practitioners should bear weighty responsibility for the erasure of personal information, and in particular, children are key protected targets.

## Problems in View of the Legal Attribute

Now that China's necessity to adoption of the right to be forgotten and Chinese current legal structure has been discussed, the following section focuses on the review of

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18 “In the following situations, if the information subject believes that the personal information on the Internet is inaccurate, irrelevant or infringes his or her legitimate rights and interests, and is unrelated to the public interest, the information subject shall have the right to request the information practitioner to take necessary measures such as deleting, blocking or disconnecting:

- (a) Upon receipt of notice from the information subject, information practitioners that work on platform service, once affirm the personal information is unrelated to public interests, shall take timely measures to delete, block, or disconnect the information content, and help the information subject to inform other links or information practitioners that copied the information to take the necessary measures.
- (b) Upon receipt of notice from the information subject, information practitioners that work on search engine, once affirm the personal information is unrelated to public interests, shall take timely measures to delete, block, or disconnect the information content
- (c) Where a minor or the guardian requests the information practitioners to delete or block the minor's personal information on the Internet, the information practitioner shall promptly take such necessary measures as deleting, blocking or disconnecting the minor's personal information.”

See Zhang, X and Ge, X. (2019). *Personal Information Protection Law (Expert Proposal)* [online]. Available at: <http://www.mpaypass.com.cn/news/201910/18093801.html> [Accessed 12 May, 2020].

possible legal attributes of the right to be forgotten in order to figure out the problem of use-limitation and asymmetric information market.

### First Case: Viewing the Right to Be Forgotten as a General Personality Right

In July 2015, Ren Jiayu, a senior human resources specialist, filed a lawsuit against the search engine Baidu in Haidian District People's Court (Haidian Court) in Beijing, accusing Baidu of violating his right to reputation, right to name and "right to be forgotten." This is the first case of the right to be forgotten in China.<sup>19</sup> When the plaintiff entered his name into the Baidu search engine, the words "Tao Education Ren Jiayu" appeared at the bottom of the search page. In light of the bad reputation of Tao Education, such an associated keyword will cause great damage to Ren Jiayu, so the plaintiff asked Baidu to delete it and compensate for his losses. However, the first and second instance courts did not support the plaintiff's claim.

When it comes to the "right to be forgotten" claimed by the plaintiff, the court held that although the right to be forgotten was not a concrete personality right, it could be assessed with the elements of the general personality right: (1) it was not a concrete personality right; (2) the legitimacy of its interests; and (3) the necessity for protection. With condition (1) met, the court was unable to approve the plaintiff's subjective evaluation of Tao Education's goodwill and believed that Ren's intention to conceal his business experiences from potential clients on the Internet did not have the legitimacy or necessity of protection, so the court rejected the plaintiff's claim.

Whether the court's logic was sound is debatable.<sup>20</sup> In terms of a general personality right, the argumentation structure of the right to be forgotten should include the following: (1) judging whether it constitutes a tort according to the corresponding elements, and (2) determining whether the other party's defence constitutes the exemption. In *Ren Jiayu v. Baidu* case, the court took the defence of the customer's right to know as the corresponding element to constitute a tort and denied the necessity of protection of the right to be forgotten, which actually confuses the aforementioned logical reasons.

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19 See Beijing No. 1 Intermediate People's Court. (2015). *Ren Jiayu v. Baidu*. Available at: <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=789e76ed-c08441bb8e75a092cba58912>; Beijing Haidian District People's Court. (2015). *Ren Jiayu v. Baidu*. Available at: <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=43d8366cc47f41beba7769f1ce688973>. [Accessed 12 May. 2020].

20 See Yu, Y. (2018). The Logical Deduction and Reasoning Construction of the Right to be Forgotten from the Perspective of Judicial Judgment—Based on the First Chinese the Right to be Forgotten Case. *Northern Legal Science*, (2), pp.34–44.

The court also begged a problem that should be addressed: Is the plaintiff's right to be forgotten justified? This is a problem that needs to be interpreted in context of the constitution,<sup>21</sup> but Haidian Court, as a primary court, does not have the power to interpret the constitution, so the judge avoided assessing a justification of the right to be forgotten in the judgment document.

As a result, *Ren Jiayu v. Baidu* reveals that viewing the right to be forgotten as a general personality right would not provide adequate protection of personal information for individuals, not only because the distribution of the burden of burden is unbalanced, but also because courts are unable to examine the legitimacy of the interests. It shows that classifying the right to be forgotten, maybe as a part of the concrete personality right, is very necessary with respect to protection of interests.

#### Major Academic Perspective: Viewing the Right to Be Forgotten as a Concrete Personality Right

In regard of the problem that viewing the right to be forgotten as a general personality right could not protect personal information subjects, the majority of Chinese academics assume that the right to be forgotten should be recognized as the right to personal information<sup>22</sup> and that the personal information right should be a concrete

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21 According to the EU case of *Google Spain SL v. Agencia Española De Protección De Datos*, in view of the legitimacy of the right to be forgotten, the court discussed the two human right values of privacy and information self-determination in accordance with Article 7 and 8 of the European Convention on Human Rights.

Before there were search engines, personal information was not easy to capture. The intervention of search engine enables any network user to identify a data subject completely by searching information. For example, the results of a name search can potentially reflect every aspect of someone's life, which proves that the operation of search engine processing data is easy to violate the fundamental rights of data subjects such as privacy right and freedom of expression. In addition, a search engine plays an important role in the dissemination of information in modern society. It makes information ubiquitous and thus enhances the interference with individuals' rights. Such interference is potentially so serious that the economic interests of the search engine cannot balance its negative impact.

22 Because in China, personal information right is analogous to European data right, similarly the right to be forgotten is mostly considered as a type of personal information right.

personality right,<sup>23</sup> so it is important to examine relationships of these rights and privacy rights in civil law.

American Scholars Warren and Brandeis in 1890 described “privacy right” as the right to enjoy life and the right to be let alone.<sup>24</sup> This right to privacy was later elevated by the Supreme Court of the United States to a constitutional right to privacy.<sup>25</sup> However, the Chinese privacy right is not a constitutional right in a strict sense, but only a concrete personality civil right. It only emphasizes privacy interests such as preventing disturbance or the privacy of physiological information and family life, but excludes some interests protected by other Chinese concrete personality rights, such as right to name<sup>26</sup> (protecting name privacy) or right to portrait<sup>27</sup> (protecting portrait privacy).

Although Chinese right to privacy comprises a small scope, a behaviour could violate the right to privacy and the right to personal information at the same time. However, the privacy right is a negative and defensive right that mainly stresses mental rest. Before

- 23 See Wang, L. (2012). The Status of Individual Information Right in Person Right Law. *Suzhou University Journal (Philosophy and Social Science)*, 33(6), pp.68–75. “Individual information cannot be divided from individual personality, and it shows various personalities, so individual information right is a new personality right.” Wang thinks the main features of personal information right is its personality attribute, instead of property attribute: on the one hand, personal information is identifiable, reflecting the personality characteristics, like name, gender, phone number, or family address; on the other hand, many organisations collect personal information not for the purpose of property use, but for the public interest or other non-financial interests. Furthermore, he claims personal information right should be protected as a concrete right of personality. First, personal information right has the concrete right object, personal information. Secondly, the object of the right of personal information is so rich that should not be generalized by other rights including right to name, right to portrait or right to privacy. Thirdly, specifying personal information right is beneficial to provide effective legal protection. If the right to personal information is regarded as a property right, when it is infringed, the calculation of damages will vary according to different individual identities. This will not happen when it comes to a concrete personality right. Last, Wang believes that viewing personal information right as a concrete personality right is helpful to respect people’s dignity.
- 24 Warren, S.D. and Brandeis, L.D. (1890). The Right to Privacy. *Harvard Law Review*, 4(5), p.193.
- 25 Supreme Court of the United States: *Griswold v. Connecticut*, [online]. Available at: <https://supreme.justia.com/cases/federal/us/381/479/> [Accessed 12 May, 2020]
- 26 See Article 99 of General Principles of the Civil Law of the People’s Republic of China: “Citizens shall enjoy the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions. Interference with, usurpation of and false representation of personal names shall be prohibited. Legal persons, individual business and individual partnerships shall enjoy the right to name. Enterprises as legal persons, individual businesses and individual partnerships shall have the right to use and lawfully assign their own names.” Available at: [http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content\\_4470.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm). [Accessed 9 July, 2020]
- 27 *Ibid.* Article 100: “Citizens shall enjoy the right to portrait. The use of a citizen’s portrait for profit without his consent shall be prohibited.”

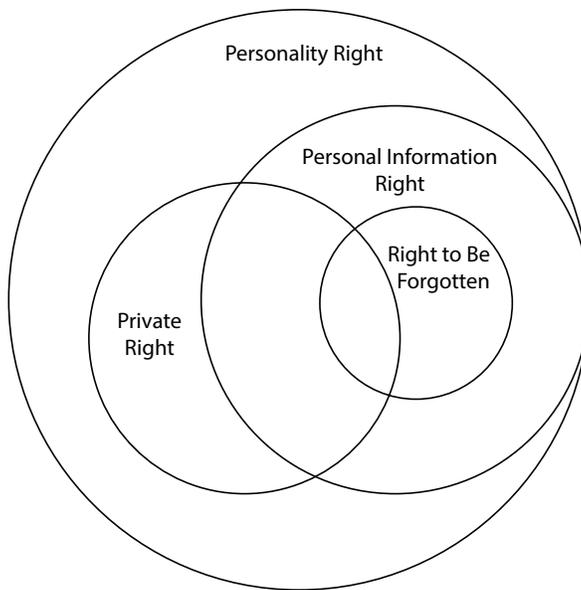


Figure 2. Relationships among Chinese Right to Be Forgotten, Personal Information Right, Personality Right and Privacy Right.

the infringement, a person cannot actively exercise the right. By contrast, the personal information right refers to the control of self-information and is an active right that affirms both personality interests and privacy interests.<sup>28</sup>

Therefore, Duan Weili offered a compatible interpretation of the position of the right to be forgotten by citing Wang Liming's theory about the relationship between privacy right and personal information right.<sup>29</sup>

This interpretation, which reconciles some theoretical contradictions in the civil law, limits the use of the right to be forgotten, reducing the necessity of its existence. Scholars Yang Lixin and Han Xu believe that the Chinese right to be forgotten applies the principle of fault liability, and that the judgment of the right to be forgotten should rest on four elements (illegal act, loss, causality and fault), which is similar to

28 *Supra* note 21.

29 Duan Weili (2016). How to Protect the Right to Be Forgotten\_The Position of the Right to Be Forgotten in Personality Right System. *Study & Explore*, 4(1002–462X).

the judgment of other concrete personality rights.<sup>30</sup> Similarity leads to the restraint of the exercise of rights. When the infringed interests are the overlapping interests of the right to be forgotten and the right to privacy (or other concrete personality right), the infringed can choose the right to privacy as the basis of the right to claim, so as to improve the probability of winning. Furthermore, if the infringed interests do not belong to the protection scope of other concrete personality rights but only in the protection scope of the right to be forgotten, the plaintiff's burden of proof could be as heavy as Ren Jiayu had. To be more specific, the four elements of the right to be forgotten should be satisfied, and the negative condition that the interests do not belong to the right to reputation, right to name, right to privacy or other concrete personality rights should also be satisfied, which restrains the application space of the right to be forgotten. There is neither simplicity of operation nor significance of effect. Therefore, the limited scope of the right to be forgotten needs further theories to explicitly regulate the elements of the right to be forgotten and make up for this limitation.

Also, due to the restraint of the specific information subject, the right to be forgotten, as a post-remedy to a particular object, has its limitations. The exercise of the right to be forgotten relies on the specific information subject to identify the damage caused by infringement, which tends to be independent and a one-time relief. However, network infringement is usually systematic and complex. The infringement process is not easy to identify, and the infringed information is often uncertain of multiple subjects.

First of all, the information subject's cognition of information processing is limited, and they may not know that they can or should exercise the right to be forgotten. Most information subjects do not know their personal information has been collected when they use the website, and even if they do, they do not understand how personal

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30 See Yang, L. and Han, X. (2015). Chinese Localization and Law Application of the Right to Be Forgotten. *Journal of Law Application*, (2), pp.24–34.

"Illegal act: the infringer is the information controller who violates the act obligation of the right to be forgotten.

Loss: the information that should be deleted is not deleted in time, so that the continued existence of the information on the network has caused lasting damage to the reputation and social evaluation of the information subject.

Causality: before the right to be forgotten is exercised, the inadequate and outdated information about the information subject already existed on the Internet has caused the occurrence of damaging results; after the information subject exercises the right to be forgotten and requests the information controller to delete the relevant information, the information controller fails to delete due to the omission of the information controller, which results in the "further" expansion of losses and continues to reduce the social evaluation of the information subject.

Fault: a deliberate or negligent fault."

information is collected, transferred or shared.<sup>31</sup> This knowledge blindness of information processing makes the information subject uncertain whether he or she can exercise the right to be forgotten, which leads to the failure of the relief of the right to be forgotten.

Secondly, there is information asymmetry between the information collector and the collected, and the holder of the right to be forgotten may not know the scope of his rights and applicable conditions. Information collectors do have the potential to engage in “smokescreen tactics”<sup>32</sup> that make it difficult for individuals to know exactly how data is being processed or used. For example, they could design long, difficult and complex sentences and paragraphs in the “privacy agreement” that users must check in advance to make the agreement less readable.<sup>33</sup> In order to use the site as quickly as possible, users are likely to scan through the contents of the privacy agreement without knowing when, where or how they could practice the right to be forgotten.

Therefore, setting four elements of the right to be forgotten referring to the liability fault principle narrows the use of right to be forgotten. As the right to be forgotten should be exercised by a particular information subject, it is essential to expand the applicable conditions of the right to be forgotten by explicitly classifying the constitutive elements.

### Minor Academic Perspective: Viewing the Right to Be Forgotten as a Property Right

Some scholars have paid attention to the property attribute of personal information.<sup>34</sup> For example, they categorize personal information as basic personal information,

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31 See Solove, D.J. (2013). Privacy Self-Management and the Consent Dilemma. *Harvard Law Review*, 126, pp.1880–1903.

32 See Janger, E.J. and Schwartz, P.M. (2002). The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules. *Minnesota Law Review*, 86, p.1219.

33 Take Taobao Privacy Agreement for instance. It has 13953 Chinese characters, which is almost equivalent to that of Chinese Constitutional Law.

34 Representative essay see: Xing, H. (2019). Mechanisms for Distribution and Realization of Personal Information Property Rights Under Background of Big Data Transactions. *Law Review*, 37(6), pp.98-110.

associated personal information, and anticipated personal information and make a distinction of ownerships.<sup>35</sup>

In fact, the idea of viewing personal information as property mainly comes from the United States. The information privacy right<sup>36</sup> is the right granted to the information subject in order to protect the public good of the “privacy community.”<sup>37</sup> In the “privacy community,” anonymous and semi-anonymous information interact, and people exchange information with each other, which is conducive to promoting democratic consultation and increasing individual autonomy. Scholar Paul Schwartz proposed that in order to establish a healthy privacy market, information privacy should be regarded as “a bundle of interests,” which should be shaped through legal attention to five areas: inalienability, defaults, rights of exit, damages and institutions.<sup>38</sup> He thought the information subject should have the right of exit in the privacy market. As far as the privacy market is concerned, the right of exit is conducive to increasing people’s opportunities to protect privacy and to preventing deceptive information controllers. At the same time, the right of exit also makes it possible for personal information to re-enter the market, reducing the costs of information repeatedly entering and leaving the market. From this perspective, the right to be forgotten can also be regarded as a right of exit, enabling the information subject to withdraw personal information from the public space and correcting the imbalance of power between buyers and sellers in the privacy market.

Nevertheless, this paper holds that the to-be-forgotten right of exit still faces risks. First, information subjects have different expectations on the transactional price of personal information, so the degree of willingness to exercise the right to be forgotten is also different. In the seller’s market, some people care about information privacy and consider the price of personal information as “A.” Other people do not care about information privacy, and the price of their personal information is “B” (lower than that

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35 *ibid.* “The property rights of Basic Personal Data belong to individuals wholly, while the property rights of Associated Personal Data and Anticipated Personal Data are shared between individuals and information companies; however, in the property rights of Associated Personal Data, the share of individuals is greater than that of information companies; in the property rights of Anticipated Personal Data, the share of the information companies is greater than that of individuals.

36 In the United States, they usually call the personal data right or personal information right as information privacy right.

37 See Schwartz, P.M. (2013). The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures. *Harvard Law Review*, 126, pp.1966–2009.

38 See Schwartz, P.M. (2004). Property, Privacy, and Personal Data. *Harvard Law Review*, 117, p.2056.

of A). In the real information privacy market, the buyer obtains all the sellers' personal information at the price of B with the help of technical means, thus causing the seller's deadweight loss at the macro level and the failure of information privacy market. The same proportional relationship appears in the exercise of the right to be forgotten, so when more concerned about the privacy of information, people are more likely to exercise the right to be forgotten. Conversely, the person who originally sold the personal information at a lower price is less likely to exercise the right to be forgotten, and therefore, the failure to raise the minimum seller's price will not rebalance the unequal market between the buyer and seller. Secondly, in terms of the public welfare "privacy community," the purpose of the right to be forgotten is to reduce the circulation of personal information in the public domain, which may cause damage to the "privacy community" constituted by anonymous or semi-anonymous information.

It seems that if some information subjects do not raise their awareness of data protection, the information subjects as a whole cannot guarantee a fair information price. In the game between the information collector and the collected, consciousness of personal information protection affects the collective rights and interests of the information subjects. When the information collector intends to obtain personal information at a low price, those with a weak sense of personal information protection become the target. At the same time, when the information collector is able to obtain personal information at below-market prices, they tend to invest less in technology and services, further weakening sellers. Behavioural economics argues that consumers' general inertia to default terms is a pervasive and severe constraint on free choice.<sup>39</sup> Thus, the sloth of some information subjects in exercising the right to be forgotten could not change the imbalance between buyers and sellers.

In light of economic analysis, the establishment of the right to be forgotten has little effect on rebalancing the privacy information market, and there needs to be some supports from higher-level laws or principles.

## Solution

To solve the problem mentioned above, this section puts forward two suggestions that would promote the practical implication of the Chinese right to be forgotten.

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39 See Kahneman, D., Knetsch, J.L. and Thaler, R.H. (1990). Experimental Tests of the Endowment Effect and the Coase Theorem. *Journal of Political Economy*, 98(6), pp.1325–1348.

### Balancing the Triangle Relationship

Traditionally, the government often acts as a mediator to determine the damage and compensation between the infringer and the infringed. However, the discussion of personal information right should start from the tripartite relationship among the government, the organization and the information subject, since the government and the organization may become both protector and infringer of personal information. Therefore, when the right to be forgotten is in discussion of different ways, its applicable conditions and the exemption conditions of personal information controllers should be different.

The “Balancing Three Parts” theory proposed by professor Zhang Xinbao<sup>40</sup> provides an analytical approach – that is, a balance should be reached among the personal dignity interests of individuals on personal information, the economic interests of organizations in the use of personal information, and the public interests of the state in the management of society.

In regards to “government-personal information subject,” there is a confrontation between public management and individual fundamental rights. This paper claims that in the face of information processors of public power, the information subject should have the right to exercise the right to be forgotten, but conditions for the exercise should be tightly limited due to public interests. The government usually uses citizens’ personal information for administrative purposes, so as to improve administrative efficiency and maintain social security. Unless the administrative subject’s use of personal information exceeds the administrative purpose, the information subject should not enjoy too many interests or rights of to-be-forgotten.

Regarding “organization-personal information subject,” there is a game between commercial interests and individual freedom. At this point, it is best to categorize the personal information. One category is the classification of personal information into sensitive and non-sensitive information. The protection of sensitive information that involves privacy or brings the individual great sense of offense should be strengthened, and the involved personal dignity should be protected at a higher level. For non-sensitive personal information, the information subject can make a certain power-transfer so that the information processor has more space to take advantage of personal information, which is not only conducive to the operation of the information practitioners, but also conducive to providing better services for the information

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40 See Zhang, X. (2015). From Privacy to Personal Information: Theory and Institutional Arrangements for the Re-balance of Interest. *China Legal Science*, (3), p.52.

subject. Another classification is to divide personal information into identified personal information, identifiable personal information and unidentifiable personal information.<sup>41</sup> This paper argues that the law should provide the strongest protection for identified personal information, and all provisions written in Personal Information Protection Law apply; for identifiable (semi-anonymous) personal information, the application of some provisions can be exempted;<sup>42</sup> for unidentifiable personal information, the provisions of the Personal Information Protection Law only apply under certain conditions. Such classification contributes to promoting anonymous processing by information collectors and processors, which not only ensures the security of personal information, but also protects the commercial interests of enterprises.

Concerning “government-organization,” there is a competition between the national administrative power and the organization’s independent management right. This paper argues (1) that China is in the midst of a rapid growth of the Internet industry and (2) that attaching the obligation of “the right to be forgotten” to emerging companies with sky-high compensation<sup>43</sup> may be too hasty. Without allowing companies to arbitrarily violate the right to personal information, the Chinese government can appropriately reduce the number of penalties for violation of Personal Information Law and maintain the price within a range that enterprises dare not easily violate and can still afford.

It is crucial to determine the constitutive elements of the right to be forgotten in more detail with respect to the above theory. It will not only remove the right to be forgotten from the elements of civil law infringement and release more space for application, but also take the regulation of the government into account, which is helpful to stabilize the interests of the three parties.

### Perfecting the Right to Be Forgotten Referring to the Informed Consent Principle and Expanding the Principle

Although the rights and obligations of three information participants have been pointed out above, the legal-system problem of the right to be forgotten – that the establishment of the right to be forgotten cannot change the unequal relationship between the

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41 See Schwartz, P.M. and Solove, D.J. (2011). PII 2.0: Privacy and a New Approach to Personal Information. *New York University Law Review*, 86, p.1864.

42 For example, customers’ right to be deletion from the semi-anonymous financial list published by a commercial bank should be limited, this situation does not usually exist in other fields.

43 For example, on January 22, 2019, the French Data Protection Authority imposed the first GDPR fine on Google, amounting to 50 million euros. It is unclear whether China’s Internet companies can afford such pain.

information controller and the information subject – has not been solved from the part 4.1. To address this systematic problem, the solution must start from the principle of personal information protection.

The informed consent principle means that, in view of the information subject's right to self-determination and control over personal information, any collection, use, disclosure or deletion of information must be subject to the consent of the information subject. In theory, the right to be forgotten embodies the principle of informed consent. It can be used as a remedy to enable information subjects to withdraw personal information from the public domain and to withdraw "consent" made when the information was previously collected.

If the right to be forgotten is to achieve the purpose of the informed consent principle and guarantee the individual's control and self-determination of information, it still needs to be further confirmed by the legal object, target object and manners of exercise.

With regard to the legal object, for which information individuals can exercise the right to be forgotten, Peter Fleischer, Google's global privacy counsel, offers three scenarios: first, whether an individual can delete information he/she posted; second, whether an individual can delete the information forwarded by others; third, can individuals delete information about themselves posted by others?<sup>44</sup> This thesis suggests that the answer can be determined by combining the reasonable expectations of society with the reasonable expectations of individuals. In the first scenario, there should be no dispute that individuals should be given the right to be forgotten, as individuals could reasonably expect to delete personal information they sent out. In the second scenario, when publishing personal information, the publisher should anticipate the possibility that such information will be copied and forwarded and should bear the risks associated with it. Thus, the answer is that the personal information subject should be restricted to exercise the right to be forgotten in the second scenario. In the third situation, because information comes from others at first, individuals have less expectations of the flow of such information or the risks associated with it, so information controllers should consider individual requests of removal more than in the second scenario.

As for the target object, to whom can the information subject exercise the right to be forgotten? The right to personal information was originally aimed at information

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44 See Fleischer, P. (2011). *Foggy thinking about the Right to Oblivion*. [online] Peter Fleischer. Available at: <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html> [Accessed 29 May 2020].

collectors with strong information collection and processing ability,<sup>45</sup> so governments, institutions, enterprises and other organizations may become the target object of the right to be forgotten. However, when it comes to ordinary people, they do not pose an urgent and substantial danger to individual personal information rights. This paper holds that ordinary people should not be considered as the target of the right to be forgotten unless they meet the conditions like holding strong information collection or processing abilities.

Furthermore, how is the personal information forgotten from the Internet: by invalidating the link or by completely deleting the data code from the original database? This paper advises that, considering Chinese developing Internet enterprises, as long as the information could be forgotten from the public, it is the freedom for the information controller to take measures of delisting or completely deleting.

It is noted that even if the right to be forgotten can carry out the purpose of the informed consent principle, the informed consent principle itself is still confined in the individualism and cannot independently support the entire personal information protection system. For example, in the case of Ren Jiayu (as Ren Jiayu sued Baidu because of the associated term), the number of people whose names are linked with other terms to become search terms is countless, and the number of people whose names are linked with offensive terms is large. However, Ren Jiayu is the only person in China who has taken Baidu to court. It exposes the limitations of the informed consent principle. From the cognitive point of view, there are risks in the information subject's decision on personal information. First, with notification rules, such as long and difficult privacy agreements, the subject may not read them at all. According to a survey by iMedia, 14.9% of China's mobile Internet users never read the privacy agreement in 2020, while 48.7% did not read it carefully.<sup>46</sup> Second, even if the subject reads the privacy agreement, they may not be able to understand its meaning – that is, they may not be fully informed. Thirdly, even if the information subject reads the privacy agreement carefully and fully understands the content, he/she may make irrational decisions due to the misunderstanding of the process of collecting, using, converting and deleting personal information, wrongly evaluating the costs and benefits. In addition, information collectors themselves will induce the information subject to unconsciously agree to the privacy agreement and avoid responsibility through

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45 See the Draft of Personal Information Protection Law, [https://www.sohu.com/a/203902011\\_500652](https://www.sohu.com/a/203902011_500652)

46 Imedia (2020). *2020 China Mobile APP Privacy Rights Evaluation Report*. [online] [www.iimedia.cn](http://www.iimedia.cn). Available at: <https://www.iimedia.cn/c1061/69373.html> [Accessed 30 May 2020].

commercial means, which increases the cognitive difficulties of the information subject. From the perspective of information market structure, even if each information subjects are fully informed and are rational decision-makers, they cannot predict how much value their information will have in the hands of the collector after reprocessing or after being transferred to other collectors. The informed consent principle cannot reverse the weakness of the market structure of personal information, and therefore, it cannot guarantee the right of information subject to control or self-determinate personal information.

It seems that due to the cognitive and structural problems, it is not easy for the informed consent principle to protect the information subject effectively, so it must be supported by other corresponding principles. Take the U.S. experience for instance. According to the principle of Fair Information Practice, the information subject can be rigidly or flexibly empowered, and other supporting principles including Accountability Principle, Individual Participation Principle, Use Limitation Principle and so on<sup>47</sup> may help.

## Conclusion

This contribution has provided an overview of Chinese localization of the right to be forgotten.

The chapter goes beyond the right to be forgotten established by the European Court of Justice and starts the discussion with broad and narrow definitions of the right to be forgotten. With the previous legislation of the broad right to be forgotten, Part 1 focuses on why China needs a narrow right to be forgotten. In recent years during the era of digitalization, China's rising nationalism and populism has imposed Chinese people into Bentham's panopticon, where they are anxious about their utterances. The right to be forgotten as an active right could be a remedy against this.

The Chinese legal framework of personal information protection and right to be forgotten has not been completed yet. While the constitutional law lays the basis of information protection, the administrative law only offers a patchwork of rules and regulations, which emphasize the enterprises' responsibilities but neglect that of the government as an information controller. Furthermore, the draft of Personal

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47 The Privacy Protection Study Commission (1977). *The Relationship Between Citizen and Government: Chapter 13 of 1977 Report on The Privacy Act of 1974*. [online]. Available at: <https://epic.org/privacy/ppsc1977report/c13.htm> [Accessed 29 May 2020].

Information Protection shows the legislators' attention to the duties of information controllers and protection of minors regarding the right to be forgotten.

Although the draft seems useful, there are lots of problems assessing different legal attributes of the right to be forgotten. If viewing the right to be forgotten as a general personality right, the first Chinese case of this right reveals that it is hard for the interest subject to safeguard its forgotten interests because of the heavy burden of proof and the helplessness of primary courts. Nevertheless, judging the right to be forgotten as a concrete personality right is the major academic viewpoint. While Chinese scholars managed to paint the relationship map of the right to be forgotten, right to privacy, right to personal information and right to personality, the problem is the limitation of the use of the right to be forgotten. Other voices suggest that considering the right to be forgotten as a property right could be a solution, but associated with economic theories, the establishment of the right to be forgotten could not change the unequal positions between the information controller and the information subject.

No matter which legal attributes are assigned to a Chinese right to be forgotten, the solutions mentioned above lie in the balance of a triangle relationships among the government, the organizations and the information subject as well as the extension of the Informed Consent Principle.

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