



Research Article

Return of a Forgotten Right: Application of the Right to be Forgotten in Criminal Justice

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Abstract

The right to be forgotten refers to the right of citizens to have certain data of their personal information deleted. Originating in criminal justice, the right was later somewhat "forgotten" in it while widely applied in civil and commercial laws. In fact, the right can be widely applied in criminal justice: litigants and court participants including the convicted criminal, the victim, the acquitted defendant, and the witness all have demand in claiming the right. However, such claims from the subjects of information could conflict with rights and legal interests such as the public's right to know, freedom of speech and the press, and public security. To resolve these conflicts, limits should be imposed on scope of the subject of the right, applicable cases, and ways and procedures of exercise so that the right can be legitimately practiced in criminal justice.

Keywords: Conflicts and resolution; Criminal justice; Data subject; The right to be forgotten

Introduction

With ever-evolving Internet technologies and dawning of an era of "big data", the right to be forgotten has been much debated by civil and commercial jurists in Europe and the U.S., even influencing legislation and verdicts. Chinese civil and commercial jurists also attach importance to the right and have proposed constructive research [1]. However, the right is much less discussed and seems to have been forgotten in criminal justice where the concept originated. It is indispensable for criminal justice to face and embrace the return of the "long-forgotten" right to be forgotten to enhance protection of human rights in a time of information explosion.

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The Return of the Right to be Forgotten from Civil and Commercial Laws to Criminal Laws

The origin of the right to be forgotten: Background and concept

Being forgetful is part of human nature. However, it seems impossible to be forgotten with highly developed technology of computers, databases and the Internet, bringing doubt about whether individuals' personal information could be legitimately used and whether the use infringes civil rights. In 1967, Vance Packard, a renowned journalist expressed his concerns: "The most disquieting hazard in a central data bank would be the placing of so much power in the hands of the people in a position to push computer buttons. When the details of our lives are fed into a central computer or other vast file-keeping systems, we all fall under the control of the machine's managers to some extent" [2]. It has gradually come to people's realization that removal or oblivion of information and data from data storage systems should be given as much consideration as the input of data into such systems as computers, databases and the Internet, so as to create a two-way channel to prevent data storage technology from threatening individuals' freedom.

The jurisprudential circles did not pay much attention to the issue of oblivion nor started debating on the right to be forgotten until recently, right in criminal justice. It is generally believed that the right to be forgotten is derived from le droit à l'oubli in French, a right that allows convicted criminals who served their time and have been rehabilitated to object to the revelation of the information of their conviction and incarceration [3]. Nonetheless, this newborn right seemed to be left sinking into oblivion by criminal jurists while their counterparts in civil and commercial laws had thorough heated debate on the right and gradually drawn attention from legislative and judicial circles.

The European Union has been leading in discussion and exercise of the right. A French Member of the European Parliament put forward a proposal involving the right to be forgotten in 2009. In January 2012, the European Union released Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free movement of Such Data (General Data Protection Regulation) SEC (2012) 72 which formally adopted the right to be forgotten and defined it in Annex 4.1.3 as "the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes. This is the case, for example, when processing is based on the person's consent and when he or she withdraws consent or when the storage period has expired" [4].

Based on this definition, it can be clarified that the subject of right is the data subject directly or indirectly identifiable as natural persons to whom the personal data relate. The subject of obligation are natural persons, legal persons and public organizations that have the obligation to delete the personal data. The right allows the subject of right

(i.e. the data subject) to request the subject of obligation to delete personal data related to the data subject. According to the definition, there are several issues to be noted when individuals request to have their personal data deleted and forgotten. First, the scope of the subject of right is confined, i.e. only the data subject whom the personal data relate to can exercise the right, which means only individuals who are natural persons can be the subject of right. Second, individuals can only request to have their personal data deleted or no longer processed when they are no longer needed for legitimate purposes, i.e. the right to be forgotten cannot contradict the legitimate needs of data storage and use. Third, even though individuals have given their consent for storage and uses of their personal data, they can also identify a storage and use period or withdraw such consent later.

Application of the right to be forgotten in civil and commercial laws

The intention of the European Union to adopt the right to be forgotten has caused repercussions, especially from technology companies and telecommunication network operators who expressed their concerns for the potential threats the right could pose to the public's right to know and even freedom of speech. Nonetheless, the European Court of Justice formally adopted the right to be forgotten as a citizen's civil right in the judgment made in May 2014 of Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González [5].

In Regulation (EU) 2016/679 of The European Parliament and of the Council of the European Union of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), [6] Para.1 and 3 of Article 17 clarify the applicable cases and limits of the right to be forgotten, defining the scope of the right. According to Para.1, the right applies in the following six cases: (1) the personal data are no longer necessary, (2) the data subject withdraws consent, (3) the data subject objects to the processing, (4) the personal data have been unlawfully processed; (5) the personal data have to be erased for compliance with a legal obligation to which the controller is subject, and (6) the personal data have been collected in relation to the offer of information society services directly to a child. In fact, the six cases fall into three categories: (a) reasons on the subject of right's side, i.e. the lack of consent of the data subject, either by objecting or withdrawing the consent, including consent referred to in Article 9 and consent for information society services directly to a child in Article 8; (b) reasons on the subject of obligation's side, namely the inappropriate processing of the personal data, including unlawful processing and processing not for the original purposes for which the personal data were collected; and (c) reasons of legal obligations, i.e. the law provides that the subject of obligation have the duty to delete the personal data.

Compared with strides made by the European Union, the United States is much more conservative on the issue. The State of California, however, promulgated Senate Bill No. 568 which requires the operator of an Internet Web site, online service, online application, or mobile application to permit a minor, who is a registered user of the operator's Internet Web site, online service, online application, or mobile application, to remove, or to request and obtain removal of, content or information posted on the operator's Internet Web site,

or application by the minor [7]. The provision confines the subject of right to a minor and the content to information provided by himself or herself, which is a narrower scope than that provided by the European Union. Nonetheless, that was indeed a formal attempt to legislate for the right to be forgotten in the U.S.

In China, there is no provision nor judicial precedent recognizing the right to be forgotten so far. In December 2015, No.1 Intermediate People's Court of Beijing Municipality made the final judgment of the first case involving the right to be forgotten in China – Jiayu Ren v Baidu Netcom Science and Technology Co., Ltd. Affirming the original judgment of the People's Court of Haidian District, Beijing Municipality, the Intermediate People's Court believed that "although the right to be forgotten is recognized by judicial precedent of the European Court of Justice and has been discussed by Chinese jurists for its localization, the existing laws have no provision on the right nor any matching type of the right" [8]. It was believed that the plaintiff's claim on the right to be forgotten is an interest of personality, however the plaintiff failed to prove the legitimacy of the right and necessity to protect it, which made the Court dismiss the plaintiff's request to have particular personal data – in this case, Ren's teaching experience in a particular educational agency – removed by the defendant.

Sealing of criminal records: Original states of the right to be forgotten in criminal justice

As mentioned above, the right to be forgotten has its root in the right of convicted criminals who have served their time and been rehabilitated to reject the publication of the facts of their conviction and incarceration. The right to be forgotten later sank in oblivion in criminal justice, whereas legislation and practice both allow rehabilitated criminals to request for sealing or erasure of their criminal records.

A typical legislative example of sealing of criminal records can be found in Criminal Records (Clean Slate) Act 2004 of New Zealand. Section 7 of the Act provides the eligibility of individuals for the request of sealing their criminal records. Specifically, an individual is eligible under the clean slate scheme if:

1. He or she has completed a rehabilitation period no less than 7 consecutive years after the date on which the individual was last sentenced, or a specified order was last made, in which the individual has not been convicted of an offence; and
2. No custodial sentence (such as home detention, corrective training, and borstal training) has ever been imposed on him or her; and
3. No order has ever been made on him or her to be detained or treated as a patient in a hospital due to his or her mental impairments; and
4. He or she has not been convicted of a specified offence (such as sexual conduct with a child under 12, sexual conduct with a young person under 16, and sexual exploitation of a person with a mental impairment); and
5. In the case of a court having imposed a sentence of a fine or reparation on the individual or ordered the individual to pay costs or compensation, the amount owing has been paid in full or has been deemed to have been remitted; and
6. No order has ever been made disqualifying him or her from holding or obtaining a driver's license under the Land Transport Act 1998 or the Transport Act 1962 [9].

Apparently, these provisions aim to limit the burden brought by an individual's criminal record and facilitate the convicted offender's rehabilitation. The provisions feature two characters: first, they are only applicable to offenders convicted of minor offenses instead of felonies; Second, any eligible individual is deemed to have no criminal record without the need of his or her request. These features, especially the latter, distinguish the Act from the right to be forgotten as a litigant's right; The Act regulated obligations of the government rather than entitling individuals to certain rights.

Chinese provisions on sealing or erasure of criminal records focus on protection of juvenile criminals. Criminal Procedure Law amended in 2012 contributed a chapter to procedures for juvenile criminal cases where Article 275 provides as follows:

"Where an offender was under the age of 18 at the time of a crime and is sentenced to imprisonment of less than five years, relevant records of the crime should be sealed. Where the records of a crime are sealed, they may not be disclosed to any organization or individual, save where they are required by a judicial authority for handling a case or by a relevant organization that is conducting an inquiry in accordance with the regulations of the state. Organizations conducting a lawful inquiry should maintain confidentiality of the information in the records sealed." Also, Interpretation of the Supreme People's Court on Criminal Procedure Law and Rules of Criminal Procedure of the People's Procuratorate have specific provisions on sealing of criminal records. Similar to the act of New Zealand, Chinese provisions underline the duty of judicial authorities to proactively seal criminal records instead of the litigant's right to request record sealing.

Despite the fact that the current criminal justice provisions on sealing of criminal records can hardly be equated with the right to be forgotten, these provisions could be considered as an primitive state of the right which, with appropriate revision, could be turned into a formal institution of the right to be forgotten. Moreover, these provisions also reflect wide prospect for the application of the right to be forgotten in criminal justice.

Applicability of the Right to be Forgotten in Criminal Justice

In criminal justice, the subject of obligation of the right to be forgotten are mainly state judicial agencies along with the press, network operators and telecommunication service providers. Meanwhile, there may be various subjects of right including litigants, such as the convicted criminal, the victim and the acquitted defendant, and court participants such as the witness.

The right to be forgotten of the convicted criminal

For convicted criminals, the right to be forgotten means first and foremost that their criminal records stay unknown to the public. The aforementioned countries including China have established policies of sealing of juvenile or minor offender's criminal records. However, the current policies can be further extended to make the right to be forgotten a formal right of a convicted criminal.

First, a right can be granted to convicted criminals to allow them request sealing of their criminal records, which means to turn the government's proactive sealing of criminal record to a combination of government action and the offender's request. Take China for

example, the current Criminal Procedure Law provides that criminal records should be sealed where an offender was under the age of 18 at the time of the crime and is sentenced to imprisonment of less than five years. With this provision still in place, it can be considered allowing other criminals to request sealing of their criminal records and the request shall be approved by judicial authorities. The advantages of the solution are: On the one hand, allowing a larger scope of cases to be sealed and thus facilitating the rehabilitation of minor offenders other than juvenile criminals; On the other hand, turning convicted criminals as the data subject from a passive recipient to an active requestor of sealing while allowing the judicial authorities to determine whether to approve the request based on the progress of the offender's rehabilitation.

Second, the right to request record sealing can be extended to the conditional right to request removal of criminal records [10]. It is a big leap from sealing to complete removal. In fact, there is legislative precedent in Western countries on the issue. Article 770 of the Code of Criminal Procedure of the French Republic provides as follows: "Where, after a decision has been made in respect of a minor of 18 years of age, the re-education of this minor appears to be achieved, the juvenile court may, upon expiry of a period of three-years from the date of the decision which may be after the minor has reached the age of majority, order the removal from the criminal records of the card mentioning the decision in question, either on application made by the minor or by the public prosecutor, or on its own motion. The juvenile court's decision is final. Where the removal of the record card has been ordered, the entry concerning the initial decision may not remain on the minor's criminal record. The card relating to the decision in question is destroyed." [11].

The complete removal of criminal records is the ultimate realization of the offender's right to be forgotten, which means the offender are finally freed from the burden of their past offense. Complete removal of the information makes it impossible for any inquiry, even the ones for legitimate purposes, to acquire relevant records. Thus, such removal must be carefully adopted and made only applicable to a narrow type of cases with strict conditions. Third, a right could be granted to the offender to allow his or her request of removing relevant news reports. News reports on the press regarding the facts of the crime and the conviction could have massive negative impacts on the offender's life beyond his or her rehabilitation, especially given that such impacts could be intensified exponentially by the rapid dissemination of information in the highly-intertwined society and the Internet. The press cannot report directly on the case of which the records are sealed by the judicial authorities proactively. However, even though the approval has been given for sealing or removal, the news reports before the approval could still put the offender in a disadvantageous position. Under such circumstances, the offender should be entitled to request the press to remove any relevant news report, either through the approval of the judicial authorities for the sealing or removal, or through special court order.

The right to be forgotten of the victim

In criminal justice, the victim also has an interest in the right to be forgotten. Unlike the case with the offender, the records of the case do not constitute the criminal record of the victim, and thus the victim's right to be forgotten often underline the removal of personal data in news reports instead of the sealing or removal of the records held by the judicial authorities. The victim in criminal cases, especially in sex

crimes, could be exposed to the press and the public attention over a long period of time, which could inflict secondary damage to the victim. There have been plenty of examples. For instance, in a rape case in Shenzhen in 2011, the victim Juan Wang (alias) was raped by her fellow villager and community security watcher Xili Yang while the victim's husband Wu Yang (alias) was hiding in the utility room next door, too frightened to interfere [12]. The case piqued the interest from the press immediately. Reporters flocked to the victim's house and bombarded the victim and her husband with questions. The victim hid herself under a quilt which did not stop the reporters from thrusting video cameras, microphones and recorders to her face. The victim's husband even begged the reporters to get out, saying: "I endured pain and pressure that is intolerable for any man. I am loath to recall any part of it. I beg of you. Please just go away" [13]. Attention from the press had greatly disturbed the victim and her husband. Strangers came to their house to insult the man as "coward" and "useless"; until this day, many reports on the case can be found online, many of which dubbed the victim's husband as "the most useless husband". It is utterly unfair for the victim who has suffered from the crime to endure secondary damage caused by news reports and long-term storage of such reports. To grant the victim the right to be forgotten is to reduce the secondary damage by doing damage control of the news reports and pacify potential negativity such as antagonism and revenge, allowing the victim to heal and resume his or her normal life. The victim's right to be forgotten should be exercised by the victim because the impact of news reports and its online storage on the victim varies from case to case. The judgment should be solely made by the victim about whether the influence of the news reports is positive or negative and whether these reports should be allowed to exist publicly. Therefore, the victim's right to be forgotten should be exercised by the victim's requesting the press, Internet operators, and telecommunication service providers to remove relevant reports and information. If the request is declined, the victim should be allowed to file a court order or a lawsuit to enforce the removal.

The right to be forgotten of the innocent

The innocent in criminal cases fall into two categories. Either they are charged but later found innocent, including criminal suspects or defendants whom the judicial authorities withdraw the case with, or do not prosecute, or find innocent, or wrongly convict and later redress; or they are wrongly recorded as offenders, including the innocent recorded as criminals or the convicted criminal recorded with wrong crime.

The innocent are either wrongly accused in criminal procedure or branded recorded as criminals by mistake of the judicial authorities. Their involvement with criminal case is by nature wrong and therefore they should be allowed to request the removal of relevant data from the authorities and the press to avoid negative impact on their lives. Take the UK for example. It was reported by Daily Telegraph that over 1,500 people had been wrongly given criminal records or mistakenly given a clean record by Criminal Records Bureau. Those who had been wrongly branded as criminals suffered major negative impacts on their lives, especially in job hunting; many would have been intending to take up jobs as teachers, nurses and childminders, or become youth volunteers. Some victims of the mistake will also have had to go through an appeals process to clear their names [14]. To prevent such damage from occurring or expanding, the innocent as the data subject should be allowed to request sealing or removal

of relevant data and information. For those who are wrongly accused and then found innocent, the judicial authorities should not only seal or remove proactively the disadvantageous data, but also publicize the mistakes on the press to rectify his or her reputation proactively or upon request of the innocent. The innocent should also be allowed to request the press to remove news reports on his or her "wrong-doing" and, if rejected, file an order of enforcement or a lawsuit for data removal. For those who are recorded as criminals by mistake, the judicial authorities should remove the wrong data upon receiving the request of the innocent or discovering of such mistakes by any other means. Where the wrong data has inflicted damage to the innocent, the judicial authorities should control or eliminate the damage by issuing relevant documents to prove his or her innocence.

The right to be forgotten of the witness and other court participants

Aside from the aforementioned litigants, other court participants might also have interests in the right to be forgotten. The most common among them is the witness's right to be forgotten. At present, the witness seldom appears in criminal court in China; the appearance rate of the witness is below 5% [15]. One of the reasons is the ineffective witness protection. Despite Article 61 in Chapter I, Part One of the Criminal Procedure Law of China amended in 2012 provides that people's courts, people's procuratorates, and public security authorities shall ensure the safety of witnesses and their close relatives, no specific provision was given on the duty of the judicial authorities to protect the witness, resulting in ineffective protection in practice. It is not uncommon for the witness to get threatened, attacked or even killed [16]. Under such circumstances, the witness's request of anonymity or removal of personal data after testification is a practical need, demonstrating the need of the witness's right to be forgotten. In practice, the laws in China partially admit the application of the witness's right to be forgotten by specifying duties of the judicial authorities. For instance, Article 62 in Chapter I, Part One of the Criminal Procedure Law of China provides that "where a witness, identification or evaluation expert, or victim testifies in a crime of compromising national security, a crime of terrorist activities, an organized crime of a gangland nature, or a drug crime, endangering the personal safety of the witness, identification or evaluation expert, or victim or his or her close relatives, the people's court, people's procuratorate, and public security authority shall take" protective measures such as "not exposing his or her look, true voice, and so on, when he or she takes the stand." [17]. Nevertheless, the current provisions are considerably limited and awaits expansion in both crime types and protective measures. Especially, rights should be given to the witness allowing him or her request removal of personal data or anonymous testimony so as to improve witness protection and witness appearance rate in line with the principle of directness and verbalism. Other court participants aside from the witness, including the legal representative, the agent ad litem, the pleader, the expert witness and the interpreter might have interests in exercising the right to be forgotten, the need of which should be considered in order to protect their legitimate rights from negative impact of the criminal procedure.

Conflicts and Resolution: The Right to be Forgotten and Other Rights and Legal Interests

Rights and legal interests that may conflict with the right to be forgotten

Criminal justice covers multiple rights and legal interests representing various value orientations which may conflict with or antagonize one another under particular circumstances, resulting in influences on the institution of criminal justice. The right to be forgotten is no exception: it may conflict with other rights or legal interests, most possibly with the public's right to know, freedom of speech and the press, and public security.

First, the right to be forgotten might infringe the public's right to know. The right to know refers to the legitimate right and freedom of natural persons, legal persons, and other social organizations to know and acquire information on the rights granted to the natural person, legal persons, or social organization [18]. The public's right to know is the foundation of democratic governance. Based on the right, relevant subjects have the duty to disclose information to natural persons, legal persons, and other social organizations, namely the duty of information disclosure [19]. The public's right to know and the consequent information disclosure system may, however, become obstacles for the data subject to exercise their right to be forgotten in criminal justice. On one hand, the convicted criminal, the victim and other litigants need to avoid becoming "involuntary public figures" [20] by exercising their right to be forgotten; on the other, the public need to know the facts of criminal cases. For instance, according to the principle of open trial in China, the judgment of criminal cases shall be publicly announced and uploaded to the website "China Judgments Online" for public inspection. Such provisions require special exercise of the right to be forgotten, such as request for judicial authorities of anonymity, which protects the litigant's right to be forgotten as well as the public's right to be informed about criminal cases.

Second, the right to be forgotten might infringe freedom of speech and the press. Freedom of speech is a constitutional principle worldwide. The First Amendment to the U.S Constitution provides that no law shall be made abridging the freedom of speech, or of the press. In China, Article 35 of the Constitution also provides that "citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration". Freedom of speech, a right of natural persons, derives freedom of the press, a right of legal persons which protects the objective and fair news reports of the press from interference, constraint or prosecution. Some are concerned that recognition of the right to be forgotten in criminal justice actually allows natural persons as the data subject to "censor" the press, which might infringe freedom of the press to report on criminal cases and consequently infringe freedom of speech. Professor Jeffrey Rosen expressed a gloom view on the issue: "Although there are proposals in Europe and around the world to create new legal rights of oblivion that would allow us to escape our past, these rights post grave threats to free speech." [21] How to strike a balance between the right to be forgotten and freedom of speech and the press is an issue impossible to escape in criminal justice.

Third, the right to be forgotten might infringe public security. Hobbes wrote. "The safety of the people is the supreme Law" [22]. This statement, albeit slightly extreme, expresses the importance of public security. Fundamental to rights to life, freedom and property and other much cherished rights of human, public security serves as a pillar and a premise for justice to be served. However, special institution established in criminal justice to ensure public security might become obstacles for the data subject to exercise the right to be forgotten. For instance, the U.S Federal Violent Crime Control and Law

Enforcement Act of 1994 provides that states shall set up registration database of offenders convicted of sexual assaults, especially sexual abuse of children, and personal information of these offenders shall be published for public inspection; in addition, state law enforcement agencies shall inform the family with minor children in the jurisdiction of the registered sexual assault offender in the community so as to take preventative measures [23]. Republic of Korea setup a website of "Sex Offenders Notification" [24] allowing the public to inquire personal information of sex offenders including names, addresses, photos and etc. Sex offenders in these cases cannot exercise their right to be forgotten. Besides, in response to a greater threat from terrorism, states might prohibit the exercise of the right to be forgotten by the data subject in terrorist crimes in order to fight against terrorism and ensure national security. When the data subject's right to be forgotten infringes public security, the former may be more often than not compromised for the latter, as it was in the above examples.

Resolution of conflicts: Necessary limits of the right to be forgotten in criminal justice

To solve the conflicts between the right to be forgotten and the public's right to know, freedom of speech and the press and the public security, trade-off and compromise are indispensable between these rights and legal interests, which requires appropriate limits of the right to be forgotten.

In terms of the subject of the right, public figures who are convicted criminals should be restricted in exercising the right to be forgotten. It is inappropriate for public figures with higher social positions to enjoy the same right to be forgotten as ordinary citizens. In the spotlight of the press and public attention, public figures have low expectation of the right to privacy and understand that their offense may cause massive concern. Therefore, allowing the same degree of right to be forgotten for them could impair the public supervision, especially for political public figures to ensure the legitimate exercise of their power. On the other hand, since to err is human, public figures should be entitled to the right to be forgotten which exempt them from the negative impact of their past wrongdoing. Moreover, news coverage of public conviction and sentence of offenders who are public figures can be educational to citizens. For instance, the conviction of the DUI case of Gao Xiaosong, [25] a renowned Chinese-language songwriter has been used as a vivid example showing DUI as a criminal offense and education against DUI. Considering public figure's low expectation of right to privacy, the public supervision over public figures, and social and educational importance of the conviction of public figures, their right to be forgotten, especially as the convicted criminals, should be more strictly limited than other offenders, in terms of stricter conditions for application, longer storage period of data, etc.

In terms of types of cases, certain offenders in special types of case should only be allowed limited right to be forgotten or deprived of the right at all. First, in crimes against national security and terrorist crimes, national and public security outweigh the convicted criminal's right to be forgotten. State authorities should have discretion of the use of data, including storage, sharing, sealing and removal, regarding these cases. The convicted criminals in these cases may not be entitled to the right to be forgotten or to request of sealing or removal. Second, for sex offenders, especially those against children, experience could be drawn from the U.S and the Republic of Korea

to deprive the offender of the right to be forgotten as well as to establish specific database for the public information disclosure. This is a trade-off of the right to be forgotten for the public's right to know and public security in order to protect the public, especially vulnerable groups such as minors. Third, for serious corruption and bribery, considering "the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law", [26] the convicted criminal's right to be forgotten in these cases should be restricted or deprived to serve as a stronger warning. Levels and conditions of restraints or deprivation should be provided explicitly or left to the judge's discretion. Meanwhile, the victim, the innocent and court participants should not be subject to this restriction or deprivation.

In terms of the ways and procedures the data subject exercises the right to be forgotten, there should be reasonable provisions as follows. First, ways of exercise should combine request and review. The right to be forgotten, as a personal right, is different from an administrative right in that the data subject is entitled to decide on the exercise of the right or not. Thus, the data subject's request should be considered as premise of the exercise. However, as mentioned above, the litigant's exercise of his or her right to be forgotten might conflict with many other rights and legal interests, which make judicial review of the exercise necessary. To be specific, when the data subject requests the judicial authorities to remove relevant information regarding the criminal case, the request should be reviewed by the court; when the data subject requests the press or network operators to remove relevant information and is rejected, he or she should be allowed to file a suit or a court order against the subject of obligation. Second, in terms of conditions of exercise, for the offender in the aforementioned criminal cases such as crimes against national security, terrorist crimes, sex crimes and major corruption and bribery, the court should either prescribe in the conviction that the offender have no right to request sealing or removal of the criminal data or provide the minimum period of time and conditions to approve the request, so as to limit or deprive the offender's right to be forgotten. For the offender in other types of cases, in reviewing the data subject's request, the court should consider factors such as the period of time after the conviction has been made and the public's need. Third, in terms of the time to exercise the right, since the conviction of criminal cases in China must be publicly announced and uploaded to the website "China Conviction Online", litigants and court participants including the victim, the witness and the minor offender should be allowed to request removal of their real names and other personal data that could reveal their identities, [27] or replacement of their names with aliases or pseudonyms, before the conviction is made.

The above solutions can limit the exercise of the right to be forgotten in terms of the scope of the subject of right, the applicable cases, and the ways and procedures to exercise the right so as to resolve effectively the conflicts between the right and other rights and legal interests and balance different value orientations, in pursuit of both deterring crimes and protecting human rights in criminal procedures.

Conclusion

The advent of the big data era brings both convenience and the risk for personal information protection, which inevitably creates a need for the right to be forgotten. In the criminal justice there is also space for the right to be forgotten. At present, the right to be forgotten has

not been recognized in criminal justice, but some original forms of the right to be forgotten in criminal legislation can formally establish the right to be forgotten in the criminal justice field and prudently expand its scope of application. The introduction of the right to be forgotten in the criminal justice may cause confliotions with other rights or values. Therefore, various interests should be carefully balanced to ensure the smooth implementation of the system of right to be forgotten in criminal justice.

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25. On the evening of May 9, 2011, Gao Xiaosong committed DUI and caused a rear-end collision of four cars. Later the month, Gao was sentenced to six-month criminal detention and a fine of 4,000 RMB. It was the first celebrity DUI case since the enforcement of The Amendment (VIII) to the Criminal Law of the People’s Republic of China on May 1, 2011.
26. United Nations Convention against Corruption.
27. Current provisions in this regard in China only allow the court the discretion instead of the right of the victim or the witness to request. For instance, Article 6 of The Provisions of the Supreme People’s Court on the Issuance of Judgments on the Internet by the People’s Courts of provides: “ When issuing judgments on the Internet, a people’s courts shall retain the parties’ names and other true information, but the names of the following parties and participants in the proceedings must remain anonymous in the form of alternative symbols: (1) The parties and their legal representatives in the cases of marriage and family or inheritance disputes; (2) Victims and their legal representatives, witnesses, and identification or evaluation experts in criminal cases; and (3) A defendant who is sentenced to fixed-term imprisonment of three years or is exempted from criminal punishment, and is not a recidivist or habitual offender.”



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