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The Juridical Logic of the Right not to be Subject to Automated Processing and Its Applications in China

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Abstract:

In order to cope with the digital dilemma associated with algorithmic society, the Right not to be Subject to Automated Processing came into being. Originated from the GDPR Article 22, then mirrored by most of the personal information protection laws world-wide. The very nature of GDPR Article 22 is a right, not a prohibition; yet the right not to be subject to a decision based solely on automated processing conveniently confuses with the right to erase, the right to be provided with an explanation and the right to be forgotten. There are two critical paths to understand this right: (1) Recital 71 of GDPR has stipulated three fundamental rights for the data subject to protect their legitimate interests; in between these three rights there are no reciprocal causation but degree ascension. (2) The right itself varies in different scenes, it may mean not to be subject to data collection, not to be subject to profiling or not to be subject to platform interaction according to different technological contexts. In order to break the illusory promise of the right not to be subject to automated processing, the Assumption of Risks alike exemption conditions should give way to statutory permit aiming to increase public well-being. To think outside the GDPR's box, the right to be heard and the right to attention both revealed practical path for the application of the right, so far as the social cost could be maintained in a proper manner. To apply such rights in the Chinese context, law-makers shall balance its efficacy and cost, so as to construct a full-cycle protective mechanism.

***Keywords**: The Right not to be Subject to Automated Processing, The Right to Erase, The Right to Be Provided with An Explanation, The Right to Be Forgotten, Exemption Rule, Chinese Application.*

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I. INTRODUCTION

It is wide accepted that Sustainable business paradigm asks for responsible technology use, yet only effective regulations could guarantee responsible technology use. Along with the technological development, personal information protections laws are adapting rapidly. Automated Processing is a concept opposite to human processing, which relies heavily on either computer technology (1980-2000), or algorithm program (2000-2020), or deep learning and neural network (2020+), or the combination of the above to rule out human processing on data and information, so as to generate decisions automatically that have binding effects on the data subject. Paragraph 1, Article 22 of the General Data Protection Regulation (hereinafter referred to as GDPR) allows the data subject not to be subject to automated processing, and domestic mainstream scholars in China translated such right as "against Automated Processing" or "not to be restricted by the decision from automated processing", but in accordance with the original "shall have the right not to be subject to a decision-based solely on automated processing", both paraphrase above seem to be inaccurate. This leaves a wide gap for legal interpretation [1, 2]. Yet although paragraph 1 of Article 22 gives the data subject the right to disengage from decisions with legal consequences that depend entirely on automated processing, it is unclear how and to what extent the data subject could be disengaged [1].

Although China has no relevant legal transplantation, but in practice the government had acted in an "actions speak louder than words" manner to realized the above spiritual connotation of *"the right not to be subject to automated processing"*. A case in point is that the government allows individuals to call the 12345 hotline for error correction when their health QR code results do not match the actual situation. After verification and confirmation by the county-level prevention and control headquarters, the risk determination results can be modified. Such instance indicates three profound reality: first, under the background of epidemic prevention and control of the normalized, the "decoupling" of the data subject from automated processing would prove to be difficult; Second, even if the effect is limited, *"the right not to be subject to automated processing"* is a legal right worth protecting, because no matter how advanced the automation technology would be, mistakes are inevitable. At this time, appropriate human intervention is the remedy for the data subject to "make things right". Third, *"the right not to be subject to automated processing"* is a very special right, which has different requirements and application scenarios from the common rights that we encounter everyday. For example, article 16 of GDPR stipulates *"the right to erase"* of the data subject, which allows the data subject to improve or correct the insufficient personal data without violating the purpose of processing. China's "Network Security Law" also has similar provisions, and the latest promulgated by the "Civil Code" by the absorption, has become an important provision in the private rights section. It seems that, dialing 12345 to correct health QR code error is quite similar to the practice of exercising *"the right to erase"*. In this regard, it needs to be clarified that, whether in the EU or China, the objects that the data subject can correct when exercising *"the right to erase"* can only be the data or information before automated processing rather

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than decisions generated from the automatic process. In terms of the legal effects, *"the right to erase"* can only achieve a very small fraction of what the *"the right not to be subject to automated processing"* intends to achieve.

In the general trend of the structural integration of automated applications into human society, *"the right not to be subject to automated processing"* is not a simple request for human intervention and modification of decision results. Otherwise, the painstaking and even circuitous legislative attempts of GDPR would be unnecessary. What is the connotation and extension of *"the right not to be subject to automated processing"*? What is the relation and difference with other rights of data subject guaranteed by GDPR? A correct understanding of the core value and theoretical basis behind *"the right not to be subject to automated processing"* will bring important enlightenment to the future legislation of artificial intelligence in China, and this is exactly what this article desires to clarify.

II. THE HISTORICAL EVOLUTION AND THEORETICAL CONTROVERSY OVER RIGHT NOT TO BE SUBJECT TO AUTOMATED PROCESSING

"The right not to be subject to automated processing" is not the invention form GDPR, it was first seen in article 15 (1) of the EU Data Protection Directive (hereinafter referred to as DPID) in 1995: "Data subjects shall not be subject to fully automated decisions based on profiling". The exercise of this right presupposes two necessary conditions: (1) the automatic decision must have a significant impact on the data subject with legal consequences; (2) User profile is completely realized by automated processing.

2.1 "Historical Issues" in Article 15 of DPID

DPID is the predecessor of GDPR, and the interval between the two were 23 years. During this period, two facts need to be noted. First, Automated Processing has achieved a leap in technology and gradually changed the context of discussing *"the right not to be subject to automated processing"*. In the 1990s, when DPID was developed and implemented, automatic decision-making mainly refers to computer automation based on database coding, that is, using computer to replace natural person to achieve repetitive basic work and process work. After 2000, computer automation based on database coding gradually gave way to algorithm-based automation based on machine learning, whose essence was "seeking logic through rule origin" as a model of programming theory. Big data supports machine learning model, and carries out law mining or pattern recognition in the environment with uncertain scope, so as to replace natural person to realize the basic prediction work and normative identification work of "reviewing the past and learning the new". GDPR has been in effect since May 2018, and algorithm automation based on machine learning is gradually advancing towards super automation based on neural networks. As the data platform of open source sharing and machine learning model of overlapping interaction, today's Automated Processing has been gradually break through set up the fund

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referred to "natural person can, a robot cannot" "reasoning and deductive" upper limit of "smart", to distinguish a particular period of macroscopic law, legal and social operation with an unusual insight to provide system solutions or value judgment of the singularity is near [3]. At this stage, Automated Processing will be "a highly autonomous, refined governance order that intervenes and guides daily social interactions in the form of continuous control, supported by any information technology device [4]". In summary, although the term is "Automated Decision", the concept of DPID automation only covers computer automation based on database coding and algorithm automation based on machine learning, while the concept of GDPR automation covers all types of automation so far. This is the change of the scope of application that needs to be taken into account in the study of *"the right not to be subject to automated processing"*. About *"the right not to be subject to automated processing"*, the subtle differences between DPID and GDPR are shown in Fig 1.

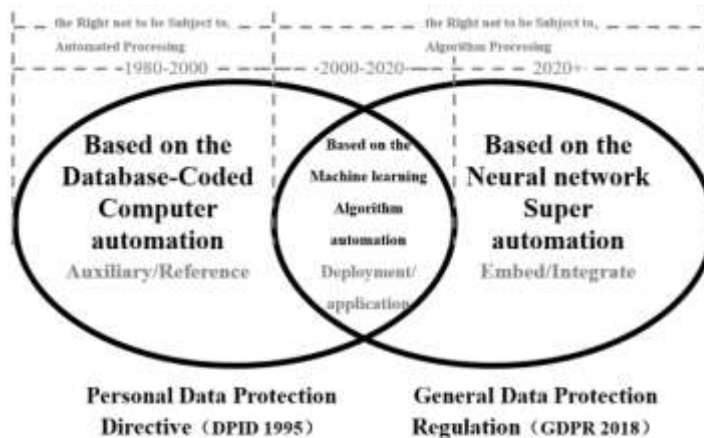

Fig 1: difference between DPID and GDPR in "the Right not to be Subject to Automated Processing"

Secondly, in the whole life cycle of DPID, article 15 is almost completely dormant, but article 22 of GDPR still resolutely inherits the provisions of Article 15 of DPID, and article 9 of the Convention on Modern Protection of Personal Data Processing adopted by the Commission of Ministers of the European Union in 2018 also absorbs the relevant provisions of Article 15 of DPID. This may mean that in the context of algorithmic automation based on machine learning and super automation based on neural networks, it is more necessary to apply and popularize *"the right not to be subject to automated processing"*. Prior to that, *"the right not to be subject to automated processing"* has been dubbed as a "private right" of DPID, because in the member states of the European court and the court's trial practice, against the two sides have never in the exercise of the rights and legal effect meaningful debate: "out of Automated Processing suit" objective existence, but the two sides are always focused on the controversial decisions are made by automated processing. For example, the German Federal Court ruled in SCHUFA case that the credit evaluation output by the credit evaluation system does not belong to the

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automatic decision-making category defined in article 15 of DPID without manual intervention, because the bank's credit evaluation of its customers is actually completed by natural persons under the "auxiliary" of automatic decision-making. The French Supreme Court held that law enforcement, which employs an algorithm-based automated system for adjudicatory assistance, is also not subject to DPID Article 15[5]. In its working report, the former EU Individual Protection Office pointed out that article 15 of DPID is not a general principle that can be generalized for data protection, but an exception principle for specific automated user profiling. The new question, which comes after earlier attempts to legislate failed, is whether GDPR 22, as opposed to DPID 15, will give new life to the idea of *"the right not to be subject to automated processing"*.

2.2 Evolution of Related Rights

Compared with article 15 of DPID, the progress of article 22 of GDPR is mainly reflected in the following three aspects.

First, Article 22 of GDPR gives more attention to particularly sensitive personal data. Article 22, paragraph 4, provides that data subjects have the right to disengage from automated decisions based on data relating to race, national history, political views, trade unions, genes, natural persons' health and sexual orientation. Such sensitive information can be handled without interference if and only if the data controller has the explicit consent of the data subject or the statutory permission necessary for the realization of the public interest. Thus, GDPR has a higher "granularity" than DPID in the typed processing of personal data.

Second, article 22 of GDPR expands the scope of exercise *"the right not to be subject to automated processing"* to include the personal data of minors under special protection. Article 38 of the PREamble to GDPR states that the specific protection of personal data of minors "shall be particularly applicable to data that may be used by machine learning models to generate user profiles"; Article 71 of the preamble states that automated decisions based on user profiling "do not apply to minors". In contrast, DPID does not make relevant provisions on data protection for minors, and it is difficult to infer from the relevant provisions whether minors should enjoy *"t he right not to be subject to automated processing"*. The special protection of minors' personal data shows that the law conforms to the market demand to keep pace with The Times: with the arrival of the Internet age, the post-90s gradually become the "backwave" abandoned by public opinion, and the post-00s even take over the banner of the "Pan-entertainment era" to dominate the Internet. Research report makes clear, 00 hind has become consumption main force in the field such as economy of food, appearance level[6]. Data controller capable of "zero zero the latter to the world" "marketing to grab from baby" "first impressions are most lasting culture consumption habits", under the temptation of huge business interests, social media, electric business platform, the video website for juvenile data, to obtain new generation individual browsing history and individual

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trajectory, consumption records, thumb up and collect the list - accurate content push for minors and values to guide followed, this risk is self-evident, legal intervention is helpless.

Third, Article 22 of GDPR expands the scope of application of *"the right not to be subject to automated processing"* and is no longer limited to the exercise restriction of Article 15 of DPID that "User profile is completely realized by automated processing". According to the statement of article 22 of GDPR, "have the right not to be the subject of automatic decision control, including user profiling", it seems that "Automated Processing and user profiling" together constitute the applicable scenario of *"the right not to be subject to automated processing"*. That is to say, automated decisions, whether or not implemented in user profile, can trigger the data subject to exercise *"the right not to be subject to automated processing"*; Conversely, user profiling, whether or not an automated decision is eventually made, will ultimately be subject to article 22 of GDPR. For example, Mendoza and Bygrave argued that the meaning of "including" in the text of article 22 "violates its rationale and legislative context, and should be interpreted as involving the use of" including. Mr Bourcan argues that automated decisions today inevitably involve user profiling, so the article 22 controversy is unnecessary[7]. At least in my opinion, the opposition point of view of scholars made two mistakes: (1) failure to Automated Processing from the initial study based on the database encoding computer automation, to the recent automation based on machine learning algorithm, and then to the future based on neural network of transition process of super automation, decision is taken for granted that automation machine learning model in accordance with the specific algorithm of user profile form of decision-making. In fact, if the automatic decision is made by the computer to retrieve the database code, it does not involve the user profile process at all. If realized by neural network, user profile is only a link of super Automated Processing. (2) Article 22 of GDPR is regarded as a simple continuation of Article 15 of DPID, failing to investigate the possible policy shift behind the wording change. The change of conditions applicable to local application is generalized, so that the automatic decision and user profile, which together constitute the necessary conditions in article 15 of DPID, are converted into sufficient conditions in Article 22 of GDPR. It also confirmed from the front, DPID article 15 only allow the data subject in the algorithm based on machine learning model automation situation exercise *"the right not to be subject to automated processing"*, while GDPR 22 can be applicable to the coding based on database of computer automation, automation based on machine learning algorithm based on neural network and the automation of all cases, the applicable scope of the rights is greatly widened.

Regrettably, despite the drastic changes mentioned above, there is no sign of a recovery from *"the right not to be subject to automated processing"* since GDPR came into effect. As a legal right worth protecting, why is *"the right not to be subject to automated processing"* often forgotten, rarely exercised, and almost "de-connected" from reality? The answer to this question first lies in the "application condition" of GDPR 22, which has not been substantially modified compared with DPID 15 -- the decision subject has the right to request disengagement must be made by "completely relying on

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automated processing", which undoubtedly greatly raises the application threshold of *"the right not to be subject to automated processing"*. Regardless of whether they are based on database coding computer automation, or automation based on machine learning algorithm, the minimum "human intervention" is inevitable, whether it is for the maintenance of the machine must be, or to ensure the consistency between structured data processing, or confirm the machine learning model is not out of the "REINS" algorithm code. Against the authority of the suitable threshold explain the absence of long-term, further exacerbating the vagueness of the law itself, making each participant can only be fully in accordance with the literal understanding to adjust their behavior - now that is a little bit of a natural person involved in the "evidence" of can data subject's overthrow GDPR article 22 of the trust interests, *"the right not to be subject to automated processing"* is completely the result of the overhead is not unexpected.

The decline of *"the right not to be subject to automated processing"* is also due to overly lax exemptions. Article 15 of DPID stipulates that when the data subject actively requests and agrees to accept the automatic decision service, it will be subject to the similar "estoppel principle". When a contract is signed, the effectiveness of purely automated decisions will be "unchallenged" as long as the data controller or handler takes "appropriate measures" to safeguard the "legitimate rights and interests" of the data subject. GDPR actually expands the scope of DPID exemption. In Paragraph 2 of Article 22, it clearly specifies three situations where *"the right not to be subject to automated processing"* does not apply -- consent of parties, legal authorization and contractual agreement. In addition to the above three exemptions, restrictions on exercise that require cross-referencing with other articles of law are added to the amount specified in GDPR 4. Although under paragraph 3 of article 22 to appropriate narrowed the exemption conditions, require "data controllers shall take adequate measures to guarantee the data subject of rights, freedom and legitimate interests, allow the data subject to artificial interference, the data controller in order to express their views and the basic right of decision-making of dissent", but probe the wording, it is not hard to see in the exemption cases, the data controller in accordance with the law should ensure that the data subject, is "an artificial interference with subject" rather than "a data subject request data controllers for manual intervention" rights, and, "human intervention by data subjects" is intended to "express their views and objections to decisions" and has the appearance of a "right to oppose" rather than a *"the right not to be subject to automated processing"*. In other words, *"the right not to be subject to automated processing"* exemption conditions, just for the guarantee of "against rights" as a prerequisite, and has set up a file in the GDPR 21 "against right" to separate provisions: "for public interests, the official authority, controller, or a third party pursue legitimate interests of the data processing, including in accordance with the relevant provisions of the user profile, the data subject shall have the right at any time against." The simple repetition of article 21 in paragraph 3 of article 22 does not substantially raise the threshold for exemptions for data controllers.

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2.3 The Substantive Dispute between "Right" and "Prohibition"

Under the double restriction of strict application conditions and low exemption threshold, the right granted to the data subject by *"the right not to be subject to automated processing"* does not exist in the legal "executable state", and it is difficult for the data law enforcement authorities to take article 22 as the practical law enforcement basis in practice. In practice, the understanding of the inherent nature of GDPR 22 is split between legislators and law enforcers: lawmakers believe they have created a right for data subjects to be exercised in certain situations, but the law enforcers see it only as an injunction against certain types of automated decisions. Article 11 of the EU Law Enforcement Directive (LED) corresponding to GDPR continuously USES three "prohibitions" for special types of automatic decision-making, apparently regarding Article 22 of GDPR as a ban, which has aroused doubts from most member states. From the perspective of law enforcers, prohibition thinking is indeed easier to carry out law enforcement activities, and it also maintains the harmony and unity between GDPR and LED on the surface. However, such a superficial understanding of "execution for execution's sake" overlooks the overall view of EU lawmakers on personal data protection, and forcing the implementation of ARTICLE 22 of GDPR to conform to the provisions of ARTICLE 11 of LED will actually destroy the consistency of the overall data protection framework of EU.

In my opinion, there are at least three advantages in understanding Article 22 of GDPR by right thinking rather than prohibition thinking. First, it recognizes that article 22 of GDPR is *"the right not to be subject to automated processing"* that data subjects can exercise, which is consistent with the literal expression of Article 22, and also conforms to the subjective imagination of legislators to "restrict" the automatic decision-making process with legal rules. Second, right thinking conforms to the reality that Automated Processing is widely applied in the private and public sectors, so it is not appropriate to "prohibit" certain types of Automated Processing, but to investigate its application scenarios. Third, right thinking is more in line with the "natural science view" advocated by dialectics, that is, automatic decision-making can bring considerable benefits to the whole society, rather than always causing social costs due to external diffusion. To sum up, in order to ban the practice of thinking to understand GDPR 22 is too simple, it is actually LED other terms have more or less common problems, lawmakers and law enforcers is difficult to reflect the field of artificial intelligence to kill deviation of thinking, and the resulting interpretation fault, can explain the law unenforceable, executable law doesn't explain; How to narrow the gap between the two as far as possible is a basic problem worthy of seeking from academic circles and practical circles in addition to the debate of the rules in nature and reality.

As a "right" wearing a ban, *"the right not to be subject to automated processing"* is essentially a claim, is the Automated Processing relations in the data subject request data controller "for or not for the rights of a certain behavior", the subject of the data can't directly in the subject matter of the Automated Processing rights, but to cooperate with the request data entity. This leads to the key question in this

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paper, which is: does *“the right not to be subject to automated processing”* give the data subject the right to ask the data controller “why” and “not why”?

For a long time, the debate on the nature, legitimacy and scope of application of the rights defined in article 22 of GDPR has never stopped. There are various theories formed from this, among which there are two common misunderstandings. One misconception is that article 22 of GDPR is regarded as the “center of circle” of algorithmic interpretability requirements, which is mutually reinforcing with several clauses of *“the right to be provided with an explanation”* in GDPR. Another misconception is that *“the right not to be subject to automated processing”* is confused with *“the right to be forgotten”*, and that an attempt by a data subject to be left out of an automated decision is the same as a request to the data controller to erase personal data. On the application level, *“the right not to be subject to automated processing”* is regarded as the right of the data subject to request “to be interpreted” or “to be forgotten”, which is operable to some extent. In fact, it is a compromise move to move towards the prohibition thinking under the general premise of the right interpretation of Article 22 of GDPR. The understanding of the two different approach, is “from Automated Processing” is translated as “against Automated Processing” or “not restricted by the decision of the automated processing” the fundamental cause of, also reflect on the original dry each version of the translator is not hard to pure literal translation, but at high above attainments of law into their own artificial intelligence to GDPR in-depth understanding of the terms, rigorous legal thinking can be shown from free translation of the expression does not provide craftsmanship. So what's the difference between *“the right not to be subject to automated processing”* and *“the right to be provided with an explanation”* and *“the right to be forgotten”*? Is the difference between the rights virtual or real? From the perspective of right thinking, what institutional firewall has GDPR established for the coming era of super automation? What is the status and function of *“the right not to be subject to automated processing”* in automatic governance?

III. A RETHINK ON THE PROTECTIVE RIGHT SYSTEM OF THE GDPR

This section intends to clarify the differences between *“the right not to be subject to automated processing”* and *“the right to be provided with an explanation”* and *“the right to be forgotten”*, so as to reflect the original legislative intention of *“the right not to be subject to automated processing”* and to explore its true essence.

3.1 *“The right not to be subject to automated processing”* vs *“the right to be provided with an explanation”*

Big data, cloud computing and artificial intelligence technology by leaps and bounds, “revolutionary change to the network space ability difference and relationship between structure of main body”, the traditional legal system is difficult to deal with technology controlled by the black box hidden among the

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audience, information rent-seeking and regulatory arbitrage triple spiral out of control, the algorithm can be interpreted compliance requirements arises at the historic moment [8]. Although some scholars pointed out repeatedly, aimed at enhancing algorithm is hard and fast rules of transparency "is neither possible nor necessary"[9], but in the long regulatory practice, algorithm interpretability compliance requirements has become the world of artificial intelligence is the core purpose of the laws and regulations, even those who rely heavily on accountability, later also don't deny algorithm interpretability are artificial intelligence era "the fall against the data of individual subjectivity and autonomy and the loss of inner goodness", is a clear decision of subjectivity, automation to determine causality and correlation and the important premise of responsibility allocation algorithm[10]. In the era of unprecedented public accountability, the mass deployment of any new technology is bound to be placed in the field of continuous interaction between the media and society, so as to gradually eliminate public doubts, fully respond to social conditions and public opinion, and successfully obtain the consent of the majority as the basis of its legitimacy.

It is puzzling that GDPR, which repeatedly emphasizes the importance of algorithmability in the formulation process, only requires that personal data involving data subjects be processed in a "legal, reasonable and transparent manner" in article 5, Paragraph 1, of the Regulation. Obviously, open and transparent data processing method is not enough to ensure algorithm interpretability, at best, it is regarded as an indispensable link among the many components of algorithm interpretability. In practice, people have to combine the preface of GDPR to find the basis for the requirement of algorithm interpretability. Article 71 of the PREamble to GDPR states that data subjects accepting algorithmic automated decisions should enjoy "appropriate protection" because potential machine error and data discrimination are likely to bring "prejudice and injustice" to the whole society [11]. Article 71 immediately classifies "appropriate protection" into three categories: the right to human intervention, the right to express objection and challenge, and the right to the interpretation of relevant decisions. In this regard, GDPR starts from the path of *"the right to be provided with an explanation"* of data subject to reverse construct the compliance requirements of interpretability of algorithm [12]. Evidence is based on this reality, GDPR article 13 and article 14, article 15 respectively set directly from the data access to personal data, indirect from the data subject access to personal data, and data access of personal data controllers for all kinds of reasons to the data subject specific detailed information disclosure obligations, and relating to the further explanation obligation, especially "decision-making process involved in the logic of the program and its effect on the significance of the data subject and the possible"[13].

But, from GDPR article 13 to 15 extended out of *"the right to be provided with an explanation"* entirely confined to data collecting and processing stage, so "prior explanation" can only superficial data subject to learn their general situation of the processing of personal data and the potential impact, and can't keep the data subject really know the final formation of the Automated Processing and the causal relationship between the present circumstances [14]. It is obvious that the ideal expectation of the data

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subject in the extremely vulnerable position of information is to actively exercise *"the right to be provided with an explanation"* in order to obtain its in-process and post-event interpretation in the automatic decision-making stage, while GDPR is vague about this. In this context, some scholars regard article 22 of GDPR as a link with article 13 to 15, which complements the legal vacuum of *"the right to be provided with an explanation"* after the completion of a case [15].

GDPR literally, of course, be stipulated in *"the right to be provided with an explanation"* does exist in advance, the chasm between matter and afterwards, lead to coverage right to Automated Processing process, but the cohesive fracture problems can repair by means of direct supplementary provisions, it is not necessary in article 13 to 15. "At least 7 away" in article 22 of matter and afterwards so obscure, so a hidden way of defining *"the right to be provided with an explanation"*. The reason why EU lawmakers do not establish a complete *"the right to be provided with an explanation"* chain in GDPR is most likely due to two levels of thinking and concerns. For one thing, critics see a world in which automated decisions can be explained by setting up a *"the right to be provided with an explanation"*, an ideal that is far from the reality of how technology works today. Especially in the in-process and post-process stage, with the increasing complexity of machine learning models, the wide application of convolutional neural networks, and the convergence and overlap of data collection sources, it is extremely difficult to make a detailed and understandable explanation of the operation principle and judgment mechanism of Automated Processing[16]. In advance of all kinds of explanation may help agree with Automated Processing of the data subject judgment, but given the artificial intelligence is based on bionic technology on the depth of a natural person, guided by the desired effect, the causal relationship between matter and afterwards to try the experience rule of material surface can be easily with inner intuitive perception judgment confused, finally can only be mystifying, unfounded assumptions rather than explain. Secondly, the compliance requirement of algorithm interpretability must be accompanied by considerable compliance cost. The more complete and complete the provision of *"the right to be provided with an explanation"* is, the lower the cost of preliminary contracting and negotiation of data subject in the vulnerable position of information will be, but other costs thus increased will be borne by the data controller or processor. The debate over whether such cost pass-through is justified has long raged. On the one hand, as pointed out above, the in-process and post-process explanations of automatic decisions by data controllers are most likely to be futile explanations, often "explanations are also useless explanations". On the other hand, *"the right to be provided with an explanation"* in a complete sense is helpful to eliminate algorithm discrimination and reduce the information asymmetry between the data controller and the data subject to a certain extent. The teaching of modern legal economics about such "all or nothing" legal rules is that the costs of law enforcement should be weighed against the potential social benefits, that is, whether "principles that appear fair" are also "principles that are consistent with efficiency" [17]. At a time when the global race to the top is heating up, persuading governments and multinational corporations to set up a closed-loop of pre-event, in-event and post-event of *"the right to be provided with an explanation"* is a long way off.

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3.2 “The right not to be subject to automated processing” vs “the right to be forgotten”

“The right not to be subject to automated processing” with *“the right to be provided with an explanation”* under the condition of scale, some scholars tried to GDPR article 22 as an extension of *“the right to be forgotten”* related terms and repeat, because in history, *“the right to be forgotten”* with “from Automated Processing” to create with the development of the issues [18].

In the 2010 Google Spain v. Costeja Gonzalez case (hereinafter referred to as “Google”), the plaintiff required Google to delete the outdated personal information displayed in the search engine 12 years ago due to the online auction of houses. The European court, when the referee, deduced the data from DPID main body shall enjoy *“the right to be forgotten”*, is based on article 6 “the processing of personal data should be appropriate, relevant, and be processed (and further processing) for the purpose of update when necessary to ensure accuracy” and article 12 allows data subject “correction, erase and shielding is not in conformity with the stipulated DPID processing data”. The 2013 EU Guidelines for the Protection of Personal Information in The Information Security Technology Public and Commercial Services Information System, which incorporate the judgment of the European Court of Justice and the preceding provisions of DPID, make a straightforward recommendation: “When the data subject has a justifiable reason to request the deletion of his personal data, the personal data shall be deleted without delay.” Article 17 of GDPR directly stipulates *“the right to be forgotten”*: “The data subject shall have the right to request the data controller to erase his/her personal data”.

The confusion between *“the right to be forgotten”* and *“the right not to be subject to automated processing”* stems from the controversy over the nature of search engines that arose from the Google case. One side argues that search engines are merely mediators of data, not strictly controllers or handlers of it, as Google's general counsel walker told the New Yorker: “we don't create information, we just make it accessible [19]”. The other side pointed out tit for tat, the search engine in the information processing aspect is not completely passive, the result presents the way and the order, namely is the search engine processing data after the formation of automatic decision. From the search engine company “bid ranking” common means of profit, obviously the latter point of view is more convincing [20]. By confirming the search engine as the data controller, a consensus cognition can be derived, that is, the plaintiff exercised *“the right to be forgotten”* to Google in the Google case, hoping that Google could manually intervene the specific search results and realize the exercise effect of *“the right not to be subject to automated processing”*. Should be the result of artificial intervention is not really their appeal to the plaintiff “forgotten” in the online world, but to make Google search interface is no longer will the plaintiff outdated information into sorting algorithm, which is said, as the main body of the data of the plaintiff exercise *“the right to be forgotten”* to achieve the effect of the decision is, in fact, from the search engine's automation. The self-deceiving aspect of this approach is that the search engine has no way or right to actually delete all the pages that contain information that the data subject wants to forget.

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Instead, it simply “hides” those pages from the search results, and if you enter the url of those pages into the address bar, it will still be able to open them. It is important to note that there are many popular websites devoted to Google to delete or remove links, such as Hidden From Google, Wikimedia and Reddit, makes the hope for the exercise of *“the right to be forgotten”* data subject often fall into “added insult” “take knife broken water flow more”, even if from a search engine automated processing also from don't snoop unexpectedly is how much ado about nothing. In this sense, *“the right not to be subject to automated processing”* seems to be the main means to exercise *“the right to be forgotten”*, and also the lowest end to be realized in exercising *“the right to be forgotten”*. It is not surprising that some scholars regard article 22 of GDPR as a “useful and necessary reaffirmations” of Article 17.

However, *“the right to be forgotten”* is not the same as *“the right not to be subject to automated processing”* in all cases. To understand the uniqueness of *“the right to be forgotten”*, you need only take the Google case a little further. The plaintiff's exercise of *“the right to be forgotten”* against Google can only achieve the effect of *“the right not to be subject to automated processing”*, because of the special nature of the search engine. If the plaintiff wishes to achieve the effect of being completely forgotten, he should exercise *“the right to be forgotten”* to the owner of the page that publishes the plaintiff's personal data. These pages directly captured by the search engine are pure information publishing or reprinting parties, which hardly involve automatic decision-making. Simply deleting the page from the server can fulfill the forgotten request of the data subject. This process involves human intervention, but peers make a big difference in *“the right not to be subject to automated processing”*, with content deletion and link removal as the main legal consequences of exercising the right [21]. In fact, the search engine to completely fulfill the data subject's forgotten request, in addition to the data subject in the form of manual intervention from the automated decision out, also need to manually delete the related page in the server snapshot, and delete process workload does not even lower than during the “off” the amount of work. On the basis of the above cognition, it seems inappropriate to forcibly confuse *“the right to be forgotten”* with *“the right not to be subject to automated processing”*.

3.3 Reconstruction of GDPR Rights System

In the final analysis, *“the right to be provided with an explanation”* and *“the right to be forgotten”* have their own profound connotation and denotation respectively, which are totally different from *“the right not to be subject to automated processing”*. However, the exercise of these two rights does make the data subject “out of automatic decision” to some extent. Therefore, the question is whether *“the right to be provided with an explanation”* and *“the right to be forgotten”* can be regarded as the passive and active power of *“the right not to be subject to automated processing”* in reverse. To put it simply, are articles 13 to 15 and 17 of GDPR two different forms of peer rights in Article 22? The answer is no.

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3.3.1 Reinforcing Clause of *"the right to be provided with an explanation"*: Article 35 of GDPR

First of all, let's look at why *"the right to be provided with an explanation"* is not a passive right of *"the right not to be subject to automated processing"*. Theory, firing *"the right to be provided with an explanation"*, it can "from automation decision" the implementation of the results, provide the strong power, as long as the data controller or processor can't to the behavior of the data subject to provide a reasonable explanation, then the data collecting and processing will lose and legitimacy is - as the program runs "fuel" big data once foreclosures, Automated Processing will cease to exist, the data subject is natural "off". However, as pointed out in the first section of this chapter, GDPR article 13 to 15 only stipulates *"the right to be provided with an explanation"* of data subject in advance. When the data subject exercises this right, the automatic decision has not yet taken place, so naturally there is no "separation from automatic decision". At the same time, for the pursuit of utility, EU lawmakers have the incentive to maintain the weak *"the right to be provided with an explanation"*, instead of rashly granting *"the right to be provided with an explanation"* to the whole process chain of data subjects.

Between 13 and 15 rule under the condition of complete sex is unsustainable, structuralists take GDPR article 35 controller and data processing of "the data protection obligation of impact assessment" as its matter and afterwards reinforcing: when a user profile may bring high risk to the data subject of rights and freedoms, the data controller or processor must be "fully considering the nature of the data processing, scope, on the basis of the context and purpose", evaluation of Automated Processing will be the effects on the personal data protection. Article 35 is supplementary to the requirement of interpretability of in-process and post-event algorithms in three aspects. First, data protection impact assessment requires a systematic description of the possible operations and planned purposes of data processing, and a written systematic description mainly focuses on the legitimate interests pursued by the data controller. Secondly, the data controller must elaborate on the necessity and proportionality of data collection and processing, that is, user profiling should be limited to the legitimate interests of the data controller, and its rights should not be sacrificed without the consent of the data subject. Third, when there is a tension between the legitimate rights of the data subject and the legitimate interests of the data controller, the data controller must indicate in the data protection impact assessment the emergency risk response measures that can be taken, including but not limited to the legal guarantee, security measures and incentive mechanism already stipulated by GDPR. From the perspective of a provision which combine to produce effect, article 13 to 15 mainly control and data processing requirement of data mining is advance information source, characteristic and classification method and the operation mechanism of the algorithm program, code logic and the expected effect of prior explanation, in article 35 is for the sake of their will specify the system deviation, running fault and the correction mechanism, which is actually at a minimum to achieve the manifestation of the algorithm and interpretability, and due to explain later demand is still weak. At best, the exercise of *"the right to be provided with an explanation"* by a data subject can lead to an explanation that seems to illuminate the causal relationship

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between the interaction between the hardware, software, and data processing of the ai carrier [22]. In good faith, the data controller or handler gives a "self-righteous explanation"; if there is an ulterior motive, the way in which it is explained and reasoned will depend entirely on the economic or political objectives to be achieved. In this sense, the combination of articles 13 to 15 and 35 of GDPR reluctantly constructs a multiple weakened but relatively comprehensive *"the right to be provided with an explanation"*.

3.3.2 Upper Clause of *"the right to be forgotten"*: Article 21 of GDPR

As pointed out above, *"the right not to be subject to automated processing"* is not the way to exercise *"the right to be forgotten"*, because *"the right to be forgotten"*, in addition to manual intervention, also includes the responsibility of the data controller to delete the original page, erase certain content and remove relevant links; More importantly, the exercise of *"the right to be forgotten"* does not presuppose the existence of automated decisions. But is *"the right to be forgotten"* the initiative to *"the right not to be subject to automated processing"* when the automated decision has already been made? This will be harder to prove, since the data body's "detach from automated decisions" means that personal data can be "erased" at least at some point in the process.

To answer the above questions thoroughly, we must sort out from another Angle: *"the right to be forgotten"* is an independent right, just like *"the right to be provided with an explanation"*. Both of them are specifically stipulated in the text of GDPR. The obvious question is why *"the right to be forgotten"* is not among the three fundamental rights that data subjects should be guaranteed under article 71 of the preamble -- the right to human intervention, the right to dissent and challenge, and the right to the interpretation of relevant decisions -- like *"the right to be provided with an explanation"*. This also raises another question. If GDPR 17 is not the exercise mode of ARTICLE 22, is there another clause as the superior clause of Article 17? *"The right to be forgotten"* is a right of claim, which can be regarded as a separate right or as the content of the substantive right, but cannot exist apart from the basic right. In the author's opinion, the right basis of *"the right to be forgotten"* is "the right of opposition" stipulated in Article 21 of GDPR. From the point of view of legislative technology, if article 21 only gives the data subject the right to "object" to data processing or user profiling, but not supplemented by necessary opposition measures, the so-called "objection" can only be imaginary. Combining 17 and 21, it is not difficult to see that exercising *"the right to be forgotten"* is a powerful means for the data subject to oppose data processing or user profiling. In other words, *"the right to be forgotten"* comes into play only when the "right to be forgotten" is used as a means and an end. In this way, *"the right to be forgotten"* can be consistent with one of the three fundamental rights set out in article 71 of the preamble to GDPR -- the right to express dissent and challenge.

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Article 17 of GDPR is the most direct proof of the enforcement mode of article 21.Article 17, paragraph 1, lists six situations in which *"the right to be forgotten"* may be exercised :(1) personal data is no longer necessary for the purposes for which it is collected or processed;(2) The data subject withdraws its prior consent;(3) The overwhelming reasons for the collection and processing of data in the public interest or based on official authority cease to exist;(4) Illegal processing of personal data;(5) The data controller needs to perform specific legal responsibilities;(6) The collected social service related information contains the personal data of minors under the age of 16. In contrast, the six main provisions of article 21 are almost entirely mechanical repetitions of the six situations in article 17 (1) in which the data subject may object to data processing and user profiling. Although article 21 also slightly increases the right of users to object to user profiling for marketing purposes and to object to data processing that is not necessary for the public good but is used for scientific invention, historical research, or statistical regression purposes, these two situations also coincide with those provided for in paragraph 3 of article 17. In conclusion, the data subject's "right to express objection and challenge" in article 71 of the PREamble of GDPR corresponds to the "right to object" stipulated in article 21 of the text of GDPR, which is realized through *"the right to be forgotten"* stipulated in Article 17.

3.3.3 From "No" to "Yes": Lift the veil of *"the right not to be subject to automated processing"*

Thus, *"the right to be provided with an explanation"* and *"the right to be forgotten"* have been corresponding to the two basic rights in the GDPR preambular article 71, and the remaining "the right to human intervention" in the preambular Article 71 has become the key to understand *"the right not to be subject to automated processing"*. *"The right to be provided with an explanation"* and *"the right to be forgotten"* both require different degrees of "human intervention". The former is to give a reasonable explanation to the automatic decision by human, while the latter is to clean up the outdated or wrong data by human. However, there are many differences between "human intervention" and "human intervention" in degree and nature. Combined with the significant difference between the three kinds of rights, the author believes that *"the right not to be subject to automated processing"* is the right of the data subject to request the data controller to conduct manual intervention on the unfair automatic decision result, and the purpose of manual intervention is to make the data subject get rid of the vicious circle of "making more and more mistakes" in the automatic decision.

On the basis of the above definition, the following three aspects should be defined precisely to *"the right not to be subject to automated processing"*. First of all, *"the right not to be subject to automated processing"* requires a higher degree of human intervention than *"the right to be provided with an explanation"* and *"the right to be forgotten"*, with the fundamental purpose of interfering in unfair automation decisions. From the perspective of directivity, *"the right to be provided with an explanation"* and *"the right to be forgotten"* are process-oriented, while *"the right not to be subject to automated processing"* are result-oriented, which also proves why the "post explanation" for algorithm

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transparency is almost absent in GDPR. Second, *"the right to be provided with an explanation"* and *"the right to be forgotten"* and *"the right not to be subject to automated processing"* constitute the data subject in Automated Processing means of each link for protection, the three layer on line between right of appeal: when the data subject of Automated Processing entities doubt (usually in advance), may exercise *"the right to be provided with an explanation"* require explanation; In an Automated Processing process, the data subject can exercise *"the right to be forgotten"* and request the deletion of inaccurate personal data. When the unfair decision results have externalities (after the event), the data subject only exercises *"the right not to be subject to automated processing"*, so as to eliminate the negative impact of the automatic decision. Third, article 25 of GDPR stipulates the basic principles of data operation -- the principle of minimal impact and the principle of appropriateness for purpose. It requires personal data to remain in a passive state of "streamlining and locking" at all times. In these two principles, under the constraint of GDPR article 25 article 22 shall be required data controller in the process of data processing of "integration of the necessary security measures, to protect the rights of data subjects to GDPR requirements" the provisions of understanding, which guarantee the data subject can *"the right not to be subject to automated processing"* is Automated Processing at the beginning of the program design, data controller must be fully considered and reserved the basis of the work shall be arranged accordingly.

TABLE I. Combination mechanism of GDPR three-weight linkage system

Basic Rights	**The Main Clause**	**Reinforcing the Terms Line Right of Way**	**Right Content**	**The Main Phase**	**Line Right of Appeal**	**The Principle of Reflect**
That humans do the right to advance	Article 22.	Article 25.	Request substantial human interference, and left the data subject to automatic decision-making errors.	After the event	High (exercise for secession)	Limit of human autonomy principle

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Dissent and the right to question	Article 21.	Article 17.	Express objections or doubts to automated decisions, and request to erase incorrect personal data and remove outdated links.	In the process	Middle (exercise for redress)	Data minimization
Access to relevant explanation rights	Article 13. Article 15.	Article 35.	Request data controller for automated processing related information in detail, 1 for information disclosure of potential hazards.	In advance	Low (exercise for awareness)	The principle of legitimacy, rationality, and transparency

To sum up, GDPR is carried out with preamble 71 as the core. GDPR does not rely on single and individual rights, but builds a simultaneous linkage system of three rights to fully protect the interests of data subjects. It runs through the whole process of automatic decision-making before, during and after the event, realizing the systematic connection between data control and program governance. According to the thought of this paper, GDPR is reinterpreted, and the mechanism of rights system and articles combination is shown in the table below (TABLE I).

IV. SCENARIO-BASED APPLICATION OF THE RIGHT NOT TO BE SUBJECT TO AUTOMATED PROCESSING

The design of the data subject's right to "stay out of the way" does not mean that it is neutral to the automatic decision, it is only a gesture to "retreat" from the overwhelming influences due to technological development. So far, we have only discussed *"the right not to be subject to automated processing"* as an inherent right, and clarifying its connotation is still inadequate to solve the dilemma that *"the right not to be subject to automated processing"* is difficult to implement. The first part of this paper points out that the situation of *"the right not to be subject to automated processing"* has been shelved for a long time, mainly because its applying-threshold is too high and the its exemption-threshold is too low. A practical solution is to look into different application scenarios to discuss the connotation and extension of *"the right not to be subject to automated processing"*, and to look down to the feasible institutional framework and the way of exercising the such right, so as to lay a

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good institutional foundation for the application of *"the right not to be subject to automated processing"*.

4.1 De-Scenization: Breaking the Traditional AI Dichotomy

Traditionally, the AI system has been divided into Automatic System and Augmentation System, with the main difference of whether the ultimate decisions are completely made by automated processing or by a natural person under the auxiliary of AI technology. DPID article 15 and GDPR article 22 clearly recognized the dichotomy, not only not "auxiliary system generated by the Automated Processing" limits, also once to any degree of human intervention is seen as evidence of decision-making of automated processing, make coding based on database of computer automation and automation based on machine learning algorithm was attributed to the category of "auxiliary system" package, but must belong to the "intelligent system" super automation based on neural network in the short term it is difficult to popularize, *"the right not to be subject to automated processing"* became a "only may exercise the rights" in the future.

EU is not alone in making automatic decisions on "ancillary systems". In 2016, the Supreme Court of Wisconsin of the United States recognized the reasonability and legitimacy of judges' sentencing by means of auxiliary system in State V. Loomis case. This move by Wisconsin, which has been leading the wind of labor union struggle for a long time, immediately aroused the academic community's concern about the abuse of automatic decision-making in the field of public governance [23]. Even judges can use auxiliary systems to judge judicial sentencing. Is there a boundary for the application of ARTIFICIAL intelligence technology? A large number of studies show that natural persons are prone to over-dependence on machines and become "intoxicated" with them. The "auxiliary system" will reduce the occupational vigilance of natural persons until they "completely lose the ability of critical analysis [24]". In a more extreme case, in order to reduce their own thinking and efforts, the natural person's decision will naturally tend to be consistent with the automated decision, and the original correct judgment will eventually be reversed by the computer, resulting in the "reflexive paradox" of overlapping errors. For example, the algorithm tool calculates that there may be a large number of asymptomatic infected persons in a certain area based on the crowd density and the trajectory of high-risk personnel flow, thus reminding the natural person regulator to conduct more frequent nucleic acid tests in this area. High-frequency active testing will inevitably "catch" more infected people, which in turn will spur public health authorities to impose more algorithmic regulation on the region. In this process, the judgment error that may exist in the auxiliary system gives the natural supervisors "colored glasses" and forces them to conduct the "investigation of the guilty stereotype" in a specific area.

Scholars who justify "auxiliary systems" point out that automated systems, while far from perfect, are far less likely to be wrong in most areas than natural persons. Even if this view is supported by

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empirical research, it is not uncommon to find that an infallible automated system is subject to the natural person's endowment. Taking the current algorithm automation based on machine learning as an example, the machine learning model is definitely superior to the natural person exponentially. However, as the structured processing of big data is difficult to complete automatically, the upper limit of human resources in the data processing link becomes the bottleneck that hinders the machine learning model from giving full play to its strength. In the Automated Processing process, natural persons' inherent emotional bias and value load often become the burden of machine decision-making, which has been repeatedly proved in the application scenarios of “auxiliary systems” such as business audit, fraud prevention and violent conflict avoidance [25]. As a result, it is the intervention of natural persons that makes possible the frequent mistakes of some of the automation systems that might otherwise be impervious. Therefore, it is more necessary than not to apply the indiscriminately *“the right not to be subject to automated processing”*.

Amid widespread scepticism, the European Union's data protection agency has published a guide to Personal Automation Decisions for regulatory purposes, which requires that natural persons using the “ancillary system” must have “the right and ability to question and often voice objections to automated decisions”. In the author's opinion, the “loophole filling” method of forcibly increasing the participation level of natural persons is too idealized and has no operability. On the one hand, due to natural person's inherent nature of “tool control”, natural person's intervention in the automatic decision-making process, even if it is full and saturated, is difficult to form effective control on the automatic decision-making. Automated Processing, on the other hand, the consequence of failure is sensational, but some mistakes are due to a natural person's improper intervention, the so-called “often dissent” or become a mere formality in the decision making out the repeated games, either will disrupt the Automated Processing application planning further, cause the opposite effect. Considering that the application of automatic decision in the guise of “auxiliary system” has been structurally embedded into every aspect of social operation, the premise that data subject *“the right not to be subject to automated processing”* should no longer be the premise that automatic decision is made by machines. That is to say, it is no longer necessary to *“the right not to be subject to automated processing”* for computer automation based on database coding, algorithm automation based on machine learning and super automation based on neural network. However, the actual meaning of the right should be differentiated according to the exercise effect: the data subject exercises *“the right not to be subject to automated processing”*, which means out of data collection in the computer automation scenario, out of user profiling in the algorithm automation scenario, and out of platform interaction in the super automation scenario. What all three scenarios have in common is that, once in the process of “getting out of automated decisions”, a higher degree of human intervention will “overwrite” or “endorse” the automated decisions already made.

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4.2 Limited Immunity: A Social Responsibility Perspective

Look at *"the right not to be subject to automated processing"* exemption conditions of design, whether DPID article 15, or GDPR article 22, adopt a similar field of early American product liability exemption "express from gump risk" approach, with the contract, the parties agree to and specific statutory basis as an infringement of rights deterrent for its theoretical basis is method economist coase in the context of the problem of social cost about the arrangement of the rights and define inevitably affect economic resource allocation. Coase pointed out that economic externalities or inefficiencies can be corrected through negotiations between parties, so as to maximize social utility. In the United States, the producer of the product was bound by the 1916 federal court's long arm rule instead of the litigant principle precedent, which held it liable not only to distributors with whom it had a direct contractual relationship, but also to any consumers (and their family members) and bystanders who were harmed by the defects of their products. In order to avoid liability, the producer deliberately lists itself as the opposite party of the product sales contract or user agreement, and exempts itself from liability in terms of specific product defects and potential risks. Once a consumer brings a producer to court for the damage caused by a product defect, the producer can immediately claim that the consumer risks themselves by means of "informed consent of the consumer" or "contractual agreement". Under the influence of modern legal and economic theories, American courts at the beginning almost blindly recognized the validity of the "express willingness to take risks" agreement between the parties, and even didn't care whether the agreement of the parties violated the provisions of mandatory law.

"Express self-risk" is reasonable in a particular historical period, with "the beneficiary's reasonable compensation for the loss party" as the legal interest superior to "the greatest happiness of the greatest majority". But in the age of artificial intelligence, this kind of "pareto optimality", Yang suppression "Karl - hicks efficiency" approach is very dangerous, because history shows that technological progress has never promote social welfare and dew of but frequently aerial power exclusive principle and due process principle, take turns to calculate the general public to achieve maximum regulatory arbitrage. The technology black box, together with the "user informed consent", opens the door for data controllers to do whatever they want. The multi-channel information collected for specific reasons is likely to be used for ulterior purposes. Technology has become a tool for the few to make huge profits, while the majority are powerless to resist. In short, "the principle of informed consent is in conflict with the objective laws of risk perception and data utilization [26]". Moreover, *"the right to be provided with an explanation"* and *"the right to be forgotten"* between *"the right not to be subject to automated processing"* the existence "progressive transformation of the right to appeal," and as agreed in the contract the parties agree to as *"the right not to be subject to automated processing"* exemption for directly deprived of this subject is in a vulnerable position information data is the most powerful means of relief, make the main body of data and the automation world completely every link have become "the gansu risk". Data is subject to contract and agreement of the tacit secrets "don't catch a cold" has long

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been the industry - regarding the terms of their vital interests, not necessarily, look at the data subject may not understand, is unlikely to have the ability to understand a rebuttal, some Automated Processing services often corresponds to the hundreds of thousands of pages of the user requirements, some Banks even artificial intelligence investment advisory services to clients can read to the screen after a clever packaging specific disclaimer for the video to the client.

In fact, since the 1960s, American courts have begun to correct the practice of “express willingness to take risks” in the field of product liability. In the wake of the turbulent civil rights movement, American product liability law gradually changed from negligence and guarantee liability to strict liability, and incorporated relevant personnel in all aspects of product production and marketing under the accountability framework of no-fault liability. The self-imposed risk rule can only be applied in the rare exceptions where strict product liability is broken [27]. Essence, automated decision can be seen as data controllers provide a service to the data subject, is a party aggregated data through the manpower and material resources, resources and environment of the structure of the system to sales and the actual production and delivery, on the other side of the data can be provided to buy and actually receiving or consumer products, exists in the form of non-food work achievement. The problem is that the pace of technological innovation will inevitably be hampered if the producers of such a particular product or service, namely the data controllers or processors, are not specifically held accountable. Data is now the most important factor of production has become the consensus of the world, countries to fight for the commanding heights of ARTIFICIAL intelligence technology can be spared, should not impose too high responsibility on science and technology enterprises with a higher mission. Fault liability is a better way to balance the conflicting interests of individual protection and technological innovation -- to encourage technological development while avoiding the absence of accountability -- than strict liability that costs too much [28]. In the author's opinion, there are two review criteria to measure the fault of the data controller. First, whether the data controller repeatedly gives true, accurate and complete “risk warning” to the data subject through continuous information disclosure; In the information disclosure, the data controller should make a list of the potential harm that the automatic decision may cause to the data subject, and should not prevent the data subject from exercising *“the right not to be subject to automated processing”* on the ground of risking the behavior beyond the list. Secondly, whether the data collection and processing are used for legitimate and only purposes agreed by the data subject. In order to make the judgment standard more clear, the enterprise data utilization and sharing criterion should also be established by means of special legislation, and security measures such as encryption storage, processing restriction and access classification should be adopted for the relatively sensitive private information. Data use that violates the rules will not be exempt from *“the right not to be subject to automated processing”*.

It is also necessary to pay attention to the frequent occurrence of public health emergencies in recent years. It is not wrong to promote the “social common law” by administrative means to supplement the

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necessary lack of self-discipline of individuals in the society. However, we should always be on guard against the "intensified harassment" that may bring to users' privacy and personal life [29]. According to reports, Hangzhou plans to launch a "color-changing" health QR code, which will integrate personal data such as electronic medical records, physical examination information and even life habits to establish a personal health index evaluation system. Not only that, Hangzhou Health QR code application also intends to bring the group evaluation system of corridors, communities and enterprises into the scope of automatic decision-making, creating an "all-knowing" health ecological service circle. From the health QR code to the "universal code" promotion, everyone has his own opinion, wisdom, this article does not make evaluation; In terms of whether the data subject enjoys *"the right not to be subject to automated processing"* in such a scenario, the author believes that this will depend on whether the Automated Processing aimed at improving public governance is also necessary for the realization of public interests. In general, personal data, after being restructured and circulated in the social operation network, becomes an organic part of the public database out of the control of individuals, and any separation from Automated Processing will "affect the whole body". From the perspective of information flow, if data subjects are allowed to enjoy absolute rights to their data without any reservation, it will undoubtedly erode the comprehensibility and fairness of automatic decision-making in the field of public governance and destroy the integrity ecology of the modernization of national governance system. Therefore, in automated decision making scenarios involving the public interest, the application of *"the right not to be subject to automated processing"* can only be the exception rather than the general principle. This perception is consistent with the "limitation situation" contained in article 23 of GDPR: "For reasons of national security, national defence, public safety and public interest, EU member states may restrict the scope of responsibilities and rights set out in articles 12 to 22, 34 and 5 by legislative means." GDPR article 89 also provides for this: "Further processing of data for public interest, scientific or historical research or statistical purposes. The safeguards and rights of the data subject can be derogated from." In short, there is always a tension between public and private interests, which is an inherent contradiction that lawmakers have been trying to reconcile for a long time, but it is difficult to calm down, especially in the field of public health. However, if we can make ethical judgments that reflect the value of the whole society in the changing legal environment, it will be the greatest justice to promote the health of the society by personal health in a visible way.

4.3 Beyond GDPR: New Rights to Protect Human Autonomy

In *"the right to be provided with an explanation"* and *"the right to be forgotten"* on the basis of the progressive transformation, with a higher degree of human intervention to replace low levels of human intervention, GDPR define the data subject in requests for interpretation, dissent and opposition can temporarily request from Automated Processing rights, and work together with other two kinds of fundamental rights form the protection of rights and interests of the data subject, the separation of the linkage system. The above discussion in this paper has not gone beyond the barriers defined by DPID

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and GDPR as *"the right not to be subject to automated processing"*. Such cognitive restrictions are bound to bring difficulties in legal transplantation, because *"the right not to be subject to automated processing"* independent of the original framework will once again face the instability of connotation and fuzziness of extension.

The habit of "ingest" thought, feeling, and will in experience, Alfenarius points out, leads to the division of experience into external and internal, and to the forced division of subject and object, with the result that "reality" is reversed[30]. In order to eliminate "ingesting", scholars in the field of public governance try to seek "pure experience" in dealing with Automated Processing, and to issue the "real rights" that data subjects should have in this lifetime. These "real rights" have the obvious characteristics of James's "pragmatism", which eliminate all the right attributes processed by conceptual thinking, include logical consistency and verification in the practical utilitarian concept, and more or less restore the "clean" and "original" state of *"the right not to be subject to automated processing"*.

Returning to the "natural justice view" of administrative law, British scholars put forward the concept of *"the right to be heard"*, which advocates to guarantee that individuals whose rights and interests are damaged by a decision have the right to a fair hearing and to request administrative reconsideration. Despite the increasing ability of artificial intelligence to simulate human emotions, it is still unable to express warm compassion, compassion and love like a natural person in the short term. The purpose of exercising *"the right to be heard"* is to force policy makers to take the position of "co-natural persons" to empathize with the actual experience of the decision makers, so as to develop more humanized policies and laws. In the field of Automated Processing, the United States has always been a practitioner of *"the right to be heard"*. It often corrects the failure of Automated Processing by means of hearings, so that the victims are completely "divorced from Automated Processing". For example, in January 2018, New York State took the lead in using the Early-warning protection system to identify parents with "severe domestic violence tendencies" and to isolate and protect "at-risk children" based on the lack of scientific proof. Not only did the system not significantly reduce the incidence of child abuse, it also caused tens of thousands of parents to be separated from their children, sparking outrage less than six months after it was launched. After several hearings, the authorities reversed an earlier automated decision and abandoned the use of an early-warning protection system. In April 2019, a hearing on the state of Michigan's use of artificial intelligence to review social aid claims led to a class action lawsuit by more than 40,000 residents against the state. The Midas system, used to combat fraud, was found to have made mistakes of 93 per cent, leading to tens of thousands of applicants being punished for no reason at all. If the class action is won, all Michigan residents will be removed from the automation of the Midas system and the state will be "bankrupt".

Therefore, although *"the right to be heard"* can achieve a better effect of "getting rid of automatic decision-making", the exercise of the right is bound to be accompanied by high legal costs, and needs to

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be supported by mature systems such as class action, which may overcompensate for justice. Posner points out that "the law does not attempt to enforce any moral code at the highest level...The full cost of implementing the law will outweigh the benefits [31]". It can be imagined that once the implementation cost of *"the right to be heard"* exceeds the threshold value that the society can bear, the exercise of the right will lose its original legitimacy, because maintaining one kind of justice should not be at the expense of another kind of justice. It is more likely that before the implementation cost approaches the critical value, the exercise of *"the right to be heard"* has naturally appeared the situation of rapid decline in the marginal utility of communication. We live in an era of information explosion, with unlimited information increment and extremely limited attention. People often appear to be indignant about a news item for one minute, applaud a piece of information for one minute, and then become distracted by a piece of advertorial with tears streaming down their faces the next. With the rapid development of artificial intelligence, the doomsday scenario of machines completely replacing natural persons and even enslaving natural persons will inevitably lead to the gradual transition of people's psychological state from the creepy at the beginning to the indifference and even the indifference at the end.

Scholars in the field of public governance also point out that automated information decisions further fragment people's already lax attention, and prediction algorithms and preference algorithms even attempt to manipulate people's attention under the name of "personalization". In Reinventing Humanity, Messrs. Friesman and Salinger argue that the right to be offline needs to be recognized at the legal level if agency and autonomy are to be maintained in the 21st century [32]. The so-called "off-line right", as the name suggests, means the right to live a normal life free from the automatic decisions imposed on one's self, which is similar to *"the right not to be subject to automated processing"*. Frischman and Salinger do not specify a clear path for the *"the right to disconnect"*. Therefore, *"the right to disconnect"* is interpreted by some scholars as "the right to attention" from the practical level, that is, the right to get rid of automated content push and marketing user profile writing [33]. Although the limited interpretation greatly restricts the original comprehensive meaning of *"the right to disconnect"*, its significance cannot be underestimated in terms of the concept of rule of law and self-protection consciousness instilled by the general public that refuses to be easily looted data dividend.

Automated Processing carrying people naturally accept build on each information cocoon room "after the independent society" and threatened half on and half way to push people into "the truth after age", amazon's former chief scientist d's is given at the beginning of "the data for the people", an important cognitive premise: "the time has recognized that privacy and autonomy is but an illusion." For this reason, either *"the right to be heard"* or *"the right to disconnect"*, any approach that achieves the effect of "disengaging from Automated Processing" -- even for a moment or part of the time -- will give humans who have long since retreated from Automated Processing bullying "something to hold on to and something to rely on". From this point of view, the future of data control will need to fulfill more than a little bit of social responsibility.

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IV. CONCLUSION

The Right not to be Subject to Automated Processing is essential for the responsible technology use in modern business scenarios. The legal response to Automated Processing focuses on the vigilance that technological tools, under the guise of promoting freedom, are used to generate more “chains” that are hard to break. Karl Heinrich Marx pointed out that the positivist legal cognition of law as power will only tells part of the truth, law is not only the expression of the moral code understood by human reason, but also the creature rooted in the historical value and normative habit of the social community[34]. EU legislation experience and lessons show that linkage system of rights and make more will not be able to ensure that individual will independently, independently, in accordance with the laws of universal recognition and habits will coordinate with others, it may be because some less important for some really important rights and constraint, the cover of block of substantial justice and effective remedy to cash. In the field of artificial intelligence, national legislators have created a plethora of unhelpful completions and paradigms to match the well-known metaphor of meaningless informed consent. The more absolute power technology expands, the more human dignity is threatened. *“The right to be provided with an explanation”* and *“the right to be forgotten”* are at best limited “seemingly autonomous” and “limited freedom”, and it is only by enjoying the right of active participation in matters critical to determining one's own interests that human beings are likely to maintain and continue their intellectual, empirical and moral excellence. In this sense, *“the right not to be subject to automated processing”* is actually the last barrier to the common destiny of mankind.

Back to the Chinese example at the beginning of this article, if the health QR code mis-determines the risk level of an individual and causes the code holder's passage to be blocked, the code holder can call 12345 to initiate an application for error correction, which can be regarded as *“the right not to be subject to automated processing”*. At this point, the control command at the county level are neither simply to the code to explain or psychological counseling to accept the wrong results, also not directly erasure or correction of personal data of every description (the result of the decision), but the result of the decision is obtained through automation reverse view, find some mistakes of link, and the error result “series of rectifying”; If there is no error in the link, the county-level headquarters for prevention and control should also conduct natural person review of the judgment result and re-form the judgment result. Of course, this is a highly idealized situation, but it also reflects the inevitable trend that automatic decision-making has gradually become an important part of the modernization of national governance system and governance capacity. In the future, China's Personal Information Protection Law will introduce the necessity of *“the right not to be subject to automated processing”*. The civil code regarding the make up of personal information processing has established “legal, proper, necessary and not overly” principle, for information processing technical measures and other necessary measures “to take” safeguard the rights and interests of information subjects all the requirements and regulations, for

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"the right not to be subject to automated processing" is no longer just an illusory promise to reserve the space. The next step is through explanation or for typical embodiment of events, the existing rules and legislative concerns the possible conflict between clarification, develop the feasible, at the same time, has the elastic line right path, and make *"the right not to be subject to automated processing"* artificial intelligence law in our country to promote good governance, the governance efficiency of the system advantages can be converted to human rights protection [35].

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