Study on Localization of the Right to Be Forgotten and Solutions

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Abstract: Internet infringement has been prevailing in the digital era, which has gained increasing attention to the right to be forgotten. The General Data Protection Regulation of the European Union established the right to be forgotten and the right to erasure in the form of a written law the first time, but there are differences between these two rights. Considering the urgent need of the network society, the right to be forgotten attaches more importance to protecting the right to self-determination of personal information than protecting the right to get informed and freedom of speech. Therefore, most Chinese scholars deem localization of the right to be forgotten necessary. The Personal Information Protection Law of the People’s Republic of China and the Personal Information Protection Law of the People’s Republic of China contain regulations on the right to be forgotten. However, due to the fuzziness and incompleteness of legislation, the realization of the right remains a challenging task. The author thinks that safeguarding the completeness of the involved party’s litigious rights relies on improving the platform mechanism of rights maintenance, introducing a diverse dispute solution mechanism, and promulgating relevant cases or judicial interpretations. Efforts in the above three aspects can ensure a timely remedy for right holders, thus promoting the realization of the right to be forgotten.

Keywords: Right to be forgotten, Localization, Civil Code Tort Liability, Personal Information Protection Law, Realization of the right to be forgotten.

1. Introduction

With the deepening of globalization and rapid development of the digital economy, different parts of the world have gradually realized the importance of promoting regional economic integration. To the end, a critical measure is breaking down the regional data barriers. However, the sharp strengthening of data liquidity means not just more benefits. On the other hand, it can cause the deluge network deluge. As a large number of personal data flows into the Internet, being used beyond the control of individuals, infringement of personal information, even personal privacy, has been a common occurrence. Particularly in today’s China which has the world’s largest number of netizens, an increasing number of civil subjects hope that the frequency and content of their information appearing on the network can be controlled by personal will, which can provide reasonable protection for personal information. Therefore, a reasonable construction of the right to be forgotten (RBF) has been imperative to address and prevent personal information infringement under specific conditions.

2. Development, Reform, and Value Conflicts of the Right to be Forgotten

The RBF was first proposed in the European Union (EU) at the legislative level. In 2010, EU Justice Commissioner Viviane Reding introduced a bill to the European Parliament on the RBF. In 2012, the General Data Protection Regulation (GDPR) was officially drafted, of which Article 17 is “Right to be forgotten and right to erasure.” The draft adopted by the European Parliament in March 2014 changed it to the “right to erasure.” In the “Google Spain v. Gonzalez case” in May 2014, the Court of Justice of the European Union (CJEU) established the RBF for the first time in the form of a judicial precedent, making it legal. Subsequently, in 2015, the EU Council adopted the Draft GDPR, which changed the “right to erasure” (RE) to “right to erasure and right to be forgotten” [1]. In 2018, the GDPR came into effect, and Article 17 of which stipulated the “Right to erasure (Right to be forgotten),” confirming the existence and status of the RBF in legal form.

Although the vast majority has approved the establishing process of the RBF system of scholars, there are still divergent views in the academic community regarding the origin and the concept of the RBF. It is argued that the concept and legislation of the RBF originated in the EU Data Protection Directive of 1995; it is also argued that the legislative origin of the RBF originated from French law [2]. Scholars cannot agree on this issue.

So the debate mentioned above results from a lack of detailed clarification between the RBF and the RE. Some scholars believe that the RBF and the RE represent the same concept [3]. However, there is no logical support for this view. The RE means “the data subject has the right to request the information processor to delete his personal information in the event of legal or agreed-upon reasons”. The RBF means “the data subject may request the controller to delete his outdated, irrelevant, harmful, and inaccurate personal data which are collected, used, processed or transmitted on a lawful basis” [4]. If the two are the same concept, there is no need for the EU to struggle with the name of the right when legislating repeatedly. In terms of the form, the RBF is placed after the RE and is also placed in brackets. Since the words in brackets are usually supplementary explanations for the content mentioned above, the two are not equivalent. There are many similarities between the RBF and the RE. The basic form of the RBF is to erase. The difference between the two is that: the object of the RE is personal data collected without a legal basis; the object of the RBF is outdated and unnecessary personal data that exists with a legal basis, only serves the needs of data subjects who no longer wish to place the relevant data with the data controller. Therefore, the RBF has a narrower scope than the RE and belongs to a type of it.
The RBF gives the data subject the right to request the data controller to delete the relevant data under certain conditions. The legal basis for this right is derived from Article 8, “Protection of Personal Data” of the Charter of Fundamental Rights of the EU, i.e., the right to personal data. However, the exercise of this right alters the original state of the data so that it may conflict with other legal rights existing in the original state in terms of value orientation.

First, there is a conflict of values between the RBF and the right to know (RK). Although the RK is not directly stipulated as a fundamental right of the EU, it can also be regarded as a derivative right of the “Right to vote and to stand as a candidate at elections” and “Ombudsman” established in Chapter V, “Citizen’s rights” of the Charter of Fundamental Rights of the EU. The RK is a political and spiritual need, an individual’s right to be approached and informed about public affairs or matters of interest. Especially in the modern society with highly developed Internet technology and communication technology, information openness and transparency is the most basic requirement of a democratic society. However, the RBF allows the data subject to request the deletion of certain specific information, which may be important information that needs to be publicly disclosed, such as the list of defaulters. Therefore, it may conflict with the public interest represented behind the RK.

Second, there is a conflict of values between the RBF and the freedom of expression and information. The latter is stipulated in the Charter of Fundamental Rights of the EU. Like the RK, the information that the right holder of the RBF intends to delete may be the object of freedom of expression. However, the right holders of the RBF cannot abuse their rights and demand the removal of all unfavorable information. As long as the information is objective and factual, it cannot be requested to be removed even if it is negative. If the relationship between the two is not correctly balanced, excessive protection of the RBF and thus restricting freedom of expression may lead to a “chilling effect.” The GDPR does not go further on clarifying the line between personal interests and public interests. As a result, the conflict between different values is difficult to balance.

3. Evolution and Value Selection of Localization of the Right to be Forgotten

The localization of the RBF has experienced an evolution from theoretical discussion to institutional discussion. Since the “Google Case” in 2014, the RBF has aroused widespread heated discussions in China. Especially after the first case on the RBF in China, namely the “Ren Jiayu case.” which was announced in 2015, the drastic difference in the verdict has led to a heated debate among scholars. Many scholars believe that the construction of the RBF in China has both practical and theoretical legitimacy and necessity, so China should import the RBF. The proponents argue that in the network society, the RBF gives users the right to delete information that is not conducive to their development, thereby improving their social evaluation [5]. Therefore, it is a vital rectification mechanism that can prevent the personal distress caused by the “excessive memory” of the Internet and protect human rights. In addition, there are many traces of personal information protection and the RBF in China’s legislation, which can provide a legal basis for the localization of the RBF in China.

Nevertheless, some opponents still believe that the RBF is unnecessary as the existing legal norms in China already provide adequate protection for personal data and privacy. The introduction of the RBF will hinder the development of the Internet industry [6]. The author favors the former. Due to the openness of the Internet age, personal information floods into the network platform to varying degrees, resulting in a flood of information. Many online platforms lock or even use users’ information for illegal transactions. Individuals usually lack professional knowledge and technical means, making it difficult to fight against the controller, which ultimately makes personal information out of their control. China’s first Cyber Security Law was implemented in 2017, which sets out the obligations of network operators but does not stipulate the rights of individuals, and the non-reciprocity of rights and obligations cannot provide substantial protection for personal information. Therefore, in the context of the inadequate Internet legal system in China, it is necessary to accept the introduction of the RBF in order to strengthen the protection of personal autonomy.

Since the view supporting the introduction of the RBF became the mainstream view, the discussion on how to construct the RBF system followed. Some scholars believe that China lacks a special personal information protection law, so the right to personal information should be established in the Personality Right Law, and the RBF, which can be regarded as its sub-right, should be taken as important content and detailed in the Personal Information Protection Law [7]. Other scholars believe that in the light of China’s specific situation, it is not appropriate to elevate the RBF to a substantive right but rather to provide for it as a procedural claim through special legislation [8]. The author believes that, considering the universality and harmfulness of personal information violations in cyberspace, the need for the RBF is very urgent. Defining the RBF as an individual’s substantive right and stipulating it in the corresponding personal information protection legislation is more conducive to protecting personal information and individual autonomy.

The legal basis of the RBF is “personal information self-determination,” and its degree should be subject to certain conditions. The right to personal information self-determination originated from the German “Census Case” judgment in 1983. The German Constitutional Court established the concept of “personal information self-determination,” which means individuals can decide the disclosure or use of their personal information. This right is essentially the maintenance of human dignity. Personal information refers to information that can identify a specific natural person and is closely related to personality interests so that the disposal of personal information by an individual should be respected. It has been pointed out that the EU data protection regime is essentially an institutional arrangement to protect the right to self-determination of personal information [9]. The RBF gives individuals the right to request the controller to delete their personal information, disposal of personal information. Therefore, the RBF is a right derived from the right to self-determination of personal information. However, this kind of disposal is not unlimited, as the
legitimacy and rationality of the individual’s disposal of their information should be clarified. For example, the individual has no right to request the controller to delete his information if the government collects personal information based on the public interest. In other words, personal information self-determination should be within a reasonable range.

From the perspective of protecting individuals’ interests, the value of the right to self-determination of personal information protected by the RBF is higher than the RK and the freedom of expression. There is an irreconcilable conflict between the RBF, the RK, and the freedom of expression, which raises the issue of different value selections. The author believes that the choice of different values is determined by the current social background and characteristics of the times. The Internet age has made memory the norm but forgetting the exception. Information from a few years ago can still be retrieved when technology allows. While this information may satisfy the needs of the public’s RK and freedom of expression, it limits the progress and development of individuals under certain circumstances. For instance, the information of the defaulter can be disclosed and consulted following the law. However, if the defaulter fulfills his obligations, his information should be removed, including the original information and the forwarded and reprinted information. Otherwise, it is a violation of the rights of the party. Therefore, in the context of protecting the right to personal information, the public’s RK and the freedom of expression should make concessions to the right to self-determination of personal information, and it is necessary to give individuals the right to request the controller to delete specific, outdated, and unnecessary information about them.

4. Legislation Status and Realization of the Right to be Forgotten

China’s Civil Code (CC) and Personal Information Protection Law (PIPL) have provisions related to the RBF. Firstly, in the light of the CC, network service providers mainly bear two kinds of responsibilities, namely “own liability” and “third-party tort liability.” The so-called “third-party tort liability” means that when a third party infringes the rights and interests of others through the services or platforms provided by the network service provider, the network service platform shall bear the tort liability under certain conditions. There are two basic rules for network service providers to assume “third-party tort liability,” namely “notification rules” and “knowing rules.” According to Article 1195 of the CC, if a network user uses network services to infringe, the right holder has the right to notify the network service provider to take necessary measures to stop the infringement. The network service provider shall promptly forward the notice after receiving the notification to the alleged infringer of the Internet user and take necessary action based on prima facie evidence and type of service. These are the “notification rules.” Under the guidance of this rule, as long as network users can prove that their rights have been infringed, they have the right to notify network service providers to take necessary measures such as deletion. In other words, this article focuses on the result of the infringement, regardless of whether the infringer’s information collection is legal or whether the information released is outdated or unnecessary; and the infringer is an Internet user, not the Internet service provider itself. Therefore, the scope of the “notification rules” includes the RBF. The “knowing rules” are stipulated in Article 1197 of the CC, which means if the network service provider knows or should know that the network user has infringed but fails to take necessary measures, it shall be jointly and severally liable with the network user. This rule focuses on the legal responsibility of network service providers, but it implies that when they know or should know the infringement of network users, they are obliged to take necessary measures such as deletion on their initiative. Since the “knowing rules” can be applied independently, it is logically parallel to the “notification rules” [10], and can also be regarded as a legal consequence of violating the RBF.

Secondly, the PIPL stipulates the RE in Chapter 4, “Rights of Individuals in Personal Information Processing Activities,” namely Article 47. This article stipulates that when “the purpose of processing has been achieved, cannot be achieved or is no longer necessary to achieve,” “personal information processor stops providing products or services, or the storage period expires,” “individual withdraws consent,” “personal information processing,” “processors’ processing acts are illegally or in breach of contract.” Under these four circumstances, personal information processors should take the initiative to delete personal information. Otherwise, individuals have the right to request them to do so. In the second and fourth cases, there is no legal basis for collecting or processing personal information, so the individual has the right to request the information processor to delete it, which is the content of the RE. However, the first and third cases are based on information collected or processed by lawful means, and the law also gives individuals the right to delete personal information at their discretion, which is very close to the EU’s RBF. Therefore, the RE in the PIPL has essentially included the content of the RBF.

Although China’s legislation has already covered the content of the RBF, due to its ambiguity and imperfection, the RBF still has the practical dilemma of being challenging to implement in China. As a special law, the PIPL improves and improves the CC. Compared with the general provisions of the CC on online torts, although it clarifies the RE, which includes the connotation of the RBF, and imposes an obligation on personal information processors to delete their personal information voluntarily or when they receive a personal request. However, the legislators entrusted the personal information processor with formulating and delegating rules regarding RBF themselves. Review of the validity of an individual’s request and the measures taken to respond to his request are all within the discretion of the personal information processor. Specifically, suppose an individual sends a request to the information processor to delete personal information. In that case, the information processor completes the acceptance, review, response, and processing of the personal request, which only reflects his unilateral will. Hence, the individuals cannot know the processors’ specific rules or technical means. Therefore, when individuals are dissatisfied with the response of the information processor, they can only defend their rights by reporting to the supervisory department, complaining, or other approaches. In other words, the PIPL does not avoid the problem of information bias between the right holders and the obligated party. The power to formulate specific rules for
implementing the RBF is handed over to the personal information processor. No adequate remedy is provided, which implements the RBF without substantial guarantee and is not conducive to protecting rights.

5. Solution of Problems Facing Right to be Forgotten and Prospects

The RBF is currently facing a complicated dilemma, so the most urgent task is to solve its realization. According to the above analysis, the author believes that the improvement and refinement of the RBF system include but are not limited to the following three aspects. Firstly, the problem of “difficulty in safeguarding rights” when users think their RBF has been violated on the Internet directly reflects the weakness and defects of the rights protection mechanism of the online platform. Many platforms set some standard infringement-type options when handling user complaints. Even if users are allowed to describe their problems, the platform’s background always uses keyword filtering when analyzing and processing, which significantly reduces the accuracy of the complaint mechanism. Failure to respond promptly will undermine the effectiveness of the platform’s rights protection mechanism. Therefore, the flexibility of the platform’s rights protection mechanism can be improved, for example, by allowing the platform to set up a complaint review post to build a manual review mechanism for user complaints or by adopting a public referee mechanism that encourages users to participate in the protection of the rights. The addition of the human element would significantly enhance the timeliness and effectiveness of the complaint review, thus truly guaranteeing that rights holders’ RBF can be remedied in the event of an infringement. Secondly, in addition to improving the platform’s rights defense mechanism, it can also draw on China’s pluralistic dispute resolution mechanism. Chinas “Civil Procedure Law” establishes the principle of court mediation. In the CC and other departmental laws, it is stipulated that parties can seek mediation from relevant organizations or departments in some specific cases, so this measure can also be introduced for the RBF. In factual disputes, pre-litigation mediation has become a pre-litigation procedure in many places. The use of the “Multi-Mediation” applet can help to resolve disputes and conflicts outside the courtroom. When a user finds his RBF has been violated, he can also apply to the platform or the court to mediate disputes. In the former case, the platform needs to connect with dispute resolution institutions such as people’s mediation and set up special posts to handle the user’s mediation request, verify and determine the disputes between the two parties by China’s legal norms and the relevant norms of the platform, and then make appropriate handling. In the latter case, it is necessary to consider the feasibility of mediation, like verifying the identity of the parties and the presentation of evidence. However, it is undeniable that if the mediation procedure can be successfully introduced in the field of RBF disputes, it will promote the resolution of conflicts between the parties as soon as possible, prevent or avoid further intensification of disputes and save judicial resources. Finally, although Article 50 of the PIPL gives individuals the right to file a lawsuit under the law when faced with a personal information processor’s refusal to exercise their rights, but considering the intense privacy of the online world. It is easy to be rejected when requesting the platform to provide the personal information of the infringer, which directly leads to the difficulty in determining the true identity of the party concerned. Coupled with the emerging nature of this right in China, there are many vacancies in guiding cases, and it is difficult for the court to decide to accept a case when reviewing the cause of action. So when filing a lawsuit regarding the RBF, it is still faced with realistic difficulties in verifying the identity of the parties and filing a case. Therefore, it is possible to start from the perspective of macro-guidance: The Supreme People’s Court can issue corresponding guiding cases or formulate judicial interpretations on the litigation of the RBF, to enhance the practical feasibility of litigation of the RBF so that the dispute over the RBF can genuinely enter the litigation procedure and ensure the realization of the right to litigation.

The solutions mentioned above are based on the central dilemma existing in implementing the RBF. In addition, the prospect of the RBF system should also be looked at at a macro level. In the future, the system of the RBF should be further affirmed and regulated at the legislative level, so the probability of the successful realization of the RBF will be greatly increased. For example, the State Council should issue corresponding administrative regulations to support the implementation of the PIPL. Local regulations on the protection of big data should be introduced in accordance with local conditions to prompt the improvement and maturity of the system RBF. In terms of legal responsibilities, it is also possible to impose additional burdens on personal information processors to urge them to cooperate with the implementation of the RBF. Moreover, establish an effective supervision mechanism so that the public can comprehend the information processing behavior of personal information processors. At the practical level, the practical problems of the RBF should be reasonably resolved, and the rights holders can protect their legitimate rights and interests through legal or non-legal means in a timely and effective manner when their rights are violated. As a result, the RBF should echo with the protection of rights and relief of rights to act together to realize rights. The implementation and improvement of the RBF system are related to each individual or personal information processor and the prospect of China’s informatization development.

6. Conclusion

The improvement of the RBF can improve the platform complaint review mechanism from the perspective of rights actualization. Additionally, it can also introduce the pre-litigation mediation proceedings or safeguard the realization of the involved party’s litigation rights from the perspective of rights remedy. The Chinese government brought forth the magnificent goal of “accelerating digitalization, building a digital China” in the “14th Five-Year Plan”. Which relies not only on the development of the Internet technology or economic development level but also on a complete legal system. The RBF constitutes an indispensable part of the legal system construction. Therefore, the implementation of the RBF can provide vigorous protection for personal information and reduce the occurrence of network infringement. Moreover, while promoting the realization of China’s strategic goal of “Digital China,” it can help lay out a new development pattern with the domestic
major cycle playing the principal role and the domestic and international dual cycle mutually reinforcing each other.

References


