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The Right to be Forgotten in the Online Environment

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Abstract: In the present paper we aim at analyzing an important right: the right to be forgotten in the online environment, as a part of the right to respect for private and family life and also as a part of the protection of personal data, GDPR. In order to do that we will first refer to the content of the right to respect for the private and family life, then we will analyze the content of the specific regulation regarding the protection of the personal data of the natural person. More specifically, the right to be forgotten is established in the paragraph of the Regulation (EU) 2016/679 of the European Parliament and Council. We will explain the conditions which have to be fulfilled in order to use a natural person personal data and the situations in which this use is no longer allowed or necessary. In conclusions, we will argue that this specific right is very important in order to ensure the natural person that his or her personal data are only used in specific and necessary cases and then, after the specific situation has ended, the keeping and the use of those personal information is forbidden.

Keywords: right to respect for private and family life; human rights; the right to be forgotten; democracy; personal data protection

1 Introduction

The right to be forgotten and the need for personal data protection have emerged in the wider context of respecting the right of the individuals to private life. The human being lives in society, and this lifetime implies both the need to get long

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with the others, to be visible and accessible to others, as well as the existence of intimate, personal aspects that we do not want to share with our peers (or at least not with all of them) or we just want to do it to a certain extent. Being of vital importance for the respect of human dignity, the right to private life is guaranteed by international and national legal rules, to which we will refer in the following sections.

The need for updating the methods of personal data has emerged as technology and digitalization have evolved, and this personal data has begun to be collected and processed informally by the organizations with which the individual comes into contact and, usually for the purchase of products or services, is obliged to supply them. The right to be forgotten involves the deletion of this data after it has been used, if its retention is no longer required.

One of the main features of the human being is sociability, our ability to communicate, send and receive information and to cohabit with one another. In a paper that became famous, the renowned evolutionary biologist E.O. Wilson rightfully said that humankind became the dominant species on earth thanks to sociability, and even spoke of "the social conquest of the earth". (Wilson E.O., 2013). According to contemporary specialists in the field of social psychology, "the ability to unite and form societies is indeed a biological feature of our species, just as it is the ability to walk. […] It is not our brains or muscles that allow us to govern the planet. And, similar to other behaviors that have helped our species survive and reproduce, it is precisely the human capacity to build societies that has become an instinct" (Christakis, 2022, p. 26).

The human being has a dual nature and has evolved both in order to reach his/her own goals and to live in groups. "Once you understand the dual nature and the instinct to belong to a group, you can understand why happiness is coming from bonding. We evolved to live in groups. Our brains were conceived not only to help us win the group competition, but also for succeeding in uniting with our group so as to win the competition with the other groups." (Haidt, 2016, p. 301). Thus, human nature is, on the one hand, selfish, meaning "our minds have a diversity of mental mechanisms that make us capable to promote our own interests in competition with others around us" (Haidt, 2016, p. 239) and, on the other hand, altruistic: "our minds contain a variety of mental mechanisms that enable us to forward the interests of our group in competition with the other groups." (Haidt, 2016, p. 239).

Naturally we pursue our own individual interests and we need society to create an

adequate framework for it, but, at the same time, we have a strong sense of our belonging to the group: to the family, to the people we belong to. It is from this very human nature that the idea of fundamental human rights comes or originates. Today, fundamental human rights are widely recognized and respected in most countries of the world. The law of international protection of human rights is that branch of law which has recently developed following the end of World War II, but has had a rapid and spectacular evolution. The notion of human rights "designates a set of international legal rules through which there are recognized to the individual attributes and faculties ensuring the dignity, freedom and development of his/her personality and benefitting from institutional guarantees" (Predescu, 2019, p. 78). Institutional guarantees are without precedent in the history of law. For the first time, the human being, the individual, becomes a subject of the public international law, possibly a plaintiff before an international judicial body (an international court), and the state in whose territory a fundamental right has been infringed may have the capacity of respondent. At this point in history, fundamental human rights, inherent in human nature, are protected in the international arena, including against abuses committed by national authorities and courts.

Human race has thus become aware that, in default of respecting fundamental human rights, society cannot evolve harmoniously. Where people feel that the fundamental rights inherent in their nature are not respected, conflicts, rebellions and wars occur. Humanity itself is in danger if these rights are not respected.

2. The Right to Privacy and the Right to Be Forgotten

The first provision that we must think of when we want to talk about the right to privacy is the one from the Universal Declaration of Human Rights[1]. Article 12 - Right to privacy states that "*you have the right to protection if someone tried to harm your good name, enter your home without permission or interfere with your correspondence."* Furthermore, in the next paragraphs it is said that *"no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

[1] Universal Declaration of Human Rights was adopted at 10th of December 1848 by the United Nation. It is an international soft – law document which recognizez the most important human rights and it is the basis for all the international documents on human rights elaborated afterwords.

Later on, within the International Covenant on Civil and Political Rights[1], provisions regarding the right to privacy were enshrined in Article 17. According to the first paragraph of this article, "*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation"* and to paragraph 2 *"everyone has the right to the protection of the law against such interference or attacks"*.

We can observe that, even though, the right to privacy is stated a little bit different, the main idea is kept: undoubtedly, the human being has the right to protect his/her private life and home from unallowed interventions from the states or from other individuals.

At European level, legal recognition and international protection of the right of the individual to private life has been accomplished through the European Convention on Human Rights and Fundamental Freedoms[2]. Within the Convention, the regulation of the right to private life is more complex. Thus, Article 18 of the Convention expressly protects both the private life of the individual and his/her family life, being considered that there is a difference of tinge between the two concepts – private life and family life – and that both must be expressly protected. In this manner, the first paragraph of Article 8 states that "e*veryone has the right to respect for his private and family life, his home and his correspondence."* We can notice that the provision is similar to that of the Universal Declaration of Human Rights, saving that the phrase "family life" is added. The notion of family life is defined in the case law of the European Court of Human Rights. Thus, in the case X, Y, and Z v. UK, it is shown that "*the notion of 'family life' in Article 8 is not confined solely to families based on marriage and may encompass other de facto relationships. When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couples live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means."* (Case of X, Y and Z v. United Kingdom, 1997, paragraph 36 of the Judgment). Thus, it is revealed that the notion of "family life" is quite wide, and the existence or not of family life is analyzed in each separate case, depending on

[1] International Covenant on Civil and Political Rights adopted at 16th of December 1966 also by the United Nations.

[2] European Convention on Human Rights and Fundamental Freedoms adopted by the European Council, was signed by the States at 4th of November 1950 in Rome. The document came into force in September 1953. Romania signed the European Convention on Human Right and its Protocols on October the 7th, 1993.

the elements indicated in the definition.

In the next place, paragraph 2 of Article 8 of the Convention sets out that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In the case-law of the European Court of Human Rights, the aspects targeting possible infringements of the right to private life, the protection of personal data and the right to be forgotten concerned aspects such as the right of a person to find out the identity of biological parents (Odièvre v. France, Gaskin v. UK) and the right to confidentiality as concerns the health of the individual.

In the first type of situations, in which the plaintiffs claimed that there have been infringed the provisions of Article 8 of the Convention in relation to them, reasoned by the fact that, in the country of origin (France and Great Britain respectively), the competent authorities refused to disclose details regarding the identity of the biological parents. The plaintiffs considered that they had the right to know the identity of those who gave them life, this being necessary for the psychological balance of their own existence. The solutions of the Court were different. Thus, in the first case, Odièvre v. France, the plaintiff required the Court to find that, through the refusal of the French authorities to notify her the identity of her biological mother who had left her shortly after birth and had never before taken an interest in her, it was an infringement of her right to private life, thus preventing her from having access to information vital to her identity. The problem found by the court was that "the Court's task is not to judge that conduct, but merely to take note of it. The two private interests with which the Court is confronted in the present case are not easily reconciled; moreover, they do not concern an adult and a child, but two adults, each endowed with her own free will" (Odièvre v. France, 2004, Judgment, paragraph 44) given the fact that the actions of the biological mother clearly indicate that she does not want to know the child or that child to know her identity. Virtually, by abandoning the child and agreeing (tacitly) with his/her subsequent adoption, the biological mother wants to maintain confidentiality about her own identity and toward the child left shortly after birth. The question is which of the two is more rightful: the biological daughter to find information that the mother does not wish to reveal about her identity, or the mother who, by her conduct, claims confidentiality and even the right to be

forgotten as the mother of that child? In the present case, the Court held that Article 8 of the Convention was not violated, that the French law attempted 'to reach a sufficient balance and proportionality among the interests in the case' (Sudre et all, 2009, p. 353).

In the other case, Gaskin v. United Kigdom (1989), although the situation was somewhat similar, the solution was different. Mr. Gaskin was "a juvenile delinquent who claimed that he could overcome his difficulties if he knew his tumultuous past" (Sudre et all, 2009, p. 355). He had not known his mother, being raised in part by his father and then given to foster families. The abuse he suffered as a child abandoned by his mother made him to break the law. He believed that if he could find out who his mother was (a thing which the UK authorities did not allow him to do), this would lead to his improvement. The Court granted that request, considered that Article 8 had been prejudiced against the plaintiff, but without settling the question of the mother's right to keep her identity secret, reasoned by the fact that there was not provided any specialized, independent body in British law to decide whether, in the given situation, the applicant was entitled or not to receive the requested information.[1]

With regard to the right to the protection of medical data, the case-law of the Court was not uniform. At times it has been judged that the disclosure of the state of health and illness of the plaintiff was an excessive measure (Case of Z. v. Finland, 1997), other times it was considered that the disclosure of the plaintiff's health was not an excessive prejudice to his private life since the purpose intended by the authorities was to obtain funds for treatment (Case of M.S: v. Sweden, 1997), and the examples could continue. "For a long time, the Court has been held by the mere

[1] Case of Gaskin v. The United Kingdom, Judgment, paragraph"49. In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8 (art. 8), considering the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case."

question of the medical data disclosure" (Sudre et all, 2009, p. 357) and determined, in each case separately, according to the proportionality between the disclosure of medical data and the purpose for which the disclosure was achieved, the persons who have come to have access to that information, etc.

3. Protection of Personal Data in the European Union and the Right to Be Forgotten

For citizens of the European Union, "the safety of private life is the top priority" (Stanciu & Bratoveanu, 2018, p. 214).

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was the first legislative act adopted at the European Union level to ensure an effective protection of personal data. The provisions of this Directive have also been taken into the Romanian legislation in Law no. 677 of 21.11.2001 regarding the processing of personal data and the free movement of such data

Notwithstanding, due to the extremely fast and unprecedented evolution of digitization and internet access, which led to a huge increase in the access and collection of personal data of individuals, in a short time legal rules were no longer adequate to reality. As a consequence, in 2016 it was issued a new Regulation at the level of the European Union, with much tougher and stricter rules – Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) which came into force on 24 May 2016 and is being enforced from 25 May 2018. The rules included in this new Regulation reflect much better the realities and dangers faced when respecting the right to private life and the protection of personal data. The provisions of Regulation (EU) 2016/679 have been integrated into the Romanian legislation, through Law no. 128/2018 amending the Law no. 102 of 3 May 2005 (republished) regarding the establishment, organization and operation of the National Authority for the Supervision of the Processing of Personal Data.

Regulation (UE) 2016/679 provides expressly the right to be forgotten within Article 17. Moreover, in the preamble to the Regulation, where there are mentioned the arguments and reasons which led to its approval, the need for legal recognition

and the right of the person to be forgotten is specified in paragraphs 65 and 66. It should be mentioned that the right to be forgotten is not provided in EU Directive 95/46/EC.

In order to legally regulate and protect the right of persons to be forgotten, the European Union authorities, which thought this Regulation, considered that "*(65) A data subject should have the right to have personal data concerning him or her rectified and a 'right to be forgotten' where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation."*

In addition, there is a particular emphasis within the Regulation on the agreement given by a person during childhood, before becoming an adult. So much the more, on an agreement reached in these circumstances, in which the discernment is not entirely formed and it is presumed that the child has not completely understood the consequences and implications of accepting the use of his/her personal data. The child who has become an adult may revert to the initial decision and the person in question must have the right to have his or her data deleted.

Further, again in paragraph 65 there are also mentioned the situations when personal data may continue to be stored, namely: "the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defense of legal claims."

The right to be forgotten is not limited only to the obligation of the operator to delete the personal data used. According to paragraph (66) of the preamble of the Regulation *"the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal*

data." The obligation to inform the other operators falls on the controller: *"in doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request."*

The proper Regulation of the right to be forgotten is found in Article 17 of the Regulation[1], article named *Right to erasure ('right to be forgotten').* Within this Article there are listed the situations in which the controller must proceed at once to the deletion of personal data:

- "*(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed*" – this means that the contractual relationship between the parties is no longer in force, the processing of personal data is no longer necessary, therefore, the maintenance of the data is not justified anymore";

- "(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;"

- "(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);"

- "(d) the personal data have been unlawfully processed";

- "(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;"

- "(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)."

Paragraph 2 of Article 17 reinstates the controller's obligation to make sure that the personal data are also erased from other sites or links[2]. Furthermore, the third paragraph of Article 17 states the situations which the controller must consider

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=RO, accessed on 26.06.2022.

[2] Article 17, paragraph *"2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.*

when erasing the personal data of someone.[1]

4. Applications of the Right to Be Forgotten in Romanian Legislation

Given that Romania is a Member State of the European Union, the *acquis communautaire* is also applied in our country. The European rules on the protection of personal data and the right to be forgotten are also applied accordingly in our legislation. As mentioned previously, respect for the right to private life and, consequently, the issue of the right to be forgotten is often closely linked to the right to confidentiality regarding a person's health. In the Romanian legislation, a normative act was recently issued: *The law on the right to be forgotten for cancer survivors*. This law was promulgated by the President of Romania on 07.07.2022 and is to become effective within two months from the date of publication in the Official Gazette. C

What does this law provide? The main provision refers to the fact that if a person wishes to conclude an insurance contract and the insurer requires information or documents concerning the health of that person, if the person has suffered from an oncological disease and it has been at least 7 years since the date of finishing the oncological protocol, then that person is entitled not to provide that data. In case the oncological diagnosis was made before the age of 18, then the term is 5 years the purpose of this provision, which derogates from the provisions of the Civil Code in the field of insurance contracts, is obvious, given that insurance companies avoid or even refuse to conclude insurance contracts with persons who have suffered oncological diseases, on the grounds that the risk of relapse of such a disease is deemed high.

[1] Article 17, paragraph *"3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:*
(a) for exercising the right of freedom of expression and information;
(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(c)for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing;
(e) for the establishment, exercise or defense of legal claims." (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=RO).

The obligation not to provide this data belongs to medical institutions and medical-health personnel. In case the insurance distributor fails to comply with these provisions, its civil liability will be incurred according to the law.

5. Conclusion

During this brief analysis we followed the idea of explaining the content and the extent of a rather new discovered human right, the right to be forgotten. These rights emerge from the much larger right to privacy, a fundamental human right recognized both internationally and nationally, a long time ago. The need to privacy is as old as society itself, so we can safely say that it is as old as human kind is. Living together, in groups, exposes us to our fellows human and, until a certain point it is ok. But our dignity requires that some things are kept to ourselves, and the law should ensure this right. And it does.

Given this situation, the right to privacy was not so complicated to obey a hundred of years ago. Or a thousand. But as society evolved, we became more and more exposed to the other. There was an era where the simple passing of time was difficult to calculate with accuracy and not many documents were kept or existed. Many did not know with certainty the date of their birth. What we are trying to say is that we did not have so much personal data then. But with the internet and the digitalization our personal data became more and more important and more and more exposed. So, the GDPR regulations state how, when and to what extent they can be used. Only that these data can be used only with a certain purpose and only for a limited time period. After that, in order to prevent abuses, the data must be forgotten, erased.

In conclusion, it is our opinion that the right to be forgotten is a new human right erased from the specifics of our contemporary society and from our natural need to keep certain aspects of our lives private. It also has the purpose to prevent any kind of prejudice that we could suffer, morally or materially.

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*** Case of Odièvre v. France, Application no. 42326/98, 2004, available at https://hudoc.echr.coe.int/eng#{“docname”:[“Odièvre%20v.%20France”],”documentcollectionid2”:[“GRANDCHAMBER”,”CHAMBER”],”itemid”:[“001-60935”]}, accessed on 26.06.2022.

*** Case of Gaskin v. The United Kingdom, Application no. 10454/83, 1989, available at https://hudoc.echr.coe.int/eng#{“docname”:[“Gaskin%20v.%20United%20Kingdom”],”documentcollectionid2”:[“GRANDCHAMBER”,”CHAMBER”],”itemid”:[“001-57491”]}, accessed on 26.06.2022.

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*** Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=RO, accessed on 26.06.2022.

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