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RIGHT TO BE FORGOTTEN IN THE EU: CHALLENGES AND FUTURE PERSPECTIVES

SENIOR THESIS

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Abstract

"People like to express themselves, and are curious about other people. . ."[i] Famous words of John Cassidy reveal the importance of the problem of the clash between the right to privacy and freedom of expression which is the main question of the paper. There will always be a tension between such contradicting notions as privacy and freedom of expression. The Right to be forgotten, a proposed right in the EU will allow an individual to erase data about him/her that is available on internet.

Looking at the future, one can see that in case of implementation of this unique right, right to privacy of the individual will be greatly strengthened. People will be in control over their personal data again. They will be determining the potential users of the information regarding them. This will create assurance in the use of new technologies, as well as it will allow a person to feel secure in the world web.

The paper will analyze the important provisions regarding the Right to be Forgotten. Moreover, it will introduce possible challenges that can take place in case of the implementation of the Right. The main challenge is the creation of a clash between the two fundamental rights granted to a person: right to privacy and freedom of expression. In order to identify which right shall prevail when it comes to such a sensitive issue as personal data, the paper will refer to the proportionality test as the main means of application of the limitations to the rights.

Introduction

Internet is such a powerful and universally used tool; it has been created by a mankind but still remains uncontrollable. Internet stores so much of information, including personal information: names, addresses, nationality, medical records, blogs, pictures, videos etc. Generally, personal information is shared on various social networking websites and forums. In most cases this kind of information is not kept privately and remains easily accessible to public. However, not all people want their personal information to be shared with everyone.

This paper explores a recently proposed right in the EU which will make internet "forget" things by requiring the deletion of the information from the websites. The Right to be Forgotten is unique in its nature because nothing like this has been introduced before. It will definitely serve as a strengthening mechanism of a person's right to privacy However, it is important to remember that people like to express themselves, by writing articles, blogs, posting information about themselves as well as about other people. This consequently results in the creation of a clash between the fundamental human rights: right to privacy and freedom of expression. The paper pursues its main question of which right shall prevail over which when it comes to the protection of personal data.

First chapter will give a general overview of the important provisions concerning the Right to be Forgotten within the proposed Regulation. Further, the chapter will address the clash between two fundamental rights: the right to privacy and freedom of expression in case of the implementation of the Regulation.

Second chapter will discuss the notions of the right to privacy and freedom of expression as well as their scopes. Moreover, it will include analysis of the cases decided by both European Court of Human Rights and U.S. courts. The scopes of the rights will be determined as a result of the analysis.

Third chapter will address the issue of application of proportionality test which was proposed by a prominent scholar in the field of Constitutional law Aharon Barak. This test will determine the scopes of the rights, the limitations which right shall prevail in case of protection of personal data.

Overall, the paper is aimed at analyzing the consequent clash of the two fundamental rights granted to an individual in case of the implementation of the Right to be Forgotten: right to privacy and freedom of expression. Moreover, it will identify challenges and future perspectives the Right will encounter in case of its implementation.

Chapter One

The clash between the right to privacy and freedom of expression with the proposal of the Right to be forgotten.

"People like to express themselves, and are curious about other people. . ."[1]

This chapter will discuss such issues as: the importance of privacy reforms in the EU, the Right to be forgotten (further: "the Right") as a new emerging right; the concept of the Right within the Regulation ("the Regulation") which was recently proposed by the Vice-President of the European Commission Viviane Reding and its development: who benefits from it and what are some challenges. The proposed Regulation is aimed at strengthening data protection rights of an individual; it includes a number of provisions that comprise a big difference in comparison with the current legislation. Further, the Chapter will address the clash between two fundamental rights: the right to privacy and freedom of expression in case of the implementation of the Regulation, and in particular of the Right in the European Union. Each provision of the Regulation concerning the "Right to be Forgotten" will be carefully analyzed.

In order to understand the importance of the clash of the two rights, we need to understand the concept of the "Right to be forgotten". That is why it is significant to look at how this provision in the Regulation consequently leads to the clash of the two rights. First, it is important to try to define this new emerging Right that was proposed, because as we see no clear definition of it is provided in the Regulation itself. All the provisions which describe the notion of the Right, however do not give a precise definition of it, could be in reality

[1] Althaf Marsoof, *Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression*, 19, International Journal of Law and Information Technology (January 16, 2011), *available at* http://ijlit.oxfordjournals.org/content/19/2/110.full.pdf+html.

combined and result in a clearly formulated definition. The Right to be forgotten is the right that will allow an individual to erase personal data concerning him/her that is available on internet when there is no any legitimate purpose for keeping the information.[2]

The definition of the Right, especially if it is heard for the first time, raises a lot of questions in one's mind. One of the first issues questioned would be the necessity of introducing this Right which would make Internet, such a powerful and not always easily controllable network, "forget" things.[3] In other words, why did the European Commission institute the Proposal of the Regulation on the data protection reforms?[4] The idea of creating those reforms started spreading back in 2009, and from that year on there were many conferences, round tables, workshops held, directed at the reforms on the data protection laws. The proposal received numerous responses not only from the individuals but also from the business organizations and public authorities.[5] This, in my opinion, reflects the existence of significant interest regarding the issue of data protection.

It is important to keep in mind that the proposed Regulation on Data Protection is aimed at creating a stronger and more harmonized legal framework for data protection laws in the EU, and the protection of personal data, in particular. With the intense development of technology, there is a need for a strong normative legal base,[6] especially when it comes to the protection of right to privacy of an individual.

In order to understand certain provisions of the Regulation, specificallly those concerning the Right to be forgotten, one must look at the terminology provided in Article 4

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[2] *The Right to be Forgotten – the fog finally lifts*,12, Privacy and Data Protection Journal (Jan/Feb 2012), available at http://www.vanbaelbellis.com/en/fiches/publications/articles/?Area=250.

[3] *Right to be forgotten' could cause problems for publishers*, outlaw.com, last modified November 11, 2011, *available at* http://www.theregister.co.uk/2011/11/11/expert_says_right_to_be_forgotten_causes_problems_for_publishers/.

[4] Press Release, *European Commission* (January 25, 2012), *available at* http://europa.eu/rapid/press-release_IP-12-46_en.htm

[5] *Commission proposes a comprehensive reform of the data protection rules*, (European Commission), *available at* http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm

[6] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

of the Regulation. The article provides definitions which will help to set up a clear and explicit picture of the notion of the Right itself. Therefore, all of the following terms will be defined further on in the paper: «data subject», «personal data », «processing», «controller», «processor», «recipient»[7] etc.

What or who does a legislator refer to when talking about a concept of «data subject» as defined in the Article 4? One becomes a data subject when he or she can be identified either directly or indirectly by certain means by referring to an identification number, location data, so called online identifier or to certain factors of physical, physiological, genetic, mental, economic, cultural or social identity of that person. A data subject could be either a natural person or legal entity. The information regarding the data subject can be identified by anybody: whether it is a controller or natural/legal person.[8]

The next relevant definition provided in the Regulation is the definition for «personal data». It is important because the main objective of the Regulation's is to strenthen privacy rights of an individual, and the Right to be forgotten, particularly, is intended to make the protection of personal data stronger. Thus personal data is an object of not only the Right but the whole Regulation, as it also reminds one of the key concepts of both: the Regulation and the Right. The exact definition given in the Proposed Regulation is following: «personal data» means any information relating to a data subject.[9] We have already discussed what is included in the notion of a data subject; however, the first part of the definition does not describe the exact concept of «personal data».

The description provided is rather vague and imprecise. Stating that as "any information relating to a data subject", in other words, all the information regarding certain person/entity, the definition creates a lot of questions in one's head. It is not clear what information or data

[7] See id.
[8] See id.
[9] See id.

could be or shall be considered "personal".[10] Can we consider only political opinion, sex and religion to be regarded as "personal data"?[11] Or does the definition also include such things as address, work place or maybe even feelings of a person? The absence of concrete definition that specifies the data that may or shall be subject to the Regulation or the Right will create difficulties while exercising the Right to be forgotten or relying on the Proposed Regulation.

The next important definition is the notion of "processing" is also included in the number of important definitions and is one of those that need to be defined carefully. Processing is identified as an operation, or set of operations, that are executed upon the personal data. Those include the following actions: collection of personal data, its recording, organization, structuring, storage, adaptation or alteration. Moreover, "processing" anticipates retrieval, consultation, use as well as disclosure by transmission, dissemination or otherwise making available, alignment or combination. Processing also includes erasure or destruction of personal data.[12]

The definition of the «controller» is not less crucial to understand. Controller is defined as something or somebody that executes control over certain things. This could be both natural person and a legal entity. Moreover, this could be a public authority, agency or «any other body» which decides the means, purposes and conditions of processing of personal data. Purposes, conditions and means of processing are determined by the law of the Union or a Member State.[13]

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[10] Office of the Data Protection Commissioner in Ireland, *What is Personal Data?* (last visited April 06, 2013), *available at* http://www.dataprotection.ie/viewdoc.asp?docid=210.
[11] See id.
[12] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)
[13] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

Another important figure in the Regulation is the «processor». The processor may also be either natural person or legal entity, public authority, agency or any other body which would process personal data on behalf of the controller.[14] However in both of the definitions «controller» and «processor», there is no exaustive list of those who could be either a «controller» or a «processor», as they include «any other body».

> Recipient» can be a natural person or legal entity, public authority, agency or any other body to which the personal data is disclosed. In other words, a person who would be receiving the information/personal data regarding data subject.[15]

«Personal data breach» is one of the violations that takes place while using personal data. It can be manifested in form of accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.[16] It is a breach of certain security measures taken.

Another important provision in the proposed Regulation is Article 17, "Right to be Forgotten and to erasure."[17] It allows a data subject to make the controller erase the personal data regarding him/her and prevent from further dissemination of such data, «especially in relation to personal data which are made available by the data subject while he or she was a child».[18] There is a list of conditions when this rule is applied. Those are :

1. The data is no longer necessary for the purposes it was collected for or processed;
2. The data subject withdraws consent which was given earlier for the data dissemination or when the data storage period that was agreed on expired, and when there is no other legal ground for its processing;
3. the data subject objects to the processing of personal data;
4. the processing of the data does not comply with this Regulation for other reasons.[19]

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[14] See id.
[15] See id.
[16] See id.
[17] See id.
[18] *The EU Data Protection Reform: New Fundamental Rights Guarantees*, last visited April 11, 2013, *available at* http://fra.europa.eu/fraWebsite/symposium2012/docs/right-to-be-forgotten-Wiewiorowski-1.pdf
[19] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

The same article also refers to cases when the data controller automatically becomes responsible with regard to the personal data and its use. The first case is when the data controller makes personal data public: this makes him responsible for the actions taken. In this particular situation the controller has to make sure that after the personal data has become public, third parties undertake all actions in order to erase all the links to the content of the personal information or its copies or objection of that data. Another case when the data controller becomes responsible is in case when he/she authorizes or, allows, the publication of such data .[20]

The Regulation creates a general obligation for the data controller to immediately erase the personal data upon the request of the data subject. However, there is an exception to this rule which states that personal data is kept when necessary[21]. Cases when keeping of the data is considered necessary are the following:

> (a) «for exercising the right of freedom of expression in accordance with Article 80;
> (b) for reasons of public interest in the area of public health in accordance with Article 81;
> (c) for historical, statistical and scientific research purposes in accordance with Article 83;
> (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;
> (e) in the cases referred to in paragraph 4».[22]

In order to understand the cases described above, all of those conditions provided must be carefully analyzed. All of them require the storage or keeping of the personal data to be necessary. The first condition that makes keeping personal data necessary is when the retention of personal data is needed for «exercising the right of freedom of expression in

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[20] See id.
[21] See id.
[22] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

accordance with Article 80».[23] In Article 80 it is stated that exemptions or derogations shall be provided by the Member states on the provisions on general prinicples (Chapter II), the righs of the data subject, including the Right to be Forgotten (Chapter III), transfer of personal data to other countries. Moreover it provides list of other provisions fully described in Chapter 9, Article 80 of the Proposal, in case of processing personal data solely for journalistic purposes or the purpose of artistic or literary expression[24]. This has the effect of adjusting the fundamental right of protection of personal data with another not less important right, freedom of expression.

While exemptions mean that the Member state is free not to follow the particular provisions of the Proposal, derogation within the meaning which is given to it in the EU legislative measure, gives more freedom and flexibility to the law that is to be applied.[25] According to certain provisions of the Regulation, it will be up to each Member State to choose the potential ways of implementing those measures. It is very important that this particular provision was left for the discretion of each Member State. It often is made that way so it is indeed almost impossible to create the same rules for the whole EU, that is why the legislator leaves implementation of the measures to each Member State to decide what steps to undertake in this or that case.

Another condition when storage of personal data is necessary, is in case of the reasons of "public interest in the area of public health in accordance with Article 81".[26] When analyzing Article 81 of the Proposed Regulation, one can note that this Article identifies that the protection of personal data concerning health is deemed for the purposes of creating preventive medicine. It is also necessary for the purposes of establishing precise diagnosis, as

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[23] See id.
[24] See id.
[25] *Derogation*, (last updated March 12, 2007), *available at* http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/derogation.htm).
[26] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

well as for reasons of public health, in the even that there is a serious threat to the health of many or providing high standards for medical treatment and also the issue of social protection.

The next case when it is necessary to keep personal data is for the reasons of processing personal data for historical, statistical and scientific research purposes in the following cases:

1. those purposes listed (historical, statistical, scientific) can not be achieved in other ways by processing data which does not allow identifying the data subject;
2. data which allows the referring of information to the data subject that can be identified is kept separately from the other information as long as the purposes can be fulfilled in this manner[27];

The results of the research, either historical, statistical or scientific, could be published or could in some other way disclose personal data available from the research only in cases where consent was given by the data subject for its disclosure.[28] Another condition for making the results public is when «the publication of personal data is necessary to present research findings or to facilitate research insofar as the interests or the fundamental rights or freedoms of the data subject do not override these interests».[29] The third condition is when the data becomes public due to the data subject's agreeing to this.[30]

Moreover, keeping personal data is necessary when it there is a legal obligation to retain the personal data by EU or Member State law to which the controller is a subject.[31]Alternatively, if it is in the public interest of the Member States and consequetly, protection of personal data shall be proportionate to the legitimate aim pursued. The concept of «legitimate aim» is defined in each Member State in their own way, in other words, left to the discretion of each Member State.

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[27] See id.
[28] See id.
[29] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)
[30] See id.
[31] See id.

Another important provision of the Proposed Regulation is the provision which allows a controller to keep personal data, but to restrict it. This happens in the following cases:

1. When the accuracy of the data is disputed by the data subject himself/herself, but only for the period during which the trustworthiness of the personal data is subject to verification by the data controller;
2. When the personal data is no longer needed for the accomplishment of the task of the data controller. However it has to be maintained for purposes of proof;
3. When the data subject itself requests restriction of personal data, for the reasons that the processing is unlawful, and the data subject for some reason does not want the erasure of data to take place;
4. When the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2)[32].

There are four conditions upon which personal data referred to in the above mentioned paragraph 4, may be processed. Those are: for the purposes of proof; with the data subject's consent; for the protection of the rights of another natural or legal person; for an objective of public interest.The data controller is responsible for ensuring that the time limits are followed for the processes of erasure of data[33].

It is important to note that after each essential provision, the Proposed Regulation introduces the provision that gives a right to the Commission to adopt delegated acts for the purpose of further specifying the following conditions:

1. the criteria and requirements for the application of paragraph 1 for specific sectors and in specific data processing situations;
2. the conditions for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph 2;
3. the criteria and conditions for restricting the processing of personal data referred to in paragraph 4»[34].

Looking at everything which was said above, one can state that the proposed Regulation indeed can be considered as a thorough approach for privacy reformers for starting to ensure

[32] See id.
[33] See id.
[34] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

the noninterference of others to the private life of an individual, especially when it comes to such a sensitive issue as personal data of each person. Nobody wants certain personal information regarding him/her which is available on social networking websites to be disclosed, disseminated or otherwise used without their consent. However, there has always existed a tendency to be curious about others and at the same time not wating any restrictions on use or dissemination of their personal data which in fact is controversial.

On the one hand, allowing a data subject to erase his/her personal data when necessary creates great protection of personal information, thus creating a well-founded base of privacy rights of an individual. However, this right given to a data subject, violates freedom of expression of those who put up the information regarding this or that person.

The clash between the two fundamental rights: right to privacy and freedom of expression, takes place as a result of the creation of this new «right», right to be forgotten. Aimed at strengthening of privacy rights, «the right» infringes the fundamental right to speech of the persons who posts infromation about others.[35] It in fact can be applied in two cases:

What effect does the Right have on free speech? First, it was stressed that the Right allowed deleting "personal data that people have given out themselves".[36] However, according to the provisions regarding the Right in the Regulation itself, the Right refers to the personal data as "to any information relating to a data subject"[37]. This makes the latter definition much broader, in the sense that it is not only about the information people have given out about themselves, but also encompasses the information posted by others and in some way related to a data subject. There are three categories that actually threaten to free

[35] Jeffrey Rosen, *The Right to be Forgotten*, Stanford Law Review, 88, (2012), (last visited April 06, 2013), *available at* http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten).
[36] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)
[37] See id.

speech; two of them, the most controversial ones, will be discussed further in the paper. One of the categories is the following:

If a person posts something online and someone else copies it and re-posts it on their own site, will this give the initial author of the post a right to delete it?[38] This situation is problematic, because it allows deleting the information another person has posted. The fundamental right of freedom of expression of the person who posted the personal information, in other words, "any information regarding a particular person"[39] is violated. The supporters of privacy issue would undoubtedly try to prove that no one has the right to publish/post information about a person, in case if it is personal. However this raises a question, if so, does not it work that way that we, people, are guaranteed to have not only a right to privacy, but also right to freely express our thoughts, opinions and ideas, and share those in the "online atmosphere?"[40]

Moreover, according to the Regulation, the obligation to make sure that the information is deleted from all the websites that it had links to, including the website with the initial post, would lay on the first website. As for now the implementation measure is considered to be one of the crucial problems that do not have solutions yet. The technical side of the obligation would be very difficult to implement because at this time, there are no such procedures to accomplish this[41].

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[38] Jeffrey Rosen, *The Right to be Forgotten*, Stanford Law Review, 88, (2012), http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten (last visited April 06, 2013).

[39] Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

[40] Michael Hoven, *Balancing Privacy and Speech in the Right to be Forgotten*, Harvard Journal of Law and Technology", (last updated on May 2, 2012), *available at*.http://jolt.law.harvard.edu/digest/privacy/balancing-privacy-and-speech-in-the-right-to-be-forgotten

[41] Winston Maxwell, *Right to be Forgotten Can't be Enforced on the Internet, says European Security Agency*, Chronicle of Data Protection, November 28, 2012, *available at* http://www.hldataprotection.com/2012/11/articles/international-eu-privacy/right-to-be-forgotten-cant-be-enforced-on-the-internet-says-european-security-agency/

Another case when privacy rights of the individual would be infringed is when one person posts something about another person[42]. Will this another person have the right to delete this post? In this case, a positive answer to the question would cause serious breaches of freedom of expression, especially if taking into consideration the definition of personal data provided in the Regulation. The definition is too broad. This happens for the reason that in most cases, especially when it comes to interpreting the law, it is always good to rely on the definitions provided by the legislator. It is necessary to grasp the notion of specific terminology used by the legislator, as according to its meaning, many provisions can be understood in different ways. However if, when the Regulation is approved by the European Parliament and Council, there is still no clear definition on personal data, this will create many difficulties not only while interpreting but also while implementing certain provisions of the law.

These days when internet is "free and open", we already face problems on the issue of privacy. These difficulties will only increase if we do not create measures to address a more coherent protection of privacy. The Vice-President of the Commission, who proposed the Regulation, Viviane Reding, pointed this out as well[43], by stating that: "We need to make rules that are capable of adapting themselves to new technologies in the future. All these breathtaking possibilities bring about new dangers and the biggest danger is about losing control of your own».[44] data." Currently, we do in fact need better privacy protection measures, because of the fast-developing technology and technological minds. Those described herein create many opportunities for the Internet users, as well as possibilities to develop and upgrade in the technological sense[45].

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[42] Jeffrey Rosen, *The Right to be Forgotten*, Stanford Law Review, 88, (2012), http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten (last visited April 06, 2013).
[43] *The Right to be Forgotten*, last visited April 10, 2013, *available at* http://clbb.mgh.harvard.edu/the-right-to-be-forgotten/
[44] http://www.telegraph.co.uk/technology/news/9070019/EU-Privacy-regulations-subject-to-unprecedented-lobbying.html, last visited on April 10, 2013
[45] Jeffrey Rosen, *The Right to be Forgotten*, Stanford Law Review, 88, (2012), http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten (last visited April 06, 2013).

Most people will agree that recent technological developments have indeed made our lives easier in many ways. One can search for anything possibly thought of in Internet, and it is not a secret that anything can be found online these days. There is a lot of information that is available online, especially that of personal data[46]. This cannot have good consequences as the personal information could easily be used against a person. These days it is very difficult to track when and who uses the personal data available online. In most cases the data subject himself/herself makes the data available to public, or gives consent for the data controller to do so.

When talking about privacy and expression, we understand that these are two opposite things, as privacy presupposes secrecy, and expression, on the other hand, presumes publicity.[47] "Although the right to express truthful and useful information is justifiable, expressions predicated on conjecture and rumor must not be tolerated especially if it invades privacy rights".[48] One of the first definitions of the right to privacy was **"right to be left alone"**[49], given by the US Supreme Court.[50] The definition has evolved but it does give the core explanation of the notion of "privacy". Another explanation of privacy was given by Alan Westin: ". . . the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behavior to others"[51].

One should also remember that the protection of personal data is guaranteed both in Article 16(1) of the Treaty on the Functioning of the European Union (TFEU), introduced by

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[46] Press Release, *European Commission* (October 30, 2000), *available at* http://europa.eu/rapid/press-release_SPEECH-10-700_en.htm
[47] Althaf Marsoof, *Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression*, 19, International Journal of Law and Information Technology (January 16, 2011), *available at* http://ijlit.oxfordjournals.org/content/19/2/110.full.pdf+html.
[48] See id.
[49] http://law.justia.com/constitution/us/amendment-14/30-right-of-privacy.html, last visited on April 11,2013
[50] Darity Wesley, *The Right to be Forgotten*, last updated on October 25, 2011, *available at* http://omtimes.com/2011/10/the-right-to-be-forgotten/
[51] Human Rights Encyclopedia, Vol. 3, *available at* http://ru.scribd.com/doc/31997737/Encyclopedia-of-Human-Rights-Vol-3

the Lisbon Treaty[52], and Artcile 8 of the European Convention on Human Rights (ECHR)[53], where it is indicated as being one of the fundamental rights. It is also mentioned that personal data needs careful protection but at the same time it should not stop free flow of information as it remains an important indicator in economic development[54]. In other words, protection of personal data or right to privacy of an individual, shall not violate freedom of expression of the other person.

[52] Treaty of Lisbon, December 13, 2007, Art.16, pg. 23, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF
[53] European Convention on Human Rights, November 4, 1950, Art. 8, pg. 10, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf
[54]Proposal of a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (January 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, («Regulation»)

Chapter Two

Right to Privacy and Freedom of Expression: scope of the Rights, safeguards and limitations.

Right to privacy

> *Privacy is the quietest of our freedoms . . . Privacy is easily drowned out in public policy debates…Privacy is most appreciated by its absence, not its presence.*[55]

Privacy or freedom of expression…Which of these rights can you give up and which you cannot? As very often these two rights contradict to each other, and if there is one, the other is usually limited. These rights will be discussed in the second Chapter. They in fact are two different rights meaning the opposite. Each of the rights has its own scope, or boundaries. For instance, the scope of the right to privacy includes, what can be controlled and protected within the privacy framework etc. The same with the other rights: whatever is protected and controlled can be referred to as to the scope of particular right. In order to see which right prevails over which one need to understand the scope of each right.

Article 8 of the European Convention on Human Rights (ECHR) states that everyone is entitled to the right to respect of his private and family life, his home and his correspondence.[56] The second part of the Article describes privacy as the right that cannot be interfered in, except for certain situations which allow the interference of the public authority and application of limitations. However, the right to privacy indicated in Article 8 is rather

[55] Andrew Puddephatt l, Ben Wagner *Global Survey on Internet Privacy and Freedom of Expression,* last visited on April 10, 2013, *available at* http://unesdoc.unesco.org/images/0021/002182/218273e.pdf
[56] European Convention on Human Rights, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf

broad, than it is defined, as according to the definition it only covers one's private and family life, home and correspondence. This broad scope will be illustrated by the cases which will be discussed further in this paper. The notion of privacy which we see today precludes more than just one's private and family life, his home and correspondence. The reason for this is that the issue of privacy is becoming more and more actual in today's world, and people need their privacy rights to be protected. Presently, the right to privacy can be extended to the right to end one's life[57], right for adults to engage in private, consensual homosexual activity[58], right for an abortion[59], contraception, control their bodily parts, etc.

Privacy can be described by many terms. When thinking about privacy, there are certain words that describe it in the best way. The definition reveals liberty, autonomy, personal space, solitude, anonymity, etc[60]. All of those definitions reveal the true notion of the privacy. Moreover, privacy can be determined as leaving yourself to yourself. When it comes to privacy and certain personal information about someone, it can be referred as to so-called information privacy which allows an individual to exercise the right of not sharing information regarding him/her with the others, would it be a powerful State or any other person[61]. Today keeping your personal information to yourself and not sharing this information with anyone else is next to impossible. Regardless of your desire to do so, or on the contrary, not to do so, this sometimes is not an option and instead of the right to share personal information there appears an obligation to do so.

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[57] Pretty v. UK, Eur. Ct. H.R. App. No. 2346/02, (2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448#{"itemid":["001-60448"]}

[58] *Lawrence v. Texas*, 539 U.S. 558, (2003), **http://supreme.justia.com/cases/federal/us/539/558/case.html**

[59] *Roe v. Wade*, 410 U.S. 113, (1973), No. 70-18. http://supreme.justia.com/cases/federal/us/410/113/case.html

[60] Office of the Australian Information Commissioner, *What is Privacy?* http://www.privacy.gov.au/aboutprivacy/what

[61] Cornell University Database systems, *Data Privacy and Security*, last visited on April 10, 2013, *available at* http://www.cs.cornell.edu/bigreddata/privacy/

There are mainly four types of privacy[62], some can have different names however, and the notions are the same. First category of privacy is called decisional privacy[63]. In various sources it can also be referred to as to defensive privacy[64] or privacy of communications[65]. Derived from the word "decision", decisional privacy allows an individual to make his/her own decisions regarding his/her own life. The term "defensive" might have gotten its name due to the reason that it concerns the information sharing of which will "make a person vulnerable". This can vary from person to person, depending on the individual we are talking about. Generally, this is the information on home address, Social Security Number, financial reports, medical documentation on health condition etc. For others this could include email addresses or photographs. The question of whether to reveal that information and how much of it shall be revealed will be each individual's decision.

Example of decisional privacy is well illustrated in the case Pretty v. UK which was decided in 2002 in the UK. There was a question whether the right to privacy of Diane Pretty was violated. Pretty had a serious disease which had no cure. Suffering a lot of pain, she wanted to control how and when she died. According to the English law, committing suicide was allowed (Suicide Act 1961[66]). However, the applicant was not physically able to commit suicide due to the fact that she was paralyzed, thus she wanted to be assisted by her husband. However, the Prosecution office said they would not free him from responsibility. After several appeals, the Court indicated that there indeed was a violation of Article 8 of ECHR[67], right to respect of private life along with other violations. However, the Court pointed out at

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[62] *Privacy,* Stanford Encyclopedia on Philosophy, *published on May 14, 2002,* http://plato.stanford.edu/entries/privacy/

[63] *Workplace Privacy: An Individual Rights Perspective*, Class Blog for Information Privacy Law at Seattle University, posted on April 25, 2012, *available at* http://www.brianrowe.org/infoprivacylaw/2012/04/25/workplace-privacy-an-individual-rights-perspective/

[64] *Privacy,* Stanford Encyclopedia on Philosophy, *published on May 14, 2002,* http://plato.stanford.edu/entries/privacy/

[65] Office of the Australian Information Commissioner, *Protecting Information Rights – Advancing Information Policy, available at* http://www.privacy.gov.au/materials/types/speeches/view/6768

[66] Sucide Act of 1961, (August 3, 1961), http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60

[67] European Convention on Human Rights, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf

the second section of the Article and found that the interference was "necessary in a democratic society" for the protection of the right of others, therefore no violation of Article 8 was found. In this case it is shown how the scope of the right to privacy can be very much extended. In Pretty v. UK the right to privacy includes her right to end her life, being part of her right to respect of private life.

The second type of privacy is called territorial privacy, also referred as to spatial or locational privacy. This type mostly concerns certain places or physical space of a person, in other words, interfering into their life by entering on their personal territory. Territorial privacy can also be interconnected with such personal spaces as home or bedroom or bed[68]. Locational privacy is "the ability of an individual to move in public areas with the expectation that under normal circumstances their location will not be systematically and secretly recorded for later use"[69]. By way of explanation, this type of privacy allows an individual to have some private space and the assurance that he/she is not watched by anyone. This leaves one a comfortable sense of being alone and not having others to interfere into our affairs.

In order to clearly define what the scope of territorial privacy is, one needs to take a look at the case law which will help to identify it. In the court decision of Katz v. United States[70] in 1967, Charles Katz was thought to conduct illegal gambling operations across the states, thus violating the federal law. For the purposes of gathering evidence against him, a wiretap was placed on the public booth by FBI where Katz often made calls from. The federal agents listened to his conversations and the wiretap was used against him in court. The issue here was whether the Fourth Amendment to the US Constitution protects

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[68] *Workplace Privacy: An Individual Rights Perspective*, Class Blog for Information Privacy Law at Seattle University, posted on April 25, 2012, *available at* http://www.brianrowe.org/infoprivacylaw/2012/04/25/workplace-privacy-an-individual-rights-perspective/

[69] *See id.*

[70] *Katz v. United States*, 389 U.S. 347 (1967), No.35, http://supreme.justia.com/cases/federal/us/389/347/case.html

conversations in a phone booth, against being secretly recorded and used against a person as evidence. In its defense the Government said the federal agents listened only to Katz's conversations and nobody else's and only to the parts of his conversations dealing with the gambling transactions[71]. However, the Court decided that the wiretap cannot be used as evidence against Katz in his illegal operations, because it initially was unlawful to place it on the phone booth and this way to record the conversations.

The Court found that, first of all, there was no search warrant for the wiretap. Secondly, they pointed out that "Fourth Amendment protects persons and not places from unreasonable intrusion"[72], in other words stating that privacy has to be guaranteed to a person, even in case when a person is using a public booth. A public booth was considered to be a place where a person "may have a reasonable expectation of privacy in his person"[73]. In other words, even when communicating in the public booth a person has to be guaranteed privacy or non-intrusion into his personal life, because as correctly mentioned in the court's decision, "a person enters a telephone booth, shuts the door behind him, pays the toll, and is surely entitled to assume that his conversation is not being intercepted"[74]. Katz never assumed that the wiretap would be put on the public booth and his conversations this way would be recorded. In this case we see that privacy includes non-intrusion into private life of a person, in a narrower sense – it doesn't allow the wiretap be put on the such public places as a public booth. Even in such public places privacy has to be guaranteed to a person. Going to the public place or anywhere, a person brings privacy along with him. Wherever that person exists, privacy exists there.

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[71] *Katz v. United States,* 389 U.S. 347, 353 (1967), No.35, http://supreme.justia.com/cases/federal/us/389/347/case.html
[72] *See id.*
[73] *See id.*
[74] *See id.*

Lawrence v. Texas is another case which helps to identify the broad scope of the notion of privacy[75]. The assurance that a person has some private space and is not watched by anyone can also be referred as to locational privacy. In response to reported disturbances, the police came to Lawrence's apartment and saw him and another man being involved in a sexual act. Both were arrested as the Texas law forbids the sexual conduct between the same sex individuals. In this case Court held that the right to privacy includes or protects the "right for adults to engage in private, consensual homosexual activity"[76]. Justice Kennedy said that this right can be in other words referred to as to "liberty" in the Fourteenth Amendment[77]. The term "liberty" has the same meaning as privacy: the definition includes such terms as autonomy, personal space etc. It gives an individual certain guarantees of protection of personal space, private life, family, home etc. Privacy or liberty does not allow public authority to intervene into your private life except for limited number of cases indicated in the law[78]. In this case intimate relationship can also be considered as one's autonomy, liberty and deciding for oneself. The sexual conduct between the guys was held in private, not in public and thus could not and did not violate any moral norms.

In the analysis of the case Justice Kennedy defined the right to privacy as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"[79]. This means that privacy that is guaranteed to every person allows an individual to get into sexual conduct with the opposite sex as well as this can be referred to as to their private lives. "Petitioners' right to liberty under the Due Process Clause gives them the full

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75 *Lawrence v. Texas*, 539 U.S. 558 (2003), http://supreme.justia.com/cases/federal/us/539/558/case.html

76 *See id.*

77 *See id.*

78 *See id.*

79 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), No. 70-17, http://supreme.justia.com/cases/federal/us/405/438/case.html

right to engage in private conduct without government intervention"[80]. Adult persons may decide in what way and with whom to conduct sexual conduct. However, there was a dissenting opinion of Justice Scalia where he stated that "states should be able to make a moral judgment against homosexual conduct and have that enforced through law"[81].

Moreover, the right to privacy includes the right of a woman for an abortion against state action[82]. Roe v. Wade (1973) is the landmark case in the US Supreme Court that again extended the right to privacy to granting the woman with this right for an abortion. The issue was the question of the unconstitutionality of the Texas laws prohibiting termination the pregnancy and allowing it only in case when there was threat to the mother's health. In the decision, the Court found that right of privacy can be found "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[83]. However, it was never found to be an absolute right, which means the State could restrict it in a number of situations prescribed by law. This decision further served as the basis for finding the laws prohibiting abortion unconstitutional in all the other States[84].

Besides, the right of privacy of a woman which entailed the right for an abortion was again discussed in Planned Parenthood v. Casey case where the Court was reviewing the legitimacy of the conditions that were imposed in order to make the abortions well-considered. One of those conditions was 24-hour waiting period during which information about abortion has to be provided to a woman and let her make a decision afterwards. However, it was found to be a reasonable condition and thus was left as it is. Another condition which was woman's informing of her husband of the planned abortion was found to constitute undue burden, in other words, violating the right to privacy of the woman. Further,

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[80] *Lawrence v. Texas*, 539 U.S. 558, 560 (2003), http://supreme.justia.com/cas**es/federal/us/539/558/case.html**

[81] *See id.*

[82] *Roe v. Wade*, 410 U.S. 113, (1973), No. 70-18. http://supreme.justia.com/cases/federal/us/410/113/case.html

[83] *See id.*

[84] *Roe v. Wade*, 410 U.S. 113, (1973), No. 70-18. http://supreme.justia.com/cases/federal/us/410/113/case.html

as it found in the Court's decision the right of privacy protecting the decision of abortion, it also touches upon the "questions of a woman's personal autonomy, personal sacrifices, emotional and mental health, and fundamental right to define her life"[85]. As the cases demonstrate, privacy does not simply refer to territorial, decisional, bodily and information, but also extends to protection of persons and places, etc.

Bodily privacy can be defined as the privacy of an individual's physical appearance and of his/her body against certain procedures or tests (which are conducted mostly for medical or scientific purposes). These procedures could be drug testing, genetic tests etc.[86], in other words, something that is intruded into a person's body without his/her consent and that way violates physical privacy.

A clear example of bodily privacy is enshrined in the case of Evans v. UK[87]. The facts of the case state that the applicant and her partner after getting engaged found out she could have some serious illness which would possibly require surgery. Her partner gave his consent to use his sperm to fertilize the applicant's eggs *in vitro,* eleven eggs were harvested and fertilized. Six embryos were created and put into storage. Soon the applicant underwent a surgery and she was told to wait two years before implanting the embryos in her uterus. However, the applicant and her partner soon broke up, and the partner sent the notification to a clinic to destroy the eggs. The trial court found his withdrawal of the consent "perfectly reasonable" due to the changed circumstances. In the court of appeals the judges pointed out that while giving the consent for this whole procedure, both Ms. Evans and her partner

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85 Planned Parenthood of Southeastern Pa. v. Casey - 505 U.S. 833, 924 (1992)

June 29, 1992*, http://supreme.justia.com/cases/federal/us/505/833/case.html

86 *Privacy*, The Public Voice, http://thepublicvoice.org/issues_and_resources/privacy_01.html, last visited on April 10, 2013

87 *Evans v. the United Kingdom*, Eur. Ct. H.R. App. no. 6339/05, (2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80046#{"itemid":["001-80046"]}

consented to undergo treatment together. Considering the fact that they could not do it together anymore, the Court overruled the decision in the applicant's partner's favor.

Further, Ms. Evans applied to the European Court of Human Rights with alleged violation of her right for private and family life. The Court agreed that the right to privacy here extended to the decision of becoming and not becoming a parent, and in fact privacy included "aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world"[88]. The issue here was whether the woman could proceed with the whole process of fertilization without a man's consent. As a result of analysis of both sides' merits, the Court decided that there must be positive obligations from the State's side to protect privacy of the parties. For instance, allowing the applicant to use those embryos and give a birth will automatically make her partner a father of the child thus creating moral, legal obligations towards his child. Finally, Court found that there was no violation of the right to privacy of the applicant.

However, the type of privacy that this paper mostly will be concentrated on, and which is of a concern to data protection, is what is called information privacy. Information privacy is the right or ability of a person to control the personal information regarding him/her and to decide who can possess this information, who can use it and in what ways[89]. In the case of Hadzhiev v. Bulgaria[90], Hadzhiev, the applicant wanted to find out "whether he had been subjected to secret surveillance". He noted that the laws which authorized secret surveillance did not and could not sufficiently ensure the potential abuse or misuse of such information and would not allow obtaining such information. The Government stated that there in fact was no interference into his private life, thus no violation of right to privacy of

[88] *See id.*
[89] *Privacy,* Stanford Encyclopedia on Philosophy, *published on May 14, 2002,* http://plato.stanford.edu/entries/privacy/
[90] *Hadzhiev v. Bulgaria*, Eur. Ct. H.R. App. No. 22373/04, October 2012, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076#{"itemid":["001-114076"]}

the applicant. The government used a letter from the National Security Agency as an evidence of that Hadzhiev was not a subject to secret surveillance. However, as it was discovered, the letter did not contain full proof of the fact that the applicant had not been subjected to secret surveillance[91].

In its analysis, the Court stated that the individual can claim to be considered the victim of a violation of the right to privacy in case of knowledge of the existence of such secret measures or of the laws that permit those without having to allege that this kind of measures were in fact applied to him/her[92]. After establishing the fact that there were interferences into the applicant's life, the Court took a look at whether this interference was "in accordance with the law" and "necessary in a democratic society"[93]. As a result of the analysis, the Court found that the laws indeed did not provide sufficient guarantees in cases of the misuse or abuse of the information which was received via secret surveillances, thus the interference was found to be not "in accordance with the law". If it is considered to be not "in accordance with the law", there is no need to prove that it was "necessary in a democratic society". Therefore, the Court found the violation of Article 8 of the ECHR which is right to privacy.

In the 1960s, the American lawyer Alan F. Westin was the first to give a definition of information privacy, in his book *Privacy and freedom* (1967). Westin defines information privacy as «the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others»[94].

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[91] *See id.*
[92] *Hadzhiev v. Bulgaria*, Eur. Ct. H.R. App. no. 22373/04, October 2012, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076#{"itemid":["001-114076"]}
[93] European Convention on Human Rights, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf
[94] Fred Cate, *Principles of Internet privacy*, (2000), http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1245&context=facpub, last visited on April 10, 2013

The desire for information privacy can be seen as a dialectical process in that it is always balanced against the desire to participate in society. In law, we see that the right to information privacy is balanced against the right to receive information, which is part of the right to freedom of expression[95]. Being part of the society and participating in it, an individual gives up some of his/her privacy, because interaction with others requires it. When talking about establishing the balance between the right to control one's personal information and the right to receive information, one can see that it in fact is really difficult. The reason for this is that those two rights in fact are opposite to each other, they have different notions. While the right to information privacy guarantees an individual a right to control the information regarding him/her and a right to decide who can use that information, the right to receive information supposes one's right not necessarily to use that information but to obtain it.

Privacy plays a crucial role in today's information society. The internet is used by many people if not all. People use internet on a daily basis for different purposes including work, studies, leisure etc. Being one of the ways how to connect with the world, internet remains much needed in a today's world. People store personal information online by means of registering or logging into different websites, and often forget to keep track of it.

People will tend to participate in an online environment, in other words use internet, only in case if they feel that privacy is guaranteed to them in that "online world"[96]. While using internet a person gives up his/her own freedoms, as well as some personal information about him/her. Privacy is a fundamental right granted to each and every person, and the State should guarantee certain legal protection of it. It is important for an internet user to feel safe and secure while using the World Wide Web. However, it sometimes can be very challenging

[95] Litska Strikwerda , *Information privacy, the right to receive information and (mobile) ICTs*, Vol. 4 Issue 2, p27, November 2010.
[96] *Privacy*, Stanford Encyclopedia on Philosophy, published on May 14, 2002, http://plato.stanford.edu/entries/privacy/

in today's fast- changing developing world with all the technological progress being achieved.

The rate at which the technology develops gives a feeling that sometimes laws do not keep up with all those developments both in technology and internet.[97] The first legal framework that was aimed at not only unifying data protection laws of all the Member States but also directed at strengthening the rights of an individual regarding personal data is the EU Data Protection Directive, introduced in 1995. Being more individual-oriented, it focused on individual privacy rather than on economic interests of companies and the State. This is the difference between the EU and the US, as in the situation with the latter, the US focuses on the economic growth and national security[98] thus using personal information of an individual for those reasons.

Information privacy was defined as "the interest an individual has in controlling, or at least significantly influencing, the handling of data about themselves."[99] As we have been looking at the shortages of information privacy and what negative effects dissemination of personal information can or will have, it is important to remember that the use of personal information can also have advantages for the individual whose information is shared. For instance, availability of information regarding an individual in internet gives some kind of benefits for a person who is looking for a job. By stating his/her interests and qualifications obtained[100], it would be much easier to find a future employer via internet rather than by not having those characteristics described in internet.

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[97] *Workplace Privacy: An Individual Rights Perspective*, Class Blog for Information Privacy Law at Seattle University, posted on April 25, 2012

[98] *Privacy,* Stanford Encyclopedia on Philosophy, published on May 14, 2002, http://plato.stanford.edu/entries/privacy/

[99] Privacy International, *European Privacy and Human Rights,* https://www.privacyinternational.org/sites/privacyinternational.org/files/file-downloads/ephr.pdf, last visited on April 10, 2013

[100] Paul A. Pavlou, *State of the Information privacy literature: Where are we now and where should we go?*, "Management Information Systems Quarterly" Journal, vo. 35, iss. 4 (2011).

Freedom of expression

The right to freedom of expression is a fundamental right granted to each and every individual and is enshrined in the two fundamental documents of the EU: in European Convention on Human Rights (ECHR) and Charter of the EU. Both of these documents reveal the core concept of the right, its subdivisions and possible limitations that could be applied[101].

Article 10 of the ECHR states that: "Everyone has the right to freedom of expression"[102]. It also says that this right shall include right to hold opinions and to receive information and ideas without public authority interference. The second part of the same Article sets out conditions when certain restrictions and limitations can be applied. Those are when are "prescribed by law" and "necessary in a democratic society". Moreover, those limitations must be "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". In other words, any limitation that takes place but is not listed in the second section of the same article, will be considered unlawful. Thus it is crucial to examine the definition of the right and its possible limitations that can take place.

Freedom of expression is a core right in our modern world. It is not only a "cornerstone in the society"[103], it also serves as a basis for other rights and freedoms guaranteed to each and every person in all of the human rights fundamental documents[104]. It

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[101] *Freedom of Expression in the European Union*, FEPS Jurists Network, 17 March 2011, http://www.feps-europe.eu/uploads/documents/freedom-of-expression.pdf

[102] European Convention on Human Rights, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf

[103] Human Rights Education Associates, *Freedom of Expression*, http://www.hrea.org/index.php?doc_id=408

[104] *First Fundamental Rights Conference: Freedom of Expression, a cornerstone of democracy – listening and communicating in a diverse Europe*, Conference Report of EU agency for Fundamental Rights, December 2008, http://fra.europa.eu/sites/default/files/fra_uploads/634 FRC2008_FinalReport.pdf

is quite challenging to think of the world today without considering the ability to exercise this right. People implement this right every moment of their lives, sometimes not even realizing it: expressing their opinions, writing articles, giving feedback etc. Freedom of expression not only allows you to freely express your opinion regarding something; it also allows you to say what you want.

The right to freedom of expression includes certain number of rights which allow you to participate in everyday life situations, both in personal and public aspects. Regarding the public aspect of this right, it is important to remember that freedom of expression allows a person to fully exercise rights of the member of the society. It allows a person to become part of important procedures within the State as decision making and voting. The personal aspect of the right to freedom of expression also remains a significant part of the right. What it does is guarantees a person the freedom to receive and pass on information, as well as it allows an individual to freely express himself/herself[105].

According to Article 10 of the European Convention on Human Rights, the right to freedom of expression includes *"freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"*[106]. In other words, the right allows an individual to have his/her own opinion and it also presumes receiving information and ideas without State representatives being involved and interfered in the process of receiving the information.

In the Handyside v. UK case[107], the question of the application of the right to freedom of expression was raised. The applicant published a book "The Little Red Schoolbook" which consisted of sets of instructions on sexual matters designed for the children aged 12 and upwards. However, the publication of the book was prosecuted according to the Obscene

[105] *Freedom of Expression*, http://www.hrea.org/index.php?doc_id=408
[106] European Convention on Human Rights (ECHR), http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf
[107] *Handyside v. the United Kingdom*, Eur. Ct. H.R. App. no. 5493/72, 1976,

Publications Act, and the applicant had to appeal to ECHR. The issue that arose in front of the Court was whether the prosecution or the interference was “necessary in a democratic society” in accordance with the legitimate aim of "protecting morals"[108].

As the Court found, protecting morals, is indeed difficult to define within groups of states. Therefore, it was concluded that in this case margin of appreciation shall be applied. This would allow the authorities of each State to define the necessity of that restriction according to the policies of the State. Further, the Court stated that “freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person”[109]. Moreover, it noted that every limitation must be proportionate to the legitimate aim pursued. However, after looking at the fact that this book was aimed at the children aged 12-18 and the applicant had plans in distributing those books at schools, the Court found that the book included certain passages that could encourage children to get involved in harmful activities. As a result of all analysis, the Court found no violation of Article 10 of ECHR.

In order to understand the significance of the right to freedom of expression, it is important to note that the issue of this right has been raised frequently in the ECHR, and it has been referred to the television and broadcasting[110], books[111], magazines[112], etc.

As this Chapter has demonstrated, one can see that both of the fundamental rights granted to an individual, both right to privacy and freedom of expression, have wide scopes and include a wide range of rights within their frameworks. It is not absolutely true that one right will always prevail over another, as a matter of fact; it is decided on case-by-case basis.

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[108] *See id.*

[109] *See id.*
[110] *Monnat v. Switzerland*, Eur. Ct. H.R. App. no. 73604/01, 2006.
[111] *Alinak v. Turkey*, Eur. Ct. H.R. App. no. 40287/98, 2005,
[112] *Axel Springer AG v. Germnay*, Eur. Ct. H.R. App. no. 39954/08, 2012,

Chapter Three

Limitation of the Rights: How far can it go?

Human rights are universal, moreover, they are inalienable. No human can be deprived from his rights that are given to him/her as to a human being. However, it is crucial to remember that human rights can be divided into two main categories: absolute and relative. Absolute rights of a person are those rights that can or shall never be limited by the Government in any circumstance. Right to prohibition of torture, prohibition of slavery or forced labor, etc. can be referred as to the notion of "absolute rights"[113]. However, the unifying characteristic is that there cannot be any limitations on the absolute rights, if there is any kind of limitation applied; the right is considered to be invalid.

There are also relative rights that can be limited by the Government in certain situations, which are usually prescribed by law. We can refer right to liberty, freedom of expression to that category. The State can limit those rights if it bases those limitations on certain legal justifications[114]. For instance, the right of freedom of expression can be not only limited in case when the implementation of the right violates some other person's rights. It can even be restricted in case if a person delivers a speech on racial hatred[115].

The question here is how far the Government can go when limiting one's rights so that they will not be considered to have been violated. In order to have a clear answer for that we must know the scope of each right that is a subject to limitation as well as the limitations of those rights which are prescribed by law. In the second chapter we were able to define the scopes of the two rights: right to privacy and freedom of expression. Both rights indeed have wide scopes and can include a range of issues within their scopes. In order to decide which

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[113] Equality and Human Rights Commission, *Understanding human rights,* http://www.equalityhumanrights.com/advice-and-guidance/equal-rights-equal-respect/useful-information/understanding-human-rights/

[114] Equality and Human Rights Commission, *How do human rights work ?* http://www.equalityhumanrights.com/human-rights/what-are-human-rights/how-do-human-rights-work/

[115] See id.

right prevails, in case of a clash, it is important to identify possible limitations that could be applied.

As it was well described in Aharon Barak's book, "Proportionality: Constitutional Rights and their Limitations», there are limitation clauses which are the clauses that in certain ways limit the constitutional right granted to a person. Limitation clause is "the instrument in shaping the proper relationship between the human rights and their limitations"[116]. Limitation clauses are divided into specific and general ones. General limitation clause is the clause which is directed not only at one right or particular group of rights, it in fact applied to the whole list of rights. An example of a general limitation clause is Article 29 (2) of Universal Declaration of Human Rights, which specifies limitations that could be applied to the rights guaranteed in UDHR. One cannot find general clauses applied in a widespread manner. On the contrary, specific limitation clauses are mostly used; they provide special arrangements for each right or group of rights, they do not apply to all the rights listed.

Overall, there are three tests which are applied in case if the limitation takes place. First is called balancing: this test is generally applied by European Court of Human Rights[117]. Another type of a balancing test is referred to as to scrutiny[118]; it is mostly used in the US when applying the limitations to the right. The third type of limitation test is called proportionality, which was identified as the main tool for limiting the constitutional rights[119] by a prominent scholar in the field of constitutional and international laws Aharon Barak. In my paper I will discuss the application of proportionality test on the rights as it is considered to be the most detailed one. Moreover, Aharon Barak being one of the best experts in the

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[116] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge, U.K.: Cambridge University Press, 2012.
[117] Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?* http://centers.law.nyu.edu/jeanmonnet/papers/08/080901.html
[118] *Levels of Scrutiny Under the Equal Protection Clause*, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm
[119] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge, U.K.: Cambridge University Press, 2012.

field of Constitutional law, was the first person to suggest this type of test. Every single human right which is guaranteed to each of us can be tested through this test.

The proportionality test consists of six elements. Those are:

- Scope
- Limitation
- Proper purpose
- Rational connection
- Necessary means
- Balancing

Let us define and analyze each of those constituents of the proportionality test. The first thing that needs to be done when applying the test is defining the scope. According to Aharon Barak, the scope of the right is considered to be "the right's boundaries" and its content. In other words, it can be described as what overall is included into the right, as well as all what it is extended to as to a right and what it covers.

After determining the scope of the right, one needs to take a look at the next stage called limitation. When identifying this particular element, the court looks at whether the limitation was "according to law", "necessary in a democratic society", etc. This is considered to be the widely accepted stage for all of the tests, and thus is used universally.

Proper purpose is the next thing to consider while applying proportionality. In fact this purpose is derived from the values on the basis of which the society is founded. Besides, those values can be different depending on what society we are looking at, at what state, etc. The thing one needs to look at in the proper purpose is the social need. Social need can be described as whether the society indeed needs this limitation to be applied to the right. The proper purpose examines whether a limiting law justifies the limitation according to this social need. In other ways, it shall raise a question of whether the society indeed needs this limitation of the right. According to the name of this element, the purpose must be "proper". The notion "proper" requires examining the degree of urgency required in realizing the

proper purposes – to what degree does the society really need this limitation. Examples of proper purpose include morality, public policy and others.

The next element of the proportionality test is rational connection. There has to be a connection between the means used to limit the right and proper purpose of the limitation. Will those means used (the limitation) help to achieving the proper purpose? It has to identify how the measures taken will affect the limitation of the right.

Necessity is the next constituent of this test. The question here is if there are less intrusive measures than the proposed limitation that can apply in this case. Less intrusive measures mean those measures that if applied would be less harmful or which would least harm or limit the human right. Moreover, this particular element identifies how necessary is this limitation of the right and whether it is the only option available in achieving the proper purpose.

The last element of the proportionality test is balancing. This refers to the balance between rights which conflict with each other. By comparing the value of each right in a clash, the Court must evaluate which of the rights prevails. However, in order to determine this, the Court will have to look at each case separately. As seen from all the elements mentioned above, one can clearly see that balancing can be or should be applied only after we know the scope of the rights, limitations set by the law, its proper purpose, and the rest of the constituents of the proportionality test.

In order to ensure the understanding of the proportionality test and all of its elements, an actual case of the clash between the rights will be discussed further. The case will discuss the two fundamental rights guaranteed to each individual: right to privacy and freedom of expression. As it has already been identified in the second chapter, the scope of the right to privacy is very broad and includes a broad range of rights. Therefore, for the purposes of this hypothetical case, an example of the right for the data protection will be taken as one of the

scopes of privacy. Considering the fact that freedom of expression has a wide scope as well, the example of the right to receive information will be used. These two rights will be discussed within the context of the emerging "right to be forgotten" which in fact creates this clash. In case if the Regulation[120] which contains this new right is passed, it will create violation or limitation of freedom of expression of the person who wants to obtain the information. Accordingly, in order to see whether this limitation is lawful or not, proportionality test must be applied.

The scope of the two rights have been identified: it is right for data protection for privacy and right to obtain information for freedom of expression. As it is seen from ECHR[121], limitations which are prescribed by law are: the limitation to be applied must be "necessary in a democratic society", "in the interests of national security,...for the protection of health and morals, for the protection of the rights of others…" etc.

In order to identify the proper purpose itself, one needs to take a look at whether there is a "pressing social need" for the limitation. Is the application of the limitation indeed necessary for our society? This automatically brings up a question of whether this new law, which will regulate data protection, is necessary for the people. In fact the Regulation is aimed at strengthening the individual's right to personal data protection. The reason for its proposal was technological progress which allowed too much of personal data to appear available in internet[122]. In fact, one can see the "pressing social need" resulting from the availability of personal information online. Thus, as it has been identified, the proper purpose would be strengthening of the right to personal data protection.

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[120] Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25.01.2012. («Regulation»).
[121] European Convention on Human Rights, November 4, 1950, Art. 8, pg. 10, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf
[122] European Commission, *Why do we need an EU data protection reform?* http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/1_en.pdf

The next thing that needs to be taken into account is the application of the second stage of proportionality, which is rational connection. Will the limitation of freedom of expression help to achieve the proper purpose which is strengthening of the individual's right to personal data protection. The answer would be positive, as with limiting freedom of expression people will not be able to obtain personal information regarding others without their consent. Thus it creates the assurance that this limitation will indeed lead to achieving the purpose.

Turning to the next element of the test, necessity, one must identify whether there are less intrusive measures that could be applied in this case, whether there are any other less harmful ways of achieving the proper purpose. The EU Commission found that the Regulation, specifically, the provision "Right to be forgotten" was not intrusive and did not violate the right to freedom of expression. Thus we will consider that there are no such measures. Besides, in today's world with the technology progress, it is believed to be the only option available at the moment (or soon to be available) that will help to achieve the proper purpose which is strengthening of the right to personal data protection.

The last step of the proportionality test is referred to as to balancing. Let us look at both of the rights: right to protection of personal data within privacy and right to obtain information within the framework of freedom of expression in a meaningful way. Both of the rights as it was concluded in the second chapter have great values and are equally important. Moreover, they both have wide scopes. Having looked at all the above discussed, one can see that despite the importance of the right to freedom of expression in a democratic society, and an individual cannot imagine his/her life without this right, the limitation will still be applied. In the result of the clash, when it comes to the protection of personal data, right to privacy will prevail over freedom of expression.

Conclusion

The Right to be Forgotten, a unique right, has been thoroughly analyzed in this work. The paper described the future perspectives of the Right in case of passing of the Regulation as well as some challenges that have a possibility to take place. The implementation of the right will result in the creation of the strong mechanisms for the protection of privacy. However, as it has been clearly illustrated in the paper, this will at the same time create a clash between the two fundamental human rights: right to privacy and freedom of expression. The reason for this is that this Right if implemented will violate a person's freedom of expression by allowing deletion of personal data about him/her on internet.

The main question of the work was which of those rights shall prevail when it came to the protection of personal data. The paper introduced a solution this twhich we get by application of the proportionality test by Aharon Barak in order to identify which right prevails.

The first chapter mainly discussed the importance of privacy reforms. Moreover, it described the concept of the Right to be Forgotten and introduced to the reader how the proposed Right creates a clash between the right to privacy and freedom of expression.

The second chapter demonstrated that both the right to privacy and freedom of expression have indeed wide scopes, and include a wide range of rights within their framework. It showed that the notions of the rights are not limited to the definitions provided in the European Convention on Human Rights but on the contrary, are much broader. Thus this fact makes deciding the case more difficult than it is.

The third chapter described the application of proportionality test proposed by Aharon Barak, to the rights which are being subjected to limitation. The rights were tested through application of a set of elements that constitute proportionality test.

Having looked at all the above discussed, one can see that despite the importance of the protection of the right to privacy of a person, there is a need to observe that a person's freedom of expression is not violated. Having both advantages and disadvantages, the Right to be Forgotten will these days remain a much needed right in the society for the reasons of growing of people's concern on such issue as privacy.

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