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Ruslan VALIEIEV ©
Ph.D. (Pedagogical Sciences), *(Dnipropetrovsk State University of Internal Affairs)*, Ukraine

Ricardo Daniel FURFARO ©
D.Sc. in Law *(University of Business and Social Sciences)*, Argentina

PROBLEM ASPECTS OF INSTITUTIONALIZATION AND IMPLEMENTATION OF THE RIGHT TO BE FORGOTTEN

Abstract. The right to be forgotten has been institutionalized in the legal space of Europe and continues to cause debate both due to the high level of competition of this right with other rights and legitimate interests of various individuals, and due to the "transatlantic split" regarding the place of this right in the EU legal system and the US legal system.

The article examines important aspects of the institutionalization and realization of the right to be forgotten, in particular: the search for the origins of its "conflict"; substantiation of search engine operators (and not site owners) as data controllers to whom applicants should contact; determination of the appeal procedure and actions of the controller; settlement of territorial jurisdiction of such disputes; determination of grounds for correction, erasure or blocking of information, etc.

Keywords: *search engine operator, personal data controller, personal data processing, transatlantic split, implicit and explicit influence on law.*

Introduction. Humanity is currently experiencing crisis times associated with the confrontation between communities that have advanced through transformation and those in which "transformational matter" has not yet reached critical mass. The new era is gradually but inexorably changing all spheres of life. In particular, new rights are gradually being realized, substantiated and institutionalized. Among them, our attention was drawn to the so-called right to be forgotten. Information in the post-industrial age is constantly, globally and instantly available, easily copied and distributed, and not prone to being lost or forgotten. The right to be forgotten seems to defy an entire era.

Indeed, modern technologies allow the application of unprecedented forms of collection, processing, artificial intelligence analysis of data, without making an exception for personal data. This contributes to the creation of large-scale personal digital files, the development of behavioral and targeted advertising. Individual personal data (website browsing history, search history, physical movement data, etc.) is often collected and used even without the individual's

© Valieiev R., 2023
ORCID ID: https://orcid.org/0000-0001-8593-5515
osvitne.pravo@gmail.com

© Furfaro R., 2023
ricardofurfaro@yahoo.com.ar

knowledge (Ausloos, 2012). As R. Weber notes, the Internet "requires us to reconsider privacy as a concept" (Weber, 2011).

In these conditions, we can observe various threats: the difficulty of protecting personal space; the risk of a quick and large-scale leak of information that a person has shared only with loved ones; the possibility of widely available and permanent linking of one's name to a previously committed mistake, or an indecent act or statement. In such situations, the need of a person, if not to delete the information, then at least to limit its distribution or to break the connection with his personal data, seems natural.

At the same time, the procedure for removing information or erasing its connection with a person's name will undoubtedly interfere with the life of other subjects and create obstacles to the free dissemination of information. In this connection, acute questions arise: what information can be demanded to be "forgotten"? To whom should these requirements be addressed? What is this "forgetting" procedure? Are there mechanisms for compensating entities that take measures to "forget" or suffer from this procedure? How significant is the risk of abuse of such a right and what are the mechanisms for their prevention?

Finally, in Ukraine and other countries that are not covered by the decision of the European Court of Justice, which actually institutionalized the right to be forgotten, other issues are also relevant, in particular: how to prepare lawyers for the future implementation of the concept of this right and to provide assistance.

Analysis of recent research and publications. In recent years, the problems of this right have become the object of study by such researchers as A. Bunn, L. Bygrave, J. Dowdell, F. Manjoo, J. Rosen, N. Tirosh, R. Walker, R. Weber, O. Kokhanovska, O. Legka, Yu. Razmetaeva and others. Lawyers came close to answering six problematic questions related to the "forgetting information" procedure, in particular, why there was a need to "forget information", who should take appropriate measures, how it should be implemented, where it should happen, what can be "forgotten" and why.

The purpose of the article. Based on the mentioned above studies, we aim to emphasize the problematic debatable aspects, which, in particular, had to be interpreted by the European Court of Justice in "the decision that invented the right to be forgotten" (Bunn, 2015).

Formulation of the main material. A wide and sharp scientific debate on the right to be forgotten is caused, first of all, by the competition of the new law with the rights and legitimate interests of other persons. In particular, the right to be forgotten competes with the legitimate interests of data controllers and the legitimate interests of third parties who need the relevant information. The right to be forgotten competes with the economic interests of the owners of search engines, which search for information, index it, link it with other information (including personal data), store this link and provide access to it and primary data at the request of Internet users, along the way, making a profit from the sale of advertising.

It should be noted that in the information civilization, the conflict and the rights of previous generations are intensifying, in particular, the competition of freedom of information with the economic interests of data subjects. For example, a Microsoft survey found that 75 % of US recruiters and HR professionals order online candidate surveys, and 70 % reported rejecting candidates based on information found online (Ausloos, 2012). That is, a significant number of candidates could get a job, if information about them was

not so freely distributed.

In this regard, it is worth paying attention to the fact that according to Joseph Raz's theory of interest, conflicts of rights are practically inevitable (Waldron, 1989). Today's increased competitiveness is not caused by the high conflict of new rights. From the very beginning, it is embedded in the potential opposition of freedom of speech and dissemination of information, on the one hand, and the dignity of the individual and his right to privacy, on the other, which A. Stone and F. Schauer draw attention to: "In a positive way, dignity strengthens freedom of speech. On the other hand, it may turn out that dignity limits freedom of speech..." (Waldron, 1989, p. 106).

The conflict has intensified under the influence of the development of technologies, which have multiplied the possibilities for creating, copying, saving, processing and distributing information, radically simplified the procedures for searching for information about specific individuals, and also almost erased the boundaries of a person's private and public life.

With the use of information technologies, the processing of personal data has a high risk of violation of fundamental human rights. Therefore, in the modern world, in particular, in the EU, a system of pan-European and domestic protection of personal data and their processing has been formed. In particular, natural persons whose data are processed have the right "to be informed that the processing is taking place, to familiarize themselves with the data and to object to the processing under certain circumstances..." (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31995L0046). Personal data controllers are responsible for the processing of materials.

However, a problematic aspect for a long time was the question: are search engine operators data controllers? (from which people draw the main array of personal information). This question was raised by the Spanish court before the European Court of Justice in case No. C-131/12CJEU "Google Spain" and "Google Inc." v. Spanish Data Protection Agency (Agencia Espanola de Proteccion de Datos (AEPD)) and Mario Costegi González", namely to interpret: "the company that operates the search engine "Google" must be considered the "controller" of personal data contained on the Internet pages that this system indexes?" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX% 3A62012CJ0131).

According to Google's objections, the search and indexing of information is carried out automatically: "the activity of search engines cannot be considered the processing of data placed on the Internet pages of third parties, which are displayed in the list of search results, given that search engines process all information available on the Internet, not distinguishing between personal data and other information" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A62012CJ0131). In addition, according to Google, "even if this activity should be classified as "data processing", the operator of the search engine cannot be considered a "controller" with respect to the said processing, since it does not know about this information and does not exercise control over the data" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX% 3A62012CJ0131). American researcher L.A. Bygrave generally noted that the key issue in this lawsuit was Google's status – should it be considered "the controller of the personal data contained in the links indexed by its search engine?" (Bygrave, 2014).

In response, the European Court of Justice recalled the definition of "personal data processing" from the text of Directive 95/46 in force at that time as any

operation performed on personal data, both by automatic means and without them. Moreover, the operator of the search engine constantly and systematically processes personal data, although not making fundamental distinctions between personal and other information, but providing it to Internet users when searching for personal data. The fact that personal data has already been published on the Internet and is not changed by the search engine cannot weaken the degree of responsibility of the search engine operator. This processing of personal data, according to the Court's conclusion, "can be distinguished and considered as additional to the processing carried out by the owners of Internet sites" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131). As the Court rightly emphasized, it is the operator of the search engine that determines the purposes and methods of said processing of personal data and, thus, it must be considered the "controller" in relation to this processing.

Finally, the Court emphasized the crucial role of search engines in the dissemination of personal data, as it makes it available to Internet users who would not otherwise have found the site where the data is originally published and actually forms a dossier ("structured review of information") on a particular subject information For this reason, the operator of search engines must take comprehensive measures to "achieve effective and full protection of data subjects, in particular their right to privacy" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131) and not transfer their responsibility to site owners who may indeed inform search engines about the need to exclude certain information published on their site from the automatic indexes of search engines (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131).

Accordingly, the opinion of the Court of Justice on this aspect determines that "the activity of a search engine, which consists in searching for information published or placed on the Internet by third parties, its automatic indexing, temporary storage and, finally, its provision to Internet users in accordance with a certain order of preference must be classified as "processing of personal data"… when this information contains personal data, and, secondly, the operator of the search engine should be considered a "controller" with respect to said processing" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A62012CJ0131).

But is it appropriate in this situation to seek out and contact web page controllers? Google just advocated the need to seek protection from the owners of sites where personal information is posted, since it is not burdensome for website controllers to assess the legality of their publication, and to take "the most effective and least restrictive measures to make the information unavailable" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131). Austria's representatives in the Court indirectly supported this position, recognizing that a necessary condition for the search engine operator's termination of access to data is "a successful objection to the owner of the Internet site on which the relevant information was published" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131).

However, the European Court of Justice emphasized the ease with which nowadays information is copied, transferred to other Internet pages, including outside the jurisdiction of the EU, in connection with which "effective and complete protection of data users cannot be achieved if the specified users will have to seek, initially or in parallel, the deletion of information concerning them

from the owners of Internet sites" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131).

Indeed, a problematic aspect is the territorial jurisdiction of such disputes. In this regard, the European Court in its decision in the case of González emphasized that the fact of processing personal data in several states should not prevent the protection of fundamental rights and in such cases the processing should be regulated by the law of the participating state in which the used means are located (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131). This provision required clarification, as means could mean both physical equipment and a domain name. The situation is complicated by the fact that personal data is "temporarily stored on servers, the location of which is unknown, because this information is kept secret due to competition between companies" (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131). At the same time, the court clarified that although Google Spain does not directly index and store information, its sale of advertising space is directly related to these types of data processing.

An important ruling in the territorial dispute came in 2019, when the European Court of Justice heard an appeal against a fine imposed by the French data protection authority on Google for refusing to remove all links relating to an individual from all versions of its search engine. Google then explained that instead of tying searches to a domain name (e.g. Google.fr in France, Google.de in Germany), it implemented differentiation of searches depending on the geolocation of the IP address of the device from which the search request comes (https://curia.europa.eu/juris/document/).

Given the widespread use of vpn server technology that allows you to temporarily change a device's IP address, or rather use a proxy IP address with any geolocation, this solution and the geolocation argument seems extremely vulnerable. However, the Court's 2019 decision found a certain compromise between the concept of personal data protection applied in the European Union and the concept of freedom of speech protection formed in the United States.

Many researchers emphasize the diametrically opposed views of Europeans and Americans on the issue of the right to be forgotten. J. Rosen states that "in Europe, the intellectual roots of the right to be forgotten can be found in French legislation, which recognizes le droit à l'oubli, or "the right to be forgotten" – that is, the right that allowed a convicted person, having served his sentence and been rehabilitated, to object to publicizing the facts of his conviction and sentence. In the US, on the contrary, the publication of someone's criminal history is protected by the First Amendment to the Constitution" (Rosen, 2011). These differences in the field of personal privacy are so striking that American experts called them the "transatlantic split" (Bygrave, 2014), and the decision of the European Court in the Gonzalez case – a form of censorship (Tirosh, 2017). In general, American courts perceive restrictions on the right to freedom of speech as a prerequisite for self-censorship (Weber, 2011).

Researchers see the origins of the split, in particular, in the historical upheavals of the 20th century, pointing to the national register of the Netherlands, which "allowed the Nazis to identify 73 % of Dutch Jews, compared to only 25 % in France", where such reliable records did not exist (Dowdell, 2016). Philosophers of law also believe that in continental Europe, the construct of private life is based on the concept of human dignity, and in the

USA – on the aspect of human freedom (Dowdell, 2016). At the same time, in continental Europe, the right to be forgotten can be considered as contained in the right of the individual, covering several elements such as dignity, honor and the right to private life (Weber, 2011).

In any case, it is worth agreeing with the American specialist R. Walker, who argues that "only a limited form of the "right to be forgotten" is compatible with US constitutional law. This form is the right to delete voluntarily provided data..." (Walker, 2012). Even before the aforementioned court decision, J. Rosen emphasized that the European interpretation of the right to be forgotten, with the possibility of deleting not only self-published information, actually speaks of the creation of a new right (Rosen, 2011).

Consequently, the Court's decision exacerbated the controversy related to the competition between the human right to privacy and freedom of expression, and also called into question the status of the right to privacy as a fundamental right. L.A. In this regard, Bygrave concludes that "according to EU law, the protection of personal data is itself a fundamental right. Thus, data privacy should be considered on a par with other important human rights, such as freedom of expression" (Bygrave, 2014).

The competitiveness of the two rights is tried to be mitigated by legal experts who point out that the information is not destroyed, but remains on the websites of third parties and can be accessed directly from there (Tirosh, 2017). In this regard, researchers also note such forms of implementation of the right to be forgotten, such as the payment of compensation, along with the removal and deidentification of personal information (Bunn, 2015).

In general, the European Court has unquestionably prioritized the right to be forgotten over economic interests, in particular, search engine operators and other data controllers. As for freedom of speech, the court recognized that requests for de-identification may be outweighed by the dominant interest of the general public in the relevant information (Bygrave, 2014).

The most important substantive problem is the question of what information can be "forgotten" and what information cannot be "forgotten"? The regulation on the protection of natural persons in connection with the processing of personal data and the free movement of such data (https://ogdpr.eu/en/gdpr-2016-679) established an exception for the processing of personal data for the purposes of journalism, scientific, artistic or literary activities. Note that the activity of the search engine operator does not apply to these exceptions. In this regard, there may be a special case of a situation where the data subject initiates erasure from the search results of information published on legal grounds for the purposes of journalism or scientific, artistic or literary activities.

Directive 95/46 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX:31995L0046), valid at the time of the Court's decision, through the member states guaranteed the data subject's rights to clarification, erasure or blocking by the data controller due to their incomplete or inaccurate nature. The court specified that the basis for correction, erasure or blocking may be non-compliance with other conditions of legality (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131) – except for incompleteness or inaccuracy. The general rules for the legality of personal data processing were established in Chapter II of the Directive and contained the principles of data quality (in particular, reliability and relevance) and criteria for the legality of

their processing (for example, the consent of the data subject to processing). In the context of these conditions, the Court used the terms "correct and lawful" and emphasized that the controller must take all reasonable steps to ensure the exclusion or correction of data that does not meet the relevant requirements (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131).

Currently, the current Regulation in Article 5 established a system of principles for personal data processing (legality, legality and transparency; target limitation; data minimization; accuracy; limitation of storage periods; integrity and confidentiality; accountability of the data controller). Article 6 of the Regulation defines the criteria for the legality of personal information processing.

Considering the key role of information in the modern world, as well as the important role of freedom of information in the dominant Western civilization, the right to be forgotten requires a philosophical understanding. The problem of this right goes to the problem of memory and identity in the field of social and existential philosophy. In the context of the Internet society, according to J.W. Dowdell, creates a new reality in which, unlike the previous one, memorization is the norm, and forgetting is the exception (Dowdell, 2016).

This tendency seems to be positively evaluated in the context of the discourse "Culture is memory" (Ausloos, 2012), at the scale of society, however, this is opposed by the idea of rehabilitation: eternal and inexorable memory will hinder the changes of a specific person (Bunn, 2015), and will complicate the management of the process representations of one's personality externally. It is no coincidence that the idea of the right to be forgotten is precisely what the national expert Yu. Razmetayeva sees: "everyone has the opportunity at any moment to represent their personal identity in a relevant way" (Razmietaieva, 2017).

Accordingly, the information of a natural person about himself is classified by domestic researchers as a personal non-property good (Kokhanovska, 2019), for example, like the acquired education (Valieiev, 2014) and according to the conclusions of foreign authors, the right to be forgotten belongs to the natural person who is the right holder of personal information on a time scale - moreover, the longer the origin of information reaches the past, the more likely it is that personal interests prevail over the interests of society (Weber, 2011). That is, a certain trend can be observed: the long-term memory of a person is necessary for her, but society can limit itself to only the most relevant information.

From this position, many researchers criticize the proposed name of the right, in particular, speaking of the right to dispose of one's memory (Tirosh, 2017), the right of deindexation. It seems to us that experts are right who say that the more correct name is "the right to be de-indexed or, more precisely, the qualified right not to appear in publicly available search results" (Bygrave, 2014).

Conclusions. So, according to our assessment, modern civilization unintentionally and implicitly, thanks to the development of information technologies, changed the balance of privacy and freedom of speech in favor of the latter. The institutionalization of the "right to be forgotten" appears as a purposeful and explicit attempt to correct this imbalance. In order to balance the balance, European lawyers supplemented the concept of personal data protection with the right to be forgotten, recognized search engine operators as controllers of personal data, recognized territorial limits of protection and exclusions regarding objects of protection.

In the context of further research, the aspect of training students of legal specialties, who in the future will have to adapt and implement similar constructions

in Ukraine, as well as help implement this right, becomes relevant. Similar services are widely provided by lawyers in the European Union. Moreover, such sensitive segments of the population as teenagers and young people are interested in the implementation of the right both in the context of maintaining business reputation and in the context of protection against cyberbullying.

Conflict of Interest and other Ethics Statements
The authors declare no conflict of interest.

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Руслан ВАЛІЄВ, Рікардо Даніель ФУРФАРО

ПРОБЛЕМНІ АСПЕКТИ ІНСТИТУЦІОНАЛІЗАЦІЇ ТА РЕАЛІЗАЦІЇ ПРАВА БУТИ ЗАБУТИМ

Анотація. Право бути забутим інституціоналізувалося в правовому просторі Європи та продовжує викликати дискусії як внаслідок високого рівня конкуренції цього права з іншими правами та законними інтересами різних осіб, так і внаслідок «трансатлантичного розколу» щодо місця цього права в системі права ЄС та системі права США.

У статті розглянуто важливі аспекти інституціоналізації та реалізації права бути забутим, зокрема: пошук витоків його «конфліктності»; обґрунтування саме операторів пошукових систем (а не власників сайтів) контролерами даних, до яких мають звертатися заявники; визначення процедури оскарження та дій контролера; врегулювання територіальної юрисдикції подібних суперечок; визначення підстав для коригування, стирання чи блокування інформації тощо.

За висновком авторів, сучасна цивілізація нецілеспрямовано та імпліцитно, завдяки розвитку інформаційних технологій, змінила баланс приватності та свободи слова на користь останньої. Інституціоналізація «права на забуття» постає цілеспрямованою та експліцитною спробою виправити цей дисбаланс. Для вирівнювання балансу європейські правники доповнили концепцію захисту персональних даних правом на забуття, визнали операторів пошукових систем контролерами персональних даних, визнали територіальні межі захисту та виключення щодо об'єктів захисту.

У контексті подальших досліджень актуальності набуває аспект підготовки студентів юридичних спеціальностей, яким у майбутньому доведеться адаптувати та впроваджувати аналогічні конструкції в Україні, а також допомагати реалізовувати це право. Аналогічні послуги широко надають юристи в Європейському Союзі. Причому у реалізації права зацікавлені як у контексті підтримки ділової репутації, так і в контексті захисту від кібербулінгу такі чутливі верстви населення, як підлітки та молодь.

Ключові слова: *оператор пошукових систем, контролер персональних даних, обробка персональних даних, трансатлантичний розкол, імпліцитний та експліцитний вплив на право.*

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Olga OLEYNIK ©
Senior lecturer *(Dnipropetrovsk State University of Internal Affairs)*, Ukraine

Biswajit DAS©
Ph.D. (Management), Professor *(Institute of Industrial technologies (KSOM))*, Odisha, India

PROFESSIONAL BURNOUT IN PEDAGOGY OF SPECIALISTS WORKING IN HIGHER EDUCATION SPHERE

Abstract. The article considers the study of the peculiarities of the management strategies for the higher education institutions to preserve and enhance the productivity of scientific and pedagogical personnel, to eliminate their professional burnout; impact of chosen strategy on the results of the staff; reasons why professional burnout may occur. The main factors causing the professional burnout are analyzed along with the ways of how to avoid and eliminate them.

Also such phenomenon as stress is viewed here as both a natural factor that triggers

© Oleynik O., 2023
ORCID ID: https://orcid.org/0000-0002-4453-2397
olyasergeyevna@gmail.com
© Das B., 2023
ORCID ID: https://orcid.org/0000-0002-0817-2929
biswajit@ksom.ac.in