

THE RIGHTS OF THE NATURAL PERSON IN TERMS OF PERSONAL DATA PROTECTION - CONSTITUTIONAL CONNOTATIONS

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Abstract

The right to private life is a fundamental right of the person, which is safeguarded by the Constitution and fully regulated by the organic laws of Romanian law, but also by the jurisprudence of the European Court of Human Rights. The latter has mentioned that "private life" is a vast concept, which is not limited to a complete definition, but protects the right to identity and personal development, as well as the fundamental right of each natural person to develop relationships and contacts with other persons around, with itself, but also with other as those outside of the person in question. Private life refers not only to the activity at home or at the personal office, but also in places which are "open" to other persons, which implies that the notion of "private life" should refer not only to the actions performed by a specific person, but especially by the places where that person is found. In the context of the informational evolution of a modern society, it was unavoidable for the right to confidentiality not to become a more and more complex concept, out of which the need for a specific characteristic - the right to personal data protection - arose.

Key Words: *the right of private life; private life; constitutional law; human rights*

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1. Introductory elements regarding the right to private life - constitutional connotations

The right to privacy is considered a fundamental element of society, liberty and human dignity provided and safeguarded by constitutional regulations. In contemporary society, the risks related to the concentration of top information to a small circle of public and private subjects or their broadcast at an international scale have led to the appearance and evolution of the right to privacy.

The current social and historical context has especially diverse characteristics, as interpersonal relationships are based on relations built on communication and exchange of information at an international level, subject to the continuous requirements of technological development. The fast transmission of data and information is likely to generate potential interferences in the private life of any person.

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In these conditions, traditional law has faced serious difficulties in trying to protect persons from the disclosure of personal information. Out of this necessity specific, more ample, models of legal protection have appeared at a transnational level, which allow each person to know the fluctuation of the personal data which concern them or to request to block their use.

The concept of privacy originates from the Latin *privatus*, with the most important symbol for establishing its boundaries, the fence or the wall. In West-European culture it is known under the name *privacy*, and it signifies the separation from others, through the possibility of the individual to exclude itself (Duby, 2001: VI) or to exclude information about itself, having the option to disclose them selectively.

The scope of the concept fluctuates depending on the cultural, national and individual particularities of a country or region and involves several components: physical, informational, organisational, emotional and intellectual, depending on the field which it targets. Thus, the physical component of the concept of private life (Micu, 2017: 58) covers aspects for preventing intrusions in the physical space of a person, the informational one targets the scope of information which an individual would not wish to disclose, such as that concerning religion, political affiliations, sexual orientation, medical status or information of a financial nature, whereas the organisational one involves adopting the organising measures necessary for ensuring the security of the existing database at the level of each entity.

Finally, the emotional and intellectual components of the concept of private life refer to the field of feelings, aspirations and mentality of a person, considering human spirituality.

Through the Judgement in the case of *Calmanovici v. Romania*, the European Court of Human Rights has stated that: “*private life is a vast notion that does not fit an exhaustive definition, showing that it protects the right to identity and personal development, as well as the right of any individual to form and develop with its peers and with the outside world. The same court of law has shown that there is an area of interaction between the individual and the others, which, even in a public context, can enter the private sphere*”.

Legally, corresponding to the expression of private life, the right to privacy has appeared, being used for the first time in the year 1890 in the United States of America by the attorney Samuel Warren, who, together with professor Louis Brandeis from Harvard University, wrote an essay titled “The Right to Privacy” (Niger, 2006: 2-25).

This work is considered to be the precursor of recognizing a right which has surpassed the scope of personal issues. As an approach, the view expressed in the work approaches that of our times. (Zucchetti, 2005: 3)

Alain Westin considers the right to privacy to be a prerogative of the individuals to be able to determine on their own when, how and what

information they communicate about themselves to others, showing that this right can be described by four characteristics: solitude, intimacy, anonymity and reserve. (Westin, 1968: 31-32)

The right to privacy surpasses the individualistic connotation in favor of the social, which involves analyzing it in connection with the other fundamental rights and freedoms. From this perspective, the philosopher John Stuart Mill, in his essay, "On Liberty", published in 1859, thought that the only justification of the intrusion into private life is the danger of harming other people, "your liberty ends where the liberty of another begins". (Stuart Mill, 1994: 7)

Given the informational developments of modern society, the right to privacy has become a complex concept from which a specific component arose - the right to personal data protection. The complexity created by the informational and technological development has led to the appearance and shaping of the right to personal data protection. This right has acquired a distinct existence and has been recognized at a European Union level (*art. 8 of the Charter of Fundamental Rights of the European Union and art. 16 of the Treaty on the Functioning of the European Union*). It is substantiated by the right of the individual to choose what it is willing to disclose to others. In the absence of a strong protection of their own information, persons would risk being discriminated against for their opinions, religious beliefs or health conditions. (Cifaldi & Sinescu, 2009)

Consecrated as a fundamental right through art. 16 of the Treaty for the Functioning of the European Union (Micu, 2007: 284-288), the right to personal data protection aims to protect natural persons from the increasingly stronger tendencies to create record systems which contain personal data and intensifying their circulation at a transnational level, in the context of the expansion of the use of surveillance technology and the current economic interest to create profiles of natural persons (Basarabescu & Savoiu, 2010: 89).

2. The concept of personal data protection

The concept of personal data protection represents the right of the natural person to defend those characteristics which lead to its identification and the correlative obligation of the state to adopt adequate measures in order to ensure effective protection. Personal data are construed that information which can be directly or indirectly connected to an identified or identifiable natural person. Given the need to protect and respect the fundamental right to intimacy and privacy, personal data protection represents an extremely important, which is confirmed by it being approached in distinct chapters provided in the Convention Implementing the Schengen Agreement.

At the European Union level, in order to recognize the fact that record systems are destined to be of use to people, certain specific rights were instituted and recognized, applicable in the field of personal data protection.

Thus, the right to information, the right to access, the right to intervention, the right to not be subject to an individual automatic decision, the right to object, the right to lodge a complaint to the national supervisory authorities and the right to address justice.

The necessity to institute those resides in the need to defend the identity that each natural person feels, given that the use of personal data has expanded severely, and the means for collecting and storing data have diversified and have been technologically streamlined.

The obligation to respect the rights is incumbent to all personal data controllers, regardless of the field of activity (public or private), regardless of the form of organization, even if it is included in the categories of controllers exempt from the obligation to notify the National Surveillance Authority. Infringing these rights subjects the controller to sanctions from the national authorities for surveillance of personal data, based on the provisions of art. 28 of Directive 95/46/CE.

The Regulation - *Regulation (EU) no. 679/2016 regarding the protection of natural persons regarding the processing of personal data and regarding the free movement of these data and repealing Directive 95/46 / EC (General Regulation on data protection)* - provides that: "The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognized in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and a fair trial, and cultural, religious and linguistic diversity".

Also in the Regulation, the rights of natural persons are treated in Chapter III titled "The rights of natural persons", subsumed to the idea of ensuring transparency in the activity of personal data processing which the controllers perform.

3. The rights of natural persons in the matter of personal data protection - constitutional safeguards

Foreign nationals and stateless persons who reside in Romania benefit from the general protection of persons and wealth, safeguarded by the Constitution and other laws, and the public authorities respect and protect the intimate, family and private life, without making a distinction between Romanian and foreign citizens. (*art. 18 and 26 of the Romanian Constitution, republished*)

Furthermore, the framework law (*Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of*

these data with subsequent amendments and completions) in the field of the protection of persons regarding personal data processing and the free circulation of these data aims to safeguard and protect the fundamental rights and freedoms of natural persons, especially the right to intimate, family and private life, regarding the processing of personal data, without making a distinction between Romanian and foreign citizens. These provisions are applied to the processing of personal data performed by Romanian or foreign, public or private law natural persons or legal entities, regardless whether they take place in the public or private sector (*art. 2, paragraph 6 of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions*), thus ensuring a similar protection to the three categories of persons - Romanian, foreign and stateless persons.

As a safeguard for achieving the purpose of constitutional law, as well as that stated in the framework law, the rights corresponding to the natural person have been expressly provided by the lawmaker, thus: the right to information, the right to access data, the right to intervene on data, the right to object, the right not to be subject to an individual decision and the right to address justice.

The right to information (art. 2, paragraph 6 of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions)

In case personal data are obtained directly from the person concerned, the controller is obligated to supply to them at least the following information:

- a) the identity of the controller and its representative, if applicable;
- b) the purpose for which the data is processed;
- c) additional information, such as the recipients or categories of recipients of the data; whether the supply of all required data is mandatory and the consequences of the refusal to supply them; the existence of the rights provided by the present law for the person concerned, especially the right to access, to intervene on data and to object, as well as the conditions when they can be used;
- d) any other information the supply of which is imposed through provisions of the surveillance authority, taking into account the specifics of the processing.

In accordance with these provisions, the controllers also have the obligation to supply information regarding the existence of the video surveillance system and the aim to process data using such means, the identity of the controller, the existence of the recording of images and the categories of recipients of them, the rights of the persons concerned and the means of exercising them. This type of information must be made known to the persons concerned clearly and permanently.

In case the data are not obtained directly from the person concerned, the controller is obligated, at the moment of collecting the data, or, if they intend to be disclosed to third persons, at the latest until the moment of the first disclosure, to supply to the person concerned, at least the following information, except for the case in which the person concerned already has the information in question:

- a) the identity of the controller and its representative, if applicable;
- b) the purpose for which the data is processed;
- c) additional information, such as: the categories of data concerned, the recipients or categories of recipients of the data; the existence of the rights provided by law for the person concerned, especially the right to access, to intervene on data and to object, as well as the conditions when they can be used;
- d) any other information the supply of which is imposed through provisions of the surveillance authority, taking into account the specifics of the processing.

The right to access data (art. 13, of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions)

Any person concerned has the right to obtain from the controller, upon request (free of charge for one request per year), the confirmation of the fact that its personal data is processed by it or not, as well as the following information:

- a) information regarding the purposes of the processing, the categories of data taken into account and the recipients or categories of recipients to which the data are disclosed;
- b) communicating in an intelligible form of the data which are subject to processing, as well as any information available regarding the origin of the data;
- c) information regarding the functioning principles of the mechanism used for the automatic processing of data which concern the person in question;
- d) information regarding the existence of the right to intervene on data and the right to object, as well as the conditions in which they can be exercised;
- e) information regarding the possibility to examine the register of personal data processing, to lodge a complaint with the surveillance authority, as well as to address justice in court to attack the decisions of the controller, in accordance with the legal provisions.

The controller is obligated to communicate the information requested within 15 days from receiving the request.

The right to intervene on data (art. 14, of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions)

Any person concerned has the right to obtain, free of charge, from the controller, through a written, dated and signed request:

- a) the rectification, update, blocking or deletion of the data the processing of which is not in accordance with the law, especially of incomplete or inexact data;
- b) the transformation into anonymous data of the date the processing of which is not in accordance with Law no. 677/2001;
- c) the notification of the third persons to which the data were disclosed if such notification does not prove impossible or does not entail a disproportionate effort compared with the legitimate interest which may be affected.

The controller is obligated to communicate the measures taken, as well as, if applicable, the name of the third party to which the data regarding the person concerned were disclosed, within 15 days from receiving the request.

The right to object (art. 15, of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions)

The person concerned has the right to object at any moment, through a written, dated and signed request, for justified and legitimate reasons related to its particular situation, that the data concerning it to be object to processing, except for the cases in which there are legal provisions to the contrary. In case of justified objection, the processing cannot concern the data in question.

The person concerned has the right to object at any moment, free of charge and without justification, that the data concerning it being processed for direct marketing, on behalf of the controller or of a third party, or being disclosed to third parties for such purpose.

The controller is obligated to communicate to the person concerned the measures taken, as well as, if applicable, the name of the third party to which the personal data regarding the person concerned were disclosed, within 15 days of receiving the request.

The right not to be subject to an individual decision (art. 17, of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions)

Any person has the right to request and obtain:

- a) the withdrawal or cancellation of any decision which has legal effects over it, adopted exclusively based on personal data

- processing performed through automatic means, aiming to evaluate certain aspects of its personality, as well as the professional competency, credibility, behaviour, or other such aspects;
- b) the re-evaluation of any other decision made regarding it which affects it significantly, if the decision was made exclusively based on data processing which meets the conditions provided above.

The right to address justice (art. 18, of Law no. 677/2001 for the protection of persons regarding the processing of personal data and the free movement of these data with subsequent amendments and completions)

Without prejudice to the possibility of lodging a complaint with the surveillance authority, any person which has suffered injury following personal data processing which was performed illegally can address the competent authority in order to repair it.

The competent court of law is that within the jurisdiction of which the complainant resides. The summons is exempt from legal stamp duty.

Complaints addressed to the surveillance authority (art. 25, of Law no. 677/2001 for the protection of persons regarding)

In order to protect the rights provided by law, the persons the personal data of which are subject to processing under law may lodge a complaint with the surveillance authority.

The complaint may be performed directly or through a representative. The complaint towards the surveillance authority may not be submitted if a complaint in a court of law, having the same object and the same parties, was submitted previously. Except for cases in which a delay would cause imminent and irreparable damage, the complaint with the surveillance authority may not be submitted earlier than 15 days from submitting a complaint with the same contents with the controller. If the complaint is found to be justified, the surveillance authority may decide the temporary suspension or the termination of data processing, the partial or full deletion of data processing and can inform the criminal prosecution authorities or submit a court case. The decision must be motivated and shall be communicated to the interested parties within 30 days from the date of the complaint.

Conclusions

All these rights of natural persons are based on the principles derived from the European - Chapter II of Regulation (EU) no. 679/2016 regarding the protection of natural persons regarding the processing of personal data and regarding the free movement of these data and repealing Directive 95/46 / EC (General Regulation on data protection - and national regulations applicable in the field of personal data protection, as follows: the principle of lawful processing, the principle of legitimacy, the principle of responsibility, the

principle of proportionality, the principle of limiting the scope, the principle of updating the data, the principle of storing the data, the principle of ensuring confidentiality and security of processing.

The role of these principles which govern personal data processing is to shape an approach in the activity of the controllers, preceding the conception of a system, during the performance of the processing operations and their completion.

The purpose of these principles resides in the necessity to ensure the right to privacy, consecrated by art. 8 of the European Convention on Human Rights. From this point of view, it can be emphasised that, through a decision, the European Court of Human Rights has stated that: "although art. 8 has as its essential object the protection of the individual against the arbitrary interferences of public authorities, it is not limited only to forcing the state to refrain from such interferences; positive obligations may be added to this negative obligation, which are inherent to effectively respect private or family life. These may require the adoption of measures for respecting private life, including regarding the relationships between individuals. The limits between positive and negative obligations of the state with regard to art. 8 are not subject to a precise definition, however, the applicable principles are comparable. Especially, in the two cases, the just balance which must be maintained between the general interest and individual interests must be taken into consideration, the state having a margin of discretion in each situation". (Pfeifer Case against Austria. File no. 12556/03. ECHR judgment -15.11.2007)

The principles for personal data processing must be followed by all controllers regardless of whether they activate in the public or private sector, including their representatives so that the final objective of respecting the rights of the persons concerned. These principles which are subsumed to the need to ensure the quality of personal data are reflected in the provisions of Convention no. 108/1981.

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