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REVIEW ARTICLE

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REFLECTIONS ABOUT THE SAMENESS OF HUMAN RIGHTS ONLINE AND OFFLINE

Abstract: *The article explores whether and how the concept of the sameness of human rights online and offline can be justified. The comparative method analyzes changes in the meaning and scope of four human rights when transposed from the nondigital to the digital domain: the right to education, nondiscrimination, freedom of expression, and privacy (emphasizing the right to be forgotten). These rights are examined through shifts in meaning, related state duties, and the role of private actors. The theoretical framework is the non-coherence theory of digital human rights, which asserts that online and offline human rights align only at a general level. As the scope and meaning of rights become more specific, they diverge, though the abstract concept of sameness remains. This generic feature of human rights supports the argument that they are domain-independent.*

Key words: Sameness of Rights, Right to Privacy, Right to Education, Freedom of Expression, Right to be Forgotten, Freedom from Discrimination, Non-coherence Theory of Digital Human Rights.

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1. Introduction: Framing the Focus

One of the most fundamental issues related to human rights in the digital domain is the sameness of rights offline and online. This issue is often overlooked and marginalized, since the idea that the rights are the same is usually put forward as undisputed and self-evident. The present article will review some theoretical considerations related to the sameness proposition, and then proceed to seek validation or rejection of the idea of sameness concerning four rights: the right to education, the right to non-discrimination, the right to freedom of expression, and the right to privacy (with emphasis on the right to be forgotten). These rights represent highly abstract and universal entitlements, and as such allow for the reaching of conclusions which can apply to any human right that is transposable from the offline to the online domain. The research question that the authors explore through comparative analysis is whether the idea of the sameness of rights offline and online can be verified at the level of concrete human rights. The analysis will dominantly rely on existing scholarly viewpoints through literature review, as well as on policy and normative instruments. Because the aim is to determine the content of rights and their interpretation, the focus is on the international and European levels of rights.

The claim of sameness of rights is traceable to the 2003 Geneva Declaration of Principles, which reaffirms, without justification, "the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms."[1] Such a statement is not full acknowledgement of the idea of the sameness, but it conveys the impression that human rights are not domain-dependent. It took almost ten years to turn implicity into explicity, by reaching an *expressis verbis* statement of sameness in an international instrument. The UN Human Rights Council resolution from 29 June 2012 "affirms that the same rights that people have offline must also be protected online."[2]

Yet there are doubts regarding the sameness doctrine from the public and the private perspectives, expressed by academia, advocacy groups and policy makers. Representing academia, Dafna Dror-Shpoliansky and Yuval Shany propose the normative equivalency paradigm to characterize the series of resolutions where the Human Rights Committee and the General Assembly "have reiterated the notion that human rights apply in the digital

1 Declaration of Principles, *Building the Information Society: a global challenge in the new Millennium*, Document WSIS-03/GENEVA/DOC/4-E (12 December 2023), para. 3 (WSIS: Declaration of Principles (itu.int), 10. 10. 2024).

2 UN HRC, *The promotion, protection and enjoyment of human rights on the Internet*, HRC 20th Session, UN Doc. A/HRC/20/L.13 (29 June 2012).

'online world' as they apply in the 'offline world'."[3] The normative equivalency, as they assert, contains a major flaw, which is about considering "digital technology as a new tool or arena for exercising offline rights or governmental powers, as opposed to a conceptualization of digital space as giving rise to a new human condition and governance domain."[4] Another example is Molly Land's argument that new information technology has created a situation where terminology used at the time of drafting the ICCPR cannot be transposed directly into the digital domain.[5]

Representing the advocacy perspective, in 1996, at Davos, Switzerland, John Perry Barlow delivered the rhetorical attack against human rights "as we know them" without offering the quest of alternatives. He said that "[g]overnments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather."[6] The Article 19 advocacy group has translated the reaffirmation that "the same rights that people have offline must also be protected online"[7] into questions of practicality. The group states that unless greater priority is placed on addressing violations and changes to law and practice, this statement of sameness is no more "than words just written on paper".

The UN Special Rapporteur has come up with a finding that, "When dealing with technologies such as the Internet it is simplistic and naïve to be content with a statement that 'whatever is protected off-line is protected on-line'. That is a hopelessly inadequate approach to the protection of privacy in 2018."[8] We can term all these observations as the general doubts, claiming that the statement of sameness of human rights in the digital and nondigital domains can be verified for the highest levels of generality and abstractness.

The two versions – one claiming that human rights offline and online are the same, and the other showing doubts against the sameness doctrine

3 Dror-Shpoliansky, D., Shany, Y., 2021, It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology, *The European Journal of International Law,* Vol. 32, No. 4, pp. 1253.

4 *Ibid.*

5 *Ibid.*

6 Barlow, J. P., 1996, Declaration on the Independence of the Cyberspace, *Electronic Frontier Foundation*, (https://www.eff.org/cyberspace-independence, 26. 09. 2024).

7 ARTICLE 19, 2017, ARTICLE 19 at the UNHRC: The same rights that people have offline must also be protected online, (https://www.article19.org/resources/article-19-at-the-unhrc-the-same-rights-that-people-have-offline-must-also-be-protected-online/, 26. 09. 2024).

8 UN GA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN doc. A/74/486, 9 October 2019.

– might seem incompatible at first glance. Yet the expectation that one version is to be rejected at the expense of the other, which is justified, turns out to be false in the context of the recently formulated non-coherence theory of digital human rights. This theory shows that human rights online and offline have similar meaning only at the very general level of principles. For instance, the importance to protect freedom of expression remains unchallenged in both domains. Human rights, at the high level of principles in both domains, are coherent and non-coherence becomes more and more apparent as the image of digital human rights gets more detailed and concrete. Concretization of the scope and meaning of rights bearing the same name leads to images that are non-coherent. For instance, it is prima facie obvious that digital privacy has a much narrower scope than offline privacy. At one point – with the emergence of digital-domain specific human rights that are not a reflection of a comparable right from off-line – such non-coherence disappears. In the other words, non-coherence means disappearance of the sameness of rights at some point below the general level.

In order to exit the realm of abstractness and verify the validity of the non-coherence theory for concrete human rights, below we will explore if and how four human rights differ in online and offline domains. We explore the four rights – the right to education, the right to nondiscrimination, the right to freedom of expression, the right to privacy (with emphasis on the right to be forgotten) through the following aspects: changes in meaning, changes in associated state duties, and the role of private actors. These concrete observations allow us to return to the issue of sameness at the end of the article. Our findings have verified the doubts stemming from generality and the non-coherence effect. We conclude that human rights offline and online are the same and not the same – simultaneously.

2. Changes in Meaning

The right to education is one of the fundamental human rights in its normative expression. It has been recognized in a plethora of international treaties and soft law instruments both at the general and the regional levels.[9] The right is also recognized, explicitly or through interpretation,[10] in

9 See UNESCO, 2023, *Technology and education in light of human rights*, (https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Technology%20and%20education%20in%20light%20of%20human%20rights_GEM%20Background%20Papers_July23.pdf, 26. 09. 2024).

10 In a decision of 19 November 2021, the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) found, for the first time, that children have a constitutional right to education. This right is derived from Article 2(1) (free development of one's personality) in conjunction with Article 7(1) (school system) of

most national constitutions or similar legal sources.[11] Nevertheless, the full content of this right still remains open to interpretation and adjustments as to what is included in this right (*e.g.* which levels, which language), who are the beneficiaries, and what are the duties of States in fulfilling it.

Starting with the Universal Declaration of Human Rights (UDHR) of 1948, the United Nations have defined this right in Article 26.1: "Everyone has the right to education." Nevertheless, further text gives an explanation but also a restriction: "Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."[12] The UDHR was adopted by the UN General Assembly on 10 December 1948 and as a General Assembly declaration it has limited legal power.[13]

The United Nations continued its efforts to strengthen human rights by adopting two basic human rights treaties in 1966: the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[14] The former was designed to be implemented forthwith by the States parties by adopting

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the German Basic Law (Grundgesetz, GG). According to the Court, the duty of the State to provide education, codified in Article 7(1) of the Basic Law, corresponds to the right of children and adolescents to receive education, rooted in the right to develop their independent personalities in society, codified in Article 2(1). The constitutional right to education has three components. It entails the State's duty to provide education, the right of the individual to participate without discrimination in education provided by the State, and the right to be protected against State measures that restrict school operations. However, the court stated that, in general, there is no constitutional right to receive education in a specific format or setting. (Para. 44). Global Legal Monitor, 2021, *Germany: Constitutional Court Rejects Challenge to Pandemic Prohibition of In-Person Classes; Finds Constitutional Right to Education*, Library of Congress, (https://www.loc.gov/item/global-legal-monitor/2021-12-14/germany-constitutional-court-rejects-challenge-to-pandemic-prohibition-of-in-person-classes-finds-constitutional-right-to-education/, 26. 09. 2024).

11 Suzana Kraljić lists examples: the constitutions of Slovenia (Arts. 57 and 52(2)), Croatia (Art. 66), Egypt (Art. 19), Latvia (Art. 122), Montenegro (Arts. 75 and 79(4)), Norway (Art. 109), Russia (Art. 43), Tajikistan (Art. 41), Ukraine (Art. 53), and others. Kraljić, S., The Right to Education in a Digital Era, in: Sannikova, L. V., (eds.), 2024, *Digital Technologies and Distributed Registries for Sustainable Development. Law, Governance and Technology Series*, Vol. 64. Cham, Springer.

12 UN GA Resolution 217 A, UN doc. A/RES/217 (III) (10 December 1948).

13 UN GA resolutions and declarations are considered to be recommendations. See, for example, Higgins Dbe Qc, R., 2009, *The Development of International Law by the Political Organs of the United Nations*, *Themes and Theories*, Oxford, Oxford University Press.

14 UN GA Resolution 2200A, International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966), 993 UNTS 3.

necessary legislative and other measures; the latter, however, was dependent on the economic strength and development of its States parties so they are each obliged to "take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant" (ICESCR Article 2.1). The right to education was provided for in Article 13.1: "The States Parties to the present Covenant recognize the right of everyone to education." It was further elaborated that primary education should be compulsory and free, and that secondary education "shall be made generally available and accessible" while "[h]igher education shall be made equally accessible to all" (Article 13.2). The underlying principle for all is that of nondiscrimination.

The Committee, established for monitoring the implementation of the ICESCR,[15] issued General Comment No. 13, explaining its interpretation of the right to education, stating that "[e]ducation is both a human right in itself and an indispensable means of realizing other human rights."[16] The Committee emphasized availability, accessibility, acceptability, and adaptability, as the basic interrelated and essential features of the right to education. These "4 A's" are considered to be benchmarks for assessing the compliance of States parties with the obligation to provide education.

In brief, availability requires that functioning educational institutions and programs are available in sufficient quantity and fulfilling various necessities, depending on "the developmental context within which they operate."[17] Accessibility means that education must be accessible to everyone, without discrimination, especially to the most vulnerable groups, such as women, people with disabilities, indigent populations, and minorities. Acceptability means that the form and substance of education must be acceptable and beneficial to students, and, in appropriate cases, parents who may require that education respects their philosophical, religious or moral beliefs. Finally, the adaptability of education means that it must be flexible "so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and

15 Unlike the Human Rights Committee foreseen already by the ICCPR, the monitoring of the ICESCR was given to the Economic and Social Council of the UN (ECOSOC). The Committee on Economic, Social and Cultural Rights (CESCR) was subsequently established under ECOSOC Resolution 1985/17 of 28 May 1985.

16 CESCR, Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Article 13), (8 December 1999).

17 For example, "all institutions and programs are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology." *Ibid*.

cultural settings."[18] It is along these features that the right to education has different content online compared to offline. For instance, the digital divide means that online education is not accessible to everyone, and online features make it much more difficult for parents to follow what exactly their children are being taught online, which leads to change in the acceptability feature.

Freedom of expression, as enshrined in relevant international human rights documents, is protected in both the offline and the online spheres. The position that "the same rights people have offline must also be protected online"[19] is faced with new dilemmas and questions 12 years after it was first expressed by the UNHRC. In this light, the European Court of Human Rights has repeatedly emphasized that the Convention must be interpreted "in the light of present-day" conditions.[20]

As the world and lives of people are progressively transitioning from the physical to the virtual, the question that is more relevant today than ever is whether human rights, including freedom of expression, as understood in the "real" world by conventional law, could have the same meaning and substance in the virtual landscape of the Internet. If the answer is that there is no difference between the core essence of rights, regardless of the medium through which they are exercised, the applicability of the existing framework should not be challenged. However, the question is how do we address the evident differences in specific aspects of how these rights are exercised in the online world and whether the increasing number of regulatory efforts by both international organizations and individual states, which concern the specific aspects of the protection of these rights, are sufficient to address the very serious challenges that exist in the online environment.[21]

If we, however, start from the premise that rights online and offline are inherently different, we are faced with a difficult task of envisioning the concept of this "sui generis generation of digital rights"[22] and an adequate framework for their protection. The argument for such a position

18 *Ibid*.

19 UN HRC, *The promotion, protection and enjoyment of human rights on the Internet*, HRC 20th Session, UN Doc. A/HRC/20/L.13 (29 June 2012).

20 ECtHR, *Tyrer v. United Kingdom*, No. 5856/72, Judgment of 25 April 1978, para. 31.

21 UN OHCHR, Human Rights 75, High-level Event, *The Future of Human Rights and Digital Technologies*, Additional background document, (https://www.ohchr.org/sites/default/files/udhr/publishingimages/75udhr/HR75-high-level-event-Digital-Technologies-Background-document.pdf, 26. 09. 2024). pp. 1–7.

22 Coccoli, J., 2017, The Challenges of New Technologies in the Implementation of Human Rights: an Analysis of Some Critical Issues in the Digital Era, *Peace Human Rights Governance*, Vol. 1, No. 2, p. 226.

may be that there cannot be an absolute equation between the physical and the digital worlds, and therefore the rights in the inherently different realities cannot be the same. However, it seems that there is a general agreement at the international level that the differences between the two are not perceived as sufficient to allow for the conceptualization of entirely new rights. If adequate parallels can be drawn in terms of core principles, defining restrictions, and redress mechanisms, then the connotation of the "sameness" of rights in the digital sphere, as accepted by the UNHRC, would suffice. On the other side, the continuous activity of the UN, as well as other international and regional organizations, towards defining and regulating new aspects of traditional rights has resulted in a robust, mostly soft law framework that should guide the governments, regulatory bodies, private companies and citizens through (until a decade ago) mainly uncharted virtual territories.

The main value of conventional law, as it relates to exercising and protecting freedom for expression online, has been in the consideration of principles of legitimate restrictions. The long-established standards, shaped through the work of the United Nations, the Council of Europe, and more recently the European Union, provide a baseline for assessing the boundaries of freedom of expression online. In connection to this, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has clarified that there is no need to introduce new standards regulating the freedom of expression on the Internet as relevant standards already exists, in particular in Article 19 of the International Covenant on Civil and Political Rights.[23]

The right to non-discrimination lies at the core of the human rights system. It is one of the corner stones of the idea that all human beings

23 Article 19 of the ICCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

UN GA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN doc. A/74/486, 9 October 2019, para. 57.

have the same human rights. To have any meaning, these rights need to be applied in a uniform and nondiscriminatory manner. General guarantees of non-discrimination are found in a plethora of human rights treaties.[24] Article 2 of the Universal Declaration of Human Rights prohibits discrimination on the following ten grounds: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, and other status. Similar lists are contained in other human rights instruments.

The rights to equality and non-discrimination aim to guarantee that those who are in equal circumstances are treated equally in law and practice.[25] It was affirmed in the *Marckx v. Belgium* case that this "safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the[ir] rights and freedoms."[26] The HRC has elaborated that not every difference in treatment is a violation, but permissible different treatment must be "reasonable and objective" and aimed at achieving a legitimate aim that is in conformance with the ICCPR.[27]

As the Internet and digitalization have come to affect many aspects of our daily lives, the scope and meaning of the right to non-discrimination has been significantly impacted. Traditionally, non-discrimination norms addressed issues within physical spaces, aiming to prevent unequal treatment in areas such as employment, education, and accessibility of public services. The digital revolution has broadened the scope of non-discrimination to include online environments. In the digital realm, discrimination can manifest in ways that are unique to that realm, such as algorithmic bias, the digital divide (as previously indicated in light of the right to education), or discrimination on online platforms (*e.g.*, due to home

24 UN GA Resolution 217 A(III), Universal Declaration of Human Rights, 10 December 1948, Article 2; ICCPR, Articles 2, 26; ICESCR, Article 2(2); UN GA, Resolution 44/25, Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3, Article 2; UN GA, Resolution A/RES/61/106, Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, in force 24 January 2007, Article 5. There are also treaties that prohibit discrimination on specific grounds, *e.g.* UN GA, Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195) on the ground of race; and UN GA, Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13) (CEDAW) on the ground of gender.

25 For in-depth analysis of equality and non-discrimination, see, *e.g.*, Farrior, S., (ed.), 2015, *Equality and Non-Discrimination Under International Law,* Vol. 2, Routledge and Zaccaroni, G., 2021, *Equality and Non-Discrimination in the EU: The Foundations of the EU Legal Order*, Edward Elgar.

26 ECtHR, *Marckx v. Belgium*, No. 6833/74, Judgment of 13 June 1979, para. 32.

27 UN HRC, CCPR General Comment No. 18, *Non-discrimination*, 10 November 1989, UN doc. HRI/GEN/1/Rev.9 (Vol. I), para. 13.

sharing services requiring personal data such as a photo). Scholars have increasingly focused on these new forms of discrimination. For instance, numerous scholars have already highlighted how machine learning algorithms can perpetuate existing biases if they are trained on biased data sets.[28] Others have addressed the digital divide (disparities in access to technology and the Internet) and demonstrated how it represents a significant form of modern discrimination, as it disproportionately affects marginalized communities.[29]

International norms are beginning to reflect these changes and have acknowledged the broadened scope of the right to nondiscrimination. For example, the Artificial Intelligence Act, adopted by the European Parliament in March 2024, acknowledges that "AI [...] can also be misused and provide novel and powerful tools for manipulative, exploitative and social control practices. Such practices are particularly harmful and abusive and should be prohibited because they contradict Union values of respect for human dignity, freedom, equality, democracy and the rule of law and fundamental rights enshrined in the Charter, including the right to nondiscrimination."[30] The AI Act requires both providers and users to ensure full compliance with EU law on non-discrimination and makes it clear that the rules have evolved to be applicable also in this context.

As another example, documents such as the UN Committee on the Rights of the Child General Comment No. 25 (2021) on children's rights in relation to the digital environment, acknowledge the need to protect against digital discrimination.[31] The Comment recognizes that "[c]hildren may be discriminated against by their being excluded from using digital technologies and services or by receiving hateful communications or unfair treatment through use of those technologies" and emphasizes that "[o]ther forms of discrimination can arise when automated processes

28 *E.g.*, McGregor, L., Murray, D., Ng, V., 2019, International Human Rights Law as a Framework for Algorithmic Accountability, *International ad Comparative Law Quarterly* Vol. 68, No. 2, pp. 309–343; Herzog, L., Algorithmic Bias and Access to Opportunities in: Véliz, C., (ed.), 2021, *Oxford Handbook of Digital Ethics*, Oxford, Oxford University Press.

29 Overview of early discussions on the digital divide is provided in Yu, P. K., 2002, Bridging the Digital Divide: Equality in the Information Age, *Cardozo Arts & Entertainment Law Journal,* Vol. 20, No. 1, p. 2.

30 European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD), 13 March 2024, para 28.

31 UN CRC, General Comment No. 25 (2021) on children's rights in relation to the digital environment, UN doc. CRC/C/GC/25 (2 March 2021).

that result in information filtering, profiling or decision-making are based on biased, partial or unfairly obtained data concerning a child."

Civil society has also been active in promoting the broadening of the scope of nondiscrimination. For example, Amnesty International and digital rights group Access Now, with the help of various experts, drafted the Toronto Declaration on protecting the right to equality and non-discrimination in machine learning systems (published in May 2018). The declaration emphasizes that "[e]xisting patterns of structural discrimination may be reproduced and aggravated in situations that are particular to these technologies – for example, machine learning system goals that create self-fulfilling markers of success and reinforce patterns of inequality, or issues arising from using nonrepresentative or biased datasets."[32] The Declaration has subsequently been endorsed by numerous other civil society and research groups.[33]

Due to the rapid nature of changes in the digital sphere, the understanding and regulation of non-discrimination in the digital space are still evolving, but it is clear that a broader scope or interpretation is needed to encompass all new relevant aspects of nondiscrimination.

Of the many aspects of the right to privacy, the right to be forgotten has recently gained most visibility, with new norms being adopted and important case law generated at the European level. Although current interest in the right to be forgotten has been sparked by increasing digitalization and privacy concerns arising in the digital domain, the right to be forgotten also applies in the offline world and pre-dates digitalization.

Megan Richardson shows[34] how ideas of data rights started to emerge in the early twentieth century, when the arts and entertainment industry, dedicated to recording and replaying fictionalized accounts of human life stories for public enlightenment and entertainment, already posed challenges for human identity. In reaction to those challenges, philosopher Henri Bergson developed vitalist arguments for individual creative evolution as opposed to a "cinematic mechanism". According to Bergson, the human subjects engaged in a process of creative evolution under which their personality shoots, grows, and ripens without ceasing, and may have their own ideas as to how (or if) they should be recorded.

32 The Toronto Declaration: Protecting the Right to Equality and Non-Discrimination in Machine Learning Systems, (https://www.torontodeclaration.org/declaration-text/english/, 05. 06. 2024), para 16.

33 Full list available at: https://www.torontodeclaration.org/community/endorsers/ (05. 06. 2024).

34 Richardson, M., 2023, *The Right to Privacy 1914–1948*: *The Lost Years*, Singapore, Springer, pp. 39–52.

Bergson's arguments inspired plaintiffs and judges in diverse legal cases in the 1920s and 1930s. Specifically, those cases concerned films depicting real life events. Plaintiffs were unhappy with how they were portrayed and essentially complained about how their lives would be viewed by posterity. Richardson argues that the reasoning in those cases takes on a new significance in developing and construing data rights around erasure/forgetting and rectification of the record in our highly mechanized and networked world, which challenges forgetting and problematizes distinctions between true and false, free and determined. Notably, plaintiffs and judges in ECtHR privacy cases, such as *Von Hannover v. Germany* concerning celebrity photos and media articles, often draw on Bergsonian ideas of human flourishing. Even when they do not explicitly reference Bergson, they acknowledge the problem of mechanistic technologies creating the illusion that recorded information fully represents an individual or their process of becoming. Similarly, in present day cases, under the GDPR erasure or rectification provisions, people are objecting to the way their life histories are being recorded, which is an argument that is more than one hundred years old and whose scope of application extends far beyond the digital sphere.

It has also been argued that the right to be forgotten, understood as the right to preclude anyone from publicizing a particular true fact or event relating to their private life, and which has lost its newsworthiness or public pertinence, has found public recognition in some places, such as France, since the middle of nineteenth century. Currently, this right also comprises a person's entitlement to access, control and, sometimes, erase personal data held by others.[35]

The right to be forgotten in its current form was heavily influenced by the Court of Justice of the EU's judgment in *Google Spain*[36] in 2014. At the European level, this right is now specifically envisaged in the GDPR and has been read by the ECtHR into a general privacy provision of the ECHR.

Importantly, the *Google Spain* judgment was predated by a political debate on the need to introduce a right to be forgotten as a new human right, following which, in 2010, the EU Commission took up the idea of introducing a right to be forgotten in the context of the ongoing revision

35 Werro, F., (ed.), 2020, *The Right To Be Forgotten, A Comparative Study of the Emergent Right's Evolution and Application in Europe, the Americas, and Asia*, Cham, Springer, p. 1.

36 CJEU, judgment (Grand Chamber) of 13 May 2014 in Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*.

of the Data Protection Directive 95/46.[37] A decade prior to that, a similar term, namely the "right to forget," was already a topic of debate. The two rights should not be confused. Whereas the "right to forget" refers to the already intensively reflected situation that a historical event should no longer be revitalized due to the length of time elapsed since its occurrence, the "right to be forgotten" reflects the claim of an individual to have certain data deleted so that third persons can no longer trace them. The right to be forgotten is based on the autonomy of an individual becoming a right-holder in respect to personal information on a time scale; the longer the origin of the information goes back, the more likely personal interests prevail over public interests.[38]

Commentators in 2022 noted the still remaining lack of clarity as to the exact meaning of the right to be forgotten in the EU context, *inter alia* drawing attention to a variety of terms referring to the right to be forgotten as a right to erasure, delisting, dereferencing, which makes it next to impossible to deduct what constitutes the essence of the right or group of rights in question.[39]

The ECtHR does not find the variety of terms problematic. In its judgment in *Hurbain v. Belgium*[40] of 2023, it notes that the "right to be forgotten" may give rise in practice to various measures that can be taken by search engine operators or by news publishers. These relate either to the content of an archived article (for instance, the removal, alteration or anonymization of the article) or to limitations on the accessibility of the information. In the latter case, limitations on access may be put in place by both search engines and news publishers. Those specific measures have specific names. The ECtHR uses the term "delisting" to refer to measures taken by search engine operators, and the term "deindexing" to denote measures put in place by the news publisher responsible for the website on which the article in question is archived.[41]

Notwithstanding evolution and developments, the right to be forgotten has its stable core meaning. As noted by the GDHRNet researchers, at its core, the right to be forgotten expands and defines itself as an entitlement of individuals to better control their personal data. Just as is the case

37 Weber, Rolf H., 2011, The Right to Be Forgotten: More Than a Pandora's Box?, *Journal of Intellectual Property, Information Technology and E-Commerce*, Vol. 2, No. 2, p. 120, para. 1.

38 *Ibid*., para. 3.

39 Gstrein, O. J., 2022, The Right to be Forgotten in 2022, *Verfassungsblog*, (https://verfassungsblog.de/rtbf-2022/, 26. 09. 2024).

40 ECtHR, *Hurbain v. Belgium*, No. 57292/16, Judgment of 4 July 2023 [GC].

41 ECtHR, *Hurbain v. Belgium*, para. 175.

with the original pre-Internet right to be forgotten, this entitlement finds its justification in the recognition of the right to personal freedom, dignity, and self-realization.[42] There remains the potential for further developments with regard to the right to be forgotten in the nondigital domain. Commentators note that after the *Google Spain* case was decided, at least in one case the right to be forgotten was extended to a non-internet media – a physical book.[43] This suggests that the quest into the issue of whether rights offline and rights online are the same is relevant also in the case of the right to be forgotten.

To summarize, ambiguity about the content of the right to education is increasing in the digital domain. This is because the "4 A's" were designed for the offline domain and may not be fully adequate for describing the online educational environment. Since there are no new characteristic elements to replace the "4 A's" in the digital domain, their content and scope changes to reflect the functionality of the right to education. For freedom of expression, it is noted that inherently different realities affect its concrete content and scope. Yet the differences are not so wide to say that only the façade remains and the content of freedom of expression online is conceptually different from freedom of expression offline. The online environment has significantly broadened the scope of the right not to be discriminated against. There are online-specific forms of discrimination that need to be addressed by human rights law, for instance emerging from algorithms and machine learning. Furthermore, and equally relevant for the discussion about discrimination and freedom of expression, addressing specific aspects of hate speech in an online environment and challenges to the protection of human rights online will continue to be prioritized.

Finally, the digital domain contains features that narrow the scope of the right to privacy. For instance, the right to be forgotten and control over one's identity vary greatly in the digital from the nondigital domain, where these entitlements are wide.

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42 Pajuste, T., (ed.), 2022, Specific Threats to Human Rights Protection from the Digital Reality, Tallinn, Tallinn University, COST Action GDHRNet project, (https://graphite.page/GDHRNet-threats-to-human-rights-protection/assets/documents/GDHRNet-ThreatsReport-EditedVolume.pdf, 26. 09. 2024).

43 The case, in which a plaintiff, who had been sexually assaulted years earlier, was mentioned in a non-digital legal textbook that included the judgment from her trial, was decided by the Supreme Court of Turkey. The Supreme Court expanded the right to be forgotten beyond digital data to a place where personal data are "easily accessible" to the public. See Youm, K. H., Park, A., 2023, The Right to Be Forgotten: Google Spain as a Benchmark for Free Speech versus Privacy?, *Chicago Journal of International Law*, Vol. 24, No. 1, pp. 178–179.

3. Changes in Associated State Duties

Even before the COVID-19, use of technologies was part of the education process, as well as part of everyday student lives (*e.g.* smart phones). "Distance learning" features in General Comment No. 13 as something that is known and used in specific conditions, mostly in higher education or assisting students with disabilities and those who live in remote areas. All this changed dramatically with the onset of the COVID-19 global pandemic in 2020. Almost overnight, most education institutions had to abandon face-to-face education and either abandon education all together or turn to digital.[44] This switch to digital education opened a number of issues, one of the most relevant ones being the issue of the digital divide between those who could afford digital education and those who could not. Furthermore, the global pandemic amplified the already ongoing process towards privatization and commercialization, but also the "platformization" of education through commercial platforms such as Zoom and Microsoft Teams.[45]

In 2022 the UN Special Rapporteur on Education submitted her report "Impact of the digitalization of education on the right to education" to the UN Human Rights Council, highlighting the risks and opportunities of the digitalization of education and their impact on the right to education.[46] The report states that "the legal instruments relevant to the right to education remain fully applicable to digital education" and that "the digitalization of education should further not only skills, abilities and competencies, but also the development of the human personality, effective participation in a free society and societies' capacities to decide on their own development." Accordingly, "digital literacy and access should be considered as basic rights in the twenty-first century."[47] Finally, the "4 A's", as expounded by the CESCR, also remain applicable to digital education.

As far as availability is concerned, it includes obtainable computer facilities and information technology, but also teaching and other staff with

44 According to a 2020 UNESCO study, during the first peak of the COVID-19 pandemic in April 2020, 191 countries had introduced nationwide school closures, which affected an estimate of 1.5 billion children on a global scale. UNESCO and McKinsey & Company, 'COVID-19 Response Remote Learning Strategy', 2020.

45 Celeste, E., Gregorio, G. de, 2023, Towards a Right to Digital Education? Constitutional Challenges of Edtech, *Journal of Intellectual Property, Information Technology and E-Commerce*, Vol. 14., No. 2, pp. 234–250.

46 Barry, B. K., 2022, Impact of the digitalization of education on the right to education, Report of the Special Rapporteur on the right to education, A/HRC/50/32.

47 International Commission on the Futures of Education, 2021, *Reimagining Our Futures Together: a New Social Contract for Education*, Paris, UNESCO, p. 34.

the appropriate digital skills, as well as the maintenance and repair of digital devices. Families that are unable to provide technical facilities by themselves should be supported by the State.[48]

Accessibility "includes physical, economic and information accessibility to educational institutions and programmes for everyone, without discrimination."[49] Although in some cases technology can broaden accessibility for students with, for example, reduced mobility or students who would otherwise not be able to take classes because they could not afford the cost of living *in situ*, it can also become an impediment to accessibility for the students, families and teachers who do not have sufficient financial means or who reside in remote areas not connected to the Internet. Furthermore, not all families have sufficient digital skills to help their children follow education via technological means. If digital is the only or prevalent form of education, it may negatively affect the development of constructive relationships with teachers and other pupils.[50]

48 Some States, like Croatia, provided necessary technology, such as tablets, to primary school pupils on the onset of the pandemic but failed to monitor their use. (REYN-Hrvatska, 2020, Djeca Romi koja su nastavom na daljinu ostala na obrazovnoj distanci, (http://www.reyn-hrvatska.net/index.php/2020/04/23/djeca-romi-koja-su-nastavom-na-daljinu-ostala-na-obrazovnoj-distanci/, 26. 09. 2024)). For experience in some African States, where universities had to suspend their activities due to the lack of technological infrastructure, see: Motau, V., 2023, Has Covid-19 Really Moved Education to 4IR Where Learning Will Be Digital, with a Few Occasions of Face-to-Face Engagements?, *Journal of Sustainable Development Law and Policy*, Vol. 14, No. 2, pp. 222–241. For the experience in clinical legal education see: Crnić-Grotić, V., 2022, Legal Education and Legal Profession During and After COVID-19 the Shifting Idea of Law School: Systems and Processes, *Legal Education and Legal Profession During and After COVID-19*, Springer Nature Singapore, pp. 185–193.

49 Barry, K., 2022, fn. 13. Article 9 of the 2006 Convention on the Rights of Persons with Disabilities, provides for the duties of the States parties to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet, and promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost. The limited duty "to promote" and not "to ensure" should be read in the context of the "reasonable accommodation" concept, as defined by the same convention. It means "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

50 Most research following the pandemic points to serious issues related to mental health, due to isolation of students from their peers and the school environment. Some, however, point to the benefits of isolation for students with anxiety disorders, as they have the possibility to follow their lectures within their comfort zone, without having to attend crowded classrooms, which could increase their sense of unease. Asynchronous online teaching was beneficial for students who worked or had other

In addition to the students and their families, acceptability should also concern teachers, who should be included in discussions about programs and methods of teaching in the digital environment. When the COVID-19 pandemic hit, most decisions about how to proceed with education were made top-down due to the emergency situation. However, prior to the pandemic many teachers had not been trained to work in the digital environment. At the same time, teachers were encouraged to provide teaching materials online, sometimes infringing on intellectual property rights of authors and/or publishers.[51] It seems that online teaching is problematic, especially for young children.[52]

Digital education can respond to the requirement of adaptability perhaps more easily then to the previous ones. Indeed, the technology enabled teaching to be adapted to the emergency situation of the COVID-19 pandemic. Digital technology can also be adapted to some special needs students, by creating apps adapted to their needs; for example, for blind or vision impaired children. Nevertheless, there are also risks involved in managing data about the pupils, possible intrusion on the pupils' privacy or limitation of their freedom to information, for example.[53]

While the Internet has in many ways strengthened freedom of expression[54] and democratized the way in which we receive and impart information and ideas, it has, on the other hand, exacerbated the existing and created new vulnerabilities and the connected challenges for regulators. In terms of opportunities, the Strasbourg Court, for example, emphasizes the key role the Internet plays in enhancing public access to news and generally facilitating dissemination of information,[55] as well as its capacity to inform the public on matters of public interest.[56] On the other hand, the discussion about the "empowering effects"[57] of the Internet is more

engagements, as they could adjust the time needed to follow lectures (Celeste, E., Gregorio, G. de, 2023).

51 Mezei, P., 2023, Digital Higher Education and Copyright Law in the Age of Pandemic – The Hungarian Experience, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law,* Vol. 14, No. 2, pp. 330–350.

52 UN CRC, General Comment No. 25 on children's rights in relation to the digital environment, CRC/C/GC/25, (2 March 2021), para. 15.

53 Council of Europe, 2021, Children's data protection in an education setting – Guidelines (2021), (https://edoc.coe.int/en/children-and-theinternet/9620-childrens-data-protection-in-an-education-setting-guidelines.html, 26. 09. 2024).

54 Balkin, 2004, pp. 6–7, as cited in Coccoli, J., 2017, p. 228.

55 ECtHR, *Times Newspapers Ltd v. United Kingdom* (Nos. 1 and 2), Nos. 3002/03 and 23676/03, Judgment of 10 March 2009, para. 27.

56 ECtHR, *Yildirim v. Turkey*, No. 64569/09, Judgment of 18 December 2012, para. 147.

57 Rowbottom, J., 2018, *Media Law*, Oxford, Hart Publishing, p. 305.

complex and the specifics of communication via mass media, including on the Internet, need to be considered when balancing conflicting rights and interests.[58]

The list of threats to freedom of expression online is not exhaustive, and a number of specific issues affecting how we address the violation and protection in the digital realm have been identified, with some regulatory efforts already in place.

Some examples of threats and concerns include the harmful effects of proliferation of online hate speech,[59] at times resulting in offline violence, undue restrictions of online content, including arbitrary or disproportionate blocking and filtering, as well as imposing of criminal sanctions for legitimate expression of users, intermediary liability, blocking of websites or access to the Internet via internet shutdowns, cyber-attacks and surveillance of online engagement. The latter affect journalists and human rights activists in particular, with a "chilling effect" on freedom of expression as an inevitable effect of such measures. Lastly, all issues generally connected to access to the Internet and the digital divide should also be addressed from the perspective of freedom of expression.

The positive and negative duties of states, with regards to the above-listed threats have been shaped by the jurisprudence of the ECtHR and relevant UN bodies to include specific responsibilities that would ensure that freedom of expression online is exercised in line with international human rights law. For example, the right to Internet access has been recognized under Article 10 in the jurisprudence of the ECtHR, so any attempt to restrict access or block content would require a higher threshold for justification.[60] Also, the UN Human Rights Council has stressed that "States should take all steps necessary to ensure that all individuals have meaningful access to the Internet" (positive obligation) and also "refrain from interfering with access to the Internet and digital communications platforms unless such interference is in full compliance with the requirements of the applicable human rights instruments"[61] (negative obligation). This is relevant for both aspects of freedom of expression, as defined by

58 Oster, J., 2017, *European and International Media Law*, Cambridge, Cambridge University Press, p. 45.

59 Addressed also through third-party liability for comments on social media and web portals. ECtHR, *Sanchez v. France*, No. 45581/15, Judgment of 15 May 2023 [GC] and *Delfi AS v. Estonia*, No. 64569/09, Judgment of 16 June 2015, [GC].

60 ECtHR, *Yildirim v. Turkey*, para. 54, and Rowbottom, J., 2018, p. 307.

61 UN OHCHR, *Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights*, A/HRC/50/55, (19 August 2022), p. 3, see also: UN HRC, *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/47/L.22, (13 July 2021).

Article 10 of the ECHR, *i.e.*, the imparting and receiving information and ideas. The impact of restricting or complete blocking of ICT services by states, with participation of private actors, has been assessed as detrimental to all human rights, but freedom of expression in particular. The ECtHR jurisprudence has recently developed a set of elaborate standards on the topic, which should help align states' actions with international human rights law.[62]

Freedom of expression and online participation of groups that contribute to free and democratic societies, such are journalists and human right defenders, is especially affected by digital surveillance technologies (*i.e.* facial recognition, also facilitated by AI) in the online sphere, but with implications in real life, and this threat has been addressed at various international forums.[63] The ECtHR has considered this issue from the perspective of the protection of privacy but also in relation to the effect on freedom of expression.[64] The UN OHCHR has paid special attention to mass or indiscriminate surveillance, stressing it is "likely to have a significant chilling effect on free expression and association, with people limiting the ways they communicate and interact with others and engaging in self-censorship."[65]

A separate issue, but closely connected to the topics reviewed above, is the duty of states with regards to private actors, *i.e.* digital intermediaries as modern-day gatekeepers that provide platforms for speakers, organize information and facilitate mass communication.[66] While large tech

62 ECtHR, *Vladimir Kharitonov v. Russia*, No. 10795/14, Judgment of 23 June 2020; ECtHR *OOO Flavus and Others v. Russia*, Nos. 12468/15, 23489/15 and 19074/16, Judgment of 23 June 2020; ECtHR *Bulgakov v. Russia*, No. 20159/15, Judgment of 23 June 2020; and ECtHR *Engels v. Russia*, No. 61919/16, Judgment of 23 June 2020. The cases concerned different types of blocking measures, including "collateral" blocking (where the IP address that was blocked was shared by several websites, including the targeted one); "excessive" blocking (where the whole website was blocked because of a single page or file), and "wholesale" blocking (three online media were blocked by the Prosecutor General for their coverage of certain news).

63 For example: OSCE Representative on Freedom of the Media, 2023, Communiqué No. 1/2023 on the Use of Digital Surveillance Technology on Journalists, (https://www.osce.org/files/f/documents/9/4/551605.pdf, 26. 09. 2024); Amnesty International, 2022, Right to Freedom of Opinion and Expression: Threats To Media Posed By Unlawful Targeted Surveillance, (https://www.ohchr.org/sites/default/files/documents/issues/expression/cfis/threats-digital-age/csos/2023-01-26/Submission-SR%20freedex-hrc50-Amnesty%20Int.pdf, 26. 09. 2024).

64 ECtHR, *Glukhin v. Russia*, No. 11519/20, Judgment of 4 July 2023. This, such as seizures of journalistic material and the interceptions of journalistic communication, may also constitute an *additional* interference with media freedom. Oster, J., 2017, p. 91.

65 UN OHCHR, *The right to privacy in the digital age*, UN doc. A/HRC/51/17 (4 August 2022), para. 27.

66 Rowbottom, J., 2018, p. 308.

companies have in the past successfully avoided liabilities imposed on, for example, media organizations under the international framework but also national media laws, there has been increased action towards stronger institutionalization of intermediary responsibilities. States' duties, but also those of supranational organizations are, in this respect, beginning to be codified in relevant legal acts, such as the EU Digital Service Act, or the CoE Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law.[67] This process should not only be regarded from the perspective of states' duties but also as the synergizing effort of states and international organizations toward reinstalling or extending authority over private actors. In this light, it is to be regarded as an important method of holding the powerful private institutions to account.[68]

State duties regarding non-discrimination must also adapt to the digital age, despite the difficulty that it entails due to the unique space that the internet has created, where traditional methods of (intrastate) legal regulation are no longer as effective, due to a lack of consensus on how to assign jurisdiction in online contexts.[69] As human rights law obliges states not only to respect human rights but to also actively safeguard their enjoyment, states must undertake various measures, both online and offline, concerning third parties. This ensures that individuals can exercise their rights in the digital realm, while also preventing cyberspace from being used to violate the human rights of others.

The HRC has also stated that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[70] Thus, it may be necessary for states to take action to eliminate discrimination in the digital realm. States should implement and enforce robust regulations to prevent algorithmic bias, ensure equitable access to digital technologies, and mandate transparency

67 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, 2024; Digital Watch, 2024, Landmark agreement reached on Council of Europe's AI treaty, Geneva Internet Platform, (https://dig.watch/updates/landmark-agreement-reached-on-council-of-europes-ai-treaty, 26. 09. 2024).

68 Rowbottom, J., 2018, p. 308.

69 See for example the discussion in Rona, G., Aarons, L., 2016, State Responsibility to Respect, Protect and Fulfill Human Rights Obligations in Cyberspace, *Journal of National Security Law & Policy*, Vol. 8, p. 9.

70 UN HRC, General Comment No. 18, para. 10. For more detail on the duty to take positive action to ensure everyone can enjoy this right, see, *e.g.*, Moeckli, D., Equality and Non-discrimination, in: Farrior, S., (ed.), 2015, *Equality and Non-Discrimination Under International Law,* Vol. II, London–New York, Routledge.

and accountability of online platforms in order to stop discrimination in the digital sphere.

However, even if states diligently regulate this area, enforcement will remain challenging due to the global nature of the Internet and the technical complexity of digital platforms. As content and users can easily cross jurisdictions, the enforcement of national laws is complicated. Different states have varying rules and standards for nondiscrimination, which can create conflicts and gaps in enforcement. In addition, online platforms often utilize complex algorithms and data processing techniques that are not easily understood or monitored. These technical intricacies can obscure discriminatory practices, making it difficult to identify and address biases effectively.

Courts in certain states have started to address digital discrimination, but cases are still relatively sparse. One notable example is the case of *Loomis v. Wisconsin*, where the use of risk assessment algorithms in sentencing was examined for potential bias.[71] Despite the fact that the court upheld the use of such algorithms, it underscored the need for transparency and fairness in how they are applied. Discriminatory practices would be struck down in court. Civil society initiatives seek to make explicit what states are expected to do in order to ensure non-discrimination in the digital realm. For example, the Toronto Declaration declares that "States bear the primary duty to promote, protect, respect and fulfil human rights. Under international law, states must not engage in, or support discriminatory or otherwise rights-violating actions or practices when designing or implementing machine learning systems in a public context or through public-private partnerships."[72] The Declaration further dictates that states "must ensure that existing measures to prevent against discrimination and other rights harms are updated to take into account and address the risks posed by machine learning technologies" and "provide meaningful opportunities for effective remediation and redress of harms where they do occur."[73] Indeed, there is consensus in both academia and civil society that states need to take active steps to ensure that discrimination is not perpetuated in the online realm.[74]

71 Wisconsin Supreme Court, *Loomis v. Wisconsin,* 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S. Ct. 2290 (2017).

72 The Toronto Declaration, Declaration Text, (https://www.torontodeclaration.org/declaration-text/english/, 05. 06. 2024), para 22.

73 *Ibid*., paras. 26–27.

74 For example, the Toronto Declaration has been endorsed by Amnesty International, Human Rights Watch, Access Now, and numerous other NGOs. An example of academic support, see the UN Office on Genocide Prevention, 2023, C*ountering and Addressing Online Hate Speech: A Guide for Policy Makers and Practitioners*, (https://

In *Hurbain v. Belgium* the ECtHR has admitted that the concept of the right to be forgotten has many facets, that it is still under construction, and that its application in practice has already acquired a number of distinctive features. The right to be forgotten, defined as an aspect of the right to respect for private life, first emerged in national judicial practice in the context of republication by the press of previously disclosed information of a judicial nature, with the person claiming the right to be forgotten effectively seeking to obtain a judgment against the person who republished the information.[75] Subsequently, a new aspect of this right to be forgotten emerged in national judicial practice in the context of the digitization of news articles, resulting in their widespread dissemination on the websites of the newspapers in question. In judicial practice, this aspect, known as the "right to be forgotten online", has concerned requests for the removal or alteration of data available on the Internet or for limitations on access to that data, directed against news publishers and search engine operators. In such cases, the issue is not the resurfacing of the information but rather its continued availability online. The contemporary debate on this aspect of the right to be forgotten was undoubtedly reinforced by the CJEU's *Google Spain* judgment concerning the request for the operator of a search engine to remove links to the web pages of a Spanish daily newspaper from the list of results.[76] In this new context, besides the right to respect for private life, the national courts and authorities find support in the right to the protection of personal data, which in some legal systems has become a self-standing right. According to a different approach, in the specific case of requests for news publishers to alter press articles, the right to be forgotten can be based solely on the protection of the right of personality, which is thus to be distinguished from the right to informational self-determination, the latter being linked to the protection of personal data.[77]

The example of the ECtHR's ability to address issues related to the right to be forgotten in the digital domain shows how traditional human rights instruments, based on a traditional understanding of core human rights, such as the right to privacy, can be used to address issues that on the surface may seem novel because of the highly-sophisticated technological context in which specific questions related to control of personal

www.un.org/en/genocideprevention/documents/publications-and-resources/Countering_Online_Hate_Speech_Guide_policy_makers_practitioners_July_2023.pdf, 29. 09. 2024), Recommendations (to states).

75 ECtHR, *Hurbain v. Belgium*, para. 194.

76 *Ibid.*, para. 195.

77 *Ibid.*, para. 196.

data arise. State duties related to the right to be forgotten are developing, since the states must find ways of applying the universally recognized human right standards in new contexts.

With the advent of the Internet, one's home no longer delineates the boundaries necessary for full protection from invasions of privacy. The Internet, allowing for instant widespread communication and increased storage capacities in information clouds, also increases the frequency of situations in which a person wishes to disassociate themselves from certain texts or images. In this light, digitalization may be a catalyst, prompting states to reconsider data as property and to recognize, as part of one's personality, the right to own and keep control over one's personal information. At the same time, the intrinsic connection and balance between free speech and privacy, including the right to be forgotten, remain the same.[78] The level of legal protection of the right to be forgotten depends less on explicit recognition of this right at the level of domestic legislation than on whether other entitlements, such as free speech, have the tendency to trump the protection of privacy.[79] The right to be forgotten may also conflict with the right to property or the right to engage in commercial activity and the balance will also have to be found between conflicting rights in this context.[80]

The ECtHR's case law approach, as exemplified by *Hurbain v. Belgium*, shows that balancing the techniques of the right to be forgotten in the digital realm follows the general pattern of balancing applied in cases related to the nondigital right to be forgotten and the right to privacy (such as *Von Hannover v. Germany*).

Regarding the right to education, a general observation is that the states' duties to guarantee the right to education encompass new features for the online domain, which are nonexistent in the offline domain. These duties are more complex and involve the obligation to mitigate new risks, which have emerged in the digital space. New standards have been developed for freedom of expression online, compared to the offline environment, with the aim of confronting the new challenges. Vulnerabilities are exacerbated due to the increased role of private entities in safeguarding the freedom of expression in horizontal relationships. The digital domain appears to contain generic features that enable discrimination. Because the IT sector is developing at a faster pace, in comparison to the law and policies, articulation of states' duties remains at the general and the declarative levels, and private digital platforms and companies are tasked with the minimization of discrimination. States' obligations regarding the right to be

78 Werro, F., 2020, p. 19.

79 *Ibid*., p. 13.

80 *Ibid*., p. 2.

forgotten in the digital domain are weaker than in the nondigital domain, because of the technological feature of the internet to perpetuate whatever has entered the digital domain. The capabilities of states to safeguard privacy online are considerably narrower compared to the offline domain.

4. The Role of Private Actors

The inequalities that had existed before the COVID-19 pandemic were exacerbated with the introduction of digital education during the crisis. The elites in wealthy countries were in a position to benefit from digital technology to its maximum. The technology that was used was, as a rule, private and made available to those who could afford it. In her report on education, the UN Special Rapporteur expressed the view that by creating and selling digital teaching materials, educational platforms, applications for communication, short and long online courses, games and online tests, among others, technology companies experienced explosive growth in demand during and after the pandemic, with a huge surge in profits. They may offer some technology at low or no cost to governments, which end up not developing their own tools, giving control over data, decisions, privacy and autonomy to the private sector, which has one primary goal – making a profit.[81] This development poses a significant threat to the implementation of the right to education, particularly for less affluent populations and in less developed countries.

The limiting of freedom of expression online, its promotion and protection, compared to the offline world, has largely depended on large companies – the "enablers of global conversations". The shift of this power of enforcement away from the government has transformed the traditional divisions of the rights and responsibilities of states and citizens. While the efforts of governments to expand national laws to virtual spaces has faced challenges and yielded only limited success, the situation may be changing with the new framework that has emerged, with the EU leading the way. Some previous steps, including the landmark UN Guiding Principles on Business and Human Rights, have helped pave the way for stronger multilateral rules for protecting online freedoms, including the freedom of expression. The outcome of the power battle currently underway will affect not only the freedom of expression of individuals but

81 Barry, K., 2022, para. 53. According to the available data almost half of the world's population, with the majority of them women in developing countries, are still not online. The situation is not satisfactory even across societies in developed countries. Sanders, C. K., Scanlon, E., 2021, The Digital Divide Is a Human Rights Issue: Advancing Social Inclusion Through Social Work Advocacy, *Journal of Human Rights and Social Work*, Vol. 6, pp. 130–143.

also traditional media organizations that are struggling to find sustainable business models in the virtual world. If measures currently taken by the states (for example Canada, France, and California[82]) are successful, the role of private companies may be shifted from profitable channels that enable mass communication to enablers of communication in the public interest, benefiting quality, free and independent media working in the interest of citizens.

Engaging on the multilateral level and promoting a multistakeholder approach to ensuring human rights safeguards in the development and deployment of technologies by companies, including AI, has been emphasized in different forums on the role of private companies in promoting human rights and freedom of expression online.[83] How this process will move forward will not only depend on the capacities of individual governments to include these actors in discussions on the topic, but also on the wider geopolitical context and the willingness of states to cooperate on achieving the common goal of human rights protection.

Similar to freedom of expression, private actors, especially large technology companies, play a crucial role in shaping the landscape of non-discrimination in the digital realm. On the one hand, they may actively engage in discriminatory activities or permit them, while on the other hand, they may adopt innovative non-discrimination policies, which may be more effective than any state action in countering discrimination in the digital sphere. Scholars and researchers have noted the potential for both direct or indirect discrimination by tech giants (direct discrimination occurs when an individual is treated differently based on a protected characteristic, and indirect discrimination occurs when a policy or process disadvantages those with a protected characteristic[84]).[85]

82 See for example: The Canadian Press, 2024, Online streaming services must now pay into fund for Canadian news, content, (https://globalnews.ca/news/10544374/online-streaming-services-fund-crtc/, 26. 09. 2024); AP, 2024, Faced with possibly paying for news, Google removes links to California news sites for some users, (https://apnews.com/article/california-google-news-link-tax-0921cc2b39de591c173201e1ec4bee64, 26. 09. 2024); RFI, 2024, French media progress against X in legal battle over payments, (https://www.rfi.fr/en/international-news/20240523-french-media-progress-against-x-in-legal-battle-over-payments, 22. 06. 2024).

83 See for example OSCE Office of Representative on Freedom of Media, 2021, *Spotlight on Artificial Intelligence and Freedom of Expression: A Policy Manual*, (https://www.osce.org/files/f/documents/8/f/510332_1.pdf, 26. 09. 2024).

84 Australian Human Rights Commission, Quick Guide: Direct Discrimination, (https://humanrights.gov.au/quick-guide/12026, 02. 06. 2024); and Australian Human Rights Commission, Quick Guide: Indirect Discrimination, (https://humanrights.gov.au/quick-guide/12049, 02. 06. 2024).

85 Methven O'Brien, C., Jørgensen, R. F., Hogan, B. F., 2021, *Tech Giants and Human Rights: Investor Expectations*, The Danish Institute for Human Rights, (https://www.

Tech companies have also developed their own norms and standards to address digital discrimination. For example, platforms like Facebook and X (formerly Twitter) have developed policies against hate speech and harassment.[86] Companies like Google and Microsoft are working to reduce algorithmic bias by improving their data practices and implementing fairness audits.[87] Self-normative actions by private actors are essential as state regulations often fail to keep up with the rapid pace of technological change. These companies' internal policies and ethical guidelines often set higher standards than existing laws, as they are often under immense public pressure and want to maintain user trust. Yet one must remember that these are still companies driven by profit and that states cannot rely (solely) on them to ensure non-discrimination in the digital realm.

In the digital world, it is the privately operated search engines that have been primarily affected by the *Google Spain* judgment and the need to ensure protection of the right to be forgotten. Challenges related to this task stem from lack of clarity regarding the modalities of this right. The CJEU's *Google Spain* judgment was adopted on 13 May 2014 and the EU's Article 29 Working Party adopted its guidelines[88] on the implementation of this judgment on 26 November 2014. The guidelines in particular clarified that limiting delisting to EU domains, on the grounds that users tend to access search engines via their national domains, cannot be considered a sufficient mean to satisfactorily guarantee the rights of data subjects. In practice, this means that in any case delisting should also be effective on all relevant domains, including .com. In practice, the European Data Protection Authorities will focus on claims where there is a clear link between the data subject and the EU, for instance, where the data subject is a citizen or resident of an EU Member State. As a result, Google had to change its initial attitude that, since the law focuses on European users, it would focus implementation of the *Google Spain* judgment only on European sub-domains.[89] The Advisory Council to Google on the Right to Be

humanrights.dk/files/media/document/Tech%20giants%20and%20human%20rights_2021.pdf, 26. 09. 2024).

86 The policies are available online at: https://transparency.meta.com/policies (26. 09. 2024) and https://help.x.com/en/rules-and-policies (26. 09. 2024).

87 See, *e.g.*, Microsoft Learn, 2024, Adopt responsible and trusted AI, (https://learn.microsoft.com/en-us/azure/cloud-adoption-framework/strategy/responsible-ai, 26. 09. 2024).

88 EC Article 29 Data Protection Working Party, Guidelines (14 EN WP225) on the Implementation of the Court of Justice of the European Union Judgment on *Google Spain and Inc v. Agencia Española de Protección de Datos (Aepd) and Mario Costeja González* C-131/12.

89 Lomas, N., 2014, Google.com Domain Should Be Covered By Search De-Listing, Say European Regulators, *Tech Crunch*, (https://techcrunch.com/2014/11/26/rtbf-dot-com/, 26. 09. 2024).

Forgotten adopted a report[90] on 6 February 2015 containing advice to the company on the criteria that Google should use in striking a balance, such as what role the data subject plays in public life, and whether the information is outdated or no longer relevant.

In a developing legal environment, search engines ideally have to anticipate or at least react to legal developments and adapt their practices. The GDPR, adopted in 2016, reinforced the protection of the right to be forgotten through its explicit recognition in Article 17. The European Data Protection Board adopted its guidelines on the right to be forgotten in 2020,[91] with commentators noting the need of further updates pursuant to new judgments by the CJEU.[92] Furthermore, as it is up to individual states to ensure implementation of the right to be forgotten, search engines must react to decisions related to the right to be forgotten, as adopted by Data Protection Authorities and courts of individual EU Member States. Notably, following a ruling by a Swedish court in 2023, stating that informing webmasters that the search engine had removed links to their content was itself a breach of privacy of the person making the right to be forgotten request, Google stopped notifying publishers when it has removed websites from its search results under the European right to be forgotten rules. At the present, Google only informs publishers of the fact that a URL has been removed, without elaborating on what or why.[93]

GDHRNet researchers, in their contribution to the Report on Specific Threats to Human Rights Protection from the Digital Reality, wonder why search engine operators are expected to be able to strike a balance between the right to be forgotten and the right to freedom of expression without any specified standards related to it and under the pressure that the refusal of a request could lead to enormous fines.[94] This question is a valid one, especially because the GDPR sketches only faint boundaries for the right to be forgotten. While Article 17(3)(a) GDPR specifically mentions that

90 Google Advisory Council, 2015, Advisory Council to Google on the Right to Be Forgotten, Report of 6 February 2015, (https://static.googleusercontent.com/media/archive.google/en//advisorycouncil/advisement/advisory-report.pdf, 26. 09. 2024).

91 The European Data Protection Board, 2020, Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR, (https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-52019-criteria-right-be-forgotten-search-engines_en, 26. 09. 2024).

92 Gstrein, O. J., 2022.

93 Hern, A., 2024, Google Stops Notifying Publishers Of 'Right To Be Forgotten' Removals From Search Results, *The Guardian*, (https://www.theguardian.com/technology/2024/feb/15/google-stops-notifying-publishers-of-right-to-be-forgotten-removals-from-search-results, 26. 09. 2024).

94 Pajuste, T., 2002.

the right to be forgotten shall not apply to the extent that processing is necessary for exercising the right of freedom of expression, Article 17(3)(e) introduces a broader category of situations in which the right to be forgotten would not apply, *i.e.* to the extent that processing is necessary for the establishment, exercise or defense of legal claims. It would therefore seem that the right to be forgotten may have to be balanced not only with the right of freedom of expression but also with other fundamental rights. GDHRNet researchers give an example of a domestic case in which an online platform was recognized to be a holder not only of the freedom of expression but also of the right to conduct a business. It would therefore seem that the question of balancing of the right to be forgotten would arise not only in the case of its conflict with the freedom of expression but also with the freedom to conduct a business, protected by Article 16 of the EU Charter of Fundamental Rights. The latter type of conflicts does not seem to have received sufficient attention so far.

Private actors have significant role in determining the exact content and scope for all four rights under review. These rights cannot be safeguarded without the involvement of private entities. At the abstract level, any relationship of two actors (the individual and the state) that transforms into a relationship of three actors (the individual, the state, and the private service provider) undergoes transformation to some degree and does not remain the same. The role of the private actors is not limited to safeguarding the rights determined in the offline domain in the dialogue between the private rights holders and the public obligated parties, but entails active involvement in reshaping the content of these rights in the digital domain.

5. Conclusion: The Question of Sameness Revisited

Our main conclusion may come as a surprise: the sameness of human rights online and offline can at the same time be verified and rejected, and both versions appear correct. Verification applies to the general and the abstract levels, devoid of specific human rights content. Rejection is caused by changes in the scope and content of specific human rights, and the entry of private actors into the determination of the rights' meaning in the online environment and their role in rights enforceability. Therefore, we propose to move the question regarding the sameness of rights into the same category as other similar high-level rhetorical statements, such as "human rights are important". There are other methodological approaches

that would provide a more nuanced picture of the differences and similarities of human rights online and offline. For instance, the non-coherence theory of digital human rights points to degrees of difference between the online and offline versions of the same human rights.

Our observations indicate the usefulness of the non-coherence approach to showing that human rights have changed following their transposition from the nondigital domain to the digital domain. We have seen the widening of the scope of concrete human rights. For instance, in view of the European Union, virtually all future learning and jobs will require some level of digital competences and skills.[95] Although one must agree with the UN Special Rapporteur on Education that digital technology must supplement and not substitute teaching, one must also accept the inevitable expanding influence of technology on education. Consequently, the right to education in the digital age is widening to include the right to Internet access and digital literacy.[96] Although the internet has the potential to be a great equalizer, providing universal access to information and opportunities, it can also exacerbate existing inequalities and perpetuate discrimination, as seen with the digital divide and algorithmic biases. The process of ensuring non-discrimination in the digital age must adapt to new realities. It does not suffice to treat all users identically; instead, the specific challenges faced by different groups in the online environment need to be recognized and addressed. This includes ensuring equitable access to technology, transparent and unbiased algorithmic processes, and robust protections against digital harms. What has so far been lost in the transposition of the right to be forgotten is its roots in the nondigital domain. The debate around the right to be forgotten, especially in the context of EU law, has focused on the new challenges, resulting from the progress of digital technologies, which makes the issue of nothing ever being forgotten in the Internet age much more acute. Specific features of dissemination and storage of information on the Internet may acquire a better-defined meaning, as factors influencing the balancing and permissibility of limitations to competing human rights. The analysis of competing rights in the case of the right to be forgotten should encompass the right to privacy of the person concerned and the freedom of expression, including the general public's right to information, as well as the private actors' (notably search engines) right to property and the freedom to conduct a business.

We have also observed new online-specific obligations – for actors entrusted with the enforcement of human rights. One example is related

95 European Commission, Digital Education Initiatives, (https://education.ec.europa.eu/focus-topics/digital-education/about-digital-education, 26. 09. 2024).

96 Celeste E., Gregorio, G. de, 2023.

to freedom of expression. A number of recommendations have been set out to both states and companies with the aim of addressing the specifics of online hate speech, including the one for companies to "adopt content policies that tie their hate speech rules directly to international human rights law."[97] For the right to education, technological changes compel the States to develop and adopt rules and policies at the national and international levels, addressing the risks that digital education entails. The right to non-discrimination has evolved considerably in the digital realm, broadening in scope to address new forms of discrimination that are unique to digital environments. State duties have started to adapt but face challenges in enforcement, while private actors have taken on a critical role in self-regulating and setting higher standards.

Against these observations, which show variance between online and offline versions of concrete human rights, the sameness at the general and the abstract levels can be verified. The difference in the concreteness of two entitlements is meaningful only if compared against a constant. Should this constant disappear, then comparison is not possible, and the claim of sameness does not make sense. For instance, the essence of the right to non-discrimination remains the same in both domains – no matter what the context or how digitalization continues to progress – ensuring that people have equal opportunity to enjoy their human rights. Non-coherence at the level of concreteness enables the retaining of the sameness at the abstract level. Non-coherence is a generic feature of human rights, which allows to argue that human rights are domain-independent.

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97 Also, "As part of an overall effort to address hate speech, develop tools that promote individual autonomy, security and free expression, and involve de-amplification, de-monetization, education, counter-speech, reporting and training as alternatives, when appropriate, to the banning of accounts and the removal of content". UN GA, Promotion and protection of the right to freedom of opinion and expression, UN doc. A/74/486, 9 October 2019, para. 58. f.

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OSVRT NA ISTOVETNOST PRAVA U DIGITALNOM I STVARNOM OKRUŽENJU

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APSTRAKT

Cilj članka je da ispita da li i kako koncept istovetnosti ljudskih prava onlajn i oflajn može biti opravdan. Metoda je uporedna: analizira se promena značenja i obima četiri prava pri prelasku iz nedigitalnog u digitalni domen. Prava su: obrazovanje, nediskriminacija, sloboda izražavanja i privatnost (sa naglaskom na pravu na zaborav). Istražuju se promene značenja, obaveze države i uloga privatnih aktera. Teorijska osnova je teorija nekoherentnosti digitalnih ljudskih prava koja pokazuje da onlajn i oflajn prava imaju slično značenje samo na opštem nivou. Konkretizacija istih prava dovodi do nekoherentnih slika. Nekoherentnost na konkretnom nivou omogućava očuvanje istovetnosti na apstraktnom nivou. To je generička karakteristika ljudskih prava koja omogućava da se tvrdi da su ljudska prava nezavisna od domena.

Ključne reči: istovetnost prava, privatnost, obrazovanje, sloboda izražavanja, pravo na zaborav, nediskriminacija, teorija nekoherentnosti digitalnih prava.

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