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Derecho a la intimidad, Big Data y protección de datos: nuevos desafíos del ordenamiento jurídico colombiano[1]

Right to privacy, Big Data and data protection: new challenges of the Colombian legal system

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RESUMEN

Palabras clave:

Big Data, Derechos, Era digital, Intimidad, tratamiento de datos, Privacidad, Ordenamiento jurídico.

El presente trabajo de investigación analiza los retos del ordenamiento jurídico colombiano frente al Big Data y el tratamiento de datos personales en la era digital, en relación al derecho a la intimidad. Esto comprende desafíos en la implementación del manejo de datos, inteligencia artificial y la regulación dentro de lo social, empresarial, político y demás ámbitos en lo que comprendemos como el proceso de globalización. Para ello, el presente estudio menciona los medios por los cuales las personas pueden hacer valer sus derechos en cuanto a la protección de sus datos, recordando la importancia y observando el Habeas Data como acción constitucional que abarca el proceso contencioso judicial tendiente a salvaguardar los datos personales. También, se da a conocer la percepción y características del Big Data, intentando saber de qué manera pueden protegerse los derechos involucrados en la materialización del proceso de análisis de datos; finalmente se aplica un sentido crítico a la utilización del Big Data en las plataformas políticas modernas, comprendiendo el panorama para el ordenamiento jurídico colombiano, que trae consigo la probable transgresión de derechos fundamentales, como la intimidad personal.

ABSTRACT

Keywords:

Big Data, Rights, Digital age, data processing, Privacy, Legal system.

This research work analyzes the challenges of the Colombian legal system in the face of Big Data and the processing of personal data in the digital age, in relation to the right to privacy. This includes challenges in the implementation of data management, artificial intelligence and regulation within the social, business, political and other areas in what we understand as the globalization process. For this, the present study mentions the means by which people can assert their rights regarding the protection of their data, remembering the importance and observing Habeas Data as a constitutional action that covers the contentious judicial process aimed at safeguarding the data. personal. Also, the perception and characteristics of Big Data are disclosed, trying to know how the rights involved in the materialization of the data analysis process can be protected; Finally, a critical sense is applied to the use of Big Data in modern political platforms, understanding the panorama for the Colombian legal system, which brings with it the probable violation of fundamental rights, such as personal privacy.

1. Introduction

Privacy as a right is a space that the Constitutional Court and Colombian legislation has determined as intangible, that is, properly defined as immune to external intrusions. This profound perspective of protection presents us with great challenges in modern times. Although jurisprudential development has dictated protection parameters and even developed mechanisms that protect this group of human rights involved in themselves or by connection, globalisation, understood as the process of worldwide connection and appropriation of new knowledge, entails great legal and cultural challenges for the implementation of big data management and artificial intelligence.

Due to the process of information analysis given the volume, speed, veracity, variety, and value with which data flows nowadays, the relevance of the topic addresses very strong sociological aspects and ethical dilemmas. In the first place, personal data is needed, and that this is understood as all information that is associated with and through individuals, thus new concepts of identity are emerging today. Likewise, the identity processes that make it possible to individualise a person and differentiate him or her from others also pose the ostensible challenge of knowing where the need for the data ends and at what point the violation of personal privacy begins.

It is important to note that nowadays there is easy access to infinite information, and that the individual's daily life is constantly being exposed through social networks, all this information can be strategically extracted to interpret ways of acting, thinking and being.

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This panorama causes significant concern for the law, as it facilitates mass control in favour of the profits of large public and private firms, with the infrastructure for the massive analysis of data, which, with or without purpose, involve the individual in a mental game that he or she cannot understand, and which may end up affecting his or her fundamental rights. For this reason, the priority of the different countries to establish a regulation in this regard, being imperative the need to develop regulations, jurisprudence, and doctrine.

This article seeks to understand the implications of the use of big data in our legal system, to explain the importance of knowing the means or instruments for the protection of personal data and how constitutional actions can be inefficient in the modern world.

2. Methodology

In order to provide a truthful result in the development of this research, the methodological structure of the hermeneutic-interpretative approach is used, applying the systematic method, typical of the legal monograph from the academic concept of Giraldo Ángel (2012). The article will attempt to answer the following question: What are the limits generated by the massive handling of information through Big Data in the Colombian legal system? The method used (hermeneutic-interpretative) makes it possible to understand the meanings of the object under study from a triple perspective: that of the phenomenon itself, that of the systemic-structural link and that of its interconnection with the social-historical context in which it develops. The development of the research article includes the following sections: Privacy and the Colombian legal system, Personal Data, The constitutional protection of the right to privacy, Big Data vs Privacy, Tensions between the Right to Privacy and Democracy, Tensions between the Right to Privacy and Public Health and Conclusions.

3. State of the Art

3.1 Privacy and the Colombian legal system

Our relationship with the concept of intimacy has changed over time. The closest definition is found in the Royal Spanish Academy (2020) which defines it as "Intimate and reserved spiritual zone of a person or a group, especially of a family" (Literal 1.). This definition emphasises spirituality, personality and belonging as values proper to what we will call the intimate self.

In an article that forms part of the book "The right to privacy. In Killing the Messenger" the authors Warren and Brandeis (1989) conceived privacy (intimacy) as the right to solitude. It is the individual's prerogative over his or her life and person, the unobservable zone over which the other has no interference. Thus, it is an untouchable sphere where, in this logic, neither other individuals nor the state can arbitrarily interfere with his or her person.

The complexity of defining the autonomy of the concept of intimacy in our times lies in the idea of research and scientific advances that threaten precisely spirituality (understood as the essence of being), personality (understood as the elaboration of identity), and belonging (understood as the convictions professed by the person).

The Colombian legal system has developed the concept of privacy as a fundamental right in the constitutional text in the following way:

All persons have the right to their personal and family privacy and to their good name, and the State must respect them and ensure that they are respected. (Political Constitution, 1991)

The recognition of the right has not only an enunciative purpose but also a historical context. While it would have been impossible for the drafter of the Universal Declaration of Human Rights in 1948 to foresee the ethical dilemmas of information and privacy today, the opening paragraphs of Article 12 set out the inherent value of respect for the self from that time onwards in the following terms:

No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. (Universal Declaration of Human Rights, 1948, p. 1).

In this sense, intimacy has referred to the space from which external intervention is removed. This concept is not opposed to the natural idea that man converges in his nature with his fellow human beings, and that these others, in their otherness, also enjoy an intimate, personal space.

Care for privacy, its protection as a right, has also been developed in the decisions of judges. A definition close to what we have shared is the one proposed by the Constitutional Court in 1997, Sentencia T-552, in which the judge said:

[Privacy is...] An intangible space, immune to outside intrusions, from which follows a right not to be forced to hear or be what one does not wish to hear or see, and a right not to be heard or seen when one does not wish to be heard or seen.

If we come to understand the constitutional judge's theory in the deepest sense, by referring to privacy as "intangible" and "immune to external intrusion" he is developing its relevance in the sense of the state's duty or care over the intimate self.

Some doctrinaires such as (Llambías, 1997) have called the right to privacy a "very personal right". In other words, the value of privacy is so closely linked to the person that it is considered not only inherent but also lifelong, imprescriptible and inalienable.

From this perspective, the right to privacy in the Colombian legal system is a protected, protected and approved legal right, which is exclusively owned by the individual.

3.2 Personal data.

The European Union defines personal data as "any information relating to a living, identified or identifiable natural person". It makes it possible to individualise a person or differentiate him or her from others, a concept that relates directly to personal privacy.

On the other hand, in the Colombian context, Law 1266 of 2008, in its Article 3, paragraph e, defines personal data as "any piece of information linked to one or several determined or determinable persons that can be associated with a natural or legal person". It is also inferred, as a complement, that the Statutory Law 1581 of 2012, in its article c, defines personal data as "any information linked or that can be associated with one or several determined or determinable natural persons".

This concept, to talk about privacy, is developed by the sentence T - 787 of 2004 in which the Constitutional Court argues:

The concept of 'privacy' or 'private' corresponds to matters that in principle concern exclusively the specific interests of the human person, without affecting or referring to other members of the community, which is why society, through the legal system, does not demand or impose on people the duty to inform or communicate on these matters.

The manner in which the intimate or private data of individuals may be obtained may only be subject to the consent given by the owner of the information, an order issued by the competent judicial authority in the normal exercise of its functions, or to safeguard the life or integrity of the person, when he or she is in physical or legal incapacity, or such information has a historical, statistical or scientific purpose. (Superintendencia de Industria y Comercio, n.d., p. 6)

Personal data has characteristics that have been developed by the jurisprudence of the Constitutional Court; it refers to exclusive aspects of the natural person, it allows the identification of the person, its ownership resides exclusively with the owner of the data, and its processing is subject to special rules for its collection, administration and disclosure. (Constitutional Court, Full Chamber, Sentence C-748, 2011).

In Colombia, Law 1266 of 2008 classifies personal data as private or intimate data, semi-private data and public data. Private or intimate data are those that are intrinsically linked to the person; semi-private data, on the other hand, are those that are not of an intimate, reserved or public nature and whose knowledge or disclosure may be of interest not only to their owner but also to a certain sector; and public data are those whose processing or handling and disclosure may be carried out without the express consent of the owner, group of persons or society.

Law 1581 of 2012 established personal data as sensitive data, along with the data of children and adolescents. Sensitive data are those that are linked to the most intimate part of the person, such as religion, sexual orientation, political thought, among others; and data related to children and adolescents, which are strictly prohibited from processing, with the exception of those of a public character.

3.3 Constitutional protection of the right to privacy.

The Colombian legal system established a series of guiding principles related to: the principles of legality, purpose, time limitation, relevance and proportionality, freedom, truthfulness or quality, transparency, restricted access and circulation, confidentiality and security. Now, among the roles established in the law that protects personal data are the data controller and the data processor. It is important to mention that there are a series of rights for data subjects to access, rectify, cancel, and oppose the processing of their data with respect to the data controllers.

The inspection, surveillance and protection of personal data is a function of the Superintendence of Industry and Commerce, in addition to protecting the rights of consumers and administering the National Database Registry. However, this organisation sanctions and, to a lesser extent, seeks to prevent damage or harm to the private life of individuals, which is why it seeks to create strategies to keep the community in general informed of the processes carried out with the information.

The regulation of personal data has sought to protect the rights of individuals with respect to their private information. The constitutional action Habeas Data, also called the right to computer freedom or computer self-determination, defines that everyone has the right to personal and family privacy, and to his or her good name, and the State must respect them and ensure that they are respected (Const, 1991. Ar. 15).

The Habeas Data by Ruling T-414 of 1992, ceased to be a simple guarantee with constitutional jurisdiction, to become a right recognised and developed by jurisprudence, due to its intrinsic relationship with the concept of human dignity, that is, it grants the right to the holder of personal data, to access, inclusion, exclusion and certification of the data. It is important to mention that whoever exercises the so-called computing power, is the one who enjoys the great attributions of administering the information.

4. Results and discussion

4.1 Big Data vs Privacy

Guy Debord (1990), one of the philosophers who has most thoroughly studied what is known as "the society of the spectacle", states that there is currently a kind of global screen where the model of society is summarized in the fact that human beings have turned their own lives into a spectacle, because only what they project of themselves counts, in other words, a big screen. For the author, exposing the life of an individual on a platform leaves a shadow or digital footprint that is expressed in data that can be exploited and put the rights of the individual at risk.

This is how the analysis of what Big Data means today comes into play. Big Data, according to Gartner cited by Guerrero and Rodriguez (2013), is big data or information systems of large

volume, high speed and great variety, where countless resources are involved, which require new forms of information analysis, with the aim of progress, understanding of information, decision making and process automation (Guerrero and Rodriguez, 2013, p. 18).

Artificial intelligence is integrated with Big Data in everything related to data collection and prediction of results, as macro data originate procedures that emanate from Big Data. Not just any machine integrates artificial intelligence, they must have genetic elements typical of the human system, to such an extent that they can have the ability to learn and solve problems in short periods of time.

Moralising the use of Big Data would be a mistake. On many occasions the use of data helps us in the development of projects, diagnoses and policies. In the words of Tabares, L. F., & Hernández, J. F. (2014) "With Big Data Analytics it is possible to obtain results in real time that allow us to establish public policies that respond to diverse needs in an effective and efficient manner". Proof of this, there are projects such as the Americas Barometer that allows to make a diagnosis of the political thinking of citizens in Latin America and reveal their greatest concerns. These guidelines can help in the elaboration of more effective public policies.

In that sense, the legal or social conflict with Big Data is not about whether it is good or bad and closing the debate (when it is most open). It is about when it helps us to live better, facilitates our analysis of reality, and when it becomes an intrusive element that limits our perception of things.

4.2 Tensions between the right to privacy and democracy.

Big Data has transformed the environment in all areas of life, one of the great challenges has to do with democracy, that is, its paradox, as the giants of technology analyse the blindness of the individual and manipulate their essence, to the extent of making them think that they have freedom, without knowing that they have only implanted in them an idea in such a way that they believe it to be true.

One of the most influential thinkers of recent times has been Yuval Noah Harari, author of books such as "from animals to gods" and "homo deus". In his latest book, "21 lessons for the 21st century", he makes a very interesting analysis of freedoms. Regarding the risks of our time, he mentions the following:

Authority may soon shift again: from humans to algorithms. Just as divine authority was legitimised by religious mythologies and human authority was justified by the liberal narrative, so the coming technological revolution could establish the authority of big data algorithms, while undermining the very idea of individual liberty. (P.68)

Likewise, democratic freedoms, as axes of public decision making, and recognising the manipulative capacities that are exercised with algorithms, are widely threatened by the exercise of Big Data. It is only logical that modern gold is to recognise and locate people and their perceptions in real time, combine their interests and sell them the right message, even if they do not perceive it.

Harari (2018) adds to this idea by saying:

When the biotechnology revolution merges with the info-technology revolution, it will produce big data algorithms that will monitor and understand my feelings far better than I do, and then authority will probably shift from humans to computers. It is possible that my illusion of free will will disintegrate as I encounter daily institutions, companies and government agencies that understand and manipulate what has hitherto been my inaccessible inner self (P.70)

It would seem that we are talking about a dystopian future; however, presidential campaigns today hire data analysts to send messages that best connect with voters' emotions according to their region, interests and political ideology. Results such as the Brexit in England, explained by Harari himself in the book, or the Plebiscite for Peace in Colombia, strategies made public by the campaign chief Juan Carlos Vélez himself, were largely biased by the manipulation of public opinion. (El Espectador, 2016) The thermometer of this type of exercise: data.

4.3 Tensions between privacy rights and public health: CoronApp

As a result of the global Covid-19 pandemic in 2020, several countries opted for the creation of mobile applications to track new cases. These applications collected data on individuals, the likely threats of the spread of the virus and gave recommendations to those infected.

While for politicians and many technicians they became real tools for analysing the behaviour of the virus, there was concern that fundamental rights related to privacy and public health would be violated by exposing this information and the state would have absolute control over it.

CoronApp was the application developed in Colombia for this purpose. Many doubts remain about the effectiveness of the tool. A study developed by Fundación Karisma (2020) entitled "Coronapp: lots of data, few benefits" mentions the following:

The government has aggressively pushed CoronApp. Excluding the cost of development and marketing - all of which is unknown - it invested 40 billion pesos to give millions of users' free mobile minutes and data. In addition, without the consent of its users, Samsung installed CoronApp by default on many of its phones where the operating system was upgraded.

The same study pointed out that data on the functioning of the app is not being collected by the National Institute of Health. This points to an underlying difficulty and that is the inability to advocate for the public health data collected in the mobile app and the complaints of its users.

In a study by the Universidad de los Andes Ríos Villafañe (2020) citing Barker (2020) mentions:

[The way in which the issue of public health is used to restrict rights is worrying. According to this author, the discourse of protecting the Covid19 population is easily manipulated, leaving the importance of people's private information in the background, putting public health above privacy.

The absence of citizen guarantees for data protection has allowed states such as Colombia's to move forward with this type of project without taking preventive measures or measuring the consequences.

According to the political and social characteristics of the countries in Latin America, unlike in Europe, data protection and privacy rights are not dominant, and the protection of these rights are not on the agenda in these countries" (Barker et al., 2020, p. 8)

5. Conclusions

Due to the approach taken in this study, it is possible to mention that:

- The Colombian state (like most Latin American countries) is not sufficiently prepared to respond to the technical and legal challenges of Big Data implementation.
- The legal system's safeguards are insufficient in the face of the speed of development of technological tools that allow the implementation of big data and algorithms that describe citizens.
- State inaction puts the individual at risk in his essence, his individual capacity, his thinking, and his fundamental freedoms.
- Democracy as a political structure is endangered by the ability to measure and manipulate citizens' decisions.
- The principles of legality, purpose, time limitation, relevance and proportionality, freedom, truthfulness or quality, transparency, restricted access and circulation, confidentiality and security are widely violated by the use of this type of technology, often endorsed by the State itself.
- The right to privacy, as a right, is strongly threatened by supranational globalisation structures such as social networks, where even the operations of a state are insufficient.

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