THE RIGHT TO BE FORGOTTEN FROM THE MEXICAN EXPERIENCE

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Talking about new rights configured from the digital economy is increasingly common, attending to technological development. One such example is the so-called right to be forgotten. The concept of the right to be forgotten, originates from the already well-known right to personal data protection - recognized in several Ibero-American laws - and finds its relevance for analysis in the recent position of some courts and the need to incorporate it into the national legislation. However, some particularities should be emphasized with the right to be forgotten, especially in the digital age, since its guarantee could propitiate some violations of other rights, such as expression freedom, the right to truth and access to information.

In light of the above, it is pertinent to analyse in the following lines the origin of the right to be forgotten, the reflections that have taken place in Mexico regarding the subject, the position of the institution in charge of guaranteeing the data protection and the legislation about this right, with the aim of giving the reader an overview of this right in the Mexican legal system.

I-PREVIOUS CONSIDERATIONS

When we speak of the right to be forgotten, we must remember that this right has its origin in Judgment T-414 of June 16, 1992, issued by the Constitutional Court of the Republic of Colombia, as well as its incorporation into national legislation, such as the case of Article 10 of Law 787 of 2012 of the Republic of Nicaragua and Article 11 of Decree 37554 of 2012 of the Republic of Costa Rica.

On the other hand, although the right to be forgotten is not recognized, the right to de-indexation has its origin in two main sources: the *Google Spain* case of 2014, settled by the Court of Justice of the European Union (in which the search engine was required to eliminate certain results of information) and recently in the General Data Protection Regulation of the European Union.

Since then, more Latin American countries have raised the need to include the right to oblivion in their national legal systems, which is explained, among other things, by the need to achieve optimal levels of information protection, requirements to perform transfer of data, or establish commercial acts.

The right to be forgotten is directly related to the conception of the personal data protection right that we have from the countries that integrate the Roman-Germanic legal family, so the dimension of this right, will be different with respect to the countries that integrate the legal family of the common law, since for them the data protection is not a human right or fundamental right, it is a consumer right, regulated sectorially. This factor must be considered because the majority of searchers have their origin in countries of this last legal tradition.

On the other hand, the first antecedent of the right to be forgotten in Mexico, is in the position of the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI), regarding a request for protection of rights formulated by a Mexican citizen, which we will analyse in the next section.

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II-FIRST APPROACH TO THE RIGHT TO BE FORGOTTEN IN MEXICO

The INAI guarantees the right of data protection in Mexico and announced in 2015, a punishment against Google Mexico, since this search engine did not fulfil a request for the exercise of the right of cancellation of data from a Mexican citizen. The same institution ordered Google to remove information links relating to this person, referring in its argument to the so-called right to be forgotten[1].

This request was instigated by a Mexican entrepreneur, who first asked Google to remove several search results related to his name, saying that the information affected him in the most intimate sphere and also his current financial relationships, since one of those links was about the newspaper report 'Fraud in white star company, affects to Go México institution', published in 2007 by Fortuna magazine. In this note, the entrepreneur is mentioned as one of those implicated in acts of corruption.

Mexican legislation on data protection in the private sector, says that in the case that the request for cancellation rights is not fulfilled by the private actor (in this case Google), the data owner may request, through the so-called request of data protection, the guarantee of his right, in order to start an investigation and just in case, start a procedure against the private actor.

One of the arguments that the search provider (Google) gave to the authority, in relation to the non-cancellation of the data, was not having the faculty to determine the type of information that could be indexed in the search engine, since Google was not responsible for the information in the original source.

This was a unique opportunity to influence the construction of the right to be forgotten in the country since, on the one hand, the searcher was assigned an administrator role in relation to the accessibility of information through the Internet -determining the relevance of the information and having the power to affect Internet neutrality and, on the other hand, civil society was concerned about the effect on the right of freedom of expression.

In this regard, the Mexico office of Article 19, stated that the act of deleting the links to the note (despite not deleting the information in its original source), established a censorship.

When presented with the unique opportunity to establish the first precedent of the right to be forgotten in Mexico, an organization called the Digital Rights Defense, requested Fortuna magazine (the electronic media that was the original source of information) to promote a legal action against the decision of the data protection institution, since despite all the analyses described, the institution never informed the magazine about the effect that the decision (de-indexation of the journalistic note from the Google search engine) was going to have, regarding the measure of censorship imposed.

In the first instance, an administrative court dismissed the process.The organization of civil society was discontent after the refusals and the case was moved to another court, which a year and a half later left without effecting the historic resolution of the National Institute that protects the personal data.

The legal strategy consisted in promoting an amparo petition for violation of the rights of freedom of expression and guarantee of hearing. Google, for its part, challenged the resolution issued by the authority, which guarantees the protection of personal data in Mexico (INAI), and filed an appeal in the Fiscal and Administrative Court of Justice.

The Federal Constitutional Court rejected the constitutional complaint and Fortuna Magazine requested a review of the decision, and at second instance (Collegiate Court), the appeal was granted because of due process considerations (right of hearing). With this, the original resolution of the INAI was left without any effect and INAI was ordered to start a new procedure, guaranteeing rights for those involved.

III-A NEW DISCUSSION

In 2016, the public discussion about the right to be forgotten emerged again, to analyse, in the Senate of the Republic, the need to incorporate this right expressly in legislation on personal data protection. Faced with this discussion, a call was made to experts from academia, industry, and the public sector, in order to discuss the dimensions of this right[2]. One of

1 http://inicio.ifai.org.mx/pdf/resoluciones/2014/PPD%2094.pdf

2 http://comunicacion.senado.gob.mx/index.php/informacion/boletines/30363-analizan-senado-e-inai-alcances-e-implicaciones-del-derecho-al-olvido.html

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the principal approaches identified was the need to inform individuals that the guarantee of the right to be forgotten could be derived from the other human rights such as freedom of expression, the right to truth and access to information, and that tension of rights is resolved through the necessary deliberation of the guarantee of the right to be forgotten.

In this sense, one of the most common examples is related to the enforceability of the right to be forgotten, versus the rights to freedom of expression, or access to information on the Internet. Here a variety of factors will be considered such as, the degree of public exposure of the applicant, if it is a question of incorrect information, if it involves a child or adolescent, or if the request violates the dissemination of information of public interest.

In addition to the above, it is emphasized that in Mexico reference has been made to the concept of the right to be forgotten refering to the elimination of information in cyberspace, but, in the author's opinion, we are instead facing a "right of non-indexation." Since, so far, search providers have been required to de-index information, but the original sources have not been forced to suppress information. An exception to this, refers to a request for the right to be forgotten in Colombia, in which a citizen asked Google to eliminate search results that related to an investigation of human trafficking, in which she was later found not guilty. The Colombian justice, instead of ordering Google to de-index the information, ordered directly that the information medium clarified in another note that the investigation determined the the holder of the request's lack of responsibility for the crime mentioned. That is to say, it does not violate the right to the truth - a person was involved in a human trafficking investigation - but in an explanatory note, it should be stated that she was not found guilty by the competent authority[3].

IV-RIGHT TO BE FORGOTTEN FROM THE MEXICAN EXPERIENCE

Data protection in Mexico has a hybrid model that dictates provisions through two particular laws; the first applicable to the public sector and the second to the private sector. In addition, there are some normative provisions at sectoral level, for example provisions for financial, health, and fiscal data.

Currently, the federal law that protects personal data in the private sector recognizes the so-called ARCO rights (right of access, rectification, cancellation and opposition of personal data). For the purposes of this analysis, the last two rights pursue the same objectives as the right to be forgotten in spite of not being mentioned under this name; data legislation for the private sector recognizes the right to cancel information or oppose the treatment of it.

On the other hand, according to the recent Law of Data Protection for the public sector, the right to cancel personal data must be guaranteed, provided that; the causes that motivate requesting the deletion, are indicated in personal data in registers or databases of the person responsible for the information and the right of opposition to the processing of personal data, provided that the holder of the information shows legitimate causes or the specific situation that motivates the request for cessation of treatment, and the damage or prejudice caused by the persistence of the treatment, or, if applicable, the specific purposes in respect of which it requires the exercise of the right of opposition.

In the legislation of the public sector, the following limits are established for the exercise of the right of cancellation or opposition:

- Not certifying ownership of the data, or due legal representation to request the cancellation or opposition of the information.
- When there is a legal impediment (Example: In the case of the refusal of requests for cancellation of data related to the obligation of an authority to treat information derived from one of its faculties conferred by law).
- When judicial or administrative proceedings are affected.
- When there is a resolution by a competent authority that restricts access to personal data or does not allow the cancellation or opposition of the same.
- When necessary to protect legally protected interests.
- When necessary to comply with legal obligations (Example: request the cancellation of data related to a credit granted by the Mexican State).
- When, based on their legal attributions, daily use, shelter and management are necessary and proportional to maintain the integrity, stability and permanence of the Mexican State.
- When personal data form part of the information of the financial entities regulation and supervision.

3 https://www.ambitojuridico.com/BancoConocimiento/Educacion-y-Cultura/noti-141809-04-derecho-al-olvido-y-lista-clinton

In the event of a refusal by any representative of the Mexican State regarding the cancellation or opposition of personal data, the owner of such data may go to the guarantor authority through an review appeal, so that specialized institution can determine if the refusal is in accordance with that provided by the standard, or if applicable, order the guarantee of these rights.

Another important aspect is that according to the data law of the public sector, the data in possession of the Mexican state must comply with the standard of quality. It is understood that this principle depletes when they have been provided directly by the data owner and until otherwise stated.

V-CONCLUSIONS

As a conclusion of this analysis, we say that the right to be forgotten cannot be guaranteed in a general way, since categories must be established, such as those related to personality rights, property rights, or information freedoms. In addition, in traditional law, there are legal rights that could help against the disclosure of excessive, erroneous or incorrect information. Examples of this are the right of reply, the right to own images and civil compensation for moral damages.

It emphasizes the need to refrain from dictating general rules in guaranteeing the right to be forgotten and to deliberate human rights that are in dispute.

In addition, the law should differentiate the figure of the intermediary with that of the person responsible for the data disclosed by users. In the same sense, legislation should guarantee control over the procedure against excessive information elimination, in order to have a balance between the traditional protection granted to rights such as freedom of expression and the right to the truth in relation to the arguments related to the privacy and protection of personal data.

In the same sense, under the premise of global thinking and local action, Internet neutrality should be favored.

Finally, note that the information that is made available through cyberspace can be replicated in many other sites, so having control of it is not easy.