Neither rectification, nor forgetting

A thesis on the conflict of rights between the right to be forgotten and the right to information in Colombia

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Abstract

This article reviews the current situation of the conflict of rights between the right to information and the right to be forgotten in Colombia. On the basis of a review of the concepts and arguments most determining the different cases in which these rights came into conflict and which led to the issuance of final court judgements on this question, a meta-legal perspective is proposed to resolve this conflict. From a journalistic perspective, it is proposed as a possible solution to the confrontation of rights, the adoption by the media and journalists of an editorial attitude that contemplates the informative completeness in the covering of judicial cases, as a responsible journalistic conduct against information that can prevent future contradictions between the application of the right to be forgotten and the right to information.

Key words: Right to be forgotten; Right to information; Journalism; informative completeness; Colombian legislation.

1. Introduction

During the writing of this article, the two largest companies in the digital world Facebook and Google, appeared before the Constitutional Court of Colombia to explain their role and responsibility in the handling of information that affects hundreds of users who access and use its services of communication and indexing of information, when, because of what is published there, crimes such as insult or slander that infringe rights such as the honor or good name of persons or that violate rights such as intimacy and good name (Tecnosfera, 2019).

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It is not the first time that these companies go to court to explain their policies regarding the handling of this type of information. In their statements before European and North American courts, their arguments aimed at explaining that they are not responsible for what their users publish, while their function is not to be producers of information, but are indexers or facilitators of computer services that have platforms to be the same users who publish content, as is the case of YouTube channels, the Google blog service or Facebook; and that, to create and apply filters in the informative production of its users, they would be precisely attacking freedom of expression and the right to information (Anguita, 2016).

However, it is known that these companies apply some control policies when it comes to information that may be harmful to minors or that may affect the susceptibility of its users, such the case of images that may be considered pornographic, violent or immoral (Villareal, 2008). In that same sense, the different legal regulations have established limits to the publications in these platforms. They have to do with the handling of the personal information in databases and with the preservation of the right to privacy and privacy of the people (Arévalo, Navarro, García and Casas, 2011).

One of the issues that is under discussion regarding the role played by this type of information and communication platforms, is the one that involves the right to be forgotten. In this sense, this article aims to review from a journalistic perspective, the possible outcomes that may occur to the conflict of rights that occurs between the right to be forgotten and the right to information, given that to a large extent, the analysis of these issues has been given from a legal approach, rather than from a journalistic approach, it is relevant to make visible the considerations that, from the informative office, can be made to this discussion so relevant for democratic societies that face the digital world as a palpable reality.

2. The right to be forgotten

The right to be forgotten is a right associated with the protection of honor and good name, as well as the right to intimacy and privacy (Álvarez, 2015). It is related to data protection, that is, it is associated with legal initiatives to protect personal information that resides in databases. In that sense, its purpose is to eliminate or erase from said bases, all the past information of an individual that could attempt against his honor and good name or any situation that affects his privacy (García-Armero, 2018).

In some legislations it is established as habeas data, and it is a right that is associated to the individual dimension of the citizen that makes sense in the current digital information environment (Calle, 2009; Corral, 2017). It has its origin and its foundation in the growing computerization of society, which translates into the possibility that today individuals have to be the source of a large amount of information related to their personal life, since never before in the history of humanity, people's lives had been constantly recorded and archived in databases in which a multitude of information is stored and accounts for a variety of actions, even without knowing it (Rallo, 2010).

Like all rights, it has limits and conflicts with other rights. One of them, in the case of the right to be forgotten is the conflict with the right to information. The latter is a collective right that seeks to protect and promote information as a public good that is necessary for the proper functioning of society, since only informed citizens can make good decisions (Carvajal, Spain, 2010). Conflict is criminalized when journalistic information of legal actions is published on the Internet and after a while, said information prescribes or loses validity, but is still available and is not coherent with reality, affecting the good name, honor and reputation of those involved in such judicial proceedings. Since either they have already served their sentence or have been separated from such proceedings, without this being published in the press. Then, when they seek for such information it has been suppressed. That evidences the right to be forgotten (De Terwangne, 2012).

3. The right to be forgotten in Colombia

In Colombia, there is no rule of its own that establishes and guarantees the right to be forgotten The legal framework for the protection of public and private information is given first by article 15 of the Constitution, which establishes the right to personal and family privacy and to a good name, and to know, update and rectify all information collected on persons in public and private databases and archives. This article is the basis of Law 1581 of 2012 on the protection of personal data or *Habeas Data* Law (Congress of the Republic, 2012). Also, the article 20 of the Constitution which states that: "Everyone is guaranteed the freedom to express and disseminate his or her thoughts and opinions, to inform and receive truthful and impartial information, and to establish mass media. These are free and have social responsibility". The Constitution protects the good name, which refers to the consideration of a person in the public sphere, while honor relates to the private sphere; these constitute the limit of the exercise of the right to information and freedom of expression (Forero, 2018).

Notably, in the habeas data law, *article number two*, *paragraph d*, excludes databases and journalistic information files from the obligations set out in this law (Forero, 2018, p. 18) in other words, that this right to the protection of personal data finds a limit in journalistic databases, although on several occasions it has been sought to delete this type of information as if it were the object of habeas data (Forero, 2018, p. 18).

This law deals with the right of both legal and natural persons, whose databases always possess information related to persons, as well as acting as representatives of legal persons. The distinction made by law between the controller and the data controller is also unique. The person in charge is the person responsible, who manages the databases, and the person responsible decides on the database. In both cases it may be a natural or legal person, public or private, acting on his own or in association with others (Forero, 2018, p. 19).

Although Colombian legislation does not have a law on the right to be forgotten, it does have a rule establishing the right to delete data held by the holders of personal data (Article

8 of Decree 1377 of 2013 regulating Law 1581 of 2012 or Habeas Data Law (Forero, 2018, p. 17). This article delegates to the Superintendence of Industry and Commerce (2016) the determination of guilt of the violation of this Law and the Constitution by the responsible person and the data controller, thus, it limits the development of the right of suppression to commercial organizations which, by law, can only be monitored by the Super intendency. In other words, it refers only to data produced and recorded around commercial activities but could not be involved in other activities, such as civil, judicial or other.

Another important aspect to consider is that the *Habeas Data* Law clearly establishes that the right to suppress information in databases is monitored and controlled by data controllers in Colombian territory, and since the servers where the information that is available in search engines like *Google* is hosted and managed are located outside Colombian territory (Google), the said law cannot be applied to cases of request for deletion of information in which the search engine is involved.

However, the same Superintendence of Industry and Commerce, has established that by the use of cookies by search engines like *Google*, a collection of data is being done in the same area, this in addition to the fact that *Google'*s business rely in the commercial use of advertising that is carried out through a representation of the corporate giant based in Colombia. Then, the final disposition is to consider that the controller and the data controller do have headquarters in the Colombian territory (Forero, 2018). This can be understood as an interpretation of the law, since, strictly speaking, it only mentions those responsible for and in charge of processing data resident in Colombia. In this regard, Colombian nationals are unprotected in relation to data processors, most of whom operate from outside the country. In this regard, Colombian nationals are unprotected against data processors, most of whom operate from outside the country. This can be seen in the position of jurisprudence on the different cases related to the conflict between the right to be forgotten and the right to information, in which Internet search engines such as Google have been exonerated.

4. The conflict between the right to be forgotten and the right to information in Colombia

The main problem facing the implementation of the right to be forgotten in Colombia is its conflict with the right to information and freedom of expression enshrined in article 20 of the Constitution. This article establishes that the media are free and socially responsible, which means that they have responsibilities when reporting, and that their first limit thereon, also stated in the Constitution, is the respect for the honor and good name of citizens. Hence, they have as a means of protection against the actions of the media when they can harm them, the right to rectification for cases of information and replication, when it comes to the dissemination of opinions (Suárez-Castillo, 2009).

In Colombian jurisprudence, when an attempt is made to apply the right to be forgotten or a similar right enshrined in the *Habeas Data* Law, which seeks to suppress data produced

by media and journalists' actions, the conflict that emerges with the right to information has always been resolved under the protection of the latter. But as will be tried to demonstrate, the differences between rectification and clarification still need to be clarified. The latter being a new prerogative that the law requires of the journalistic exercise as a practical action that while protecting the right to information, acts as a way to safeguard the honor and the good name, in the same way as the right to be forgotten would.

In the Colombian jurisprudence related to the right to be forgotten, the following sentences stand out as the most significant, for advancing premises on the nature of this right in the Colombian sphere. The first of these is the *T-277 judgment* of 2015, in which the plaintiff through action of protection *(Acción de tutela)*, requests that the right to good name, privacy, due process and rights of petition and work be reimbursed. This is because the newspaper *El Tiempo* published in its digital edition, a story in which the plaintiff was accused in a human trafficking process. The plaintiff based her claim on the fact that she had never been found guilty, and, that the new information had not been reported by the media. The woman requested *El Tiempo* to remove from the Internet, and specifically, Google, all the information that related her to the alleged crime. In the first instance, the sixth criminal court of the circuit of Cali ruled in favor of the plaintiff, and ordered the media to publish a rectification stating that the plaintiff had not been defeated in the trial and found guilty of said crime.

The action of the court is based on the fact that the judge cannot ask the media to remove the information because it can be considered censorship, so it requested the rectification of the information. But the plaintiff demanded the judging of the court, arguing that the sentence was not requested in the guardianship. Due to this, in a second instance ruling, the Superior Court of Cali, accepted the action of protection and ordered the media to erase all negative information from the plaintiff. In a ruling of July 23, 2014, the First Review Chamber of the Constitutional Court, ordered *Google Colombia Limitada,* to be linked to the process, so that it could rule on the facts and claims of the constitutional action (Forero, 2018). Subsequently, the court delivered judgment T-277 of 2015.

In that judgment then, the media is ordered to update the information about the plaintiff, being expressed the message that the woman is no longer linked to the crime, and, moreover, ordered that by the use of the tool *robots.txt, metatags* or other similar, the freedom of access to the initial news in which the plaintiff was involved, shall be limited. As far as Google is concerned, it was exonerated from all liability, as it was the media that was responsible for keeping information up to date and not the provider of digital services and media.

It should be noted that, in that judgment, the three courts acted under the prerogative of defending the right to public information, whereas they did not request the media to delete the information, but to rectify it first, and then update it. In the same spirit, they do not link the search engine, because if asked to delete such information, it would be motivating *Google* to violate the right to information and freedom of expression, because it forces to act in the same way with other media that use their technological resources to publish their information, a question that ultimately turns out to be unconstitutional.

In the judgment T-089 of 2017, it is decided in favor more clearly in the same spirit. In this case, the plaintiff files an action for protection, hoping that the Constitutional Court protects her rights to the good name, honor and work, before a journalistic interview that was carried out by the journalistic team of a television program, within the framework of a report about the criminal record of a President of a public educational institution of Ibagué and his inconvenience to fill that position due to those same antecedents. Although the courts ruled on the protection of the right to inform and freedom of expression, the ruling did not spared statements to clarify to the plaintiff that his request to delete the recorded material could not be protected under the right to be forgotten, because such prerogative consigned in the law of *Habeas Data*, only applies to the case of credit and financial records that are stored in databases, and that because it is criminal information, this would have served the penalty, criminal *Habeas Data* cannot be deleted because this also constitutes a clear violation of the rights of the victims of said crimes committed and judged. However, by virtue of the right to the good name of the sentenced person, once he has paid his sentence, what the law demands is the restricted circulation of the sentence, that is, the control of access to said information that cannot be erased due to its nature of public advocacy information.

Similarly, the Court's recommendation to the digital media to update the information, finds in judgment T-277/15 an important precedent, in this regard the Court stated:

> The constant accessibility of the news makes the duty of updating by its author particularly sensitive, being the subject of a news publication whose availability to third parties has declined over time, does not entail the same consequences from a fundamental rights perspective as being subject to the public scrutiny because such information may be known to all at any time, although it is not complete because it reports part of the facts but not their outcome (Constitutional Court, T-277/15).

On this basis, in that judgment the Court decides to request the media to rectify information that violates the good name of a legal person, because the situation in which the plaintiff had been charged, had not been clarified by the media; this is more sensitive when the information is published on the Internet, or move from media broadcasting to digital circulation from the internet, the Court declared:

> The requirement to request the rectification of news that are hosted on the internet is counted from the moment they are no longer accessible on the network, so it is an information initially broadcast on television. (ii) The rights of individuals, whether natural or legal, are violated when a media outlet keeps information or news indefinitely available on its platforms hosted on the Internet, without updating the contents of events where the factual circumstances are clarified and specified after the time of issue or publication, thus the information was originally presented by a media in a single broadcast (Constitutional Court, T-277/15).

According to this, the Court maintains the argument of the need to update the information that is housed in the network, as part of the responsibility of the journalistic exercise that finds limits on the individual rights of people like the good name, in this case.

At this point, it could well be said that the right to rectification can replace the right to be forgotten, whereas, by appealing to this, information can be erased which at the present time would no longer be correct. But Colombian jurisprudence itself differentiates between this right, and the right to data protection, taking into account that journalistic databases are excluded from the application of this right.

The first difference is that while the rectification operates on information already published, as it aims to correct the proven excesses of journalistic information that violate the aforementioned fundamental rights, the right to be forgotten seeks to erase information that has not been published and that concerns the privacy and privacy of citizens (Zarate, 2013). This implies that the application of the right to be forgotten cannot be required when information affecting individuals is produced and published in the context of media journalism, because it would constitute an act of censorship, which is openly unconstitutional.

This makes a difference between information accumulated in databases and information that has a public interest, such as that generated by the media. To request the deletion of information to a medium, in all cases it violates the right to information.

5. Completeness of journalistic coverage as a means of redeeming the conflict of rights

The proposal put forward in this text, is that the way to protect the rights to good name, honor and information, may not transit through the one of rectification and oblivion when redeeming conflicts produced for the performance of the media and journalists in Colombia. This thesis is based on the premise that information, being protected as a right by Article 20 of the Constitution, is a public good, therefore, its producers -media or citizens- must make a responsible management of it, and that results in a better quality information (Gutiérrez, 2006). No rectification or forgetting, because, in the first place, there cannot be rectification of the media when the information produced by it was not inaccurate or false at the time. In that sense, the sentences are clear when claiming the update of the information, not its deletion or correction. So, to ask for rectification is to put the media in a position of censorship that violates the constitutional principle of the right to information, and because, in fact, there is nothing to correct, while what was reported actually happened and is verifiable. In addition, requesting a correction to the media is an action that casts doubt on the journalistic credibility that is the fundamental value of the profession (Martini, 2004; Burgueño, 2010; Gutiérrez, 2012).

Similarly, oblivion cannot be performed, because in the end, since this is public information that was at the time true, the solution of suppressing information in order to seek oblivion,

is not an attitude consistent with the information posted at the time and its public nature concerning for people involved in criminal issues or offences is, of course, of common interest and consequently, the matter of information of the media which must be vigilant before any action of persons or third parties who break the law or who are subject of application of the law (Miralles, 2002).

However, one can not deny the right of a citizen to his good name, and if the legal situation which was linked, in the end resolved, either acquitting of responsibilities or not involving them as a part of a possible dispute, as is a next court event to law enforcement, it becomes a matter of public interest, so it is information that should be publicized by the media.

But such publicity should not be given as a result of an action marked by a decision to rectify or delete the information, but of the requirement of completeness of information which is part of the same journalistic duty to inform, in so far as it seeks to give full and complete coverage to the judicial event opened by connection or syndication, and closed by the judgment. Therefore, the plaintiffs rather than request the application of the right to be forgotten, or the right to suppression as provided for in the law of habeas data, or of rectification as provided for in the Constitution, must request before the media the complete information of a judicial act that is deemed to have been completed, once a judgment is reached on it.

In this sense, the media is not obliged to suppress the factual information-; however not complete, since not having a judicial ruling - avoiding censorship, but being forced to produce more information that completes the same facts informed by the media without having suppressing previous publications referred to the same event, thus, the plaintiff is also satisfied because he sees published information that confirms his good name. This solution of an intermediate nature, further benefits the right to information, while guaranteeing the plaintiff, not only his good name, but his own right to inform, and the citizenship, its right to be informed, so the legal action is understood as an urging the media has to inform more about the event in search of its completeness and adjustment to what has actually happened, different from forcing it to be rectified or censored.

Similarly, the search engines and information managers such as Google or Facebook are also held responsible, but only in the case of the handling and disposition of information of public interest, such as that advertised in the media, it undermines the neutrality of the network (Gendler, 2015), by forcing them to delete content, as well as a serious infraction of the right to information.

This meta-legal exit to the conflict of rights is focused on the same principle that holds the right to information as an inalienable right. It is based on the principle that information is vital for the development of democratic societies - therefore, societies of rights - while only an informed citizenry can make decisions about public affairs (Bonilla, 2002) that result in the realization of the will of society itself as a democratic paradigm. This principle guides the journalistic activity since it is assigned to the profession and organizations or companies dedicated to the production of information, a responsibility associated with the common good, while the information they produce is public and therefore must be impartial, truthful

and objective (Restrepo, 2009). In this sense, the proposed exit is meta-legal insofar as it does not depend on the judgments studied before, but it can be inferred from them, while the spirit of the norm and the sentences contain this democratic configuration of the trade to inform.

This means that, in an indirect and non-binding way to the effect of the judgments, the jurisprudence in Colombia regarding the conflict of rights between the right to be forgotten and the right to information, has configured a scenario of deontological action regarding the way in which information is produced in judicial cases. This means that journalism is being indicated as an office, whose objective is to produce information of public interest, which should extend its informative activity beyond the report of the beginning of the judicial action and extend it to the follow-up of the cases.

Frequently it is said that journalism is a trade based on immediacy where daily and minute information production is the rule of acting and part of the information business model (Picard, 2012); on the contrary, the actions of the judicial system have another temporality that is not coordinated with the rapid pace implied by the production of daily news. But immediacy is not in principle a quality that is required of information so that it serves as an input for the creation of criteria in citizenship, since it is more a condition of the information business, than a democratic news value (Morales y Ruíz, 2014).

For the information to serve as a public good, it must be objective (González, 2017). For the information to be objective it is required that it possesses two qualities: factuality and impartiality. The factuality alludes to the facts that make up the news verifiable, and this, in turn, derives two concepts: accuracy and relevance. The veracity indicates that the facts can be "associated with the reliability and credibility of what happened" (González, 2017, p. 835), this means that what is reported is presumed to correspond with reality, this is what is the basis of the reading contract between journalism and its public within the framework of democratic societies. Therefore, truthfulness must be achieved through completeness, which is understood as the amount of information necessary for a fact to be understood in its total dimension (González, 2017, p. 836). Although already Lippmann (1922) had pointed out the impossibility of having all the necessary information to understand in depth the public matters that affect the collective, a journalistic behavior oriented to completeness must seek the follow-up to the facts that are considered relevant, beyond of its simple registration. In this sense and considering the case of the judicial facts, only a resolution decision ends the judicial event and, if it was informed about its opening, the most coherent with the principle of journalistic completeness is to inform about its resolution (Morales and Vallejo, 2012; Macía-Barber and Galván-Arias, 2012).

6. Conclusion

Given the constitutional framework and Colombian jurisprudence on the application of the right to be forgotten and the conflicts with the right to information, the perspective of the requirement of the duty of updating information that rests on the Internet about

people who have been involved in judicial processes convicted or disengaged, that the different judgments made to the media, is an intermediate and valid way to settle the conflict between rights.

This is possible because it does not oblige the media to rectify, which would lead to assigning to their journalistic activity a condition of falsehood in the information produced that does not correspond to reality, given that they only informed of the opening of judicial investigations, nor to erase information, which would lead to a censorship action. And in the same way, it protects the good name of the citizen who is affected by the permanence of said information, while completing the information, clarifying its real and current situation of the process.

The insistence on the updating of the information, should be seen as urging the media to the correct exercise of its journalistic function that requires the informative completeness, which is a characteristic of all information produced with quality and in a responsible manner, given that a judicial process is closed with a failure, which should also be subject of monitoring and journalistic coverage, if previously, it has been reported.

The possibility given by the search and indexing platforms of linking content regardless of the time in which they were produced, can be an advantage to apply the principle of informative completeness as a way to solve conflicts between the right to information and the right to be forgotten in judicial cases, since it allows the development of the event to be traced and to have the follow-up of the case from the moment it starts, until a resolutely failure occurs. This avoids having to appeal to censorship and rectification to settle the conflict, restricting the journalistic performance. On the contrary, to urge the producer of information to seek completeness encourages a more rigorous and judicious journalism exercise.

Although the solution aims to benefit both the private citizen and the producer of information that could be involved, the jurisprudential actions do not deepen in what terms this clarification should be given, since, from the journalistic point of view, it would be necessary to incorporate changes in the journalistic routines to be able to give completeness to judicial decisions that often take years to resolve, this implies, among other things, a communication between the judicial system and the media, which allows being aware of judicial definitions, at the same time could lead the media to refrain from reporting the opening of legal proceedings or the syndication of people to criminal litigation, only until the moment of the ruling. In any case, and in spite of these unresolved questions about the ways in which this updating should take place and what that implies in terms of the modifications of the journalistic routines, it is the way in which all the rights are protected, both individual and associate to the good name and honor, as the groups associated with the protection of the right to information.

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