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Treatment of the Right to Privacy in Cases of Conflict with the Right of Access to Information for the Publication of Judgments on the Internet

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Abstract

Objective: Today, one of society's problems is based on the influence of technology, particularly the Internet, on the daily activities of human beings, which, among other aspects, persistently faces the effectiveness of a State's normative system in the protection of human rights. To analyze the legal criteria that protects the right to privacy of every person in Colombia. **Methods**: We propose a review of the literature involving the reflections of the case, in order to establish a suggested position for the treatment of the right of the parties in the face of possible conflicts. **Findings**: Incorporate training processes for people who turn to the courts as part of some process that contemplates their fundamental rights. **Application**: It is almost impossible to differentiate, regulate and limit the information circulating on the network, since there are no parameters or guidelines that create effective filters that on a large scale purify the Internet or ICTs from negative information, so things being the case, the bodies responsible have a great challenge in providing control mechanisms for this type of event.

Keywords: Colombia, Conflict, Internet, Normative Framework, Right to Privacy

1. Introduction

The purpose of this research is to establish the legal criteria that support the prevalence of the right to privacy in cases of conflict with the right of access to public information through the publication of judgments on the Internet. This study is transcendental for society in general in relation to the conflicts that have occurred nationally and internationally in this regard, and in the specific case of Colombia there is no regulation that expressly regulates what is understood as the right to digital oblivion, although in the Law[1], indicates that it is possible to suppress personal information. Finally, it is necessary to establish a unified criterion so that between legislation and jurisprudence the regulatory guidelines for the use of technologies, specifically the Internet, are specified. This

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is an initiative to reduce the harmful effect of negative information on the Internet, which ends up violating fundamental rights and causes great harm to third parties, provided that it demonstrates the relevance of their right to the common interest[2].

2. The Right to Privacy

It is indispensable for this research to trace us back to the origin of intimacy as a right, and for this purpose the American Jurists[3] are used for excellence, who approach the study of the right of man to be left alone, that is, the respect of others towards silence, to abandon oneself within and exclude oneself from the outside. In their analysis, this concern for what they called the invasion of technology, and exposed the case of the use of snapshots by newspapers to penetrate private life, being necessary to protect the intimate and spiritual sphere of man, in line with the American legal system (common law).Now, with respect to the conception of the right to intimacy, other author[4] indicates that the pages written about it are extensive, and states that intimacy, rather than a legal concept, is an extra-legal reality sustained by history, social and cultural reality and whose content varies over time. In addition, he points out that there is a plurality of methods to seek to configure the right to privacy, finally affirming that privacy is "an intimate and reserved spiritual zone of a person or a family", which undergoes modulations based on what he points out as its juridification, that is, its incorporation into the legal system.

It should also be recalled that some international human rights instruments enshrine the right to privacy, such as:

- *Universal Declaration of Human Rights*[5] *states that:* no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.

- *International Covenant on Civil and Political Rights*[6] *states that:* no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

- *American Convention on Human Rights*[7] *provides:* No one may be subjected to arbitrary or abusive interference with his or her private life, that of his or her family, home or correspondence, not to unlawful attacks on his or her honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.

Meanwhile, in Colombia, article 15 of the Constitution establishes, among other guarantees, the right of every person to personal and family privacy, while stipulating that correspondence and other forms of private communication are inviolable, so that they can only be intercepted or registered by judicial order, in the cases and with the formalities established by law. In this sense, article 15 of the Constitution establishes a series of guarantees for their protection: 1. the duty of the State and individuals to respect it; 2. the inviolability of correspondence and other forms of private communication, except registration or interception by judicial order, in cases and with the formalities of law; and 3. the reservation of accounting books and other private documents, except for the possibility of requiring them for tax or judicial purposes and for cases of inspection, surveillance and intervention by the State, under the terms established by law[8]. For its part, the Constitutional Court defines the right to privacy as the sphere or space of private life not susceptible to arbitrary interference by others, which, being considered an essential element of being, is specified in the right to be able to act freely in that sphere or nucleus, in the exercise of personal and family freedom, without any limitations other than the rights of others and the legal system[9].

In this sense, privacy corresponds to the restricted area inherent to any person or family, which can only be penetrated by strangers with the consent of its owner or by means of an order issued by a competent authority, in the exercise of its functions and in accordance with the

Constitution and the law. Therefore, the right to privacy refers to the strictly personal sphere of each individual or family, that is, to those phenomena, behaviors, data and situations that are normally removed from the interference or knowledge of strangers. This right implies the faculty to demand from others the respect of an exclusive environment that is incumbent solely on the individual, which is a safeguard of his private possessions, of his own tastes and of those strictly personal behaviors or attitudes that he is not willing to exhibit, and in which there is no legitimate place for external interference[10].

The fundamental right to privacy is projected in two DIMENSIONS: In this sense, the right to privacy has a negative status, or of defense against any undue invasion of the private sphere and at the same time a positive status, or of control over the information that affects the person or the family. This right assures the person and his/her family an impregnable physical space, in which it is possible to find the necessary recollection to freely project the personality, without the intrusions of life in society[11]. In any case, the right to privacy is characterized by its disposable character; which means that the holder of this prerogative can decide to make public information that is within that sphere or scope of protection. Thus, in those cases in which there is an express or tacit acceptance of disclosing information or circumstances that fall within this intimate sphere, the interference of a third party could be accepted[12].

2.1 Right to Information

The right of access to information is expressly recognized by the Constitution[13] in the following terms: All persons have the right to access public documents except in cases established by law. In this sense, the Constitutional Court, through Ruling[14], defined the notion of the right to privacy as follows: it is a right that expresses man's natural tendency towards knowledge. The human being is open to the conceptual apprehension of the environment in order to reflect and make judgments and reasoning about reality. It is by virtue of this tendency that all people are owed the information of truth, as a requirement of their personal being. However, the right to information is not absolute. One of its limits is that the information transmitted must be truthful, impartial and respectful of the rights of third parties, particularly to good name, honor and privacy. By virtue of this, the Constitutional Court, in Ruling[15], determined that the principle of veracity implies that factual statements can be reasonably verified; that is, the information does not have to be irrefutably true, but that there is a duty of reasonable diligence on the part of the issuer, in such a way that it is verified whether:

1. An effort was made to verify and contrast the sources consulted.

2. There was no express intention to present as certain false facts.

3. If it was done without the direct and malicious intention of harming the fundamental rights of third parties.

2.2 Right to Digital Forgetting

The right to digital oblivion is conceived as the reconfiguration of privacy against the risks involved in the agility of information circulating and disseminated on the network, the right to oblivion is currently imposed as the legal mechanism that would limit the eternal dissemination of personal information that has been published using electronic media. Within the person's power to control or determine the use of personal data visible on the Internet, it includes the power to request and obtain the removal of them when the right holder feels threatened or violated in their dignity, honor, image or privacy of their intimate data in light of information published on the Internet[16]. On this emerging right, other author[17] explains that digital oblivion can be defined as a legally protected interest of citizens that consists in effectively ensuring that their personal data are not located by search engines on the Web. Similarly, other author[18] conceives it as the right of natural persons to have information about them deleted after a certain period of time and which presents three facets: the right to forget the judicial past, the right to

forget established in data protection legislation (Personal Data Protection Regulation in the European Union) and a final, mostly controversial one referring to the attribution of an expiration date to personal data or which should be applicable in the specific context of social networks.

In Spain, the right to forget is understood as a guarantee that demands that people's data cease to be accessible on the web, at their request and when they so decide; as a right to withdraw from the system and eliminate the personal information that the network contains. More specifically, it is a right of citizens to cancel and oppose the processing of their personal data when they are no longer useful or necessary for the purpose for which they were collected or published[19].

As it can be observed, the doctrine on data protection has received a new influence that comes from the regulation originated in the European Union, where this right is recognized; however, the subject is not new, since it is present and widely recognized in different legislations. Since 1970, in the United States it has been accepted that there may be certain cases in which the elimination of old or expired information is feasible. In Spain, Article 29 recognizes the right to forget about the files of debtors in arrears. In Mexico, it is guaranteed by article 16 Constitutional, second paragraph, and the Federal Law of Protection of Data in Possession of Individuals, which is a human right to which we can have access through the rights of cancellation and opposition to the treatment of our personal data[20]. Now, regarding the different definitions, in Colombia, other author[21] considers that this right is not only the classic right of elimination of information, but it is also related to the right of opposition that allows people who in exceptional circumstances request the negative and true elimination of their past.

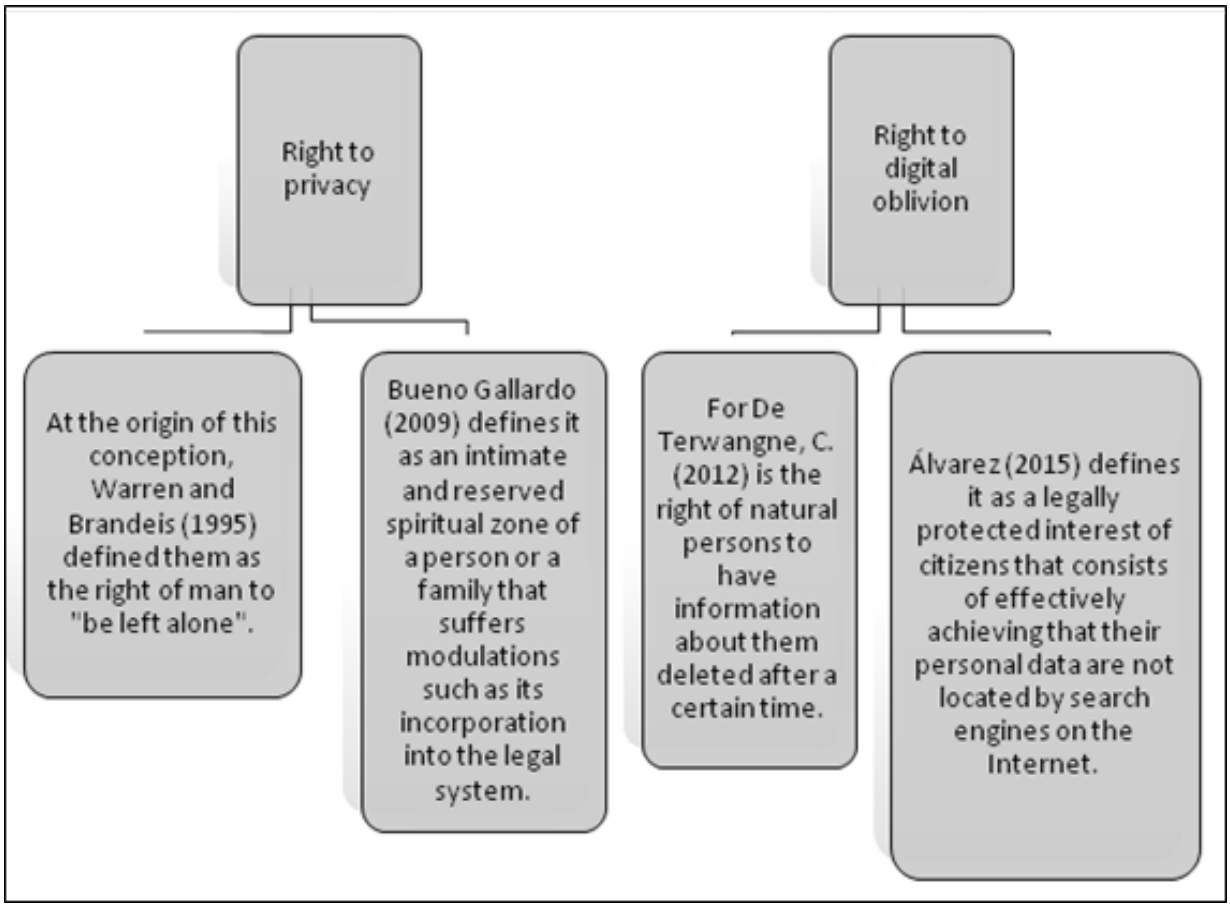

Figure 1. Concepts: Right to privacy and right to digital oblivion.

Despite the fact that in our country there is no regulation that expressly regulates what is understood as the right to digital oblivion, nevertheless, Law[1] or Data Protection Regime, configures a directive on the protection of personal data, incorporating the constitutional right enshrined since 1991 in article 15, which empowered the holders of information that rely on private or public databases to know, update and rectify such data. Thus, the Law complements the constitutional article and provides an adequate protection framework for this right in our country; the essential core of this right is concerned with guaranteeing that the holders of the information can know who has data about them, and that they act, indicating whether they want such data to remain stored, be modified or removed. In the constitutional control ruling of Law[1], the Constitutional Court indicated that, within the prerogatives or minimum contents that derive from the right to habeas data are: the right to exclude information from a database, either because it is being used improperly, or by the simple will of the owner, except for the exceptions provided for in the regulations[22]. It is concluded that the right to forget and, therefore, its eventual exercise in the digital environment is part of the essential core of what is known in Colombia as the right to habeas data, along with other prerogatives or rights such as the right to access, update, and rectify and correct information, which are the raison d'être of a legal framework for the protection of personal data[23] as shown in Figure 1.

3. Disclosure or Publicity of Judicial Orders

The disclosure or publicity of judicial orders is the result of the exercise of a competence attributed to the judiciary, that is, of a public function and not of the exercise of a right or freedom of information in the strict sense[24]. Such decisions are the result of the function of administering justice and are reflected in public documents, which is why anyone may consult them once they have been executed, except for express legal limitations[13,25,26]. Notwithstanding the foregoing, the private or sensitive personal data contained in them continue to maintain such quality, as long as they can be associated with a person and identify him or her, exposing his or her privacy and revealing, for example, that he or she was prosecuted, convicted or acquitted of a crime. Thus, when the file containing a judicial order is housed in a database and its consultation is facilitated, fundamental rights such as habeas data, privacy, honor or honor may be violated[27,28].

Therefore, if decisions contain personal data, the data subject must be able to exercise the right to habeas data; furthermore, their disclosure must comply with the legal and constitutional provisions concerning the protection of personal data and the respective purpose of the database. This explains why it is difficult to justify indiscriminate access to information that only contributes to generating suspicions about individuals, stigmatizing them or labeling them[29]. Likewise, since there is a close relationship between the personal data and the privacy of the data subject, it is understood that the data subject does not lose the power to influence the management of the data when the information is included in a bank or database, given that such activity does not confer on the data subject the possibility of appropriating the data[30].

3.1 Dissemination or Advertising of Court Orders on the Internet

Despite the fact that there is no right to avoid management, let alone to prohibit the circulation of criminal orders, the disclosure of which is legally mandated. However, the authorities can manage the files containing these decisions and disclose them in such a way that the means of dissemination, in this case the Internet, ensures that the circulation of sensitive personal data respects constitutional freedoms and guarantees and that their use is not uncontrolled[31]. In this regard, there are several constitutional decisions on the subject, when, in describing the way in which the right to habeas data can be exercised in its modality of relative suppression with respect to criminal judicial sentences, the Constitutional Court pointed out that it is possible to request the Rapporteurship of the Criminal Cassation Chamber to replace the name of the interested party with

a succession of letters or numbers that impede its identification. A restricted circulation rule was proposed" and it was determined that the indiscriminate advertising of court judgments on the Internet violated the principles of purpose, usefulness, necessity and restricted circulation, resulting in an uncontrolled exercise of the power of information.

There is a clear tension between the protection of the right to privacy from the dimension of digital oblivion and access to public information, which is why a great deal of research, has been unleashed in this area. Other author[32] analyzes the influence of the changes that arise in the legal field and administration of justice as a result of the use of technology with the so-called electronic justice, posing the inconveniences that can arise between judicial transparency and personal data by virtue of the diffusion of judicial sentences on the Internet. Others authors[33], for their part, carry out an investigation that allows them to know the development that, since the constitutional jurisprudence influenced by international authorities, has had the right of access to public information. On pain of being considered an arbitrary response, the official must support his or her decision and assess the conflicting interests and rights each time the information is requested.

The connotation of fundamental right given to access to public information is quite recent, which is why other author[34] refers to the joint declaration of the United Nations (UN), European Organization for Economic Cooperation (OECE) and the Organization of American States (OAS) in December 2004 gave way to such condition, being ratified by integrating it into article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, this author affirms that this is a right that is understood not only as one that allows a better development of the principle of transparency in public and jurisdictional administration and democratizes information, but also allows the right to know to be asserted and seeks greater accountability on the part of governments. As for the theory of weighting and its application to the tension between the right to privacy and access to public information, it seeks to establish the criteria to be taken into account to resolve the tensions that have arisen with the publication of sentences on the Internet, the right of access to public information and the right to privacy protected by Colombian jurisprudence in cases related to sexual violence, serious illnesses and the privacy of those prosecuted in criminal proceedings, among others.

Thus, other author[35] evaluates the principles in the juridical order and supposes that these are composed of rules, principles and guidelines, to which another author[36] points out that only the principles have a "constitutive nature of the juridical order, and therefore are integral norms of the juridical order that acquire relevance within the juridical theory from the entry of the constitutional state and giving it a self-evident meaning and based on the ethos; in contrast to the rules that under its appreciation are those that tell us how we should and should not behave unlike the rules that tell us how we should and should not behave as opposed to the difference of the juridical order, and therefore are integral norms of the juridical order that acquire relevance within the juridical theory from the entry of the constitutional state and giving it a self-evident meaning and based on the ethos; in contrast to the rules that under its appreciation are those that tell us how we should and should not behave as opposed to the difference of the juridical order. In[35] supposes that the principles have their logical distinction and are integrated by a dimension of weight or importance unlike the norms in which this does not exist.

Now then, the rule-rules norms are applied if the facts stipulated by the norm serve to support the decision, playing a role as well as support; however, if it does not contribute to the sentence they are not used. However, between norms and principles no legal consequences are established that follow automatically, reason why Alexy accepts the theory of principles proposed however, points out that the distinction between rules and principles should not be looked only from the theoretical-normative perspective nor from the criterion of generality that indicates that the principles are norms of a relatively high degree of generality, while the rules are

norms of a relatively low degree. Other author[37] supposes that the decisive point for the distinction between rules and principles is that principles are optimization mandates that are characterized because they can be complied with in different degrees and because the ordered measure of their compliance not only depends on the factual possibilities but also on the juridical possibilities. Rules, on the other hand, are rules that require full compliance and, to that extent, can be only complied with or not complied with.

In relation to the theory of weighting in the tension between the right to privacy and access to public information, a weighting must be made between rules and principles, according to other author[38], the theory of weighting is presented as a legal tool to apply the principles and protect fundamental rights. Other author[39] points out that weighting have become an essential methodological criterion for the application and interpretation of law, especially the interpretation and application of fundamental rights. From the above, the technological advances of the Internet and Technology, Information and Communications Technology (ICT) have fostered an understanding as a fundamental right of the fourth generation in light of the progressiveness that characterizes the historical recognition of these[40], arising from it, a reasonable concern to achieve effective protection of the right to privacy and related rights in the digital age, a matter on which States converge since the network allows the transmission of information to remote sites, territorially separated by thousands of kilometers, which implies greater difficulty in effective controls and legal measures from a single State.

Some authors assume as a problem the misuse of technology, to expose the need for action at supra-state level for the proper control of these situations, which complements[41], pointing out that current information systems and communication have become the greatest threat to privacy because they have sophisticated tools of widespread surveillance, massive databases and the ability to store and distribute information around the world in real time, that is, the freedom that promotes and characterizes the use of the Internet becomes in most cases unconscious in the exposure to offenses against their integrity and that of their family; Attacks on their assets that are facilitated and on the actions of criminal organizations. With respect to the above reflections, it is necessary to point out that the Inter-American Court of Justice has taken into account the current perspective on the Right of Access to Public Information and declared it a fundamental right, becoming the first court to do so.

In view of the foregoing, the Judicial Branch of the Public Power has been open to the promotion of transparency, citizen participation and collaboration, the opening of data (open justicie), and the beginning of a process of decisions that are still in force today. However, the information published by these State bodies is regulated in Colombia by Law[42] and other author[45] points out that the judiciary in the fulfillment of its functions and in accordance with the law must publish minimal information about it: judicial sentences, judicial statistics referring to the problems suffered by the judicial systems and finally budgetary and administrative information. With respect to the importance of protecting the right to privacy as opposed to the public importance of information, there is still an open discussion, given that the norms that protect the right to privacy do not have sufficient mechanisms for punishment, or for pursuing economic reparation of the damage, for the purposes of this case; this situation has generated that litigation based on these violations of the right to privacy is not brought forward.

The administration of justice with regard to settlements and solutions to problems of this type has been constant, particularly those referring to the Supreme Court of Justice, since on several occasions the Court has denied the interested party the possibility of having his personal and intimate information ventilated in the course of a judicial process removed from the sentence that is published on the Internet, thus ignoring the protection of the right to privacy under the perspective of the right to digital oblivion, which implies the elimination of the virtual world of all information that affects the person, even if it is true information.

However, some of the judgments have effectively demonstrated that such requests do not violate or undermine the true purpose of the rule, and it is necessary to specify the criteria used by the highest courts in the resolution of disputes.

4. Sentences of the High Court's where the Right to Privacy is Weighed in Cases of Conflict with the Right of Access to Information

In this regard, it is important to examine Constitutional Court Judgments[43], because of their special significance in the issue under discussion:

- *Sentence*[23]: the plaintiff presents the tutelage action against Casa Editorial El Tiempo S.A. and the search engine Google Colombia Ltda, to protect their fundamental rights and to order the removal from their records of the article published in the newspaper on June 10, 1997, in which mention is made of the plaintiff as a result of an investigation that began in 1993 by an aircraft that was found inside an airstrip related to the mafia and that was in his name; but in 2003 it was declared the cessation of proceedings against him by prescription of the criminal action, stating that the information that still appears on the website no longer corresponds to reality and requires it to be removed from the media file. The Court first determined that the defendant GOOGLE Colombia Ltda is not responsible for the information issued since the media that collected, analyzed, processed and disseminated the news was Editorial El Tiempo through its website and, In that sense, it goes on to study that the rights of the plaintiff were indeed violated in view of the violation of the principle of veracity, since the form in which the news was presented generates confusion and induces the receiver to draw conclusions that the judicial authority has not declared and orders accordingly, the rectification for lack of updating and thus protects the good name and honor of the plaintiff.

- Judgment[43]: The same is based on an appeal by a woman against Casa Editorial El Tiempo, because it considers that her rights are being violated by virtue of a news item published by the media in which it states that the plaintiff was captured and linked to a criminal proceeding for human trafficking and that the publication appears in the results of the Google search engine. It requests that any negative information regarding its capture and its relationship with the crime of human trafficking be erased from the Internet search engines, and especially from Google, since it was never defeated in court.

- The Court considered that the information provided by the newspaper El Tiempo is currently incomplete, since it does not include the current legal situation of the guardian who was not defeated in court; therefore, the presumption of innocence remains intact. In addition, the judicial organ affirms that the fact that the information is available in permanent form in Internet is harmful to their fundamental rights. It explains that the lack of updating of the news implies an inobservance to the duties of the media that makes news publications, since it gives rise to a lack of veracity with the passage of time.

- Based on the foregoing, it points out that despite the public nature of the judgments, they must be subject to the principles of data administration, such as those of purpose, necessity and restricted circulation, since otherwise the satisfaction of rights would be affected, especially the right to work and privacy, establishing guidelines to protect the rights exposed and in this sense has provided for the deletion of the real names of the parties or third parties.

- *Judgment*[44]: With respect to the need to establish regulations for the safeguarding of good name and privacy, the Constitutional Court, in its decision, ordered the establishment of a national regulation with a view to achieving the protection of the rights of Internet users, especially with regard to abusive, defamatory, dishonorable, slanderous and injurious publications that attempt against the honor of people on the Internet.

This is a person who was slandered by an anonymous user of the blogger.com service (manager of websites for blogs) belonging to Google Inc. The affected requested that Google Inc. be ordered, or whoever represents Colombia to remove the blog with the content denounced from the Internet.

Having considered the right to freedom of expression on the Internet, in the sense that in the face of a friction between this and other rights, the first must prevail, but that this is not the case if the expressions include pejorative qualifiers, the Court considered that the rights of the plaintiff predominated, also taking into account the defenselessness to which he was compelled; since Google claimed that what was published on the platform, which they claim, is a provider of content creation tools, not a content intermediary, so they would not proceed to remove the blog or its content unless it was by court order. The Court, by granting protection to the plaintiff, and setting a new paradigm in terms of court orders to multinationals such as Google Inc, ordered that in its capacity as owner of the tool - Blogger.com: remove the blog with address http://muebles-caqueta.blogspot.com.co because its content anonymously impute unproven information about the commission of the crime of fraud and other expressions that can be considered insults and slander against the plaintiff and his company, and given that the latter has no other effective remedy to obtain his claim.

Google Inc. was cautioned that insofar as it does not regulate anonymous blogs, in the future, it must proceed to remove the content reported without requiring a prior court order, if there are publications on blogger.com with defamatory, disproportionate, slanderous or injurious content. This ruling marks a precedent because it obliges Google to comply with Colombian law, specifically to respect the constitutional rights of the plaintiff and prevent the violation of these, including the good name and privacy.

5. Conclusions

The Right of Access to Public Information has been an approach immersed in rather narrow argumentative connotations, being this way, this right has suffered notable doctrinal and jurisdictional discussions for the diversity that this represents, because the subjectivity is also an element that notably protects in the expectation of the applicant and because of its merits in some cases judicial answers assumed by the diverse Courts of Justice. Since the concurrence of several rights makes it almost impossible to achieve an estimate of priority and relevance, in function of this, there is a need in some to establish priorities of personal rights over other collective rights, being obligatory to establish the rules that allow regulating the information contained in the networks.

Given the existence of precedents that suggest that there is an imminent risk because the information is reproduced by other users during its stay on the network, it is necessary for jurisdictional bodies to speed up requests, in order not to lose the capacity to restore the sentence, as a consequence of the fact that today, the transmission of large amounts of information on the network harms personal, social and political interests, as a result, the display of personal, governmental and social information ends up bringing inconvenience to those who are harmed by them. The law has brought notable advances, but it is necessary that this regulates to a greater extent what refers to the protection of data and sensitive information, so that the necessary mechanisms can be provided in which the national jurisprudence executes effective control, thus allowing the integral protection of the applicant.

Even though the controls must be stricter, it is almost impossible to differentiate, regulate and limit the infor-

mation circulating on the network, since there are no parameters or guidelines that create effective filters that on a large scale purify the Internet or ICTs from negative information, with the result that the subjectivity of such control mechanisms of information grouped in the network, it is necessary to conclude that it cannot give a universal appreciation, thus not allowing the correct application to the standards and hindering the protection of network users.

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