

New problems for the legal world: Information and Communication Technologies.

Introduction.

It is evident that, over the years, technological advances have become faster and faster. New technologies take less time to become obsolete and that is one of the reasons why we are living in a situation of constant evolution to which all society must adapt to be able to cope, in the best possible way, with the changes in the normal development of personal relationships that are constantly generated.

Not long ago, people communicated remotely through letters or over the phone, also, to acquire information on a subject, they had to resort only to libraries and physical files. Although none of this is a distant reality, the last thirty years were characterized by an exponential progress in the ways of communicating and accessing different sources of information, both in quantity and speed.

Nowadays, in a matter of seconds, it is possible to have access to countless amounts of data, to communicate with anyone and in almost any place in the world with, just, an Internet connection and a mobile phone.

These types of issues are included within what is known as Information and Communication Technologies (ICTs). This concept covers those aspects related to new technologies in the field of telecommunications, access to information and how they relate among themselves, such as the development of the internet, cell phones and digitization, among other things.

In this way, it is observed that the ICTs are a set of network services and devices that aim to improve the quality of life of the human being within their environment.

Its advantages are visible, ICTs generate a paradigm shift in interpersonal relationships. New technologies modify education, the economy, politics and even the way of social interaction. Communications become more agile, a large amount of personal information is shared - sometimes involuntarily - and anyone can find certain data that was previously inaccessible.

However, this new era brings specific problems that require the attention of the legal world, so that people do not suffer an affectation of their rights due to the uncontrollable advances of ICTs.

In the following paragraphs I will briefly explain some of the inconveniences that the incorporation of ICTs brings to everyday life, from different cybercrimes to conflicts linked to the right to privacy.

Also, I will explain the state measures that seek to decrease the impact of these issues and thus try to protect the individual and social rights of the citizenship, focusing on the situation of Argentina and Europe, in regard to the particularities indicated.

Overview of the legal conflicts generated by the ICTs.

Probably, the most notorious conflict between ICTs and the law is through cybercrime. The new technologies offer a wide range of possibilities to commit remote crimes, in which anonymity is commonplace. Although many of these behaviors were already foreseen in different legal systems as affectations to freedom, honor, privacy and patrimony, among others, the digital world allows the existence of commissive means that, a few years before, were unthinkable and for which the States did not have the necessary tools to repress them. Therefore, specific rules were designed to prosecute behaviors such as cyberbullying, hacking, distribution of child pornography or theft of personal information.

In this way, already at the beginning of the century, the States believed “that an effective fight against cybercrime requires increased, rapid and well-functioning international co-operation in criminal matters”¹ and, for that reason, they signed the Budapest Convention on cyber-crime. There, they defined the crimes of illicit access, illegal interception, attack to the integrity of data, attacks to the integrity of the system, abuse of the devices, computer falsification, computer fraud, the crimes related to the infantile pornography and the crimes related to infractions of intellectual property and related rights.

In addition, procedural and international cooperation measures were established which States must carry out to effectively prosecute these behaviors.

Beyond these cases, conflicts arise related to ICTs and to people's rights to privacy. This is obvious, cause if you look up someone's name on the internet, all sorts of information about his life will appear and, in some cases, it may violate the right to honor or privacy. Probably, it has been the ease in obtaining this information that has caused the problem to be made visible. It was not too conflictive when the records were nothing more than physical but, with search engines like Google, which explore

¹ Convention on Cybercrime, Budapest, 23.11.2001

the Internet in an automated, constant and systematic way, seeking for information that is published on the Internet, anyone can access sensitive information from another person, who doesn't want to share it (such as unpaid old debts or connection to some fact of the past that, if it had not been for the search engines, would have been forgotten). The manager of a search engine collects such data, extracts it, registers it and organizes it in its indexing programs and keeps it on its servers, facilitating access to users of such search engines in the form of result lists².

It is for this reason that in different parts of the world the need to install a new right of people to guarantee their privacy in the advent of ICTs, the right to be forgotten, began to emerge.

The specific treatment of the right to be forgotten in Europe and in Argentina.

As early as 1995, the European Union Parliament adopted the Directive No. 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Then, from correct hermeneutics of the directive, the European Court of Justice defined the limits of the right to be forgotten and established the framework of the liability of the search engines in this matter.

The case dates back to March 2012, when Costeja González filed a complaint with the Spanish Agency for Data Protection against Google and the newspaper La Vanguardia, after discovering that, when searching for his name on Google, it appeared that his property had been auctioned for lack of payment of social security contributions. The affected did not question the veracity of the linked information, but he considered it obsolete and irrelevant³.

After exhausting the intern instances, the case came to the attention of the Court of Justice of the European Union that, through a surprise decision, established that, as the activity of a search engine is added to that of the editors of Internet sites, and can significantly affect the fundamental rights of respect for privacy and protection of personal data, the search engine manager must ensure, within the framework of its responsibilities, its powers and its possibilities, that such activity satisfies the requirements of the Directive.

² Great Chamber of the European Court of Justice, May 13, 2014. Request for a preliminary ruling — Google Spain, S.L., Google Inc./Agencia Española de Protección de Datos (AEPD), Mario Costeja González.

³ <https://www.rsf-es.org/news/union-europea-caso-costeja-contra-google-la-ue-consagra-un-peligroso-derecho-al-olvido/>, seen July 15, 2018.

In this context, the Court emphasized that a processing of personal data by a search engine manager allows any Internet user, who searches the name of a natural person, to obtain, through the list of results, a structured view of the information related to that person circulating on the Internet. The Court of Justice also pointed out that this information potentially affects a large number of aspects of private life and that, without the search engine, such aspects would not have interconnected, or could only have interconnected with great difficulties.

Internet users can thus establish a more or less detailed profile of the people sought. On the other hand, the effect of this interference on the person rights is multiplied because of the important role that Internet and search engines played in the modern, which confer an absolute presence to the information contained in the lists of results. Given its potential seriousness, the Court considered that this interference cannot be justified by the mere economic interest of the search engine manager in the processing of the data⁴.

So, in general terms, what the Court finally ordered was that cancellation and opposition rights can be exercised directly to the search engine, without it being necessary, for this, to have previously addressed the editor of that content.

Moreover, the blocking may cover not only inaccurate, irrelevant or excessive personal information, but also that information which has no relevance or public interest, or has ceased to have it, this last thing is linked to the lack of consent whom the information belongs.

In this way, the Court has provided a broad protection of the right to privacy of European citizens, who, by exercising their right to be forgotten, can remove from the search engines those news or information they do not wish to share with the world and thus be able to form and protect their private image.

In Argentina, this situation was first addressed on October 28, 2014 in the María Belen Rodríguez against Google Inc. case⁵, and then maintained the same position in the following cases.

There, the highest court in Argentina set out a rule that distinguishes two different situations. In the first one, the cases in which the results of the searches return content that generate a manifest and gross damage. At the other extreme, there are those in which the damage is debatable, doubtful or requires clarification.

⁴ *Cit. supra* (Fn. 2)

⁵ CSJN, R. 522. XLIX, "Rodríguez, María Belén c/ Google Inc. s/daños y perjuicios", October 28, 2014.

For the first situation, it is enough with a reliable private notification made by the victim (or even any interested person) to consider that the search engine is in fact aware of the damage and, consequently, responsible for providing access to that information. Ultimately, this is about manifestly harmful content, such as child pornography, data that facilitate the commission of crimes or that instruct about them, that endanger the life or physical integrity of one or many people, who advocate genocide, racism or other discrimination with manifest perversity or incitement to violence, that disrupt or warn about ongoing judicial investigations that must be secret, as well as those that involve clear injuries to honor, assemblies of notoriously false images or that, undeniably, import serious violations of privacy by displaying images of acts that, by their nature, must be unquestionably private, although they are not necessarily of sexual content. According to the ruling, the illicit nature - civil or criminal - of these cases "is obvious and results directly from consulting the page indicated in a reliable communication of the victim or, as the case may be, of any person, without requiring any other assessment or clarification"⁶.

For the other case, on the other hand, a notification by a judicial or administrative authority is required, not just the mere communication of the individual who considers himself injured. This is so because it is necessary an explanation that must be discussed or specified in the judicial or administrative area in order to determine if the harmful content actually generates honor or other injuries. The Court affirms that, in these situations, the search engine cannot be required to substitute the function of the competent authority.

In this way, we see that, unlike what the European Court established, in the Argentine Republic we cannot speak of a true right to be forgotten. While in the European system anyone can require a search engine to remove information from the web, simply because it is not the image he wants to give to the world, in Argentina there must be damage so that the affected person may request to the search engine the removal of such harmful information or, failing that, a court will decide if the content that the person does not want to be seen generates, effectively, a harm or not, and if not, those data will be reachable for everyone⁷.

⁶ *Cit. Supra (Fn. 5)*.

⁷ Segura, Pablo, "A un año de Rodríguez contra Google: ¿Estableció la CSJN un derecho al olvido digital en Argentina?" <http://www.saij.gob.ar/pablo-segura-ano-rodriguez-contra-google-establecio-csjn-derecho-al-olvido-digital-argentina-dacf150827>, seen July 15, 2018.

In this sense, the Office of the Special Rapporteur for Freedom of Expression of the Organization of American States has said, and this is what the Supreme Court based its decision on, "that freedom of expression applies to the Internet in the same way as to all media"⁸. Therefore, as the content that appears on the web is linked to freedom of expression, it cannot be removed unless it causes a specific damage to someone.

Conclusion.

As we have observed, new technologies in communication and information always bring with them, in addition to innumerable advantages for the development of people, a variety of novel conflicts.

Even though States are making their best efforts to keep pace with the technological innovations that arise every day, and the problems they bring, this is not an easy task because of the speed of the developments.

However, we also saw that the European Union is working to give a legal framework to new technologies and thus be able to effectively solve the conflicts that arise, preventing a greater impact on individual rights.

In the same way, in Argentina it still remains to give certain discussions that would allow greater protection of some rights that may be affected by ICTs, especially with regard to the right to be forgotten.

⁸ Office of the Special Rapporteur for Freedom of Expression of the Organization of American States, "Joint Declaration on Freedom of Expression and the Internet" , June 1, 2011, points La and 6.a, respectively.