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The International Collection of Personal Data: A Challenge of the Post-Internet World

Nelson Remolina Angarita

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Dr. Remolina received the "*Xavierian Academic Merit Order*" (2015) for his outstanding academic performance during his Doctoral studies. He won the International Prize for Research on Personal Data Protection 2014, awarded by the Spanish Data Protection Agency (AEPD in Spanish) for his original and unedited work on the data protection laws in Latin American countries.

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He is an expert guest of the The Ibero-American Data Protection Network (http://www.redipd.org/). He is author and co-author of books and articles on the protection of personal data, e-commerce, dematerialization of securities, and digital identification alternatives and technology neutrality.

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PROLOGUE

The Spanish Data Protection Agency awards annual Research Awards with the aim of supporting and disseminating written work that represents an important contribution in relation to the fundamental right to data protection. This work, which I am pleased to present, has been awarded the Prize of the XVIII edition for work that addresses different aspects of this right in Latin American countries. Its author, Colombian Professor Nelson Remolina Angarita, captures in this rigorous and, at the same time, original research on international flow of personal data, one of the areas most directly affected by the emergence of new technologies.

In today's highly globalized and technologized societies, there is an increasingly heavy use of personal data, for which the use of extraction and analysis capabilities is constantly growing. The work collected in this book addresses the phenomenon of the "international collection of personal data", a process that has features in common with the international transfer of personal data and shares some of the challenges they pose but that, according to the author, requires its own legal construct. This matter was first incorporated into Article 21.j of Colombian Law 1518 of 2012 on the protection of personal data, precisely because of Remolina's research and the suggestions then submitted to the regulatory body.

The author stresses that international data collection reaches its peak with the apparition and the expansion of Internet. For Remolina, anyone with access to the Internet is potentially a collector - national or international - of data anywhere in the world, meaning that with the increasing rate of Internet usage, it is an activity that can reach a potentially greater volume than international transfers. Without claiming to provide end-to-end solutions, the author draws attention to the risks posed by this new reality to which we data protection authorities are paying special attention in order to continue guaranteeing adequate and sufficient levels of protection of rights in the international flow of information.

The jury particularly valued the originality of the work awarded as it provides the theoretical elements for the study of the international collection of personal data by giving it a legal definition. It shows marked differences with international data transfers and proposes to deepen the guarantees of protection of citizens' rights in light of these actions. Based on this work, the author urges the reader to reflect upon the terminological pluralism around the right to data protection and in turn proposes the idea of the "right to proper treatment of personal data."

The International Collection of Personal Data: A Challenge of the Post-Internet World presents elements of undeniable current relevance with rigorous treatment and great simplicity. These qualities make this author, in connection with his role as a lawyer, professor and researcher, a relevant figure of The Ibero-American Data Protection Network, to which he has actively contributed in the ten years since its foundation. His role in this forum allows him to speak with precision about the extraordinary and intense development that the regulation of the right to data protection in Latin America has undergone in recent years. Professor Remolina has been a privileged witness of this exciting process that has allowed Latin America to become a region of the world where this right has greatly expanded.

JOSÉ LUIS RODRÍGUEZ ÁLVAREZ
Director of the Spanish Data Protection Agency

SUGGESTIONS AND STARTING POINT FOR FUTURE RESEARCH

The international collection of personal data (ICPD) was the theme around which the academic concerns that led to our research emerged. While solutions to the problem were not the focus of the analysis, we submit the following ideas for the consideration of the reader, the authorities and regulators that could contribute to the improved protection of the rights of personal data holders against ICPD .

It is only fair and right to point out that some of the ideas have already been advanced and have been driven by, among others, the Data and Privacy Protection Authorities (DPPA), though not explicitly presented as a response to ICPD. None of the suggestions is sufficient by itself. The sum of them would allow for more and better tools to achieve the stated purpose.

Prior to the enunciation of proposals it seems important to put forth the following considerations:

- **Cardinal points to avoid impunity for the processing of personal data in cyberspace**

We live in a geographically fragmented but technologically merged world. The global rate of Internet access is advancing rapidly. The law and the National Authorities for the Protection of Personal Data (NAPPD) face the great challenge of acting at the same speed of this phenomenon and with sensible responses to this "sociotechnological" reality. The legal mechanisms of the twentieth century are insufficient to respond sensibly to the challenges of the twenty-first century in the field of personal data protection.

Our world is filled with local regulations and based on the functioning of transborder legal systems. Additionally, there is a doctrinal, regulatory and hermeneutic tradition of considering the necessary existence of the physical address of the data controller or of the data processor as a necessary factor for the implementation of local regulations. The post Internet world challenges such schemes in that human rights violations occur beyond our borders because the information and communications technology (ICT) have allowed for any activity to be carried out without the need of being domiciled in a certain territory.

One cannot lose sight of the fact that our society is increasingly global, nor can one fail to take into account the things that affect the citizens of a country, but which occur outside its territorial borders. Ignoring this reality will only encourage lawlessness and impunity of all that occurs in cyberspace. Therefore, it is necessary to explicitly

recognize the ICPD in national and international regulations and work on it accordingly as has been done in the case of international transfers of personal data (ITPD). But in this case, it is crucial to think and act globally as ICPD is a phenomenon of a transborder nature and difficult to control by the local authorities.

Cyberspace is not a place that is immune to the authorities and local regulations. However, its transborder feature creates challenges and requires a rethinking of the legal systems whose rules and authorities, in some cases, are confined to a geographically demarcated territory. Cyberspace is eroding and disintegrating those demarcations. The authorities and regulators must redefine their legal schemes to operate effectively in cyberspace. The world has changed and thus cannot continue to do as it has done in the past.

We live in cyberspace but we remain unaware of it or its consequences. Cyberspace has been on this earth since the expansion of the use of the Internet began in the world. We must review the current legal tools in order for them to be useful in the global, transborder and technological scenario where, it goes without saying, there is little or nothing that can be done in some real cases to ensure respect for the rights of persons by other individuals located outside a State's territory.

- **No to "technophobia" and "tecnofascination" and yes to "tecnoreflection"**

It is not sensible to put things in terms of "technophobia" or "technofascination". Innovation and development based on respect for human rights and human dignity will always be welcome. The blind and uncritical "technofascination" carries many risks. We should not be submissive and conformist subjects to what some want to do with our rights and our lives. If we let the current carry us where it may, it is likely that our rights will increasingly diminish - or disappear - and we will have to pay for them. It is necessary to awaken and react to demand respect for our rights.

We must not yield to the attempts to market human rights and transform people into objects, goods or merchandise. There will always be things to be done despite the massive flood of technology into our society and of imposing policies from some market participants seeking to shape the law to reflect their own interests. Any step we take is important to demand respect for human rights. In this sense, we partake in the idea proposed by Federico Monteverde for whom "it is *never* too late to defend human rights and it is *always* worth it"[1] (emphasized and underlined).

[1] Proclaimed on 29 January 2015 by Dr. Federico Monteverde – Uruguayan Expert - speaking at the international conference organized by InfoDF in Mexico City on the occasion of international personal data protection day.

- **Proposals of a local regulatory nature**

To continue promoting the regulation of the fundamental right of proper processing of personal data in countries around the world (60%) that still do not have general rules for processing personal data. This is a huge task but one of fundamental importance in order to achieve the existence of legal elements throughout the world so as to demand proper processing of personal data.

In addition to incorporating the principles and institutions recognized in international documents on data processing, it is crucial that these regulations:

a) recognize explicitly the ICPD to start working on it accordingly as has been done in the case of ITPD

b) provide that their scope also includes those data controllers or data processors not domiciled in the country of the data holder.

c) establish that collectors of data located in one country must respect the rights and regulations of the personal data collected from holders in other countries.

- Review the scope of existing national regulations to establish whether they can be applied to those data controllers and data processors not domiciled in the country of the data holder. If not, change that aspect of the law in order for local authorities to have the legal tools to enable them act in cases of international data collection and require those not domiciled in their country to comply with local regulations on data processing even when acting from other countries.

  The processing of personal data and not the place of domicile of the data controllers or data processors should be another factor in determining the scope of national laws. If it is established that through the use of technological tools another resident in another country has collected a person's data, this is enough for them to apply the law of the data holder's country.

- The scope of local regulations cannot be limited to the existence of the offender's national physical addresses as that would be a retrograde approach and help to further the reign of injustice and sponsor the illicit processing of personal data that can easily be carried out by people located outside any State's borders. The scope of data protection laws cannot sponsor impunity and the irresponsibility of those who work illegally on the Internet.

The DPPA should have the power and scope to act against "cyberoffenders" located in other countries.

- **International regulatory proposals and international cooperation proposals**

- The existence of international legal instruments to which all countries are bound is important. This is something the Data and Privacy Protection Authorities has repeatedly sought for a long time and which was emphasized in the 2013 Warsaw resolution entitled "Resolution on anchoring data protection and the protection of privacy in international law"[2]. We have nothing to add to what was said in that document, but rather we share the same ideas while not losing sight of the difference in international approaches to data protection and the interests at stake, which make it very difficult in the short term to achieve this task.

- In future international texts and in reviewing existing ones, ICPD must be explicitly incorporated as a situation of equal or greater importance than that of the ITPD, requiring answers from international law. The existence of more than three (3) billion potential international collectors demands the regulation of ICPD internationally and at the highest level.

- It is also necessary to strengthen international cooperation[3] among personal data protection authorities or other authorities responsible for protecting the rights of

[2] *Cf.* Data and Privacy Protection Authorities. 2013 Resolution on anchoring data protection and the protection of privacy in international law. 35th International Conference of Data Protection and Privacy Commissioners. Warsaw. See also, among others, the following statements of the Data and Privacy Protection Authorities: Data and Privacy Protection Authorities. 2005. Montreux declaration. The protection of personal data and privacy in a globalised world: a universal right respecting diversities. 27th International Conference of Data Protection and Privacy Commissioners. Montreaux; Data and Privacy Protection Authorities. 2008. Resolution on the urgent need for protecting privacy in a borderless world, and for reaching a Joint Proposal for setting International Standards on Privacy and Personal Data Protection. International Conference of Data Protection and Privacy Commissioners. Strasbourg; Data and Privacy Protection Authorities. 2010. Resolution calling for the organisation of an intergovernmental conference with a view to developing a binding international instrument on privacy and the protection of personal data. 32nd International Conference of Data Protection and Privacy Commissioners. Jerusalem.

[3] This is also a tool that the Data and Privacy Protection Authorities have insisted upon. 2007. Resolution on international cooperation. 29th. International Conference of Data Protection and Privacy Commissioners. Montreal; Data and Privacy Protection Authorities. 2011. Resolution on Privacy Enforcement Co-ordination at the International Level. 33rd International Conference of Data Protection and Privacy Commissioners. Mexico City; Data and Privacy Protection Authorities. 2013. Resolution on International Enforcement Coordination. 35th International Conference of

individuals against the unauthorized processing of their information. Nevertheless, it should not be forgotten that in order to bolster the benefits of cooperation it is necessary to expand the number of individuals that can cooperate on this matter since, according to the results of this research, only 36% of countries worldwide have NAPPD.

- **Proposals about the national personal data protection authorities**

- The global risks of improper processing of personal data can also be mitigated if the NAPPD is able to have sufficient resources and skills to perform its duties to address transborder situations. Of course, the existence of international data protection authorities dealing with these situations would also be welcome but in the meantime we should reiterate the need to review the fields where local norms can be applied and the interpretation of their scope to ensure the NAPPD can act against "cyber collectors" not physically residing in their territories.

- Another key aspect here is to make clear that any authority in the world can receive and address complaints based on the improper processing of data by international collectors domiciled in an NAPPD country. With this we ask that the NAPPD exist globally with international and national jurisdiction.

- Similarly, the mechanisms that people must use in order to access the NAPPD should be straightforward, swift and free of charge. It is important that, for example, the submission of the complaint via the Internet suffice and that the data holder should not necessarily need to act through the representation of legal counsel nor be required to appear physically before the authority nor be required to be of a certain nationality. If a complex mechanism, which is difficult to access were created this would in effect deny, in practice, the citizen of another country the right to exercise his/her rights.

- **Proposals of a cultural and educational nature**

We believe the answer to the challenges of ICPD is not only regulatory but of an educational and cultural nature. If children and adults (digital natives and immigrants) are properly trained, this will likely reduce the possibility of them becoming victims of international data collectors. If we want to do something for our children and for future

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Data Protection and Privacy Commissioners. Warsaw; Data and Privacy Protection Authorities. 2014 Resolution on enforcement cooperation. 36th International Conference of Data Protection and Privacy Commissioners. Mauritius; Data and Privacy Protection Authorities. 2014. Global Cross Border Enforcement Cooperation Arrangement. 36th International Conference of Data Protection and Privacy Commissioners. Mauritius.

generations of citizens it is crucial to start properly educating them to learn to live in a society full of ICT and an appetite for personal data.

The smart way of protecting people's rights is by preventing the breach of or threat to those rights. Therefore, the principle actors of education anywhere in the world (the government and the family) and the data protection authorities should focus their efforts on educating children and adolescents to, among others, become protectors of their own information in relation to any international data collectors.

However, this is not a fleeting and superficial work. No. What we want is a substantive and permanent solution that creates a conscience and a civic culture of protecting our rights against the inappropriate processing of our data. As such, this and other topics need to be included in high school and other scholastic academic programs from all over the world so that our children can make informed decisions regarding the use of ICT with regards to their own information as well as that of others. Education on these issues, we stress, must be permanent (not sporadic) because the social and technological scenario of the twenty-first century is substantially different from the last century.

- **Proposals of a technological nature**

We believe that the answers should directly confront and be of the same nature as the problems that arise on the occasion from the use of technological tools. We perceive that there is an asymmetry in the data collector's use of technology against the data holder. If this is the case, technological mechanisms should be provided to the latter to counteract the collection of his/her data by third parties.

Specifically, people should be taught how to technologically protect their information. Usually a user browses the Internet in an unprepared and unsuspecting manner without regard to the security of his/her data. If this user properly constituted security measures it would reduce the rate of data collection on the Internet. In short, a challenge, which has arisen from the use of technology, should likewise be answered in a technological nature.

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This book analyzes the magnitude and impact of the international collection of personal data (ICPD). It shows how we are facing a phenomenon that is potentially greater than the international transfer of data. However, to date there has been no explicit recognition of the ICPD by international regulations.

Professor Remolina emphasizes that the law and the National Authorities for the Protection of Personal Data face the great challenge of responding sensibly to the current "sociotechnological" reality. For him, it is necessary to explicitly recognize the ICPD in national and international regulations and work on it accordingly as has been done in the case of international transfers of personal data.

He emphasizes that cyberspace is not immune to the authorities or local regulations. He states that we should not be submissive and conformist subjects to what some want to do with our rights and our lives. If we let the current carry us where it may, it is likely that our rights will increasingly diminish - or disappear - and we will have to pay for them. It is necessary to awaken and react to demand respect for our rights and for human dignity.

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