



## Data protection and the transformation of rights in the digital society

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*ABSTRACT: This paper analyses the centrality that data protection is acquiring in the digital society as a right that, together with that of consumer protection, is expanding and occupying spaces for guaranteeing other rights that by themselves have weaker protections. This evolution also contributes to transforming the system of rights insofar as it detaches them from substantive principles and values in order to secure them from the market's standpoint. This instrumental character to the market is especially relevant in data protection, since in addition to being a right, it is also a commodity in the framework of the data economy. The paper also highlights the challenges posed by Generative Artificial Intelligence, not only for data protection, but also for the data economy itself and the digital society, as it has the capacity to generate and propagate disinformation of a systemic nature.*

*KEYWORDS: Data protection – digital society – Generative Artificial Intelligence – algorithms – consumer and user rights.*

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## Introduction

The importance of data in the digital society is shown by the fact that they are a feature of the economy of our time: the data economy. It is within this framework that a right such as data protection must operate. It was born before the development of the digital society and before the development of the third globalisation and it has found in both, a very fertile ground to grow to the point of occupying practically all areas of life. Indeed, it is hardly possible to think of our lives without considering this right, which is involved in most of the activities we carry out, explicitly or implicitly.

This omnipresence of the right to data protection is also reflected in the configuration of rights. When we analyse national constitutions and the Charter of Fundamental Rights of the European Union (CFREU), we see that many rights that had great relevance in the analogue world are no longer relevant in the digital world. Some are affected by technological development itself and others by the fact that the practical shaping of the new technologies is being carried out by large global technology companies that use private law for this purpose. This resort to private law enables them to derogate from rights that are protected by national constitutions or the Charter and thus, gain access to data that they could not legally obtain without a prior contract with their users.

As with law in general, rights move towards where there is potential for conflict. If this potential decreases in certain areas, rights are reduced and lose part of their purpose. For instance, we can consider the protection of the secrecy of correspondence (who uses the post office to send letters today compared to its widespread use forty years ago for example?). At the same time, if this potential increases in other areas, rights expand and tend to occupy those areas in order to adequately perform their proper functions.

This explains the great weight that consumers' and users' rights have in the context of globalisation and the right to data protection in the context of the digital society. It is a dimension that cannot fail to have an impact on the very configuration of rights. Constitutional rights, despite their diverse nature, have been linked to substantive values and principles that recognise the importance of the dignity of the person to articulate life in community. The rationale of rights that are linked to the market, such as consumer rights or the right to data protection (as it has developed in the digital society) is different, because their position is largely instrumental to the very functioning of the market.

It is this transformation that we are going to analyse here, especially in terms of the development of Artificial Intelligence (AI) in the digital society. This AI rests on data and also on algorithms and is shaping a world conditioned to a great extent by the large global players, who are the ones designing the Internet applications derived from technological advances. The latest step in this transformation has to do with the recent emergence of Generative AI, which poses specific problems for data protection and also for the data economy itself due to its enormous capacity to spread misinformation in a systemic way.

### 1. Data protection in the context of rights transformation

The impact of globalisation and digitalisation on fundamental rights can be summarised in a twofold shift: the tension over rights is moving from the state to the global sphere, and from the public to the private sphere. This is happening in a

context in which rights are also shifting from analogue to digital society, and digital society is contributing decisively to this shift, both in terms of its “globalisation” and its privatisation, since digital society is essentially being built by large global players through private law.<sup>1</sup>

The underlying logic of the globalisation process is that of the rupture of the constitutionalism of rights, which, since its inception more than two hundred years ago, has formulated the indissoluble link between the declarative and institutional aspects of their protection.<sup>2</sup> In the context of globalisation, this symmetry is broken because the institutional aspect is absent, and since constitutional rights are subject to the intervention of large global players, their capacity for protection is reduced to the points of contact between the subject of the rights and the potential harm to them. These points of contact are now concentrated at the stage of consumption of products and use of digital services and applications.

The process of globalisation and relocation as well as the progressive technological orientation of the economy are changing the priorities in the field of the protection of rights in relation to the national economic constitution. In an economy in which production is increasingly dependent on external factors,<sup>3</sup> the focus is not so much on the relationship between labour and capital as on the relationship between consumption and capital. The rights to be protected are increasingly those of consumers and users vis-à-vis large companies, especially technology companies. The role of consumer or user is becoming universal and is superimposed on all productive categories, conferring the status of citizen’s rights.<sup>4</sup>

The economy transforms the subject of rights, which will now no longer be the worker in the productive process or the citizen in the social and political sphere, but the consumer. The hypertrophy of the right to the protection of consumers and users, which is occupying more and more of the space of other constitutional rights and concentrating the protection of the legal system, expresses this transformation generated by globalisation. The global economy is not interested in the rights of workers, many of whom are located in states without a democratic constitution and without labour protection. It is interested in the rights of consumers and users because they are the ones that guarantee the continuity of the new economic processes.

The positive side of this development is that other rights, which could not be guaranteed by the constitutional order, have been protected by the right to consumer protection.<sup>5</sup> The recourse to an instrumental right to the market has thus served to

<sup>1</sup> See F. Balaguer Callejón, *La constitución del algoritmo* (Zaragoza: Fundación Manuel Giménez Abad, 2022) (2nd edition, 2023); Portuguese version: *A Constituição do Algoritmo* (Rio de Janeiro: Editora Forense, 2023); Italian version: *La costituzione dell'algoritmo* (Milano, 2023); French version in the process of publication.

<sup>2</sup> See F. Balaguer Callejón, “La interacción entre democracia y derechos en el constitucionalismo y su proyección supranacional y global”, in *AAVV, Memoria del III Congreso Internacional de Argumentación Jurídica ¿Cómo argumentar los derechos humanos?* (Mexico: Suprema Corte de Justicia de la Nación, 2013).

<sup>3</sup> This is not being substantially influenced by the current modulation of globalisation, which is leading to a “fragmented” globalisation along geopolitical affinities. See F. Balaguer Callejón, “Il futuro del costituzionalismo nel mondo (ri) globalizzato: mediazioni negative nella globalizzazione frammentata”, *Nomos. Le attualità nel diritto*, no. 1 (2024).

<sup>4</sup> See A. Aguilar Calahorra, “El sujeto de derecho en la sociedad del consumo: el ciudadano como consumidor”, in *Constitucionalismo crítico: liber amicorum Carlos de Cabo Martín*, ed. M.A. García Herrera, J. Asensi Sabater, F. Balaguer Callejón (Valencia: Tirant lo Blanch, 2016).

<sup>5</sup> The paradigmatic case is the right to housing in Spain during the financial crisis, which was not protected despite being proclaimed in Article 47 of the Spanish Constitution but was protected

protect rights that were lacking protection by national jurisdictions and based on constitutional precepts.

On the negative side, the rights that are now essentially protected from the position of consumers or users of their holders largely lose their constitutional identity. They become merely instrumental to economic rights and are guaranteed solely on the basis of economic logic. They no longer express the dignity of the person but rather the insertion of the individual as just another piece within an economic context in which the exchange of goods and services must function properly and the assurance of traffic safety is fundamental.<sup>6</sup>

The transformations of rights imply new paradigms that derive from profound changes in the economic and cultural conditions in which they unfold. The paradox is that, although rights have emerged from a state constitutional context, they have developed, as Ingo Sarlet rightly puts it, into “*a universal grammar*”.<sup>7</sup> The truth is that this grammar has been structured on the basis of the international and global projection of the different state grammars. Globalisation, however, has imposed its own logic, derived from economic demands and digital transformations. A rationale that is manifested in the spatial aspect already indicated: from the public/state sphere to the private/global sphere, and which is also expressed through the transformation of the constitutional culture surrounding rights, now mediated by the economic and technological perspective.

Rights are no longer the backbone of the state’s economic constitution, the core of the articulation between capital and labour. They have ceased to be so because these two factors are mostly located outside the state. Globalisation has detached the factors of production from their state roots, has given full freedom to capital, which has emancipated itself from any state determination (except, in part, for China, the only state that has adapted to the rules of globalisation as another agent) and has transformed the categories of the economic world of industrial society, shifting the rights of the worker to the consumer. This transformation, which is economically based, has affected all rights, not only social rights, which shows how well Peter Häberle has succeeded in his comprehensive understanding of rights.<sup>8</sup>

The deterioration of the state economic constitution has placed the legislator’s freedom of configuration outside the state sphere and thus outside the internal constitutional order.<sup>9</sup> But this “*externalisation*” of legislative policies<sup>10</sup> has not only had an impact on social rights, but on fundamental rights as a whole and on the constitutional structure. Indeed, by narrowing the constitutional framework

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by the Court of Justice of the European Union (CJEU) in relation to the violation of European legislation on consumer rights (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts). See Judgment CJEU *Mohamed Aziz v CatalunyaCaixa*, 14 March 2013, Case C-415/11, ECLI:EU:C:2013:164.

<sup>6</sup> See F. Balaguer Callejón, *La constitución del algoritmo*.

<sup>7</sup> See I.W. Sarlet, “Os direitos sociais a prestações em tempos de crise”, *Chapeco*, vol. 15, no. 2 (2014): 271.

<sup>8</sup> P. Häberle, *Grundrechte im Leistungsstaat. Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung* (De Gruyter, 1972).

<sup>9</sup> F. Balaguer Callejón, “Costituzione economica e globalizzazione”, *federalismi.it*, no. 5 (2019).

<sup>10</sup> See F. Balaguer Callejón, “Le due grandi crisi del costituzionalismo di fronte alla globalizzazione nel XXI secolo”, in *Passato, presente e futuro del costituzionalismo e dell’Europa*, ed. F. Lanchester (Padova, 2019), 59-82. Spanish version: “Las dos grandes crisis del constitucionalismo frente a la globalización en el Siglo XXI”, *Revista de Derecho Constitucional Europeo*, no. 30 (2018); Portuguese version: “As duas grandes crises do constitucionalismo diante da globalização no século XXI”, *Espaço Jurídico Journal of Law [EJLL]*, 19 (3), (2018).

and determining the obligatory course of legislative action, it has affected political pluralism, political representation, participatory rights, the separation of powers, territorial pluralism and the normative value of the constitution.<sup>11</sup>

Rights are being configured as categories that are merely auxiliary to economic and technological processes. On the one hand, on the economic level, rights are shifting towards the mercantile terrain of the consumer and user, linked to the proper functioning of the market. On the other hand, on the technological level, there is a conception of rights as a “product” or as “merchandise”, which has to do with the specific position of data in the digital society.

Once again, the logic of globalisation, with the shift from the state to the global sphere and from the public to the private sphere, is at work in this remodelling of constitutional rights. The asymmetry between the institutional and declarative aspects of rights is blatant in the digital society. The constitutional protection of many of the citizen’s rights becomes unfeasible when, through private contracting, it is the citizen himself who “cedes” these rights to large global companies that have hundreds of millions of users around the world and do not allow themselves to be conditioned, by and large, by the states and their constitutions.

As far as the European level is concerned, the essential problem we have been facing since the entry into force of the Charter, when the constitutional question moved from the theoretical to the concrete level,<sup>12</sup> is that the CFREU is a constitutional document that lacks a constitutional context. As Augusto Aguilar points out,<sup>13</sup> there is a mismatch in the European legal order between the formal source in which rights are enshrined and the effectiveness of the rights.

In our view, this lack of correspondence has to do not so much with the structure of the system of sources as with the fact that the ultimate upholder of rights, the Court of Justice of the European Union (CJEU), continues to perceive them as an instrument for the functioning of the Single Market, a purpose to which any formal guarantee in the European legal order is subordinated. Hence, as Augusto Aguilar observes, the concern of the CJEU in relation to fundamental rights does not seem to resolve subjective claims, but rather to ensure the uniform application of European provisions. This is, of course, completely foreign to the national constitutional perception of fundamental rights, which continues to rest, without prejudice to its objective aspect, on the guarantee of the effective realisation of the right for its holders.

Although this trend is evolving in the case law of the CJEU towards approaches that are more in line with the substantivity of rights, the fact is that its formulation reinforces the general tendency stemming from globalisation and the technological

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<sup>11</sup> See F. Balaguer Callejón, “Uma Interpretação Constitucional da Crise Econômica”, *Revista de Direito Público*, no. 54 (2013). Spanish version: “Una interpretación constitucional de la crisis económica”, *Revista de Derecho Constitucional Europeo*, no. 19 (2013). See also F. Balaguer Callejón, “Parlamentari nazionali e Unione europea nella governance multilivello”, *Nomos | Le attualità nel diritto* (2016).

<sup>12</sup> See F. Balaguer Callejón, “El Tratado de Lisboa en el Diván. Una reflexión sobre constitucionalidad, estatalidad y Unión Europea”, *Revista Española de Derecho Constitucional*, no. 83 (2008). Italian version: “Il Trattato di Lisbona sul lettino dell’analista. Riflessioni su statualità e dimensione costituzionale dell’unione europea”, *Quaderni della Rassegna di Diritto Pubblico Europeo*, no. 5 (2009); Portuguese version: “O Tratado de Lisboa no divã - Uma reflexão sobre estatalidade, constitucionalidade e União Europeia”, *Revista Brasileira de Estudos Constitucionais*, no. 7 (2008).

<sup>13</sup> See A. Aguilar Calahorra, *Naturaleza y eficacia de la Carta de Derechos Fundamentales de la Unión Europea* (Madrid: CEPC, 2021).

society to turn rights into mere instruments. Indeed, instead of European sources of law serving the purpose of conveying rights (as is the case in national constitutional systems), these are used as an instrument for interpreting the scope of the sources of law. In short, instead of subordinating the legal system to rights, rights are subordinated to the European legal system, to its interests and to its functionality.

A problem arises here that will have to be solved at some point in relation to the multi-level structure of the protection of rights. This structure is conditioned in the relationship between the EU level and the level of the states by the competence determinations derived from the principle of conferral. However, should rights be mediated by the attribution of competences, or should they be considered worthy of protection independently of competences? The answer to this question is decisive for defining the actual scope of rights protection in a multi-level system. If we want this system to really work and maintain the substantivity of rights, it must be decoupled from competences, because the CFREU is a proclamation of rights in a European area that admits no more variations than those established therein.<sup>14</sup>

In any case, we cannot ignore the fact that it is the EU that is best placed to regulate and protect rights in the context of globalisation and the technological society. It is not by chance that we speak of the “*Brussels effect*”<sup>15</sup> to refer precisely to the global projection capacity of European regulations. Despite all the shortcomings that we can observe in European legislation, the fact is that the European market continues to be the EU’s main asset for achieving greater effectiveness in the protection of the rights of European citizens. As far as data protection is concerned, the boost provided by the General Data Protection Regulation (GDPR) is undeniable.<sup>16</sup>

## 2. Data as a right and as a commodity in the digital society

The digital society has developed on the basis of a “*reification*” of rights, which are integrated into ecosystems created by technology companies in which data occupy a fundamental place. For these companies, the process of data mining lacks any constitutional limitation, be it the secrecy of communications, the inviolability of the home, the right to privacy, or any other of what are still fundamental rights in force in our constitutional systems (despite their manifest violation in the digital sphere). The same applies to the use of data, which serves both to harm the electoral rights of citizens and their privacy. What matters is economic profit, and constitutional rights are not an obstacle because their effectiveness has been reduced to a minimum in the digital world.

Indeed, the digital society poses many challenges in relation not only to the relative atrophy of constitutional rights but also to the need to incorporate new digital rights.<sup>17</sup> One of the most important challenges is the cultural change that is

<sup>14</sup> See F. Balaguer Callejón, “La configuración normativa de principios y derechos constitucionales en la Constitución europea”, in *Colóquio Ibérico: Constituição Europeia. Homenagem ao Doutor Francisco Lucas Pires, Boletim da Faculdade de Direito*, ed. J.J. Gomes Canotilho (Coimbra: Studia Iuridica, 2005), 167-181.

<sup>15</sup> See A. Bradford, “The Brussels Effect”, *NW. U. L. Rev.* 107(1) (2012). Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/271](https://scholarship.law.columbia.edu/faculty_scholarship/271).

<sup>16</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>17</sup> In this regard, the Portuguese Charter of Human Rights in the Digital Age, which was approved by Law No. 27/2021 of 17 May, and the Spanish Charter of Digital Rights, presented on 14 July 2021, should be highlighted, although the latter has no normative value. Also, at European

taking place in the ecosystem of Internet applications, especially social media. One of the drivers of this change is the place of data in the digital economy. Leading technology companies feed on data to make their advertising-based business model viable.<sup>18</sup> For this reason, both the design of the user interface of its applications and the configuration of the algorithms for extracting and processing data are geared towards generating greater user interaction - an interaction that serves the purpose of obtaining a greater number of data to be able to create more precise user profiles for the effects of its advertising business.

We can see this transformation clearly with the example of freedom of expression, which in its various dimensions is one of the fundamental rights that connect the individual aspect with the formation of a plural public space that contributes to the shaping of a constitutional democracy. The current context of freedom of expression has undergone a problematic evolution from a constitutional point of view because it turns this right into a mere commercial product, economically evaluable in terms of its results, without any connection with the shaping of a plural public opinion characteristic of a democratic system.<sup>19</sup>

This transformation has to do with the irruption of technology companies, the new digital mediators, which are occupying the information and opinion space, displacing the traditional media. The tension over freedom of expression is shifting to the private sphere because the new mediators are private companies, which act within the framework of private law. However, due to the way in which communication processes have been configured in the digital era, these companies have occupied a large part of the public space, providing services in a monopoly or oligopoly regime that forces us to rethink the categories of public and private in relation to the exercise of freedom of expression.

The dialectic of freedom of information and opinion no longer manifests itself in the tension between the media and the public power that could limit this freedom. On the contrary, the occupation of the public communicative space by the new mediators through private channels gives them a broad decision-making capacity over freedom of expression.<sup>20</sup> The tension over freedom of expression in

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level, among other documents, the European Declaration on Digital Rights and Principles for the Digital Decade proclaimed on 23 January 2023 by the European Parliament, the Council and the Commission. Likewise, the Ibero-American Charter of Principles and Rights in Digital Environments, approved at the XXVIII Ibero-American Summit of Heads of State and Government on 25 March 2023. Twenty-two Ibero-American countries, including Spain and Portugal, have adhered to this Charter.

<sup>18</sup> For example, 98% of Facebook's revenue comes from advertising. See C. Galindo, "Las grandes tecnológicas consolidan su liderazgo tras dos años de pandemia", *El País*, 5 February 2022.

<sup>19</sup> See F. Balaguer Callejón, "The impact of the new mediators of the digital age on freedom of speech", in *Yearbook of Socio-Economic Constitutions*, ed. S. Hindelang and A. Moberg (Berlin: Springer, 2022).

<sup>20</sup> "National constitutions and human rights laws protect internet users from *state* interference with their legal exercise of speech rights, but platforms are generally free to ban any speech they want; and, because Community Guidelines are privately defined and enforced, platforms' decisions are generally not subject to review by courts", in Daphne Keller and Paddy Leerssen, "Facts and where to find them: empirical research on internet platforms and content moderation", in *Social Media and Democracy*, ed. Nathaniel Persily and Joshua A. Tucker (Cambridge: Cambridge University Press, 2020), 226. Moreover, as Josu De Miguel points out, "service providers are not in a position to weigh up rights and legal assets properly, because they are governed by market rules". See J. De Miguel, "Las transformaciones del derecho de la información en el contexto del ciberperiodismo", *Revista de Estudios Políticos*, 173 (2016): 159. Note: Excerpt freely translated into English by the Author.

communicative processes is now being articulated around the new mediators and cannot be assessed from the perspective of private law alone.<sup>21</sup>

In the digital society, the traditional categories of the right to information, understood as truthful information, fade away. Like many other constitutional rights, freedom of expression is losing its substance in the digital world. It becomes just another link in the market chain because, for technology companies, news and freedom of expression are nothing more than data in their business model. Freedom of expression no longer has a material meaning because information and opinion are mere commodities in an ecosystem driven by algorithms. An environment in which fake news and alternative realities are promoted, to encourage public interaction, which favours their business model.

In general, in the field of the digital economy we can also see the hypertrophy, typical of globalisation, of the rights of consumers and users, which also concentrate a large part of the constitutional status of rights, so that constitutional rights tend to be merely instrumental in guaranteeing economic traffic. The subject of rights changes and will no longer be the worker or the citizen in the labour or social sphere, but the consumer of products or the user of services.

But in the digital society a further step is taken, insofar as the consumer or user is also a part of the product, through the commodification of his or her personal data. The subject of rights thus becomes an object, and the protection of rights is channelled through data protection, which is configured as a sort of “joker” right that can replace any other right, in the same way that the joker in poker can replace another card.

Andrew Lewis’s appalling opening sentence of Eli Pariser’s book – “*If you’re not paying for something, you’re not the customer; you’re the product being sold*” –<sup>22</sup> aptly expresses this “*commodification*” of constitutional rights, as their holders themselves become saleable products (through the unconditional cession of their data to technology companies) and their rights are also transformed into mere objects in the commercial traffic of the digital society.

The conversion of the subject of rights into an object of economic traffic is the latest phase of the deterioration brought about by globalisation and the development of the digital society. Substantive rights had previously been configured as instrumental rights, accessory to certain economic rights in the global context, making the subject of rights also an economic factor (the consumer or user) instead of a person. The digital context turns this economic agent, this subject, into a product, an object, whose size on the market will depend on the valuation that algorithms make of his or her personal data. This closes the circle of the involution in the configuration of rights generated by the transformation of cultural patterns derived from globalisation in the digital context.

### 3. The challenges of Generative AI in the data economy

The protection of personal data develops, as we have seen, within a social and economic context in which personal data are transformed from rights into products, into goods. This does not mean that the mechanisms for the protection

<sup>21</sup> See M. A. Presno Linera, “La libertad de expresión en internet y las redes sociales: análisis jurisprudencial”, *Revista catalana de dret públic*, no. 61 (2020).

<sup>22</sup> Andrew Lewis, under the moniker *Blue beetle*, on the *MetaFilter* website, quoted in E. Pariser, *The Filter Bubble - What The Internet Is Hiding From You* (Penguin Books Ltd, 2012), 21. Kindle Edition.



of personal data are not effective, particularly the GDPR. It simply expresses a trend that has to do with the position of data within the data economy.

The data economy has flourished through the use of AI, either to extract and accumulate data or to process it. AI is based on two parts, on the one hand, the data, which must be reliable, quality data, so that AI can function properly, and on the other hand, the algorithms, which must also be properly configured to process the data and obtain correct results. The use of algorithms through social networks has generated many problems in the public space, affecting democracy and fundamental rights. This has to do with the business model of the large technology companies, to which we have already referred. In particular, disinformation has been a feature of this use of algorithms, at least in the social and political sphere. Disinformation affects democratic processes and rights, and we can see the extent it has taken on in digital society if we compare the functioning of social networks and Internet applications with traditional media.

The traditional media constructed narratives, according to their editorial lines, through which they participated in the social construction of reality. These narratives could include elements of misinformation, eventually contrasted, or refuted through media pluralism. What allows these narratives to generate relatively credible information is not that all the media repeat the same narratives, because that only happens in a totalitarian state, but precisely that each of them contributes with their own vision of reality and shares and contrasts it with those of the other media. In themselves, these different narratives do not necessarily express disinformation or attempts at manipulation but correspond to the democratic game of a pluralistic society.

On the contrary, the new mediators, the big technology companies, do not construct narratives, but open their applications to all possible narratives, although they privilege – through their algorithms – those that promote false news and alternative realities, because this favours permanent interaction with their applications and thus facilitates the accumulation of data they need to obtain greater returns through the sale of advertising. In this way, the new mediators do not reflect the reality of the societies in which they operate. On the contrary, by promoting disinformation through fake news and alternative realities, they generate a tension on reality itself that has great destructive potential.

The destruction of this shared social perception of reality does not extend to all spheres of public space (at least not until the development of generative AI), a phenomenon worthy of analysis. In the economic field we do not find fake news or post-truth. The fundamentals of economic traffic remain intact in the digital society and have not been affected by algorithms. The same could be said of the technological side.<sup>23</sup> It is therefore possible to keep the public space free of fake news, post-truth and alternative realities. The contrast between digital political culture and economic culture is extraordinary, as is the legal protection the latter enjoys over the former.

In the United States, this protection of the economic sphere corresponds to the interpretation that has been made of the First Amendment with respect to the limits of freedom of expression. An interpretation that allows for some regulation of commercial advertising, such that it would not be protected by the First Amendment, unlike political propaganda and, in general, political debates. The fact that commercial

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<sup>23</sup> See F. Balaguer Callejón, *La constitución del algoritmo*, 80 and following.

advertising is not protected by the First Amendment regarding false statements, the false facts it contains, is evidence that in this area there is a control of factual falsehood, something that does not occur in the political sphere, where freedom of expression is protected in accordance with the interpretation given to the First Amendment.<sup>24</sup>

Notably, however, the recent case of the conviction of R. Giuliani for slandering two female election officials in Georgia in the last presidential election has raised expectations that the courts may in future be able to stem the tide of lies and misinformation that is filling the public space in the political arena.<sup>25</sup> In contrast, we have the case of Donald Trump, and his false claims during his four-year tenure in office, which according to the Washington Post amounted to 30,573<sup>26</sup> and which are concentrated on political issues.

The protection of the economy (and of technology) also extends to legal traffic, which is generally not affected by the new communicative processes designed by technology companies. The field of action of algorithms designed to promote disinformation, post-truth and alternative realities is politics. Their purpose is none other than to generate greater public attention and permanent interaction with their Internet applications, as well as to discredit politics, limiting the capacity for action of the legitimate representatives of the citizens to mostly block politics and, among other things, to hinder the control of the technology companies themselves by the democratic bodies.

With the emergence of Generative AI, this specific protection of the economy, technology or the legal sphere has been weakened, posing very serious problems for the very functioning of the data economy. We face risks of a systemic nature whose capacity to do harm in all areas of society is difficult to calculate. The potential damage to rights that can occur and that also relate to the protection of personal data is equally unpredictable.

To understand the extent of the challenges that Generative AI is posing since the first applications have been on the market, starting a little over a year ago now (especially its most popular one, ChatGPT), one should compare it to the recent experience of the pandemic. Let us imagine that, instead of testing every single vaccine that the health authorities allowed to be used, after lengthy processes to verify its effects and efficacy, vaccines that had not been subject to such verification processes had been licensed, simply because minimal initial testing had determined their possible, though not actually proven, positive effects on pandemic control.

That is what has happened with ChatGPT and other apps. They have been introduced into the market without knowledge of their real effects, with a multitude

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<sup>24</sup> As Frederick Schauer asserts, “although the existing doctrine is moderately clear with respect to the permissibility of restricting false or misleading advertising of securities or commercial products, the issue is different when we turn to questions of factual falsity in political debate”. See F. Schauer, “Facts and the First Amendment (the Melville Nimmer Memorial Lecture)”, *University of Virginia School of Law, Public Law and Legal Theory Research Paper Series*, no. 2009-22 (2010): 913.

<sup>25</sup> However overly optimistic this perception may seem, Andy Kroll points out the following: “On a societal level, the real hope for these defamation cases is that over time, as more liars are brought low by their actions and held accountable in court, politicians and political operatives will pause before spreading disinformation and, slowly, this country will move toward a better, safer political discourse”. See A. Kroll, “The unsettling truth at the heart of the Giuliani case”, *The New York Times*, 23 December 2023.

<sup>26</sup> D. Trump accumulated no fewer than 30,573 false or misleading claims in his four years in office, according to Washington Post fact-checking as of 24 January 2021.

of shortcomings that the narrative elaborated by the technology companies defines in a very mild way, as is the case with the so-called “hallucinations”,<sup>27</sup> as if it were a one-off problem for which no one has to take responsibility. Their promoters have been busy launching alarm messages as if they had nothing to do with the problems they can cause.

Following the comparison with the example of vaccines given above, it is as if the vaccine were tested directly on users, without any intermediate tests. To put it bluntly, that is what the users of this application are doing and that is why it has been put on the market: to improve it by making it better through users themselves without them even being aware of it. The result has been a global controversy that seems to be detached from the real culprits and has generated an understandable alarm in relation to Generative AI. An alarm that led to the departure of Sam Altman from OpenAI due to the doubts he raised about the harmful impact of the application, only to return in a few days, as the economic rationale prevailed within the company.<sup>28</sup>

Generative AI applications, such as ChatGPT, move within the cultural parameters of the digital society. They save time, the scarcest commodity of our time. Not because it does not exist, but because it is wasted in abundance in digital society applications. They give you results very quickly, even if they are of poorer quality than those obtained by a rigorous researcher and even if they break the logic of scientific invention and artistic creation, in which the process is fundamental, among other things, for the training of the researcher. There is no doubt that they can be a very useful tool, if they are used to complement one’s own work, but it is another matter when they are used to replace it. It is then that their destructive potential can operate without limit.

As regards their capacity to generate and massively disseminate disinformation and make it difficult to distinguish between truth and falsehood, we can point to some recent examples. In the case of science, these applications are already being used to supplant the work of scientific research.<sup>29</sup> But they tend to distort scientific research, perhaps to avoid the controls of anti-plagiarism programmes or perhaps to circumvent the copyrights of the sources they use.<sup>30</sup> The result is very poor because

<sup>27</sup> «The systems still make mistakes. They often get facts wrong and will make up information without warning, a phenomenon that researchers call “hallucination.” Because the systems deliver all information with what seems like complete confidence, it is often difficult for people to tell what is right and what is wrong». See C. Metz and G. Schmidt, «Elon Musk and others call for pause on A.I., citing ‘profound risks to society’», *The New York Times*, 29 March 2023.

<sup>28</sup> See C. Metz et al., “Five days of chaos: how Sam Altman returned to OpenAI”, *The New York Times*, 22 November 2023.

<sup>29</sup> Even if they have limitations inherent in their current stage of development, which has led N. Chomsky to describe them as “pseudoscience” and to highlight “the amorality, faux science and linguistic incompetence of these systems”. See N. Chomsky, I. Roberts, J. Watumull, “The false promise of ChatGPT”, *The New York Times*, 8 March 2023.

<sup>30</sup> Or perhaps because they are unable to do otherwise: as Carissa Véliz points out, “current AI has an unreliable relationship with truth. The most popular type of AI is based on neural networks. An AI like ChatGPT works by statistically analysing the texts provided to it and generating convincing answers based on its training data. But it does not use logic or rely on empirical evidence. It has no tools to track the truth. As a result, it often “hallucinates” or fabricates convincing answers (based on its statistical analysis) that are nonetheless false. When I asked it to cite ten books by Carissa Véliz, it came up with nine plausible but false titles.” See C. Véliz, “Perdiendo habilidades ante la inteligencia artificial”, *El País*, 2 June 2023. Note: Excerpt freely translated into English by the Author. Apparently, this tendency of ChatGPT to make up answers when it does not know how to respond is being addressed in other applications from other companies. See G. M. Pascual,

they appear to offer scientific papers for those who have no specific knowledge of the subject matter they address, but may contain very serious errors.<sup>31</sup> If these works are consolidated in academic circuits, they will be a source of disinformation that could jeopardise the foundations of the scientific system at a global level.

We also have examples of its nefarious application in the legal world, with its use in the preparation of legal claims resulting in an indication of false legal sources, invented by the ChatGPT application, with the risk that this can cause for legal certainty. If the courts do not detect these falsehoods, we may find ourselves incorporating into the legal world references to judgments that do not exist (something particularly serious in a case law system such as the US, where the first known case has occurred)<sup>32</sup> and which ended up becoming established through their repeated citation.

In the economic and technological sphere, the spread of false information can have disastrous effects. Take the banking system, for example, which is so sensitive to rumours or incorrect information. The same applies to AI, which is based on the extraction of data that is then processed by algorithms. The quality of this data is essential to ensure the proper functioning of AI, including generative AI itself. If the data is not correct, because it is “*invented*” by the Generative AI applications, the AI applications may fail to function properly. Hence the ongoing misgivings about current Generative AI applications.<sup>33</sup> If the shortcomings of Generative AI are not corrected soon, the digital society is in serious danger.

Here again we see the very close relationship between the protection of personal data as a right and its instrumental dimension to the market. Data are an essential instrument for the data economy and can generate very dysfunctional effects if they are not treated in an appropriate way. This instrumental dimension gives them a relevant position in the data economy that favours the protection of consumers’ interests so that the economic system can function. The transformation of rights in the digital society, like so many other things, cannot simply be regarded purely from a black-and-white perspective. One must be aware of both its negative and positive potentialities.

## Conclusion

Whatever we can conclude about the right to data protection in the digital society is subject to an inevitable provisional nature. The accelerated technological development gives hardly any breathing space to be able to formulate conclusions that have a minimum of stability. The trends have been clear so far: the dimension that the right to data protection has acquired in the digital society, as is generally the case with the right to consumer and user protection in the context of globalisation,

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“Google presenta Bard, su chat inteligente para hacer búsquedas”, *El País*, 7 February 2023.

<sup>31</sup> Errors that are difficult to detect for those who do not have specific knowledge of the subject. See C. Del Castillo, “La inteligencia artificial ChatGPT reabre el debate de la tecnología en las aulas”, *elDiario.es*, 19 January 2023.

<sup>32</sup> The case involved a US lawyer who had used generative AI to prepare a lawsuit. The judgments invoked in the lawsuit did not actually exist but were invented by ChatGPT. See B. Weiser, “Here’s what happens when your lawyer uses ChatGPT”, *The New York Times*, 27 May 2023.

<sup>33</sup> This is the case of G. Hinton, who has expressed his fear that the Internet will be flooded with fake texts, photos and videos, and that citizens will not be able to distinguish what is real. See “Geoffrey Hinton, el ‘padrino’ de la IA, deja Google y avisa de los peligros de esta tecnología”, *El País*, 2 May 2023.

is leading to a transformation of constitutional rights. These rights are more linked to the market than to the principles and values that have underpinned the system of rights protection. For this reason, it is only natural that their formulation is also imbued with a certain instrumental character to the market. In the case of the right to data protection this is not only a change in terms of the subject of the rights (consumer vs citizen) but, also in terms of their nature because personal data are not only a right but, also a commodity in the data economy.

The transformation of rights is not necessarily negative because the expansion of consumer rights and data protection also makes it possible to occupy spaces where the protection of other rights has been ineffective, so that other rights that were not adequately guaranteed can be secured through these rights. Certainly, this protection is not offered from a substantial consideration of these other constitutional rights but, once again, from their importance for the security of the legal traffic and, therefore, to guarantee the stability of the market. Nevertheless, it is necessary to recognise the positive “*substitution*” effectiveness that consumer law and the right to data protection are having in the context of globalisation and the digital society.

Future developments are difficult to define, not least because of the great threat to both the right to the protection of personal data and the digital society with the recent emergence of Generative AI. The ability of the applications that have been put on the market to spread disinformation on a massive scale and with a systemic reach generates inevitable concern. It is to be hoped that the shortcomings of these applications will soon be corrected and that the more dysfunctional effects they can produce will be avoided.