III CONGRESSO INTERNACIONAL DE DIREITO, POLÍTICAS PÚBLICAS, TECNOLOGIA E INTERNET

DIREITO, POLÍTICAS PÚBLICAS, TECNOLOGIA E INTERNET II (ON-LINE) I

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Apresentação

Franca recebeu o III Congresso Internacional de Direito, Políticas Públicas, Tecnologia e Internet. O evento reuniu acadêmicos, profissionais, pesquisadores e estudantes, promovendo o debate interdisciplinar sobre o impacto das inovações tecnológicas no campo jurídico e nas políticas públicas. A

programação envolveu Grupos de Trabalho (GTs) organizados para aprofundar temas específicos, abordando desde o acesso à justiça até as complexidades da regulação tecnológica, com ênfase na adaptação do sistema jurídico aos avanços da inteligência artificial e da automação.

O GT 11 reúne pesquisas que analisam o papel das políticas públicas e da inovação tecnológica na governança digital. Os trabalhos exploram as implicações éticas da tecnologia na sociedade e o papel do Estado na formulação de normas inclusivas e transparentes. O grupo destaca a importância da regulação participativa e do desenvolvimento digital sustentável.

LIMITS OF AUTOMATED DECISION-MAKING ACCORDING TO THE SCHUFA CASE: HUMAN RIGHTS ANALYSIS

LÍMITES DE LA TOMA DE DECISIONES AUTOMATIZADA SEGÚN EL CASO SCHUFA: UN ANÁLISIS DESDE LA PERSPECTIVA DE LOS DERECHOS HUMANOS

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Resumo

This paper aims to examine the SCHUFA's case, which is thus far the leading decision on the limits and implications of using algorithms in decision-making. The analysis highlights how reliance on automated systems can perpetuate injustices and lack of transparency, affecting consumers's privacy and rights. Furthermore, the study discusses the legal and ethical obligations of companies to ensure fairness and explainability of automated processes, especially from a human rights perspective. The conclusion of analysis aims for the urgent need for strict regulation and ethical frameworks in automated decision-making, emphasizing transparency, accountability, and the protection of consumer rights and human dignity.

Palavras-chave: Artificial intelligence, Algorithmic opacity, Explainability, Human rights, schufa

Abstract/Resumen/Résumé

Este artículo analiza el caso SCHUFA, principal precedente sobre los límites del uso de algoritmos en la toma de decisiones. Se examina cómo los sistemas automatizados pueden generar injusticias, opacidad y afectar derechos fundamentales como la privacidad. El estudio considera las obligaciones legales y éticas de las empresas en cuanto a equidad y explicabilidad de los procesos algorítmicos. Desde una perspectiva de derechos humanos, se destaca la necesidad urgente de una regulación estricta y marcos éticos que aseguren transparencia, rendición de cuentas y protección de los consumidores frente a decisiones automatizadas que impactan directamente sus vidas.

Keywords/Palabras-claves/Mots-clés: Inteligencia artificial, Opacidad algorítmica, Explicabilidad, Derechos humanos, Schufa

Introduction

Automated decision-making processes currently represent a major challenge in the ethical-legal context of artificial intelligence. An example of this was the case of SCHUFA, the subject of this study. To put it in context, SCHUFA is a private German organization whose main product is providing credit information (score) to its contractual partners. In other words, the company sells probabilistic forecasts of future collective or individual popular behavior, which implies a personal or collective score that will determine, for example, whether or not a loan will be granted, among other uses for such classifications.

The case in question was decided by the Court of Justice of the European Union (CJEU), which is competent to interpret European legislation, as well as national legislation related to such rules (Machel, 2021). It deals with a massive popular sequence of cases brought before the Administrative Court in Wiesbaden, Germany. The move to the European level was necessary due to the failure of the competent Data Protection Commissioner (*Hessischer Beauftragter für Datenschutz und Informationsfreiheit*) to take concrete action against activities carried out by SCHUFA. Our goal with this paper is to discuss the decision in that case deeply and qualitatively evaluate the consequences of that decision in light of human rights.

The methodology employed in this study is qualitative in nature, with a legal-analytical focus aimed at the normative and critical interpretation of the SCHUFA case in light of human rights and European legislation. The research is grounded in a case study approach—specifically the judgment rendered by the Court of Justice of the European Union (CJEU) in case C-634/21—supplemented by a specialized literature review on data protection, algorithmic transparency, and the ethical implications of automated decision-making. The study draws upon the General Data Protection Regulation (GDPR), particularly Articles 12, 13, 14, 15, and 22, along with relevant Recitals, in conjunction with principles established in the Universal Declaration of Human Rights. This combined approach allows for a critical examination of the impact of automated decisions on fundamental rights, emphasizing the risks of discrimination, algorithmic opacity, and the lack of effective mechanisms for contestation.

Discussion

The aforementioned decision was approached from two different perspectives. The first one was the scoring activity developed by SCHUFA. The other side was the opposition to the remnant debt registry conservation deadline.

The first decision issued in that case ordered SCHUFA to delete the personal data of the citizens who submitted the request. This decision was taken because of the Data Protection Commissioner's omission. In that sense, the court understood that the scoring provided by SCHUFA is an individual decision-making process, which is prohibited by GDPR (*General Data Protection Regulation*), especially considering that SCHUFA's clients use these scores to make decisions that are crucial to their personal lives, for instance, when such clients deny a loan request based on SCHUFA's scoring.

The second decision was directly related to the refusal of the Data Protection Commissioner's order SCHUFA to delete the remission of the remaining debt in favor of such entities. In that case, the German court decided against GDPR, understanding that information retention for more than six months was illegal, leading to the conclusion that the data subject had the right to demand that this data be deleted. As a consequence, SCHUFA should respond without undue delay.

Concerning the first decision mentioned, the automated decision-making process by itself, which occurs without any review by human means, is already able to significantly affect human rights (Gola, 2017). For instance, when the generated information is used to reach important legal decisions, it can generate discriminatory outcomes that go against the right to equal treatment (Wachter, Mittelstadt & Russel, 2021). This conclusion is strongly based on Art. 22 of the European Union's (UE) General Data Protection Regulation, which affirms "The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".

This article contains the so-called right to human intervention, which is violated when relevant automated decisions are not reviewed by a human. These situations occur, for instance, when the decision delivered by user companies increases the probability of unfair treatment of data subjects, but not when the decision is only made for merchandise or advertisements (Gola, 2017). In this sense the Court's understanding was that the scoring process taken by SCHUFA had negative effects on individuals and, therefore, the former decisions of national Courts should be reviewed.

One of the primary concerns with SCHUFA's automated system is the lack of transparency. Consumers are often left in the dark about how their credit scores are determined. Without transparency, consumers cannot fully understand or challenge the decisions that affect their lives, raising questions about fairness and accuracy. Furthermore, the vast amount of personal data collected by SCHUFA poses significant privacy concerns. Consumers may be unaware of the extent of the data being collected and how it is being used. The automated nature of these systems increases the risk of data breaches or misuse, as large-scale data processing is often less secure (Martini, 2019). Moreover, consumers have limited control over their data once it enters the SCHUFA system, which raises ethical questions about consent and data ownership.

As a consequence, the reliance on automated systems like SCHUFA can undermine consumer rights. In the event of a dispute or error, consumers often face significant challenges in correcting their information. The lack of transparency and the complexity of these systems can make it difficult for consumers to exercise their rights, such as the right to access and rectify their data.

In this context, it is important to emphasize the right to algorithmic explainability, which involves Article 12 of the GDPR (concerning the transparency of information) Articles 13 and 14 (regarding the information that must be provided to data subjects upon data collection and processing - right to notification) and Article 15 (concerning data access) along with the previously mentioned Article 22, which pertains to automated decision-making. Additionally, but not limited to, the Recitals accompanying the Regulation also serve as important foundations for the creation of Brazilian law. Notably, Recitals 58 (the principle of transparency), 60 (the obligation to provide information), 63 (the right of access), and 71 (profiling) are highlighted. In this regard, it is important to note that the primary objective of the Recitals is to establish the fundamental teleology of rights (in this case, the rights to information and access) rather than specifying how these rights should be exercised.

Through a joint and systematic reading of these provisions, the right to an explanation of algorithmic decisions can be extracted, although it remains not well-defined or delineated as to how these normative commands should be met. In any event, the term "explanation" is only used in Recital 71 of the GDPR and does not appear at any other point. Powles and Selbst (2017), for instance, argue that the foundations for the positive existence of the right to an explanation are found precisely in Article 22 of the GDPR, combined with Recital 71, supporting the interpretation of Articles 13, 14, and 15 of the same regulation.

Additionally, beyond the general legislation of the European Union (GDPR), specific provisions related to the exercise of information rights in certain sectors are also applicable, particularly in consumer protection. Regarding the electronic communications field, for example, the EU General Data Protection Office, explains that Article 11 of the Universal Service Directive (2002/22/EC) grants Member States the power to implement regulations that enable end-users and consumers to access complete, comparable, and easily usable information. Likewise, the data protection laws of the EU and the Council of Europe mandate that the processing of personal data be conducted "in a transparent manner in relation to the data subject." According to the *Handbook of European Data Protection Law* (2018):

> Processing operations must be explained to the data subjects in an easily accessible way which ensures that they understand what will happen to their data. This means that the specific purpose of processing personal data must be known by the data subject at the time of the collection of the personal data. The transparency of processing requires that clear and plain language be used. It must be clear to the people concerned what are the risks, rules, safeguards, and rights regarding the processing of their personal data.

Additionally, in the SCHUFA case, the refusal of the Data Protection can be seen as a clear impediment to the right of transparency, since individuals have been prevented from contesting the use of their data, even if they believe it may be incorrect and the decisions made unfair. The omission by the responsible department also directly affects informational self-determination, which consists of the right of the human person to control the use and collection of their personal data. In that sense, the informational self-determination in order to correct one's data or delete can be also considered an unfulfilled fundamental right.

Human rights frameworks, such as the Universal Declaration of Human Rights (UDHR), emphasize the right to equality and non-discrimination (Article 7), which can be compromised by biased automated decisions. This is derived from the fact that automated decisions can undermine individuals' autonomy, particularly when they are based on profiling or predictive analytics. The right to self-determination, which includes the ability to make informed choices about one's life, can be compromised when decisions are made by opaque algorithms that individuals cannot control or influence. This raises concerns about the erosion of personal agency and the potential for automated systems to make decisions that do not reflect individuals' values or preferences.

In this case, automated decision-making can disproportionately affect vulnerable groups, including minorities, migrants, and those with low socioeconomic status. These groups may be more likely to be subjected to biased algorithms or have less access to mechanisms for challenging unfair decisions. This exacerbates existing inequalities and it can lead to violations of human rights, particularly in contexts where individuals have limited ability to protect their rights or seek redress.

Conclusion

The SCHUFA case is one of the most important precedents in the realm of automated decision regulation. In this case, the European Court reaffirms the emerging need for an ethical-legal framework for strict regulation regarding the use of automated decision-making processes, thus avoiding the incorrect use of data and also avoiding biased, opaque, and often unfair decisions, which directly affect people's lives. It also highlights the need for clarity and explainability in the processes used when the main product of a private organization is either someone's data or decisions made based on the use of personal databases. It is important to emphasize that human rights are not optional rights, but rather a way of preserving personal life, the right to privacy, and equal justice for all individuals in the world.

In other words, SCHUFA highlights the broader issues associated with the reliance on automated systems for decision-making processes that have significant impacts on consumers' lives. While these systems can improve efficiency, they also risk perpetuating injustices, reducing transparency, and compromising consumer privacy and rights. To address these concerns, there is a need for greater oversight, transparency, and accountability in the use of automated systems. Ensuring that these systems are fair, explainable, and respect consumer rights is essential to preventing the perpetuation of systemic injustices.

Therefore, a good suggestion of a corrective protocol for problems similar to the case discussed is a strict implementation of a regulation in private companies, aimed at total and unconditional respect for the regulations already in force such as the GDPR, to avoid exhausting the judicial system with cases that might not occur if such precautions had been taken beforehand. In addition, the construction of an internal and external legal basis for the company focused on human rights, is fundamental when the organization in question deals directly with personal data, as was the case with SCHUFA.

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