

Spain, Tribunal Constitucional, Constitutional Court, nº 58/2018, constitutional, 4 June 2018

Area of law

Data protection - right to be forgotten

Summary Facts Of The Case

In the 80's, the printed edition of the *El País* newspaper published the criminal proceedings followed against a drug's criminal organization. The newspaper's story explained the composition of the criminal organization, the police intervention and finally the criminal proceedings followed and the relevant convictions. The story identified by names and surnames the people involved in the criminal organization.

In 2007, *El País* provided free online access to its digital archives. Consequently, the above-mentioned story was available online. Through a search on a general research engine (as *Google*) and the internal research engine of the *El País*, the story was easily accessible using as a research criterion the names and surnames of the people mentioned in the story.

The applicants in 2011 decided to start judicial proceedings against *El País* alleging that the story available online and easily to connect by a search of their names and surnames was a violation of their right to privacy and personal data. They sought the de-indexation of the story of the digital archives of *El País* from all research engines and the suppression of their names and surnames from the story (anonymization of the story of the newspaper). The first instance court (*Audiencia Provincial*) decided in favour of the applicants and obliged to *El País* to, first, de-index the story from both general research engines and the internal research engine of the newspaper and, second, anonymize the story. The second instance court (*Tribunal Supremo*) partially revoked the decision of the first instance court and decided that *El País* only was obliged to de-index the story from general research engines, but not from the internal search engine while anonymization was not necessary. Finally, the applicants filed an individual constitutional complaint before the Spanish Constitutional Court.

The Spanish Constitutional Court partially upheld the decisions of the inferior courts. It decided to de-index the story from the general research engines and from the internal research engine. It did not oblige the anonymization of the story.

The Spanish Constitutional Court expressly referred to the "right to be forgotten" as a constitutional right. Article 18.4 of the Spanish Constitution establishes the right to personal data which includes the right to control your personal data, especially in the context of computing and internet. It is the first time that the Constitutional Court referred to this specific right and, in doing so, recognized it at the constitutional level as a fundamental right enshrined in article 18.4.

Once the "right to be forgotten" is recognized as a fundamental right, the Constitutional Court

balanced the same with freedom of information (art. 20 of Spanish Constitution). The story published by *El Pais* was only a description of facts and events, without expressing opinions, therefore freedom of expression was not applicable. Under the framework of freedom of information, the Constitutional Court applied the classical canon in the field. The story published must be verified and noticeable (of general interest). There was no debate about the trustfulness of the story and the Constitutional Court focused on the noticeability of the story. There was no doubt for the Constitutional Court that in the 80's the story published was of general interest for the public (drug trafficking and criminal proceedings), but the time elapsed (more than 20 years) eroded the noticeability of the story. The story seriously affected the reputation and privacy of the applicants –there were no public figures- revealing their involvement in past crimes and their convictions. But the criminal record of the applicants was over and the story did not show any new event connected to the past. The personal data available to the public was no more relevant for the point of view of the interest of informing the public. However, the Constitutional Court recalled that still the information could be relevant from the point of view of scientific, historical or cultural research. In this context, digital archives of newspapers are relevant in a democratic society and should be protected. Making available to the public past events, digital archives preserves knowledge and disseminate it to the public.

Considering all these criteria, at the case at bar the Constitutional Court analysed the measures taken by ordinary courts. Regarding the de-indexation of general search engines, the Constitutional Court maintained the decisions of the first and second instances and did not address the issue by itself. Both *Audiencia Provincial* and *Tribunal Supremo* agreed on the de-indexation because it was very prejudicial for the applicants and, therefore, the balance between freedom of information and privacy was broken. Regarding the de-indexation from the internal search engine, the *Audiencia Provincial* ordered also the de-indexation, but not the *Tribunal Supremo*. The Constitutional Court agreed with *Audiencia Provincial* and quashed the decision of the *Tribunal Supremo*. For the Constitutional Court, digital archives should be protected, but it was enough the possibility of searching the story through a thematic or other research criteria. For preserving the integrity of the digital archive, it was not necessary to maintain the indexation of the names and surnames of the applicants. Therefore, the Constitutional Court ordered the de-indexation of the names and surnames of the applicants and consequently the general public could not research in the digital archive by texting the names and surnames of the applicants. Finally, the Constitutional Court did not oblige, following the lead of the *Tribunal Supremo*, the anonymization of the story. For the Constitutional Court, the anonymization is a more intrusive measure against freedom of information. The de-indexation from the internal search engine already reduces the impact on the privacy of the applicants and it is enough for correctly balancing privacy and freedom of information

Relation to the scope of the Charter

The ECJ judgment in the *Google Spain* case is determinant to include the right to be forgotten (or the right to control your personal data) in article 18.4 of the Spanish Constitution. The Spanish Constitutional Court refers explicitly to the case and quotes directly articles 7 and 8 of the Charter. The Constitutional Court for the first time recognizes the right to be forgotten as a constitutional right and this step is done through their own reasoning and the evolution of its own case law. However, the Constitutional Court refers to the *Google Spain* case and the Charter as a

determinant factor to support its own argumentation under national constitutional law.

Impact on Jurisprudence

The Spanish Constitutional Court uses the ECJ and ECtHR case law for reinforcing its own argumentation under national constitutional law. The Constitutional Court develops a new constitutional right -the right to control personal data- by interpreting article 18.4 of the Spanish Constitution. In the development of this new constitutional right and, therefore, in reshaping the meaning of the constitution, the ECJ case law is crucial and is used by the Constitutional Court. The new development by the Constitutional Court is supported in the ECJ case law.

At the same time, the balancing between freedom of information and privacy is reshaped thanks to the ECJ and ECtHR case law. The time elapsed between the publication of the newspaper story and the time by which an individual desires to terminate its impact on their private life now weights in the balancing (the time elapsed can reduce the relevance for the general interest). This development is directly taken into account from the *Google Spain* case. At the same time, the level of protection of newspaper digital archives is understood in accordance with the ECtHR case law (specially *Times Newspaper* case).

The Spanish Constitutional Court wanted to be aligned with the case law of the ECJ and the ECtHR. The aim of the Spanish Constitutional Court was to reinforce its own case law on freedom of information and privacy and to support new case law developments.

Sources - EU and national law

Article 18.3 Spanish COnstitution

Article 20 Spanish COnstitution
