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## **Spain - The right to be forgotten. The right to privacy and the initiative facing the new challenges of the information society**

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### **Introduction**

This article aims to show the current situation surrounding the right to privacy in the Spanish legal system. First of all, we look at the regulations governing the right to privacy and at the characteristics of the Spanish protection of privacy. In the second part of the paper, we consider the current regulations on personal data protection as the grounds for new ways of protecting privacy. Finally, the paper shows how two new rights have emerged from the legal discourse on privacy and, overall, from the regulation of the protection of personal data: informative self-determination and the right to be forgotten. This study focuses on the latter, due to the prominent role of Spanish judges in shaping the incipient right to be forgotten via inter-action with the European Court of Justice in 2014.

### **Right to Privacy**

#### *The Precedents to the Spanish Right to Privacy*

One of the first precedents of the right to privacy in Spain can be found in a Supreme Court decision from 6 December 1912. After a romantic relationship between a priest and a teenager was discussed in the press, the doctrine on reparations for moral damage was applied in Spain for the first time. This decision was followed by other decisions by the state and regional courts (many authors have studied the Supreme Court's decision and its influence; among them, Pérez Fuertes (2004) and, previously, De la Valgoma, (1983); Díez Picazo, (1979); and Herrero Tejedor, (1990)). Their arguments show the remarkable influence of American and French jurisprudence, particularly in the application of the civil law principle "neminem laedere" – unfair damage cannot be caused to anybody without creating a responsibility to repairing the evil– as the starting point for building the right to privacy. American and French judges have extended the application of this principle to many acts concerning moral damage, which are different from acts against reputation.

#### *Characteristics of Privacy Protection in Spanish Law*

The protection of privacy in Spain has certain particularities. A noteworthy characteristic is the clear difference between the right to privacy and right to one's own image. In Spain, privacy and image are regulated as if these were two substantive rights, linked

to one another but different in their aims. Taking this difference into account, the right to privacy has the purpose of keeping a personal space free from the outsiders' gaze; meanwhile, the right to one's own image tries to guarantee for each person the exclusive use of his or her image. The second characteristic of the Spanish system related to privacy is the exhaustive legal regulation of the subject, based on three kinds of protection: constitutional, criminal and civil protection. These are regulated by the Constitution of 1978, art. 18 and 20, and by the Criminal Code of 1995, art. 197, respectively; and by the Civil Protection Law on the Rights of Reputation, Privacy and the Right to One's Own Image, n. 1/1982, May 5th. This broad range of laws on privacy is due to the consistent development of the "gossip" press, which is called "Prensa del Corazón" or "Periodismo Rosa" in Spanish. This began during the 1960s with magazines like ¡Hola!, a magazine that, even today, is leading in its genre with editions in other countries and languages, such as the American and British Hello!. Tabloid journalism was expanded in the late 1980s when commercial television introduced programs of similar content. Precisely this abundance of magazines and TV programs focussed on celebrities of film, television, fashion and royalty and their personal and family lives has caused a high number of cases in tribunals. In consequence, a high priority was given to the privacy rights of celebrities. The very intensity of the law's attention towards celebrities had neglected the privacy of ordinary citizens. However, the circumstances changed with the arrival of two technological innovations: databases and the Internet.

### **The Protection of Personal Data**

In the 1970s and 1980s, the protection of privacy, both in Spain and in other European countries, had adopted the point of view of the celebrities, and, as a main factor of danger, the media. Therefore, the principle representing this perspective is that the sphere of privacy shouldn't be violated by paparazzi, cameras or journalists. The step that followed came from a simple technological change: the transformation of big computers to manageable devices in offices, public and private institutions, hospitals, banks, university departments, stores, etc. One consequence of the usual work with these new kinds of computers in a variety of businesses, public administrative offices, banks, etc. has been the feasibility of processing personal data. The alert about the risks for privacy came from the moment in which it was easy to indiscriminately register and transfer the data of millions of citizens. This was the time of the first European Convention for the Protection of Personal Data (1981), and of the European Directive for the Protection of Personal Data (1995), and the time of the first national laws on the subject. In Spain, the first law on personal data was enacted in 1992, and it was replaced by the Law 15/1999 'de Protección de Datos personales' (Data Protection Act).

### **The Protection on the Internet**

The protection on the Internet, specifically when facing search engines, is the key to understanding the frontline of today's battle for privacy. From the digitization of

newspapers and the development of blogs and social networks, a strong need arose for methods of protecting privacy that were more adequate for the era of the Internet. In the end, our society needs efficient regulation in order to avoid the uncontrollable dissemination of infringements against privacy; regulation that must react quickly and proportionate to the issue of offenses against privacy. Cases like *Mario Costeja v Google* (2014) or *Els Alfacos v Google* (2010) render the inefficiency of existing rules visible and voice the demand for new rights such as the right to be forgotten.

### **Data Protection and the Right of Self-Informative Determination: the Roots of the Right to be Forgotten**

*Data Protection: Law 15/1999 'de Protección de Datos personales' (Data Protection Act)*

In the same way that the success of Warren and Brandeis' concept of the 'right to privacy' was due to the new risks resulting from photographic technology, especially when applied by the media, the interaction of digital communication in the 1990s brought a new kind of threat to private life and, consequently, generated a new kind of right: the right to personal data protection. The main question at the time was not only privacy – which was sometimes in danger – but the real risk of manipulation in that some organization – the state, police, companies, banks, political parties, different public departments involving health, labour, etc. – could affect individuals by creating exhaustive and detailed profiles (with aspects related to a variety of interests of the institutions and businesses above). Reacting to this threat, the European Union enacted three important directives, all of which are focused on different aspects of personal data protection:

1. Directive 95/46/EC (on Personal Data) 'on the protection of individuals with regard to the processing of personal data and the free movement of such data'
2. Directive 2002/58/EC (on Privacy and Electronic Communications) 'concerning the processing of personal data and the protection of privacy in the electronic communications sector'
3. Directive 2006/24/EC (on the Retention of Data) 'on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks'

Following these European normative directions, Spanish regulators enacted Law 15/1999, 'de Protección de Datos Personales' (Data Protection Act). Its main purpose is "the protection of people's freedom and fundamental rights, especially their right to reputation and the right to privacy" [Article 1]. Five significant elements can be pointed out in this Data Protection Act, 1999:

1. The data protection principles [Article 4 to 12];

2. The citizen rights [Article 13 to 19], which include the right to access to personal data irrespective to location; the right to know about the existence of personal data; the right to correct data; and the right to delete data.
3. The regulation of any kind of files [Article 20 to 33].
4. The creation of the Data Protection Agency (Agencia de Protección de Datos)[Article 35 to 42].
5. Infractions and sanctions [Article 43 to 49]

The Data Protection Act, 1999, intends to balance the right to reputation and privacy on one hand, and the requirements of the state and public authorities such as governments, police, social security, the treasury of income tax departments, etc. as well as companies, on the other. It tries to guarantee fundamental rights when there is some ‘necessary use’ or ‘interested use’. There are three principles which help in this balance:

1. The principle of quality of data: this means not only that the personal data included must be true, but also that this data can only be held for a temporary period.
2. The right to information when the data is requested by people.
3. The principle of assumed consent given to anyone who requests access to the data.

#### *A New Constitutional Right to Self-Informative Determination*

The Constitutional Court goes beyond Law 15/1999 ‘de Protección de Datos personales’. Following its own arguments in three resolutions dealing with data protection, the Constitutional Court has recognised a right related to privacy and the protection of personal data but, at the same time, much more focused on personal identity. The first case was the denial of information from the regional institution ‘Gobierno Civil’, which at that time was a representative of the central government to a citizen who was asking about personal data that was supposedly held by the ‘Gobierno Civil’ [STC 254/1993]. In the second case, a bank denied an employee’s request to delete his medical record from the bank’s database.[STC 202/1999]. The third case was the constitutional procedure against articles of the Law 15/1999, ‘de Protección de Datos personales’ (Data Protection Act) [STC 292/2000]. The Constitutional Court states that the protection of personal data:

‘...is an answer to one new threat against human dignity and personal rights (...); and also it is, by itself, a new right or a new fundamental freedom’ [STC 292/2000, Fundamento jurídico 4].

This right is different from the “right to privacy, art. 18.1 CE, with which it shares the aim of an efficient protection to privacy” [STC 292/2000, Fundamento jurídico 6]. The peculiarity of the right of protection of personal data lies in its different function, which is the guarantee to any individual to be in control of this data, and at a lower level, the defence of privacy. [cf. STC 292/2000, Fundamento jurídico 6]. The Constitutional Court states precisely on the subject of the right of data protection:

“The object of the fundamental right of personal data protection is not only the privacy – the individual intimate data – but any kind of personal data, even if it is not intimate, when the knowledge or the use of this data by a third party can diminish the rights of a particular person. It doesn’t matter if the rights concerned are or are not fundamental, because the object (of the right of personal data protection) is not only the individual intimacy – for that purpose there is the protection of art. 18.1 CE – but the personal data. Therefore, this right also has to do with the personal data which is public and accessible to anyone. But even here, the right of the protection of personal data must be efficient” [STC 292/2000, Fundamento jurídico 6].

As a consequence, the protection of personal data goes beyond the right to privacy:

“...the data protected (by the right of protection of personal data) is all that which identifies or allows the identification of one person; it can be ideological data, sexual, religious, economic data or any type; (the collection of this data and its manipulation) in particular circumstances can constitute a threat to individuals” (cfr STC 292/2000, Fundamento jurídico 6).

In respect to the protection of personal data

“...the prerogative to dispose of, and to control personal data means that every person has the faculty to decide which parts of their data can be transferred to a third party; it doesn’t matter if this third party is the state or an individual; or which personal data can be collected by this third party. At the same time, this right allows a person to know who has access to their personal data and for what purpose. Therefore, they can oppose this possession or use” (STC 292/2000, Fundamento jurídico 6).

It is precisely in this point that the right of informative self-determination connects with the right to be forgotten, a right that has been recognised only recently. Both rights can be defined as versions of the right to privacy adjusted to the information society.

## **The Right to be Forgotten: An Aspect of the Right to Self-Informative Determination**

### *The Spanish Initiative for the Acknowledgement of the Right to be Forgotten*

One of the first consequences of the right of informative self-determination is more effective protection against the possible threat to personal freedom posed by the power of the immense amount of collected data. It is a power which mainly lies in its capacity to predict the behaviour of millions of persons. This is made possible through the knowledge of people’s interests, their personal communications, their exchanges of opinions, their favourite sites, their professional acts, their online shopping, their pictures, etc. all of which has been gathered over the past years. The power is also strengthened by the generation of digital identities which accompany citizens throughout their lives. These digital identities are built and traced by different institutions and companies on the Internet and can interfere in decisions taken by others in relation to a particular person. Even one’s own decision-making process can be affected, as long as the information, the offers or the advertisements that a person receives, are determined by their specific digital identity. This is the scope of vulnerabilities that need to be protected by the new versions of the right to privacy

(Tene, 2011). The problem was raised in the Spanish National High Court's preliminary question towards the European Court of Justice in the case of Mario Costeja (2014), which has another precedent in Spain: the Els Alfacs case (2010). Mario Costeja had suffered damage over the years as the result of an advertisement placed in the La Vanguardia newspaper in 1998 for a foreclosure sale related to debts he owed to the social security administration. When the newspaper was digitalised, Google searches for the name 'Mario Costeja' revealed personal data and financial information that had become outdated. This greatly affected his professional life. At first, Costeja filed a petition before the Spanish Data Protection Agency (SDPA), requesting for the newspaper to remove the information, but his petition was not successful. The SDPA stated that the advertisement published in the La Vanguardia newspaper was legal and that its removal would infringe upon freedom of expression. Nevertheless, the SDPA sent a request directed to Google Spain and Google Inc., calling upon these companies to stop indexing the aforementioned content. Google filed an appeal against the agency's decision (and other similar decisions) before the National High Court. It was this judicial authority that ultimately referred this question for a preliminary ruling to the European Court of Justice.

The Els Alfacs case concerned a company owning a campground that had been the site of a horrific tragedy in 1978 in which a truck carrying propylene exploded, killing over 200 people. In 2010 the company filed a lawsuit against Google Spain for ignoring an earlier petition requesting that the search engine stop placing news about the accident at the top of searches of the campground's name. The complainants demanded both the right to be forgotten and the company's rights to honour, privacy and self-image. The company wanted Google to filter the search results and differentiate between those who were looking for information on the tragedy and those who merely sought information about the campground, since the way Google presented the search results at that time resulted in serious damage to the company.

In both cases, the personal information involved had been disseminated in proportion to its relevance when it was initially published, but the fact that this information was still widely available to a large audience ten to fifteen years after the original incidents did not appear to be logical if it caused substantial moral and economic damages and the circumstances that led to its publication no longer existed.

*The European Court of Justice's Sentence in the Spanish Case of Mario Costeja v. Google, May 13th, 2014*

Many authors have provided exhaustive commentaries on the decision of the European Court of Justice regarding the preliminary questions raised by the Spanish National High Court on the Mario Costeja v Google case (Andrés Boix Palop, 2015, Nieves Busán García, 2014, Lorenzo Cotino Hueso, 2015, Artemi Rallo, 2014 Gregory Voss, 2014). For this reason reference will only be given to arguments that are directly linked to the recognition of the right to be forgotten. The Spanish National High Court raised

four doubts about the interpretation of the directive concerning Data Protection 95/46, in 2012, through three preliminary questions raised to the European Court of Justice:

1. Whether the indexation of research engines should be considered “data processing” (Preliminary question 1, part 1);
2. Whether Google.es can be considered a company headquartered in Spain or rather an affiliate of American Google (Preliminary question 1, part 2);
3. Whether the manager of a search engine must delete links to websites collected in search results (Preliminary question 2);
4. Whether an individual can request that the manager of a search engine delete both data and information if this data and information can damage them or for the simpler reason that this individual wants the data and information “forgotten” after a period of time (Preliminary question 3).

Of these, Preliminary questions 2 and 3 are more directly connected with our subject of study. In opposition to the request to delete links to the web sites collected among the search results, Google submitted to the Spanish National High Court, that:

N. 63: “by virtue of the principle of proportionality, any request seeking the removal of information must be addressed to the publisher of the website concerned because it is they who takes the responsibility for making the information public, who are in a position to appraise the lawfulness of that publication and who has available to them the most effective and least restrictive means of making the information inaccessible. Furthermore, to require the operator of a search engine to withdraw information published on the internet from its indexes would take insufficient account of the fundamental rights of publishers of websites, of other internet users and of that operator itself.” (Judgment of the Court (Grand Chamber) of 13 May 2014 Google Spain SL and Google Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (Case C-131/12) ECLI:EU:C:2014:317) or (Case C-131/12, 13 May 2014 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González).

Nevertheless, the European Court of Justice interpreted that the directive on Data Protection requires the manager of the search engine to take responsibility for the processing of personal data involved in its service:

“N. 72: (art. 6 Directive of Data Protection) Under Article 6 of Directive 95/46 and without prejudice to specific provisions that the Member States may lay down in respect of processing for historical, statistical or scientific purposes, the controller has the task of ensuring that personal data is processed ‘fairly and lawfully’, that it is ‘collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes’, that it is ‘adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed’, that it is ‘accurate and, where necessary, kept up to date’”.

As a consequence, it was determined that a user can address a request to delete personal data from a website towards the search engine:

“N.77: Requests under Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 may be addressed by the data, subject directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. Where the

controller does not grant the request, the data subject may bring the matter before the supervisory authority or the judicial authority (...)"

The Spanish National High Court also raised in its third preliminary question:

"N. 83: Can the interpretation of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 be that which enables the data subject to require the operator of a search engine to remove from the list of results (...) on the ground that that information may be prejudicial to them or that they wish it to be 'forgotten' after a certain time?" (Preliminary question 3).

Google had said that, in these last circumstances, the deletion of the links from the search results cannot be requested, because it is not logical that the simple will of forgetting information about a person justifies the duty of the search engine to delete it:

"N 90: [...] confer rights upon data subjects only if the processing in question is incompatible with the directive or on compelling legitimate grounds relating to their particular situation and not merely because they consider that that processing may be prejudicial to them or they wish that the data being processed sink into oblivion".

On the contrary, the European Court of Justice insisted that it is possible to oblige the search engine to delete these contents, because:

"N. 93: even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where the data is no longer necessary in the light of the purposes for which it was collected or processed. This is particularly so where it appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed".

his means that requests for the deletion of personal data should be resolved on a case by case basis, taking into consideration the criteria mentioned by this decision and the European legislation, relating to the exactitude, adequacy, relevance –including the elapsed time – and the proportionality of the links in relation to personal data processing (Cfr. N. 93).

### *Balancing Rights in the Application of the Right to be Forgotten*

Following the text of the decision of the European Court of Justice in the case Mario Costeja v. Google, the examination of proportionality among the rights which ask for the deletion of the search results (privacy and personal data) and those which protect the economic benefit derived from data processing, as well as the satisfaction of interest of the public for the access to information, the opinion of the European Court of Justice is the absolute prevalence of the fundamental rights:

"N. 99: As the data subject may, in the light of their fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name".



In circumstances where the individuals – because of their activities or personalities- have a public profile, the possibility to request of the search engine to delete personal data is much more limited:

“N.99: However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that interference with their fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.”

In any case, due to the certainty of the statement it is surprising that the right to privacy and the right to the protection of personal data take precedence over the public’s right to have access to all information on the Internet. This is especially interesting since the constitutional jurisprudence of the majority of European countries, Spain among them, has chosen to examine on a case by case basis the criteria in cases of conflict between the right to information and freedom of expression and the rights of reputation, privacy and self-image, all without having established the precedence of one right over the others. In some way, the decision of the European Court of Justice in this case builds a defence of privacy against a new dimension of risk generated by the Internet and search engines. This danger affects not only celebrities and public persons, but all individuals. Citizens can therefore see that there are thousands of Internet pages linked to their names. These include pictures of individuals, captured and spread on the Internet by third parties; pictures from private lives or from public situations, recent or from the past; content with personal references in official newspapers – all of which are available online today – including a diversity of professional or legal topics related to that particular person; and also in any digital newspaper or blog, recently published or, conversely, published many years ago, etc., including home addresses, telephone numbers, email accounts, commentaries by third persons involving personal issues, and a long list of possibilities of damage to privacy. Some content is registered on a second level by the companies operating the Internet – content which is connected to tastes, habits, hobbies and addictions. There are also unsolved issues such as the possibility that, once personal data is deleted from a search index, the normal activity of search engines can lead to the data being indexed again (Artemi, 2014). This can also occur if a search is made not by a person’s name but by other criteria, such as an offensive or insulting word which leads to search results connected to the person’s name (Buisán García, 2014). Also, it is necessary to determine the criteria that balance interests more narrowly to make it easier for search engines to face requests for the right to be forgotten (Mieres Mieres, 2014). The European Court of Justice has chosen to place the right to be forgotten as one of the elements of the right of informative self-determination. Andrés Boix Palop observed that the right to be forgotten

“is not a derivation of the privacy guarantees, but a consequence of the idea of (Autodeterminación Informativa) informative self-determination (art. 18.4 Spanish Constitution and art. 8 of the Bill of Rights of the European Union), and therefore, this right has a different profile to the other rights of personality set by art. 18 of the Spanish Constitution (the right to privacy and right to protection of personal data), rights which, in some ways, have been shaped, legally speaking, by the regulations on data protection. There are consequences arising from this, especially in the relationship between these rights and freedom of expression” (Boix Palop, 2015).

In any case, the decision of the European Court of Justice represents an important push in the current reform of personal data, in which the court wanted the “right to be forgotten” to be included. Remarkably, as Andrés Boix Palop points out, “beyond the existing dogmatic constructions of the ‘right to be forgotten’ it is important to say that, as from the ‘Google Decision’ of the European Court of Justice, this right is now recognised by European Law as a true right” (Boix Palop, 2015).

### **The Application of the Sentence of the European Court of Justice on Google v Spain by the Decision of December 29th 2014 Taken by the Audiencia Nacional (National High Court)**

The Administrative Chamber of the National High Court finally decided the Mario Costeja case in its decision of December 29, 2014, published January 23, 2015, to which the arguments of the European Court of Justice’s decision of May 13, 2014, were applied. It was the first time that a Spanish court recognised the right to be forgotten, and at the same time this decision set the criteria for balancing possible conflicts. The right to be forgotten was described as a “personal power of decision over a person’s own data published on the Internet” (Fundamento de Derecho 13. Criteria for balancing). It is a definition in line with the one which the National High Court presented to the European Court of Justice in its third preliminary question which asked whether a citizen has the right to directly request of the search engines to end the indexation of personal information. “It is a request based on the personal will to keep this information inaccessible, when the person concerned considers that knowledge of this information can damage them or wants to forget the information”. (Fundamento de Derecho 13. Criteria for balancing) It is an individual’s decision whether information should remain accessible on the Internet. In respecting this right, the search engines are obliged to de-index undesired content. As the Spanish National High Court has said: it is a “personal power of disposition”. (Fundamento de Derecho 13. Criteria for balancing) Google fought this idea, saying that it wasn’t logical that the mere will of a person could justify the duty of the search engine to delete personal data. From Google’s point of view, this can be justified only if the personal data processing were incompatible with the directive or if there were legitimate reasons resulting from the particular situation of the person in question. The European Court of Justice has pointed out that it is not possible to take only incompatibility with the directive on personal data protection into account when considering a person’s right to request the deletion of personal data. The main circumstance which must be taken into account is the effect of the time elapsed. Therefore, it is possible that something which was legitimately published by a newspaper or website can become “inadequate, irrelevant or no longer relevant, or excessive in proportion with the aims of these personal data processed” (N.93 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González) in the context of the search engine activity. This

means that in-compatibility with the law is no longer a solid criteria that can serve as the grounds for this personal prerogative facing Internet search engines. It will be necessary to go beyond legal texts and to create a balance in order to know definitively whether accessibility to personal data is or is not compatible with the directive. Taking into account the definition of the “right to be forgotten”, the decision of the Spanish National High Court has confirmed what the European Court of Justices pointed out in its answers to the preliminary consultation made by the Spanish Court:

1. The search engine can be obliged to de-index a list of search results linked to the name of a person, even if the initial diffusion of this information was legitimate:

“The manager of a search engine is obliged to delete from the list of search results obtained after a search via the name of a person, links to web sites that have been published by third parties and which contain information related to this person; and also in the case that this name or the personal information haven't been deleted previously or simultaneously in these web sites, and, even, if the publication in these pages is essentially licit” (Fundamento de Derecho 13- Criteria of Balancing).

2. It is not necessary that the accessibility of the personal information causes prejudice to the person concerned, for the application of the "right to be forgotten", because:

The right to privacy and the protection of personal data (art. 7 and 8 European Union Charter of Rights) prevails, in principle, not only upon the economic power of the manager of the search engine, but over the interest of the public to access the above-mentioned information, in a search by the name of this person”, with the exception of the case where there is somebody who has a role in public life or a similar circumstance. In this last case, “the trespass on their fundamental rights would be justified due to a preponderant interest of the public in having access to this information (...)” (Cfr. Fundamento de Derecho 13.- Criteria of balancing).

The Spanish National High Court formed an interpretation of the arguments of the European Court of Justice decision based mainly on those principles and criteria which are applicable to the facts that are judged. Those are the need to balance the rights in conflict; the consideration of the relevance of the criteria of the time elapsed; the need for a fair balance between the legitimate interest of Internet users to access information; and the rights of a person concerned by this information. This is a balance that depends on “the nature of the information, the sensitive character of the information towards the intimacy of the person concerned, and the interest of the audience in having this information” and that “can vary depending on the role that this particular person plays in public life”. (Fundamento de Derecho 13.- Criteria of balancing) The outcome of balancing different interests can also be different depending on whether the processing was made by a search engine, in origin or by a website.

It is noteworthy that the decision of the Spanish National High Court follows the procedure set by the European Court of Justice by which one can make a request to the manager of data processing to delete the information and, if they don't respond, that the request can be addressed to the data authority or to the courts. There is one regard,

however, in which the Spanish Court goes beyond the arguments of the European Court of Justice, in the sense that the prevalence of the protection of personal data cannot be understood as an absolute right, under any criteria:

“(…) from the Decision (of the European Court of Justice) a prevalence of the right of personal data protection (…) is deduced. However, this prevalence of the right to oppose the data processing by its holder upon the legitimate interest of the manager of a search engine is neither absolute nor alien to the particular personal situation of the claimant, with the only exception that the law could set a different provision. The protection of personal data is one example of the protection of the fundamental right to privacy. However, it may be justified to interfere with and limit that right when, as provided by law, such interference or limitation is considered a necessary measure in a democratic society to safeguard other interests, including the protection of the rights and freedoms of others, as established in Art. 8 of the European Convention on Human Rights of 4 November 1950 and in Art. 52.1 and 52.3 of the European Charter” (Fundamento de Derecho 13.- Criteria of balancing).

### **Conclusion**

The right to be forgotten – as recently approved by the European Court of Justice in the Decision of May 2014 and as the Spanish National High Court applied it in the Decision of December 2014 – allows that personal information disseminated on the Internet by search engines, and therefore out of the concerned person’s control, may be deleted if the concerned person demands so. This right can be applied if the following conditions expressed by the European Court of Justice are present: the data must be “inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes towards which the data processing was aimed” (N. 93 Case C- 131/12, 13 May 2014 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González). If the indexation of someone’s personal data is performed by a company based in Spain, it will be balanced with the freedom of expression and the right to information following the balancing criteria set by the Spanish Constitutional Court. The right to personal data protection is, in principle, dependent upon the economic interests of the managers of search engines and upon of the citizens’ right to access this data on the Internet. The right to informative self-determination is currently gaining ground in European legislation. It offers a formulation of data protection rights that is better suited to the reality of an information society.

As a more concrete result, the decision of the European Court of Justice has established a means to resolve conflicts between citizens and search engines. This is possible thanks to the right of every person to ask the manager of the search engine for the deletion of their data when it is “inadequate, irrelevant or no longer relevant” (N. 93 Case C-131/12, 13 May 2014 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Coseja González) under the control of the proper authorities, and, in particular, of the Data Protection Authorities. Eight months after the publication of the decision of the European Court of Justice, the news agency Reuters reported 200,000 submissions for the deletion of Internet links in Europe, which would affect around 700,000 URLs by the right to be forgotten.

### **References**

- Artemi, R. (2014). El derecho al olvido en Internet. Google versus España. Madrid: Centro de Estudios Políticos y Constitucionales.
- Boix Palop, A. (2015). El equilibrio entre los derechos del artículo 18 de la Constitución, el «Derecho al olvido» y las libertades informativas tras la sentencia Google. *Revista General de Derecho Administrativo* , 38,1-40.
- Buisán García, N. (2014). El derecho al olvido. *El Cronista del Estado Social y Democrático de Derecho* , 46, 22-35.
- De la Valgoma, M. (1983). Comentario a la ley orgánica de protección civil del derecho al honor, a la intimidad familiar y personal y a la propia imagen. *Anuario de Derechos Humanos* (2). 652.
- Díez Picazo, J. L. (1979). *Estudios sobre Jurisprudencia Civi*. Madrid: Tecnos.
- Gómez de Liaño Fonseca-Herrero, M. (2015). La prohibición constitucional del uso de cámaras ocultas en el marco del denominado periodismo de investigación. *Derecom*, 9.
- Gómez Sáez, F. (2013). Investigative reports with a hidden camera and constitutional jurisprudence. *Revista de Derecho* (12) 293-326.
- Gutiérrez, M. E. (2013). Intimidad y propia imagen: los ecos del common law americano y la evolución de la jurisprudencia constitucional española. *Derecom* (14).
- Herrero Tejedor, F. (1990). *Honor, Intimidad e Imagen*. Madrid: Colex.
- Magdaleno Alegría, A. (2012). La utilización de la cámara oculta en el periodismo de investigación: ¿el fin justifica los medios? *Teoría y Realidad Constitucional* (30) 515-532.
- Mieres Mieres, L. J. (2014). *El derecho al olvido digital. Resumen ejecutivo*. Madrid: Laboratorio Alternativas.
- Pérez Fuertes, G. M. (2004). Evolución Doctrinal, Legislativa y Jurisprudencial de los derechos de la personalidad y el daño moral en España. *Revista de Derecho Privado* (8), 111- 146.
- Rodríguez Gómez, E. F. (2014). El Tribunal Constitucional y el conflicto entre la libertad de información y los derechos al honor, la intimidad y la propia imagen: revisión jurisprudencia. *Estudios sobre el Mensaje Periodístico*, 20 (2), 1212-1224.
- Tene, O. (2011). Privacy: the new generations. *International Data Privacy Law* , 1 (1), 15-27.