[ES] Right to Privacy vs. Right to Information

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The right to privacy and the right to information are considered to be Fundamental Rights by the Spanish Constitution. The former is enshrined in Article 18(1) and the latter in Article 20(1)(d). However, each right limits the other and litigation will normally occur when a party claims the enforcement of one of these rights against another party claiming a defence based on the other right. In such a case, it is up to the court to find the correct balance between the two rights in question.

The right to privacy is expanded upon by *Ley Orgánica 1/1982 de 5 de mayo, de Protección Civil del Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen* (Act no. 1/1982 of 5 May 1982 on the Protection of the Right to Honour, Personal and Family Privacy and Own Image). The Act considers certain types of conduct to constitute an infringement of the right to privacy (Article 7), such as the use of hidden cameras or recording devices intended to record or reproduce private moments of the life of individuals.

On the other hand, the right to freedom of information is limited by the right to privacy, this fact is reflected in Article 20(4) of the Spanish Constitution.

Problems arise as to the determination of which of the two Fundamental Rights must prevail over the other in the case of a conflict between them, as no specific rules to help solve the problem are provided by law, while judges are called upon to analyse the question on a case by case basis.

In relation to this issue, the Spanish Supreme Court has established that the broadcasting on television of images captured with hidden cameras or devices, without the consent of the person involved, should be considered as an illegal interference, which is not justified by the exercise of the right to freely communicate information.

This was the conclusion reached by the Civil Chamber of the Supreme Court in considering an appeal from a woman who practised naturopathy and was recorded, in 2000, without her knowledge, by a journalist posing as a patient, these images being subsequently shown on a television programme in Spain.

The decision was taken against what had been a consistent course of jurisprudence, since it had been held by the lower courts that these actions could

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be included within the scope of an investigation, excluding them from being interpreted as illegal interferences. In fact, the *Audiencia Provincial de Valencia* (provincial supreme court of Valencia) had ruled that such an action could be part of so-called “investigative journalism”, “as long as no private conversations of third persons were recorded”. In addition, the Court did not consider such actions as reprehensible, as there was no doubt as to the informative character of the case.

Notwithstanding this, the Spanish Supreme Court, on 18 December 2008, considered that such interference was not justified by the exercise of the right of free speech and, accordingly, the relevant doctrine has been amended in Spain.

Sentencia del Tribunal Supremo de 18 de Diciembre de 2008

Decision of the Supreme Court of 18 December 2008

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