CONSTITUTIONAL COURT OF SPAIN
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THE PLENARY OF THE CONSTITUTIONAL COURT DECLARES THAT, DUE TO THE LACK OF LEGAL GUARANTEES, IT IS UNCONSTITUTIONAL THAT POLITICAL PARTIES COLLECT DATA ON THE POLITICAL PREFERENCES OF CITIZENS

The Plenary of the Constitutional Court has, by unanimity, resolved to uphold the appeal of unconstitutionality ("*recurso de inconstitucionalidad*") filed by the Spanish Ombudsman *("Defensor del Pueblo")*, and has thus declared the unconstitutionality and invalidity of article 58 bis, paragraph 1, of Organic Law 5/1985, dated June 19th. The contested article had been incorporated into the said Organic Law by final provision no. 3, paragraph 2, of Organic Law 3/2018, dated December 5th, on the protection of personal data and on the guarantee of digital rights.

The challenged provision allowed for political parties to collect, in the framework of their electoral activities, personal data concerning the political preferences of citizens.

The judgement, which was drafted by Magistrate Cándido Conde-Pumpido, points out that "*lawmakers have not specified which objective or purpose of a constitutional nature may justify this restriction on the right on one's personal data. Likewise, they have not determined in which cases and under which conditions may this limitation take place, and neither have they established the clear rules that could make this limitation and its consequences foreseeable for the affected people*".

The Ombudsman considered that the reform introduced in the electoral law infringed articles 9.3, 16, 18.4, 23 and 53.1 of the Spanish Constitution (CE). The first constitutional breach would consist on the fact that the challenged provision did not specify the essential public interest that may justify this restriction to a fundamental right. The second constitutional infringement would be based on the fact that the limitation of a fundamental right is not subjected to a thoroughly established set of conditions.

The Court considered that the affected fundamental right is the right to personal data, which is impacted under two different perspectives. Firstly, as an autonomous fundamental right whose purpose is to control the flow of data that concerns a given person; secondly, as an indirect fundamental right which is at the service of another fundamental right, i.e. the right to ideological liberty.

The judgement, which makes referrals to the case law of the Court of Justice of the European Union, affirms that "*the adequate guarantees must be set so that the treatment of data is carried out under the appropriate conditions that assure transparency, supervision and an effective judicial protection. Likewise, those guarantees must make sure that data are not collected disproportionately and that they are not use for objectives that diverge from those that justified its original collection*". Therefore, "*political opinions are sensitive personal data that need to be protected under higher standards than other types of data*".

The Plenary goes on to conclude its reasoning by holding that "*the law has not identified the purpose of the interference on personal data that political parties are allowed to carry out. Equally, it has not delimited the cases in which, nor the conditions under which, that interference is permitted, nor has it established appropriate guarantees so that the fundamental right to personal data is adequately protected. Indeed, that protection is not assured according to our previous case law on the standards of protection of personal data that political parties must observe whenever they collect data concerning political preferences*".

Therefore, the Court concludes that the challenged law has committed three breaches of article 18.4 CE, in connection to article 53.1 CE. These violations "*are each autonomous and distinct, but are all of them linked to the insufficiencies of the law, to which only lawmakers may now provide a remedy*".

In sum, the judgement underscores that "*the indeterminacy of the purpose of the treatment of those data, as well as the inexistence of the appropriate and minimal guarantees that must be required to the law, are by themselves interferences in the affected fundamental right that are equivalent to a direct violation of its substantive content*".

Madrid, 29 May 2019