***Case Title:* Abreu v. Google, et.al**

***Meta-Data*:**

* **Case Number**:135.543-2020
* **Date of decision**: October 27, 2020
* **Featured case**: N/A
* **Region**: Latin America and the Caribbean
* **Country**: Chile
* **Type of expression**: Electronic / Internet-based Communication
* **Judicial Body**: Court of Appeals
* **Type of law**: Constitutional Law
* **Main Themes**: Defamation / Reputation, Press Freedom, Privacy, Data Protection
* **Outcome**: Dismissed
* **Status**: In progress
* **Tags**: Right to be forgotten, Update of Information

***Analysis:***

**Summary and Outcome**:

The Santiago Court of Appeals denied a writ of protection filed by Herval Rossano Abreu Guerrero against Google, Microsoft, Verizon Chile, and Wikimedia Chile that solicited the deletion of all information related to the sexual abuse allegations against him. Mr. Abreu claimed that his "right to be forgotten" was infringed by the search engines since they maintained publications that had stopped being of public relevance after a Criminal Court had dismissed the charges. However, the Court of Appeals determined that the search engines had not infringed the plaintiff's rights since the information was neither false nor outdated.

**-Facts:**

On April 28, 2018 “Sábado” a magazine from El Mercurio, a Chilean newspaper published a series of testimonies from several actresses who claimed to have been victims of sexual abuse and abuse of power of Herval Rossano Abreu Guerrero, a Televisión producer, and director.

As a result of the publications, on April 30, 2018, las Condes Prosecutor's Office initiated an ex officio criminal investigation to examine the possible commission of a crime of a sexual nature by Mr. Rossano Abreu.

Posteriorly, the Prosecutor's Office communicated to the Fourth Court of Guarantee of Santiago (*4° Juzgado de Garantías de Santiago*) its decision not to proceed with the investigation. On March 15, 2019, the Court delivered a definitive judgment dismissing the claims against Mr. Rossano Abreu.

In 2020, Mr. Abreu filed a writ of protection before the Santiago Court of Appeals against Wikimedia Chile, Microsoft Chile S.A, Google Chile Limitada, and Google Inc., claiming his rights to psychological integrity and private life were violated as a result of the maintenance of the information concerning the alleged abuse online.

**Decision Overview**:

The main issue for the Court of Appeals to analyze was if the so-called right to be forgotten, alleged by Mr. Abreu, could entail the deletion of information on the internet if demonstrated that the search engines had infringed his right to private life and psychological integrity.

Mr. Abreu based his plea on Articles 1, 4, 16 and 19 of the Constitution. He claimed that the massive, immediate, and constant access to information generated a public and ferocious prosecution against him without considering his right to defend or be heard. Likewise, Mr. Abreu stated that the accusations affected his daily life. He also argued that since search engines allow anyone to access information regarding alleged abuses, he couldn't rebuild his life even though a Criminal Court dismissed the claims. Mr. Abreu asserted that his constitutional rights of psychological integrity and private life, emanating from the "right to be forgotten", had been violated.

Mr. Abreu claimed that the “right to be forgotten” was contemplated as the right to deletion of personal data in Law 19,628, which translated to an obligation applicable to the respondents since they carried out operations qualified as data procurement.

Further, the plaintiff held that the possible collision of rights concerning freedom of the press must yield for the benefit of the individual. He added that events depicted in the publication had stopped being of public relevance. Thus, the news ceased to be protected by the constitutional right of freedom of the press.

Based on the previous, Mr. Abreu requested the Court of Appeals to i). declare that the behavior of the respondents constituted illegal and arbitrary actions; ii). order the removal of links or access to the news, reports, or information related to the unfounded complaints against him for sexual abuse from the respondents' search engines and websites, and iii). adopt all the necessary measures to restore the rule of law, with express condemnation of costs.

The first respondent, Wikimedia Chile Corporation, requested the total rejection of the writ of protection, with express condemnation of costs. Wikimedia Chile claimed that it was not a branch or subsidiary of the Wikimedia Foundation, much less its legal representative, therefore was not empowered to carry out what was requested by Mr. Abreu. Regarding the substantive allegations, it indicated it lacked passive procedural standing since it had no control over Wikipedia´s content.

Further, Wikimedia Chile claimed that Mr. Abreu did not specify how the Corporation's active or passive actions could have affected his constitutional rights. Likewise, Wikimedia Chile argued that the plaintiff had not set the direct and necessary link with the Wikipedia article and the increased accessibility to the information regarding his alleged crimes. Also, the Corporation held that no Supreme Court precedent had established order for the removal of posts. As for the right to be forgotten, Wikimedia Chile held that it was not a right enshrined in the Chilean legislation or recognized by national jurisprudence.

The second respondent, Verizon Chile S.A., requested the total refusal of the writ of protection, with express condemnation of costs. It maintained that Verizon Chile was a subsidiary of Verizon Business Global LLC, a company based in the United States, which owns, among other services, Yahoo. The respondent claimed Verizon Chile and Verizon Media were separate legal entities with different commercial activities.

The respondent indicated that it lacked passive procedural standing since: i). it was not the owner of the Yahoo search engine and therefore did not hold the administration or any right for said engine search; ii). was not the qualified entity to answer Mr. Abreu's request; and, iii). If it were the case that Verizon Chile was to be deemed the controller of the search engines, there would also be a lack of passive procedural standing since search engines are not responsible for the information contained in their servers. Additionally, it alleged that Mr. Abreu's writ of protection was filed extemporaneously since the law provides that such recourse must be presented within 30 days after the plaintiff becomes aware of the alleged fact.

Verizon Chile claimed that the plaintiff did not establish the causality between the alleged arbitrary and illegal act and violated his constitutional rights. Regarding the protection of personal data alleged by the plaintiff, it indicated that the Supreme Court had held that search engines are not registries or personal data banks in similar cases.

The third respondent Google LLC, requested the rejection of the constitutional action with express condemnation of costs. It argued that the contested information was not the respondent's creation since Google's mission is to organize information so that it is universally accessible and useful by running a free search engine on the Internet. It added that the organization only indexes public Internet content. Additionally, Google LCC declared that the right to be forgotten alleged by Mr. Abreu was not applicable since it is not recognized in the Chilean legal system and claimed that the IACtHR had warned of the risks of applying this concept. Finally, it indicated that the challenged publications must enjoy the broadest constitutional protection, as per Articles 5 and 19 No. 12 of the Constitution and Article 19 of the International Covenant on Civil and Political Rights.

The fourth respondent, Microsoft Chile S.A., requested the Court to reject Mr. Abreu's recourse since the writ of protection presented by the plaintiff was not the appropriate recourse because the legislation contemplates a particular civil procedure for the deletion of personal information. It also held that Mr. Abreu had wrongly requested the search engines to delete personal data rather than directly asking the media outlets and journalists responsible for incorporating the information. Additionally, the respondent claimed Mr. Abreu's application was inadmissible, as it had been extemporarily presented.

Subsequently, Microsoft Chile S.A alleged it lacked passive procedural standing since the person who administers or manages the data on the Bing.com site was Microsoft Corporation and not Microsoft Chile S.A. Concerning the allegation of the right to be forgotten, it claimed that search engines do not process data or store data; instead, they organize information so that it is universally available, accessible through a free search system on the internet.

The fifth respondent, Google Chile Limitada, claimed that it was a company created in Chile and different from Google LLC. The respondent further contended that it did not hold authority over the domain google.cl or Google LLC's services.

The Court began its analysis by stating that the alleged violation of the legally-prescribed period to submit the legal recourse held by Verizon Chile S.A. and Microsoft Chile S.A. was unfounded since the publication remained available on the search engines. Therefore, the publication transcended any temporal limit.

Regarding the respondents' claim of lack of passive procedural standing, the Court held that Wikimedia Chile Corporation and Verizon Chile had provided the necessary evidence to prove that they did not have any control over the administration, indexation, and functioning of the search engines.

Whereas in the case of Microsoft Chile S.A. and Google Chile Limitada, the Court deemed evident that both companies owned and administered their search engines "Bing" and "Google" respectively, thus rejecting their allegations of lack of passive standing.

The Court held that it was unanimously accepted both by the doctrine and jurisprudence that a writ of protection of constitutional guarantees, as enshrined in Article 20 of the Constitution, legally constitutes a precautionary measure. For the Court to adopt specific measures to counteract, neutralize, or annul the undesirable effects of the action or omission, a precautionary measure requires the existence of an illegal or arbitrary act or omission that causes the infringement of the free exercise of the rights established in Article 20.

In the immediate case, the Court recalled that the act denounced by Mr. Abreu, as arbitrary and illegal, consisted of the maintenance of information, referring to the alleged commission of certain illicit or abusive acts committed by the plaintiffs, indexed in various search engines of the domain internet of those appealed, from 2018 to date. To determine if such acts constituted an infringement of Mr. Abreu's rights the Court established the following as undisputed facts: i). As a result of a journalistic report, Mr. Abreu was denounced as the alleged perpetrator of illicit conduct of a sexual nature; ii) after the Public Ministry carried out the corresponding nonjudicial investigation, it concluded with the issuance of five definitive dismissals under Article 250 a) and d) of the Code of Criminal Procedure; iii). the news about Mr. Abreu's alleged abuse and the posterior Court Resolution was published by different media outlets and indexed in the search engines such as Google, Bing, Yahoo, and the encyclopedic website Wikipedia; iv). the respondents were not the creators of the information that the plaintiff claims to infringe his rights, instead were only served as search engines that indexed the data created by third parties, and v). the veracity and integrity of the information were undisputed.

The Court then examined whether individuals could request the deletion of information on the internet when it infringes their fundamental rights. First, the Court affirmed that the so-called "right to be forgotten" is not established in the Chilean legislation. Then, the Court held that internet search engines are not responsible for the data created by users; instead, their function is limited to indexing the information produced by third parties protected under the right to freedom of expression and access to information guaranteed in Article 19 No. 12 of the Constitution.

Consequently, the Court held that, as stated by the Supreme Court in the case Rol 18.818-2019, for there to be a violation of Mr. Abreu's rights due to the respondents' arbitrary and illegal acts or omissions, it would require that the indexed information be false or outdated. However, the Court deemed that this was not the case since the search engines included the information concerning the dismissal of the claims against Mr. Abreu by the respective judicial authority.

The Court concluded that the constitutional appeal presented by Mr. Abreu was unfounded and rejected the plaintiff's solicitation that the respondents pay the costs of the appeal.

***Direction:***

* **Outcome**: Mix outcome

The decision expands Freedom of Expression since the Court of Appeals held that internet search engines are not responsible for the data created by third parties protected under the right to freedom of expression and access to information. Nevertheless, by holding that for a violation of constitutional rights, the published information must be false or outdated, the Court opened the door for libel cases against the search engines, which could eventually contract freedom of expression.

***Perspective***:

* **Related International and/or regional laws**:
  + International Covenant on Civil and Political Rights, Article 19
* **National law or jurisprudence**:
  + [Chile, The Political Constitution of the Republic of Chile, Article 1](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + [Chile, The Political Constitution of the Republic of Chile, Article 4](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + [Chile, The Political Constitution of the Republic of Chile, Article 5](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + [Chile, The Political Constitution of the Republic of Chile, Article 6](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + [Chile, The Political Constitution of the Republic of Chile, Article 16](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + [Chile, The Political Constitution of the Republic of Chile, Article 19](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + [Chile, The Political Constitution of the Republic of Chile, Article 19, N°12](https://www.oas.org/dil/esp/constitucion_chile.pdf)
  + Chile, Law No. Law 19,628
  + Chile, Criminal Procedure Code, Article 250 a) and d)
  + Chile, Supreme Court, Rol 18.818-2019

**Other national law or jurisprudence**:

* **N/A**

***Significance***:

This case did not set a binding or persuasive precedent either within or outside its jurisdiction. The significance of this case is undetermined at this point in time.

* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

**Examples:**

* **Reports, Analysis, and News Articles**: