The (posthumous) exercise of the right to be forgotten

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European Court of Human Rights, *M.L. v. Slovakia*, app. 34159/17, 14 October 2021

Dismissal of action against tabloids, which published unverified tawdry statements on, and pictures of, applicant's son, a priest convicted of sexual offences, years after his death: violation of article 8 ECHR.

Summary

Keywords

Right to be forgotten - freedom of expression - protection of private life - reputation of deceased person

1. Introduction

The right to be forgotten has become a hot topic for the ECtHR, with several decisions delivered on the different applications that this right may have in the offline and online world. Most of the cases delivered in 2021 addressed the interplay between the right to be forgotten and newspapers web archives,[1] whereas only the one analysed here addressed the traditional conflict between freedom of the press and the protection of private life in the offline world. The case M.L. v Slovakia, however, is not without interest as it addresses a specific dimension of the right to be forgotten, namely its exercise when the interested party is deceased.

2. Facts

Ms M.L. was the mother of a Roman Catholic priest. The latter was convicted twice, in 1999 and in 2002, first for sexual abuse against a minor and then for disorderly conduct.[2] The priest died in 2006 after having spent the criminal convictions in com-

[1] See ECtHR, *Hurbain v Belgium*, app. 57292/16, 22 June 2021; *Biancardi v Italy*, app. 77419/16, 25 November 2021.

[2] According to sect. 364 of Slovakian Criminal code, the offence of disorderly conduct was qualified as "Any person who, either verbally or physically, commits gross indecency or disturbs peace in public

pliance with the conditions of the conditional sentence.
In 2008, three Slovakian newspapers published a series of articles on the case involving the priest suggesting not only that his death was the result of suicide but also that it was related to the previous criminal convictions. Moreover, they included a reference to a confession by the priest to a bishop who helped him in the cases by providing a guarantee to the law enforcement authorities to avoid conviction and a detention period. The articles clearly identified the name of the priest, included photos and portrayed the case as an occasion in which the Roman Catholic church was interested in safeguarding the position of a priest in the Church and helping him to be released without conviction or a detention period.
Few months after the publication of the articles, the applicant started proceedings against the three publishers under two grounds: not only post-mortem protection of her son's personal integrity but also her own, contending that the information published in the articles was unfounded and affirming that the articles were a violation of her, and her son's privacy rights. The subsequent steps of the three-tier judicial proceedings resulted in the national courts dismissing the applicant's action, considering that the position of the parish priest was a public figure who should expect to be subject to stricter criticism by the press and public opinion, and deeming that the information in the articles was credible.
After a constitutional complaint before the Slovakian Constitutional Court, on grounds of violation of arts 6 and 8 ECHR, which was deemed inadmissible and ill-founded, the applicant brought the case before the ECtHR, claiming a violation of art. 8 ECHR. The applicant pointed to a misapplication of the relevant criteria established by the ECtHR regarding lawful dissemination of information pertaining to matters of public debate without sufficient attention to the truthfulness of the information published.

3. Judgement

The ECtHR addressed the claim and found it admissible, considering both the violation affecting the applicant and the deceased relative based on its own jurisprudence. Without further analysis the Court acknowledged that art. 8 ECHR also covers cases where an individual deals with the dead out of respect for the feelings of the deceased's relatives.[3]
The Court's assessment then indicated a balancing exercise that should be applied to the conflict between art. 8 and art. 10 ECHR. It referred to the well-known standards that the Court itself had developed in its jurisprudence since 2008 in the Von Hannover v Germany (no. 2) decision.[4] In order to evaluate if the national courts had addressed the conflict between the fundamental rights correctly the ECtHR listed the criteria and analysed each of them in detail.

or in a place accessible to public".

[3] See § 23.

[4] ECtHR, *Von Hannover v Germany* (no. 2), apps. 40660/08 and 60641/08, 7 February 2012.

The first criterion concerned his/her prior conduct. The ECtHR pointed out immediately that the position of the applicant's son and his role in the Church were not so high and important as to consider him a public figure that should tolerate a higher level of interference in his private life. As for prior conduct, the Court distinguished between the application of art. 8 regarding the commission of a criminal offence, the impact of which on one's reputation cannot be complained of, and the exercise of the right to be forgotten after the passing of time.[5] Accordingly, the Court referred to the standard applied in the *M.L. and W.W. v Germany* decision,[6] acknowledging that the conviction and subsequent reintegration of the person into society should allow the individual to request to fade out from the attention of public opinion. The court then affirmed that the national courts had omitted an analysis regarding the amount of time passed since the spent conviction involving the applicant's son.

The second set of criteria analysed were the style and content of the press articles and their impact. The Court focused on the methods used to obtain and disseminate the information. In particular, it made a clear distinction between statements of fact and value judgements, assuming that journalists may provide value judgements although they should be based on reliable sources and they should be diligently researched. A lack of such "reliable and precise" information may violate the ethics of journalism.[7] The ECtHR then evaluated the style used by the journalists in presenting the information, which was not in line with the standard applicable to journalistic activity, that should not exceed the purpose of information in the public interest and be free from insinuations or personal considerations. As the articles were presented in a sensational manner and included information that was not proven or verified by the journalists, the resulting evaluation by the Court was that they constituted a clear violation of responsible journalism. These elements, however, were not duly considered by the national courts, which deemed the journalists' unidentified sources and the unverified evidence they provided during the national proceedings credible. As a result, the Court affirmed that the publications framed in this manner and without reliable sources had an impact on the private life of the applicant, "the reputation of her deceased son being a part and parcel thereof."[8]

Last, the Court addressed the contribution to public debate by the published articles. In this case the Court acknowledged that the attitude of the Roman Catholic Church vis-à-vis sexual abuses by its members is a topic of public interest. However, the Court distinguished between the dissemination of information and opinions on more general issues and the possibility of exploiting the specific case presenting intrusive information on a person's intimate sphere in order to satisfy public curiosity.[9] The fact that the information was presented in a sensational manner and included information that was not relevant to a contribution to a debate of general interest brought the Court to affirm that in this case the principle of freedom of expression should be

[5] See § 38

[6] M.*L. and W.W. v. Germany*, apps. 60798/10 and 65599/10, 28 June 2018.

[7] See § 42.

[8] See § 48.

[9] See § 53.

limited and should give way to the protection of the private life of the individual.
As a conclusion, the Court acknowledged that the domestic courts did not correctly apply the ECHR standards as regards balancing between conflicting rights, resulting in a violation of art. 8 ECHR.

4. Comment

In *M.L. v Slovakia*, the Court addressed a traditional case of conflict between freedom of expression and protection of private life. The publication of articles in the press that may affect the personal sphere and the reputation of an individual has been the subject of several cases discussed by the ECtHR since the Grand Chamber decisions in the *Von Hannover v Germany* (no. 2)[10] and *Axel Springer v Germany*[11] cases. Accordingly, the Court had the opportunity to develop and apply a well-run set of criteria in order to strike the balance between the two conflicting rights. However, these criteria were to be applied to information that pertained to a deceased person and which may affect the private sphere of a relative.
As a matter of fact, in the Court's reasoning it seems to appear that the right to be forgotten may apply to a deceased person, with the possibility of it being exercised also by a relative.[12] This is a critical issue as the Court's decision in this case may also have an impact on the general principle that a personal cause of action dies with the person, as in the case of defamation.
So far, the Court had accepted claims for the violation of privacy protection only when the offence against the reputation of the deceased person had an impact on applicant's private life. The Court mentioned its jurisprudence showing the progressive extension of the scope of art. 8 ECHR also in this issue. In particular, the court pointed to the decisions in *Hadri-Vionnet v Switzerland*[13] and *Putistin v Ukraine*.[14] However, looking at the ECtHR caselaw there is no uniformity in the Court's approach as regards the transferability of the art. 8 right on the death of an individual. While in *Dzhugashvili v Russia* the Court denied the transferability of the right to reputation to relatives,[15] in *Kunitsyna v Russia* it acknowledged that the protection of the reputation of the deceased person can extend to the relatives *only* when the content of publications are able "to make the ordinary reader feel that the statement reflected directly on the individual claimant, or that he was targeted by the criticism."[16] However, in *Genner*

[10] See above at fn 3.

[11] *Axel Springer AG v. Germany* [GC], app. 39954/08, 7 February 2012.

[12] Note that the inclusion of the right to be forgotten within the scope of art. 8 ECHR is well set, with confirmation provided also by the recent decision in *Hurbain v Belgium*, see above fn 1.

[13] ECtHR, *Hadri-Vionnet v. Switzerland*, app. 55525/00, 14 February 2008. In this case, the applicant complained under art. 8 ECHR as she had been unable to attend the funeral of her stillborn child and that her baby's body had been transported in an ordinary delivery van.

[14] ECtHR, *Putistin v Ukraine*, no. 16882/03, 21 November 2013.

[15] ECtHR, *Dzhugashvili v Russia*, app. 41123/10, 9 December 2014, §§ 23-24.

[16] ECtHR, *Kunitsyna v Russia*, § 42.

v Austria[17] the Court moved to a more ambiguous approach, affirming that "to express insult on the day after the death of the insulted person contradicts elementary decency and respect for human beings […] and is an attack on the core of personality rights."[18] In the present case, the Court did not go as far as recognising the protection of the reputation of the deceased person, although it acknowledged that the reputation of the son had to be deemed part and parcel of the applicant's private life. In other words, it is the applicant's own right to reputation or right to be protected against distress or identity injury which fell within the scope of the right to private life.[19] However, it is still to be seen if the Court will proceed in this direction, limiting its interpretation of a deceased's reputation as a legitimate interest that could be taken into account only in a wider analysis of the violation of the right to private life of the relatives.

It must be underlined that the issue of defamation of a deceased person and the connected possibility to exercise the right to be forgotten is approached in different ways by national legal systems. A comparison with the approach adopted in the General Data Protection Regulation (GDPR)[20] and the adaptation of the legal framework in some EU countries is, therefore, useful.

The GDPR does not apply to the personal data of deceased persons as it only applies to an "identified or identifiable natural person," which is a person who is alive. However, the GDPR leaves some leeway to regulate this issue at the national level, as is clarified by recital 27 GDPR. Only a few Member States have introduced regulation on this topic, and in most cases, they rely on the right to self-determination of the data subject before death in order to comply with his will, for instance allowing the data subjects to specify their will as regards the processing of their personal data after their death.[21]

This is clearly the case in France, where pursuant to art. 85 of the *Loi informatique et libertés*,[22] individuals can request that after their death the data controller should follow the indications that they provide regarding the retention, erasure and communication of their personal data. Moreover, they can allocate to a third party the task of verifying if such indications are complied with.

In Spain and Italy, the laws adopted in 2018 to implement the GDPR also include

[17] ECtHR, *Genner v Austria*, app. 55495/08, 12 January 2016.

[18] For an analysis of previous jurisprudence, see G. Malgieri, *R.I.P.: Rest in Privacy or Rest in (Quasi-) Property? Personal Data Protection of Deceased Data Subjects between Theoretical Scenarios and National Solutions*, in R. Leenes - R. van Brackel - S. Gutwirth - P. De Hert (eds.), *Data Protection and Privacy: The Internet of Bodies*, Brussels, 2018, 300 ss.

[19] The protection of relatives' private sphere is not irrelevant as it includes moral protection of grief and memory; commercial protection from elusive forms of sensitive data processing; protection from exploitation of grief through personalised advertisements. See G. Malgieri, *R.I.P.: Rest in Privacy or Rest in (Quasi-)Property? Personal Data Protection of Deceased Data Subjects between Theoretical Scenarios and National Solutions*, cit., 310.

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, 1.

[21] See *GDPR Tracker - Personal data of deceased persons*, in *twobirds.com*.

[22] Loi Informatique et Libertés, 17 June 2019, amending Loi n° 78-17 du 6 janvier 1978 *relative à l'informatique, aux fichiers et aux libertés*.

specific provisions addressing the rights of deceased persons. In particular, the Spanish Organic Law Act 3/2018 of 5 December on personal data protection and the guarantee of digital rights[23] provides that the relatives, civil partners and heirs of the deceased person are granted a right to exercise the rights to access, rectification and erasure of the personal data of the latter against the controller or the processor unless forbidden by the deceased person or by law.[24] Italian legislative decree 101/2018 provides a more detailed (though ambiguous)[25] set of criteria: the rights of the (deceased) data subject can be exercised by an individual who "has his/her own interest, or acts in order to protect a data subject, in capacity of his/her appointee, or for family reasons worthy of protection."[26] However, this can occur not only when it is not prohibited by law but also in the specific case of information society services when the (deceased) data subject has explicitly prohibited it in a written declaration sent to the data controller.[27]

Although it is apparent that the provisions of the above-mentioned national laws are tailored to the needs emerging from the management of social media accounts that may remain available online long after the death of the data subject,[28] the same principles may also apply to traditional media. Whenever the publication of information that refers to a deceased person may affect his/her identity, it is possible for a relative to act in order to protect the deceased data subject. However, where the publication can contribute to public debate without only appealing to public curiosity and it is done in a style and manner that comply with journalistic standards, then the freedom of expression may be safeguarded against interference in the private life of the deceased data subject.[29]

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[23] Ley Orgánica 3/2018, "BOE" núm. 294, 6 December 2018, p. 119788, available at *boe.es*.

[24] See art. 3 of Constitutional Law 3/2008 regulating the data of deceased persons.

[25] T. Fia, *Death is real. How rights of deceased persons are treated under data protection laws*, in *gamingtechlaw.com,* 7 September 2018.

[26] See art. 2-*terdecies* of Legislative Decree 101/2018 regulating the data of deceased persons.

[27] This provision was applied by the Italian DPA in a recent decision, affirming that if the data subject had never requested the removal of a publication (still available online after his death), or has otherwise expressed the will to disavow the content, existence of an interest of the deceased data subject through his heir in the deletion of the publication cannot therefore be considered demonstrated. The publication instead retains its historical value as a testimony of the life of a deceased person and free expression of the latter's thought pursuant to art. 17 (3) (d) GDPR. See decision Italian DPA, no. 207, 29 October 2020, doc. web no. 9509538.

[28] Note that many social media have already started to provide dedicated functions and processes to deal with a person's information after they have died. For instance, Facebook turns its deceased users' accounts into online memorials allowing the content previously shared to remain visible. The person is also able to identify a "legacy person" who can manage the memorialised account. See the guidelines of Facebook on this issue at "What Happens When a Deceased Person's Account Is Memorialised?", available at *facebook.com*.

[29] See also the Decision of the Italian Court of Cassation, 27 March 2020, no. 7559, where the Italian Court affirmed that the right to be forgotten as regards criminal proceedings involving a deceased person cannot be claimed by the heir in his own right but only in the capacity of heir. The Court affirmed that the right to be forgotten cannot be exercised by the heir when the publisher has: a) excluded accessibility to the article in an online archive containing the data in question by means of general search engines; b) inserted in the article an update on further developments in the judicial proceedings.

5. Conclusion

The decision of the Strasbourg Court in *M.L.* touches upon a critical issue that is still unevenly addressed in the previous jurisprudence of the Court. In this case, the Court accepted that a deceased's reputation is a legitimate interest that could be considered only in a wider analysis of the violation of the right to private life of the relatives. However, it is not possible to rule out that, in the future, the Court will allow a claim for a violation to the right to private life also for a deceased person.
Given that individual's life is increasingly carried on digital platforms, whose existence outlast the life of its users, it is possible that cases addressing the possibility for heirs and relatives to exercise the right to be forgotten of deceased users will emerge soon.