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**Freedom of Speech and Right to Privacy Balance: in the  
Context of Access to Criminal Records Information**

Masters in Human Rights  
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# List of Abbreviations

- Art(s). – Article(s)
- Charter – the Charter of Fundamental Rights of the European Union
- SCC – spent criminal convictions
- COD – criminal offence data
- CJEU (Luxembourg Court, or in relevant parts Court) – Court of Justice of the European Union
- CoE – Council of Europe
- Convention 108 – The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108)
- ECHR – the Convention for the Protection of Human Rights and Fundamental Freedoms
- ECtHR (Strasbourg Court, or in relevant parts Court) – the European Court for Human Rights
- EU – European Union
- EWHC (or in relevant parts the Court) – The High Court of Justice in England
- GDPR – Regulation (EU) 2016/679 (General Data Protection Regulation)
- TFEU – Treaty on the Functioning of the European Union

# Introduction

## Importance and relevance of a study

Since the CJEU ruling in *Google Spain* case, Google has received 2,853,408 delisting requests (as of November 2018). 18,6% and 11,6% of the overall requests concerned the content of the news and social media websites respectively. The most represented categories of the requests, based on their subject matter, were those related to crimes, constituting 6,2%, and professional wrongdoings, covering 6% of overall requests. Both were mostly brought against the news websites. Google upheld 36% of such requests, related to news websites. As regards the crimes data, regardless of the source, this ‘success rate’ constituted almost 50%.<sup>1</sup> The outcome of a request fulfilment is delisting of the URLs and the limitation of access to them via the search engine.<sup>2</sup>

The background checks of job candidates are common in certain jurisdictions. By virtue of online records of past offences, however, lots of candidates can be ‘excluded from work and social integration’.<sup>3</sup> In practice, disclosure of a distant past can also harm other vital interests. A situation with Pasquale di Filippo is notable. Mr. di Filippo is a former Italian Mafia assassin, who spent his time in prison, decided to sue a TV channel for the criminal information disclosure. The reason is the following. While watching a TV drama with his daughter, who was not aware of the father’s past, they both saw on the screen the phrase that ‘di Filippo is a former assassin guilty of numerous killings’. This resulted in a serious split with a daughter.<sup>4</sup>

All this reveals a few important contemporary tendencies. First, there are individuals, who attempt to have their criminal records, once disclosed on the internet or otherwise to a large audience, hidden; (ii) such attempts clash with a

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<sup>1</sup> Google, *Search Removals under European Privacy Law*, <https://transparencyreport.google.com/eu-privacy/overview?hl=en>

<sup>2</sup> Ibid

<sup>3</sup> Elena Larrauri Pijoan, *Legal Protections against Criminal Background Checks in Europe*, 16(1) *Punishment & Society* 61 (2014); Peter Leasure, Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35(11) *Yale Law & Policy Review* Inter alia (2016)

<sup>4</sup> The Times, *Mafia Assassin Pasquale di Filippo Sues after TV Show Reveals Past to Daughter*, <https://www.thetimes.co.uk/article/mafia-assassin-pasquale-di-filippo-sues-after-tv-show-reveals-past-to-daughter-bdbgm2cwr>

public interest to know, to deter and other news portals, fulfilling public interests by publishing the initial information and, then, retaining such data; (iii) the attempts to have such data delisted are successful in every second case.

Google does not reveal how exactly it measures when to delist criminal data, albeit being the most important decision-making in this context. This raises the questions: which legal criteria should apply to decide when to delist, or, more generally, how to balance the two sides – the one of the news publishers and of the individual whose data are at stake? Or whether they should be balanced at all?

The answer is affirmative: there shall be a balance. Art. 9 of the Directive 95/46/EC obliged (through wording ‘shall’) Member States to derogate from the provisions of the Directive to safeguard the freedom of expression. Despite that, the state practice showed the problems in this regard, as ‘many Member States introduced provisions with unclear scope or failed to comply with the obligations at all’.<sup>5</sup> This paper attempts to see what can be improved in order to reach a sufficient balance between the rights at issue.

### **Research questions**

In this paper, the objectives are to:

- analyse the criminal offence data, particularly spent criminal convictions, from the freedom of expression and privacy perspectives;
- identify and compare regional and domestic judicial approaches towards the (spent) criminal convictions;
- identify the element of an applicable balancing formula regarding spent criminal convictions in cases of a conflict between the freedom of expression and privacy.

The object of this research is the balance between the right to privacy and to freedom of expression. The subject of this research encompasses a balanced approach towards the past criminal offence data, covered by the right to privacy and

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<sup>5</sup> David Erdos, *European Union Data Protection Law and Media Expression: Fundamentally Off Balance*, 65(1), *International and Comparative Law Quarterly*, (2016), 142-146

data protection vis-à-vis the freedom of (media) expression or a more general public interest.

### **Methodology**

The paper takes the European perspective on the conflict at issue. The focus predetermines the contents and the conclusions. The thesis relies on two methodological approaches – the teleological and comparative ones. The paper relies on the teleological approach when there is a need to define the object and purpose behind the statutory provisions. The comparative approach enables to assess the balancing formulas, developed in different jurisdictions.

In this research, there is a reference to primary sources, including international treaties, statutory texts and well-established precedents (in the practice of ECtHR, CJEU and domestic supreme courts), and secondary sources, primarily the non-binding case law and scholarly works.

### **Structure**

The thesis consists of the introduction, four chapters (each with the concluding remarks), the conclusion and appendix.

# 1. Freedom of Expression and Privacy in the Digital Age: Online Availability of the Criminal Records

This section explores different criminal records or criminal offence data (referred to as the ‘COD’), particularly the spent criminal convictions (also ‘SCC’), available online by virtue of media activity, from the freedom of expression and privacy points of view.

## 1.1. Criminal Offence Data: Scope and View on the Term from the Private Sector Standpoint

### 1.1.1. Criminal Offence Data: Defining the Term and Problem

Criminal records, available online, perform different functions and make various impacts. Naturally, before performing the functions, discussed in detail below, someone collects and publishes such information. Jacobs and Crepet identify three main sources of such information disclosure, i.e. ‘executive branch criminal records repositories, courts and offices of court administration and commercial information vendors’.<sup>6</sup> First two sources do not grant unlimited public access to criminal data. Instead, the media enables the audience to familiarize themselves with the criminal data even when the convictions become spent.

The digital age public watchdogs are not limited to mainstream media, but include other gatekeepers, such as citizen bloggers. All can be involved in reporting crimes or archiving past information about the crimes. In turn, as will be discussed later, archiving and retaining access are protected by the freedom of expression. Unsurprisingly, to report such information is in line with the editorial policies and guidelines, or, more generally, the public interest, for decades associated with the need to report crimes and other anti-social behaviour.<sup>7</sup> A question is: what, among such reports, constitutes the subject matter of this paper?

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<sup>6</sup> James Jacobs, Tamara Crepet, *The Expanding Scope, Use, And Availability of Criminal Records*, 11(177), *Legislation and Public Policy*, (2008) 179

<sup>7</sup> BBC, *Editorial Guidelines*, <https://www.bbc.co.uk/editorialguidelines/guidelines/crime>



Criminal offence data refer to any data relating to criminal convictions and offences, as follows from the Art. 10 of the General Data Protection Regulation ('GDPR'). The scope of criminal data may be detailed by reference to the EU Directive 2016/680, that covers the criminal data, processed for the purposes of 'prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties'.<sup>8</sup> That said, the COD, collected for these purposes, can be within the scope of this paper as well.

Regarding the COD, an additional primary source of interest is the Rehabilitation and Offenders Act 1974 ('ROA 1974'), designed to set a rehabilitation period, with a passage of which a conviction becomes spent. Such convictions are traditionally subject to expungement in the United States and certain other jurisdictions and deemed to be a point when a person paid a debt before a society.

For the purposes of this paper, the scope of the COD would cover any be the one that enables to associate a person (largely referred to as 'ex-convict' or 'ex-offender', but not only) with the commission of a crime, although the conviction at issue was spent. The COD would include any information that either reveals the fact of a criminal conviction or, being somehow associated with criminal offences, gives raise to believe that a person was connected with a crime.

The COD, particularly SCC, are problematic in certain aspects. Formally, when the conviction becomes spent, a person is entitled to deny any connection to crimes in the past.<sup>9</sup> Such guarantee is driven by the need to enable resocialization and achieve related purposes, particularly in the area of education, employment, family. On the other side, however, universal availability of the past data, easily traceable by anyone interested, can diminish such a guarantee. Left online for a lifespan, the COD can additionally and more seriously harm the vulnerable groups, including the minors. Their successful involvement in a largely digitalized world will be at serious risk. These constitute a serious aspect of a debate over unlimited

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<sup>8</sup> Directive (EU) 2016/680

<sup>9</sup> Rehabilitation of Offenders Act 1974 c. 53, Art. 4(1) (hereinafter – 'ROA 1974')

accessibility of the COD, often considered as a permanent collateral consequence of a sentence, a virtual life sentence.<sup>10</sup>

Existence of such a problem, connected with criminal justice and public policy concerns, is important to consider by the media. A publication of the COD should not become just a way how to fulfil readers' curiosity; instead, the COD appearance in a publication should be subject to prior assessment of both sides of a medal, i.e. public interest vis-à-vis a private interest. This is in view of a further unlimited storage of the COD, often inevitably becoming the SCC, and unlimited accessibility to them, considered as a resocialisation barrier, inherently connected to stigmatisation.<sup>11</sup>

The paper does not address the legal instruments an individual has vis-à-vis a State to limit access to the COD. Likewise, this paper does not deal with the economic and (at least, comprehensively) criminal justice reasons behind limitation of access to the COD. Instead, the purpose is to assess the potential clash between individual's attempt to control access to the criminal data, on the one hand, and the freedom of expression defence, raised by private persons, on the other hand.

To this end, it is important to see what status the COD, specifically the SCC, have within the two fundamental human rights – the right to privacy (private life), including its sub-element the information privacy (data privacy, data protection) and the freedom of expression, particularly under the media expression realm.

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<sup>10</sup> James Jacobs, *A Virtual Life Sentence*, <http://www.law.nyu.edu/news/ideas/jacobs-eternal-criminal-record>

<sup>11</sup> See, among others, in Murat C. Mungan, *Reducing Crime through Expungements*, *Journal of Economic Behavior and Organization* (2017)

### 1.1.2. Criminal Offence Data: A View from the Privacy Standpoint

The questions regarding the criminal information protection date back to the 50's of the previous century and the discussions, raised by Professor Reza and the US Supreme Court. This, however, concerned the protection of such information in the course of criminal proceedings. Such arguments were construed from the standpoint of a privacy interest the accuses and arrestees had.

McKenzie wrote that ‘the right to control personal information is the right to protect their identity from association with criminal conduct—to prevent “the very fact of their involvement in the criminal process” from becoming public knowledge’.<sup>12</sup> Reza raised additional privacy justifications in the contexts of ‘sexual assault complainants, juveniles [...] and the restrictions on public access to arrest records’.<sup>13</sup> Commenting on the US Supreme Court approaches, Reza concluded that ‘there is no public interest in the individual’s entire criminal record even if crime fell within the scope of a public interest.’<sup>14</sup> The individuals, in turn, have a right ‘to keep information about their prior involvement in the criminal justice system secret from the public on common-law privacy grounds’.<sup>15</sup> Such protection follows from a basic premise that ‘a mere accusation of a criminal conduct can be harmful to an individual’.<sup>16</sup>

Even an increased protection, again in the United States, was granted when expungement laws (special forms of sealing records and granting a clean slate) applied: ‘once an expungement is granted, it is wrong for a non-governmental source to release information about the conviction, because that action undermines the purpose of expungement laws’.<sup>17</sup>

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<sup>12</sup> Laura K. McKenzie, *The Right to Domain Silent: Rebalancing Tort Incentives to Keep Pace with Information Availability for Criminal Suspects and Arrestees*, 69(3) *Vanderbilt Law Review* (2016), 888

<sup>13</sup> Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 *MD. L. REV.* (2005), 755, 773

<sup>14</sup> *Ibid.*, at 789

<sup>15</sup> *Ibid.*, at 789

<sup>16</sup> McKenzie, *supra* n. 12, at 889

<sup>17</sup> Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102(1) *Journal of Criminal Law and Criminology* (2012), 254

Although release of information can undermine such laws, the practice to disclose the criminal information is widely spread. In the digital age context, Kessler highlighted that ‘because public perception of individuals with criminal records is influenced by societal discrimination, the public readily accepts, and even seeks out, the criminal history information widely disseminated through the Internet’.<sup>18</sup> As a result, there will be a stigmatized class (ex-convicts), and it will exist, ‘unless the cycle of status and crime is broken’.<sup>19</sup>

*NT1 and NT2* case shows, however, the problems surrounding a choice of the privacy regime, applicable to the COD.<sup>20</sup> Except for data protection laws, it is problematic to apply secrecy, confidentiality or reasonable expectation of privacy regimes.

In 1996 EWHC case of *Elliott v Chief Constable of Wiltshire*, the court held that to consider ‘a conviction, announced in open court, to be confidential is absurd’.<sup>21</sup> In a later EWHC case of *R (Pearson) v DVLA*, the court held that ECHR Art.8 did not apply to an ‘attempt to remove reference to a spent conviction in a driving license’. Even if engaged, then, legitimate public policy to enhance the efficiency and effectiveness of sentencing in respect of repeat offences clearly prevailed.<sup>22</sup> In response to the ROA 1974 defence, the court held that the statute created only ‘a limited privilege’.<sup>23</sup>

Albeit outside the European legal space, a notable case is *David J. Lovejoy v. James Daniel Linehan*, decided by the New Hampshire Supreme Court. The court held that a privacy regime did not apply to expunged convictions and did not fall within any of the potential privacy causes of action, including ‘intrusion upon the plaintiff’s physical and mental solitude or seclusion, public disclosure of private facts, publicity which places the plaintiff in a false light in the public eye,

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<sup>18</sup> Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 Temple Law Review (2015), 405

<sup>19</sup> *Ibid*, at 405

<sup>20</sup> *NT1 & NT2 v Google LLC*. [2018] EWHC 799 (QB). Case Nos: HQ15X04128. HQ15X04127 (hereinafter – ‘NT1 and NT2 case’)

<sup>21</sup> *Ibid*, para. 46 [citing *Elliott v Chief Constable of Wiltshire*, (The Times, 5 December 1996)]

<sup>22</sup> *R(Pearson) v. DVLA* [2003] RTR 292, [2003] Crim LR 199, [2002] EWHC 2482

<sup>23</sup> *Ibid*

appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness'.<sup>24</sup>

Such holdings are justifiable. Particularly in cases, involving just a convicted person, who tries to prevent others from discussing the crimes. At this stage, a 'fresh' public interest and interests of open justice prevail over the illusory expectation of privacy. In such cases, the reasonableness of a privacy request is tough to substantiate. The 'criminal trials take place in public, the verdicts returned and sentences imposed are public acts',<sup>25</sup> whilst the crimes are a matter of a public interest.

Nevertheless, these arguments are weaker with the passage of time. Then, an individual expects a second chance. Expectation of privacy, likewise, increases. Government-guaranteed privacy protection (for example, through COD expungement) is one of the instruments to provide a second chance. Such measures can prevent punitive shaming, stigmatization, problems in the areas of family life and employment.<sup>26</sup> These considerations are often omitted by the opponents of privacy protection in cases, involving the COD.

The court practice, however, followed a *pro persona* approach, making the passage of time a relevant factor to assess whether to give a second chance and whether to consider privacy request as reasonable. As a result, it is now the well-established case-law of the ECtHR that 'a conviction may, with the passage of time, so recede into the past as to become an aspect of an individual's private life'.<sup>27</sup> In this regard, two cases are worth considering.

Rotaru v. Romania case concerning the processing of the COD by governmental authorities.<sup>28</sup> In response to the Government's denial of privacy protection, the Court held that even 'public information can fall within the scope of private life where it is systematically collected and stored in files held by the

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<sup>24</sup> The Supreme Court of New Hampshire, *Lovejoy v. James Daniel Linehan*, No. 2010-343, 3

<sup>25</sup> *NT1 & NT2 case*, supra n 20. at para. 44

<sup>26</sup> See in James B. Jacobs, Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14(1) *Punishment & Society* 3 (2012)

<sup>27</sup> *Ibid*, at 48

<sup>28</sup> *Rotaru v. Romania*, app. no. 28341/95, 4 May 2000

authorities, particularly where such information concerns a person's distant past'.<sup>29</sup> *In casu*, distant past referred to the COD, connected to the events occurring 40 years before the proceedings.

In the *M.M. v the United Kingdom* case, again concerning governmental storage of the COD, the domestic held that 'information about an applicant's convictions [...] can fall within the scope of private life within the meaning of Art. 8(1), since information might have been forgotten for a long time by a lots of people, except for a person concerned (convicted)'.<sup>30</sup> The ECtHR agreed with such holding, adding that 'as it (the COD) recedes into the past, it becomes a part of the person's private life which must be respected'.<sup>31</sup>

Notably, in the most recent *M.L. and W.W. v. Germany*, the ECtHR did not enter into a discussion whether the COD constitutes an aspect of private life. From these considerations, it is clear that the Strasbourg Court proposed a comprehensive view on the matter of the COD, from the privacy standpoint. This view serves as a guidance for all the CoE Member States. An important consideration is a passage of time since the conviction.<sup>32</sup> In the cases at hand, the periods were different, varying from 40 to 12 years. Following the development of the data protection mechanisms, however, the passage of time should become just one of the matters to assess. This follows from two premises: the inclusion of the data protection regime into the general privacy realm and the applicability of the data protection regime to any COD insofar these concern personal data; in other words, when the COD reveal one's identity.

### **1.1.3. Criminal Offence Data: A View from the Freedom of Expression Standpoint**

From a legal standpoint, the information about crimes is factual (reveals true facts), but not a value judgment or mere assumptions. This was expressly addressed in *NT1 and NT2* case, where the EWHC held that 'the crime and punishment

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<sup>29</sup> *Ibid*; *NT1 & NT2 v Google LLC*, supra n 20. at para. 43

<sup>30</sup> *M.M. v the United Kingdom*, app. no. 24029/07, 2012, para. 102

<sup>31</sup> *Ibid*, at para. 102

<sup>32</sup> *Ibid*, at para. 43

information is not hate speech, or libel; it does relate to the claimant's working life, and appears to be (and is) factual.<sup>33</sup>

Existence of such true facts corresponds to a public interest to know.<sup>34</sup> More precisely, publication of such information responds to such traditional public concerns as: 'Why do criminals suddenly become invisible when they are caught? We have a right to know about what happens to them but the powers that be all conspire to keep us in the dark!'.<sup>35</sup> That said, a publication of crimes is undisputedly within the public interest – during all stages. To that end, the media as public watchdogs 'act to fulfil the respective public interest and to fulfil its duty to impart [...] information and ideas on all matters of public interest'.<sup>36</sup> Such considerations appeared in the relevant case-law and the media editorial guidelines.

In *Fuchsmann v. Germany*, concerning a publication as to applicant's links to the Russian mafia, the ECtHR held that 'as previously recognized, there exists a public interest where a publication concerns crimes'.<sup>37</sup> The broader the interest is, the more private information can be included, particularly an individual's name.<sup>38</sup> This applies even if some time since criminal allegations have passed.<sup>39</sup>

In the BBC, Guardian and other editorial guidelines, it is likewise common to highlight that reporting on the crimes is a part of a general public purpose of the media.<sup>40</sup>

Media acts in different ways to fulfil such interest and its duty to impart information. In the internet-publications context, the media ensures the public access to such past stories, particularly through the online archive. As a public interest

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<sup>33</sup> *NT1 & NT2 v Google LLC*, supra n. 20, at para. 143

<sup>34</sup> Mungan, supra n. 11, 2 [citing S Kilcommins and I. O'Donnell, *Wiping the Slate Clean: Rehabilitating Offenders and Protecting the Public*]

<sup>35</sup> Criminal Justice System, *Publicising Criminal Convictions: the Importance of Telling the Public*, <http://library.college.police.uk/docs/moj/publicising-criminal-convictions.pdf>

<sup>36</sup> See, among others, *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v. Hungary*, app. no. 22947/13, para. 55, ECtHR, 2 February 2016

<sup>37</sup> *Fuchsmann v. Germany*, app. no. 71233/13, para. 35, ECtHR, 19 October 2017; *Sihler-Jauch v. Germany and Jauch v. Germany*, app. nos. 68273/10 and 34194/11, 24 May 2016, para. 36; *Lillo-Stenberg and Sæther v. Norway*, app. no. 13258/09, 16 January 2014, para. 36

<sup>38</sup> *Fuchsmann*, supra n 37., at para. 36

<sup>39</sup> *Ibid*, at para. 36

<sup>40</sup> See, among others, BBC, *Editorial Guidelines*, supra n. 7

stands behind the archiving, the web archiving qualifies for the freedom of expression protection.<sup>41</sup> What is a place of privacy in such media activities?

In the media law context, privacy concerns are traditionally relevant. In any event, if one fails to consider the privacy concerns, a State is to intervene in the horizontal relations. Should one seriously fail to consider privacy concerns, a State is empowered to limit the freedom of expression and interfere in the way, enshrined in Art. 10(2) of the ECHR to protect the reputation or rights of the others.

In this part, it remains enough to conclude that media sees the reporting of crimes as falling under the public interest and being a factual statement within the scope of the freedom of expression. The next section will address the question how two camps in this de potentially justify privacy or freedom of expression standpoint in the criminal data-related problem.

## **1.2. Publication of Criminal Offence Data and Retention of Further Access: Justifications from the Freedom of Expression Standpoint**

Both the freedom of expression and privacy are based on certain general and specific justifications. This purpose of this section is to see how such justifications may benefit both sides of a COD-related dispute, analysed in this paper.

### **1.2.1. Freedom of Expression Rise and Privacy Fall in the Digital Age**

It is relevant to highlight that the influence of gatekeepers, if acting online, is unprecedentedly great, having enormous power – the power of knowledge.<sup>42</sup> The Digital changes brought such power. The essence of the changes is the diffusion of technology in society and the fundamental changes in society it causes.<sup>43</sup> The power goes hand-by-hand with the increased audience. The audience is nowadays, in McLuhan's words, a 'global village' where anybody can express themselves,

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<sup>41</sup> *Fuchsmann*, supra n. 37, at para. 38; *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), nos. 3002/03 and 23676/03, para. 45, ECtHR 2009; *M.L. and W.W. v. Germany*, 60798/10, ECtHR, 28 June 2018

<sup>42</sup> Gregory Walters, *Human Rights in the Information Age, A Philosophical Analysis*, (University of Toronto Press, 2002), xi

<sup>43</sup> Hielke Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (Springer, Law, Governance and Technology Series 31, 2016), 79



similarly enabling anybody to access to any of such expressions. As a result, at the end, nobody can truly control a data flow, 'by virtue of the very nature of the internet as a unique anarchic institution'.<sup>44</sup> Unlimited access without any control, once considered as an apparent advantage,<sup>45</sup> now brings a wide list of risks: serious harm to an individual, whose data are revealed; a platform for hate speech and disinformation, cyberbullying and harassment.

Naturally, such enormous power should go with the increased responsibility. Among others, in the media context, there should be a responsibility to provide accurate, relevant and complete information. Otherwise, the data protection rules require rectification or erasure of such data. There should be a consideration of consequences for an individual's privacy rights. Particularly, among those gatekeepers, not having editorial control.

Absence of a social constraint or technical impossibility to prevent information from being posted have been a subject matter of separate analyses.<sup>46</sup> Privacy harm considerations have been voiced in the works of Foley, Keats Citron, Solove and Carlsson. The authors identified the weaknesses of statutory protection of privacy,<sup>47</sup> double-edged sword role of the internet, both facilitating the empowerment and disenfranchisement of those very same individuals,<sup>48</sup> diminished ability to protect reputation,<sup>49</sup> or opportunities to express hatred, to harass, and to threaten.<sup>50</sup>

The risks identified suggest that, regardless of serious justifications of the freedom of expression, discussed above, the internet cannot be a harbour where one

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<sup>44</sup> Conor Foley, *Human Rights and the Internet*, in Liberty, *Liberating Cyberspace: Civil Liberties, Human Rights & the Internet* (London: Pluto Press, 1999), 267

<sup>45</sup> Foley, supra n. 44, at 270 [internet as a voice tank]; Eric Barendt, *Freedom of Speech* (Oxford University Press, 2007) [absence of editorial control]

<sup>46</sup> Isabel Hilton, *When Everything Has Its Price*, *The Guardian* (1996); Foley, supra n. 44, at 272

<sup>47</sup> Foley, supra n. 44, at 272

<sup>48</sup> Danielle Keats Citron, *Civil Rights in Our Information Age*, in Martha Craven Nussbaum, *Offensive Internet*, (Harvard University Press, 2012), 31

<sup>49</sup> Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, in Martha Craven Nussbaum, *Offensive Internet* (Harvard University Press, 2012), 18

<sup>50</sup> Ulla Carlsson, *Freedom of Expression in the Digital Transition*, 13(3) *Journal of Media Business Studies* (2016), 190

cannot find protection; in Hijmans' words, 'a free internet does not mean an unprotected internet'.<sup>51</sup>

### **1.2.2. Freedom of Expression: Applying Traditional Justifications to the Criminal Data**

It is not in dispute that the freedom of expression is broadly protected. The justifications for this are complex.<sup>52</sup> Below, the paper addresses only some of them, which are the most relevant.

The justifications usually emphasise on either instrumental value or intrinsic value of the freedom of expression.<sup>53</sup> From the instrumental value perspective, freedom of expression is often justified using consequentialist arguments, including from truth (marketplace of ideas) and from democracy. The authors often rely on such arguments in the privacy-freedom of expression debate, as 'intrinsic arguments, such as self-fulfilment, are likely to be unsuccessful in the debate at hand'.<sup>54</sup>

The truth discovery stands on a basic idea that 'the best ideas emerge when all opinions are permitted freely to compete, assists people's deliberative capacities, abilities to weigh evidence, reason logically, and draw appropriate conclusions'.<sup>55</sup> Its application to the COD context can result in two possible developments. First development: an individual will be stigmatized and judged, regardless of context, including circumstances of a crime, individual guilt etc. Second development: a marketplace of ideas is a platform where past criminal data will collide with the updates, for example when a conviction becomes spent. Access to data, supporting a premise that an individual has changed, can afford even a more powerful protection to the ex-convict. Since the ex-convict has now a proof that they disassociated themselves with a criminal past.

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<sup>51</sup> Hijmans, *supra* n. 43, at 25

<sup>52</sup> Kent Greenawalt, *From the Bottom Up: Selected Essays* (New York: OUP, 2016), 263

<sup>53</sup> Jan Oster, *Media Freedom of a Fundamental Right* (Cambridge: CUP, 2015), 14

<sup>54</sup> Barendt, *supra* n.45

<sup>55</sup> F Schauer, *Free Speech: A Philosophical Enquiry*, 36 (CUP, 1982); Brian Leiter, The Case Against Free Speech, *Sydney Law Review*, (2016). 408; *Abrams v US* (1919) 250 US 616, 630; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) 390

The argument from democracy is largely relevant regarding the elected political figures.<sup>56</sup> The overall idea is that freedom of expression promotes democracy and self-government; it enables to exposure and deterrence of abuses of authority.<sup>57</sup> Its consequence is that ‘those in power are subject to public exposure for their wrongs, reducing inevitable temptation to act in corrupt and arbitrary ways’.<sup>58</sup> In turn, the public is in a position to criticise the government, exposing the negative, but true information about the government officials. That said, the public sends a message that ‘the government service is a responsibility, not an opportunity for personal advantage’.<sup>59</sup> An example how this argument can apply is the New Hampshire case of *Lovejoy v. Linehan*, concerning the privacy complaint regarding publication of spent criminal convictions. The complaint was rejected, and the court held that as a claimant was being elected for the county sheriff position, ‘even his annulled conviction was relevant to his qualifications for the county sheriff position, as on this position, the sheriff would be able to judge the conduct of others and determine whether their conduct is in conformity with the law’.<sup>60</sup>

Deontological, or intrinsic value, arguments fall under the realms of self-fulfilment, dignity, self-relation etc.<sup>61</sup> The core idea is that ‘the restrictions on what we are allowed to say and write, or to hear and read, inhibit our personality and its growth; a right to express beliefs and political attitudes instantiates or reflects what is it to be human’.<sup>62</sup> The argument is construed from both individual and (expression of ideas) and collective (receipt of information) dimensions. Dworkin also construed the freedom of expression from the general freedom perspective to afford it the protection as a matter of principle.<sup>63</sup>

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<sup>56</sup> See in Alexander Meiklejohn, *Political Freedom*, 71(2) *Ethics* (1961), 141; Vincent Blasi, *The Checking Value in First Amendment Theory*, 2(3) *American Bar Foundation Research Journal* (1977)

<sup>57</sup> Greenawald, *supra* n. 44, at 375

<sup>58</sup> Schauer, *supra* n. 47, at 36

<sup>59</sup> Greenawald, *supra* n. 44, at 376

<sup>60</sup> *Lovejoy v. Linehan*, *supra* n. 16

<sup>61</sup> Oster, *supra* n. 53, at 17

<sup>62</sup> *Ibid*, at 13

<sup>63</sup> See Ronald Dworkin, *Is the Press Losing the first Amendment? A Matter of Principle* (Harvard University Press, 1985), 386

This paper does the intrinsic value of the freedom of expression. The problem arises, however, when this argument applies to the debate between two fundamental rights. First, same intrinsic argument applies from the privacy standpoint; absence of stigmatisation is a prerequisite for reintegration.<sup>64</sup> Here, two equal justifications collide. Second, the argument cannot assist us in measuring whose development is interfered with most. The one of a publisher of the COD, where an ex-convict submits a removal request longer after the publication. The one of a reader, generally not having any interest in the past COD publication. Or the one of the ex-convict, perhaps the only one, remembering about the existence of such publication?

In literature, there are also negative approaches justifying free speech protection. The idea is to highlight the negative outcomes, given that a State limits the freedom of expression.<sup>65</sup> This paper does not address these arguments, since they are fundamentally dependant on the positive ones and do not *per se* show why the expression requires any respect or protection.<sup>66</sup>

In practice, all of the arguments apply in the course of balancing exercises. In particular, the ECtHR uses a number of rationale for the protection, including the ‘essential foundation of a democratic society and the necessary condition for its progress’ and ‘the individual self-fulfilment’.<sup>67</sup>

The afore-discussed arguments present a strong argument in support of the freedom of expression. This is particularly true if we take the combination of arguments in a debate.<sup>68</sup> Their consideration will make a balancing test a more nuanced issue, not just a ‘simple play-off between two opposed principles’.<sup>69</sup>

### **1.2.3. Justification from the Public Discourse Theory**

Media freedom is a privilege, enjoyed by specific subjects. In Oster’s opinion, media freedom is ‘a derivative right, *lex specialis* from the freedom of expression’.<sup>70</sup>

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<sup>64</sup> See in Barendt, *supra* n. 45, at 15

<sup>65</sup> *Ibid*, at 21

<sup>66</sup> *Ibid*, at 22

<sup>67</sup> *Frankowicz v. Poland*, app. no. 53025/99, ECtHR, 2009, para. 38; *Axel Springer AG v. Germany*, app. no. 39954/09, ECtHR 2012, para. 78 (‘Axel Springer’)

<sup>68</sup> Greenawalt, *supra* n. 44, at 378

<sup>69</sup> *Ibid*, at 378

<sup>70</sup> Oster, *supra* n. 53, at 48

A basis for enhanced protection is a media's role – a 'public watchdog' function. The privilege entails the limitations for a State's interference with the media expression. In particular, under the well-established case law of the ECtHR, any interference with the media expression is subject to strict scrutiny, and, in applying such limitations, a State has a limited margin of appreciation.<sup>71</sup> Privacy and data protection also belong to an area, where a privilege finds its special protection. Example would be a derogation clause, embodied in the former Directive or the GDPR. The clause allows media not to adhere to the principles (some of them) of data processing and the rights a data subject, including a right to erasure.

Media freedom affords more protection, than a general freedom of expression defence, particularly in cases, when media provokes and offends.<sup>72</sup> Such increased protection is determined by a function of media. A public watchdog function. This affords media the protection to make any 'provocation, exaggeration, immoderate statements, to use strong words, make mistakes, since there can be no obligation to establish the truth of any publication, even if defamatory'.<sup>73</sup> In turn, the courts are not to assess which techniques to use to public information.

Regarding the media's purpose to shape the discourse. The public discourse theory itself may be summarized by the following arguments. Firstly, 'media freedom is justified, because of media's importance for the public discourse.'<sup>74</sup> Media shall 'contribute to a debate of general interest in a free, open and argumentative manner to reach understanding and to form public opinion on matters of public concern'.<sup>75</sup> Secondly, for the task of a proper public discourse, media freedom can be interfered with, particularly when it harms individuals.<sup>76</sup> Thirdly, interference should be balanced; in the balancing exercise, 'the media freedom protection depends on the adherence to its duties and responsibilities and extent of its contribution to public discourse'.<sup>77</sup>

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<sup>71</sup> Ibid, at 48-49.

<sup>72</sup> *Vejdeland and Others v. Sweden*, app. no. 1813/07, ECtHR 2012, Concurring Opinion Judge Zupančič, para 12

<sup>73</sup> *Oster*, supra n. 53, at 50

<sup>74</sup> Ibid, at 29

<sup>75</sup> Ibid, at 29

<sup>76</sup> Ibid, at 29

<sup>77</sup> Ibid, at 29

These considerations apply to the COD dilemma. The list of a public interest matters is non-exhaustive and traditionally has covered violations of the law.<sup>78</sup> The case-law, the media policies and governmental approaches are in accord with this premise.

As regards the case-law. In assessing contribution to a debate of general interest, the ECtHR numerously held that the crimes are within such public interest.<sup>79</sup> Same primarily follows from the media self-regulation policies. For example, the BBC Editorial Guidelines list the crimes and anti-social behaviour among topic broadcasted for public purposes, with due regard to the details of each case.<sup>80</sup> The Guardian Editorial Guidelines expressly provide that ‘the public interest includes, but is not confined to detecting or exposing crime or serious impropriety’.<sup>81</sup> The applicable standard to satisfy when publishing information is the existence of a public interest. Still, neither BBC nor Guardian addressed the question whether a public interest remains with the passage of time and whether they recognise the limits of a public interest to know.

Turning to the authorities, it is worth referring to the position of the UK Information Commissioner’s Office. The latter highlighted ‘an inherent public interest in the freedom of expression itself, regardless of specific content of the story’.<sup>82</sup> Nevertheless, ‘this does not automatically mean that a publication is always in the public interest, and any consideration what is in the public interest must involve element of proportionality’.<sup>83</sup> In particular, a disproportionate or unthinkable interference with an individual’s fundamental privacy or data protection rights ‘cannot be in the public interest’.<sup>84</sup>

That said, the question is: does a public interest remain that strong unlimitedly, indefinitely and in all cases? Apparently, no. Although it is not in

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<sup>78</sup> Ibid, at 42

<sup>79</sup> See in *Fuchsmann*, supra n. 37, at para. 35

<sup>80</sup> BBC, Editorial Guidelines, <https://www.bbc.co.uk/editorialguidelines/guidance/crime>

<sup>81</sup> The Guardian, Editorial Guidelines: Guardian News & Media Editorial Code, <https://www.theguardian.com/info/2015/aug/05/the-guardians-editorial-code>

<sup>82</sup> ICO, Data Protection and Journalism: a Guide for Media, 34 <https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf>

<sup>83</sup> Ibid, at 34

<sup>84</sup> Ibid, at 34

dispute that the reporting on crimes and subsequent investigation, trial and conviction are of public concern at the moment of trial, sentencing and even perhaps after the release. The same is not necessarily true after a sufficient passage of time, where additional considerations arise, including reasonable expectation of privacy, in the literature construed through a right to be left alone.<sup>85</sup> The rationale for privacy protection is presented in the next section.

### **1.3. Limits on Access to Criminal Offence Data: Justifications from the Privacy Standpoints**

#### **1.3.1. Data Protection Development**

Primarily, privacy emerged as a delineation of a private sphere from a state interference, considered as ‘a response to the claims of monarchs and, then, parliaments to untrammelled power to make law’.<sup>86</sup> Gradually, privacy has become a framework, where a person exercises some sort of control on the information about themselves.<sup>87</sup> From unexposed, hidden, confidential, concealed or secret,<sup>88</sup> privacy expanded to include all that ‘is private in the sense of individual, being personal, one’s own’.<sup>89</sup> Pursuant to this, an individual can exercise control to claim respect for their private life – ‘to affirm one’s right to live as they choose, as opposed to controlled, alienated, or estranged’.<sup>90</sup> The applicable privacy regime is the information privacy (data privacy or data protection), coexisting along with bodily privacy, privacy of communications and territorial privacy.<sup>91</sup>

The scholars agree that ‘data protection stems from the privacy and overlaps therewith.’<sup>92</sup> At the same time, privacy is a principle-based right, a normative value, whereas the right to data protection is a statutory (rule) based right.<sup>93</sup> In absolute terms, data protection is ‘more specific’, clearly defining personal data processing

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<sup>85</sup> Oster, *supra* n. 53, at 43 [citing Prosser, Wacks, Lusky, Mills, Fried and others]

<sup>86</sup> Raymond Wacks, *Privacy and Media Freedom* (OUP, 2013), 16-18

<sup>87</sup> *Ibid*, at xii

<sup>88</sup> Gloria Gonzalez Fuster, *The Emergence of Personal Data Protection* (Springer, Law and Technology Series, 2014), 22; Solove, *supra* n. 49, at 20

<sup>89</sup> *Ibid*, at 22

<sup>90</sup> *Ibid*, at 22

<sup>91</sup> Lee A. Bygrave, *Data Privacy Law: An International Perspective* (OUP, 2014), 5-6

<sup>92</sup> Bygrave, *supra* n. 91, at 3

<sup>93</sup> Hijmans, *supra* n. 43, at 66

as its scope, and ‘broader’, being applicable to all such situations, even if such are not precisely private. However, Hijmans agrees that ‘the contemporary privacy concerns in the information age are so broad that the scope of privacy (unnaturally) extends to the public matters and include the data protection matters’.<sup>94</sup>

That said, in practice, there is no need to draw clear lines between privacy and data protection, since both rights may be construed as representing the same value. Here, the ‘right to privacy defines why the protection is needed and the right to data protection respond to the question how the protection shall be delivered’.<sup>95</sup> The emerged response to ‘How to protect’ has put in its heart the control over personal information: lawful and fair collection, limitation of purpose etc.<sup>96</sup>

### **1.3.2. Criminal Offence Data: Privacy and Related Justifications**

In the literature, a various arguments apply to justify a right to privacy, either given separately or cumulatively, including the control over information about oneself,<sup>97</sup> human dignity,<sup>98</sup> intimacy,<sup>99</sup> social relationships,<sup>100</sup> and restricted access.<sup>101</sup>

In the classical works, privacy was identified from the control over oneself perspective. This was without limitation to the media right to make publications regarding the matters of public or general interest.<sup>102</sup>

Dignity, intimacy and social relationship perspectives have all addressed the same concerns, i.e. to prevent spread of information one wanted to keep in secret. Bloustein highlighted that a person should define ‘to what extent their thoughts, sentiments, emotions shall be communicated to others’.<sup>103</sup> Gerstein wrote that ‘it is

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<sup>94</sup> Ibid, at 66-67

<sup>95</sup> Ibid, at 68

<sup>96</sup> Raymond Wacks, What Has Data Protection to Do with Privacy? 6(9), *Privacy Law and Policy Reporter* (2000); A. Michael Froomkin, The Death of Privacy? 52(5) *Stanford Law Review* (2000), 1466; Bygrave, supra n. 91, at 1-3

<sup>97</sup> See Samuel D. Warren, Louis D. Brandeis, The Right to Privacy, 4(5) *Harvard Law Review* (1890)

<sup>98</sup> See Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 962, *New York University Law Review* (1964)

<sup>99</sup> See Charles Fried, Privacy, 77(3) *The Yale Law Journal* (1968); Robert S. Gerstein, Intimacy and Privacy, 89(1) *The University of Chicago Press, Ethics*, (1978)

<sup>100</sup> See James Rachels, *Why Privacy is Important?* Princeton University Press (1975)

<sup>101</sup> See Ruth Gavison, Privacy and the Limits of Law, 89(3) *The Yale Law Journal* (1980)

<sup>102</sup> Warren, Brandeis, supra n. 97, at 214; William Prosser, Privacy, 48(3) *California Law Review* (1960), 389, 410

<sup>103</sup> Bloustein, supra n. 98, at 971



*prima facie* wrong to observe a person against his will at any time, because it violates his autonomous right to decide whether he will be observed or not and leads to fundamental change in the nature of their actions'.<sup>104</sup> Fried called for intimacy in sharing of information about one's actions.<sup>105</sup>

Rachels considered privacy, from social relationship point of view. The idea was in the information control, necessary to 'be able to enter into, modify specific social relationships and associations and behave in particular manner therein'.<sup>106</sup> In response to the criticism, i.e. that such approach is nothing, but a hypocrisy, Rachels responded that a 'person can merely have different conceptions of relationships depending on the type of person he/she communicates with'.<sup>107</sup>

Gavison's a neutral concept of privacy is based on two premises. First, there could be no absolute privacy as well as total loss of privacy in any society. Second, the idea of privacy is not a claim for non-interference by a State, but 'rather a claim for a state interference in the form of legal protection against other persons'.<sup>108</sup> In Gavison's view, privacy has intrinsic value, by virtue of the functions it performs. These are the need of privacy for the moral and physical autonomy, mental health, human relations, selfhood, and, generally, leading of meaningful life.<sup>109</sup> Due to such functions, there shall be an explicit legal commitment to privacy confirming its central value.<sup>110</sup> Nevertheless, all authors agreed that privacy is not an absolute right and can be subject to limitations.

In the contemporary works, related to data protection, the scholars have tended to rely more on a human dignity as a universal ground for the recognition of importance of a specific right,<sup>111</sup> same as in the case of freedom of expression.

All the justifications discussed find their place in the relevant case-law. For example, in Rotaru case, the ECtHR held that the 'respect for private life must also

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<sup>104</sup> Gerstein, supra n. 99, at 78

<sup>105</sup> Fried, supra n. 99, at 484

<sup>106</sup> Rachels, supra n.100, at 90

<sup>107</sup> Gavison, supra n. 101, at 91

<sup>108</sup> Ibid, at 438

<sup>109</sup> Ibid, at 423

<sup>110</sup> Ibid, at 467

<sup>111</sup> Fuster, supra n. 88, at 23

comprise to a certain degree the right to establish and develop relationships with other human beings'.<sup>112</sup> In *NT1 and NT2* case, the EWHC assessed a privacy claim, in view of a need to safeguard 'unhindered social interaction' and not to negatively affect 'a young family'.<sup>113</sup>

Assessment of a negative impact is a reasonable consideration. COD do nothing, but impose sufficient burden on a person. Because of the COD, permanently available online, an ex-convict faces stigma, 'the reluctance of others to interact with him economically and socially'.<sup>114</sup> Such stigma is 'more injurious than community supervision, fines, or even incarceration'.<sup>115</sup> Empirical evidence, collected in the US, suggest that only 30% of employers would hire a person with criminal convictions, whilst existence of a conviction is a factor reducing the earnings.<sup>116</sup> Other data highlight, however, that job opportunities are different, depending on a severity of a crime.<sup>117</sup> In the family context, ex-inmates are unlikely to marry, reintegrate with the families, having, instead, high risks of divorce, disintegration with children and spouses.<sup>118</sup> Empirical evidence, likewise, suggest that the perceived stigma, or individual feeling of stigmatisation, implies low self-esteem and self-efficacy, leading to distress, fear and defensive behaviour.<sup>119</sup>

In view of these considerations, there is a room to argue that unlimited availability of the COD can affect social relationships, particularly family life, job opportunities and other vital areas. More generally, availability of the COD can lead to an individual's stigmatisation. In turn, due to the created barriers to resocialisation, there is a room to argue that the stigma implies a possibility of recidivism. Here, by the very nature of privacy, there should be a protection of an

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<sup>112</sup> *Rotaru v. Romania*, app. no. 28341, ECtHR, 4 May 2000, para. 43

<sup>113</sup> *NT1 & NT2 v Google LLC*, supra n. 20 at paras 166, 226

<sup>114</sup> Eric Rasmussen, *Stigma and Self-Fulfilling Expectations of Criminality*, (*University of Chicago Press, the Journal of Law & Economics* (1996), 519

<sup>115</sup> Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, (Chicago University Press, 2007); Jacobs and Larrauri, supra n. 26, at 2

<sup>116</sup> Jeremy Travis and Christy Visher, *Prisoner Reentry and Crime in America* (CUP, 2005), 220

<sup>117</sup> Christopher Urgan *et al*, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records On Employment*, 52(4) *Criminology* (2014), 647

<sup>118</sup> Travis and Visher, supra n. 116, at 221

<sup>119</sup> Kelly E. Moore, Jeffrey B. Stuewig, June P. Tangney, *The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediation Model*, 37(2) *Deviant Behavior* (2016), 196-218

individual. Notably, in the *M.L. and W.W.* case, the German courts primarily ruled in favour of privacy, relying on a resocialisation rationale. In any event, the protection of an individual's privacy is possible only after a sufficient balance of all the interests at issue, going beyond the freedom of expression.

#### **1.4. Discussion: Additional Considerations Regarding a Possibility to Strike a Balance**

There are additional considerations, suggesting that any attempts to reach a digital age balance are in vain, specifically when individual's intent consists in a removal of online traces of past criminal behaviour.

##### **1.4.1. Media and the Digital Age**

The present dilemma with 'the permanent online footprints' of a crimes would not have arisen given that the media had been simply in printed form or with the limited audience. Balkin elaborated on this premise. He wrote that 'in a pre-digital era, old newspaper articles that contained embarrassing information were quite literally yesterday's news'.<sup>120</sup> People simply threw the old copies and the only chance how to research the past events was to go to the place where archives were stored.<sup>121</sup>

In the digital age, however, 'organizations publish but do not delete; instead, old articles are freely searchable in newspaper archives, which remain online'.<sup>122</sup> Conclusively, 'the newspaper is no longer simply a report of the day's events, to be cast aside tomorrow and stored [...] instead, the newspaper becomes an increasingly important and valuable online archive, an institution of memory that is widely and easily accessible through search engines'.<sup>123</sup>

In such wide accessibility circumstances, McKenzie wrote 'an individual who finds himself the subject of online stories about his arrest or criminal investigation

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<sup>120</sup> Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51(1149) University of California (2018) 1203

<sup>121</sup> Ibid, at 1203

<sup>122</sup> Ibid, at 1203

<sup>123</sup> Ibid, at 1203

has only extremely limited options; extra-judicial solutions range from inadequate to nonexistent'.<sup>124</sup>

From this perspective, the contemporary attempts to limit the accessibility of the past data interplay with the pre-digital age reality, where published materials, specifically those not concerning public figures, resided to the past after a few days after a publication. Not to mention that the audience of the newspapers has nowadays unprecedentedly increased. Notably, in contrast to print media, the contemporary online publishers can retain control and can update or amend that information at their pleasure' to meet such privacy demands.<sup>125</sup>

Therefore, trying to target nowadays the search engine providers or the online media, the individuals, in fact, attempt to restore the practical obscurity (and thus privacy protection) of the pre-digital era.<sup>126</sup>

#### **1.4.2. Public Interest to Know One's Criminal Present and Past**

The freedom of expression implies a public interest. The gatekeepers are to fulfil such interest. The below considerations reveal that a public interest may exist long after a primary publication.

First point to note is the open justice principle. The courts accord additional weight in the discussion at hand to the open justice principle. One example of such approach would be *Khuja v. Times Newspaper Limited* case, decided by the EWHC. A principle, never considered as absolute and often applied in the context of open hearings, consists in the value, 'accorded to the public scrutiny as a guarantor of the quality of justice'.<sup>127</sup> Despite being mentioned in the COD discussion, the principle at hand, by and large, remains sufficient only when the justice is being served. Its application after a passage of time is, that said, questionable.

Turning to the public interest to know the past. It is argued that 'keeping information about the conviction confidential might undermine deterrence and put

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<sup>124</sup> McKenzie, *supra* n.12

<sup>125</sup> *Ibid*, at 882

<sup>126</sup> Balkin, *supra* n.,120, at 1203

<sup>127</sup> *Khuja (Appellant) v Times Newspapers Limited and others*, [2017] UKSC 49, 13

individuals and organizations at risk of being victimized by an individual of proven criminal propensities'.<sup>128</sup> Haber, assessing the US context, lists the employers, landlords, educational institutions, and other interested parties are in need of such information that are even ready to pay for such data.<sup>129</sup>

Secondly, it is argued that there is economic and social rationale in the existence of stigma due to its effective deterrence impact, insofar the data about convictions are accurate. Rasmussen criticises a public policy, making such data secret. The author appeals to 'a common sense' in the way that such data, as the COD, matter for an employer, giving an example of employing an ex-burglar for a position of ware-houseman.<sup>130</sup> This paper does not address other arguments of the author, including 'a lack of stigma increases the incentive for crime in the first place'.<sup>131</sup> The reason is the existence of an opposite data in this regard. By extension, Rasmussen's arguments are not self-evident, may have opposite implications (stigma and recidivism correlation is illustrative) and tend to ignore a specific individual and a legally set goal of ex-convicts' resocialization. That said, it is hard to find a place for Rasmussen's argumentation in a balanced approach.

Generally speaking, it is not in dispute that society is interested in deciding how to construct social relationships or carry out business, in the deterrence impact of criminal justice, in knowledge of information on political figures before the elections. This is true, however, that the essence of a spent conviction is that a person paid a societal debt and is considered to have never been involved in crimes. Therefore, formally, the COD's relevance regarding an ex-convict significantly reduces. At the same time, the COD can negatively impact one's vital interests, protected by privacy.

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<sup>128</sup> Jacobs, Larrauri, *supra* n. 28, at 2

<sup>129</sup> Eldar Haber, *Digital Expungement*, 77(2) Maryland Law Review (2018), 362

<sup>130</sup> Rasmussen, *supra* n 114, at 539

<sup>131</sup> *Ibid*, at 540

### 1.4.3. Limitation of Access to the COD: Criticism and Response

Expungement is a method of concealing criminal data by the government – either at the outset or with a passage of time. Franklin and Johnsen raised the arguments against hiding the criminal past. The authors argued that ‘expungement is a form of institutionalised dishonesty that entails concealing evidence of conduct that deserves to be remembered; that allows the offenders evade responsibility for their actions; that it prevents the parties to an employment contract creating a relationship based on good faith; and that it is contrary to victims’ interests’.<sup>132</sup>

In 1971, Kogon and Loughery also raised serious concerns regarding sealing the criminal records, as this is, in fact, practically, impossible and such information will, in any event, become known; the ‘best means to address the problem with ex-convicts is to liberalize public attitudes towards offenders’.<sup>133</sup>

McIntyre and O’Donnell respond to such criticism by presenting the following (utilitarian) arguments:

- any barrier to a full civic engagement implies the emergence of a criminal underclass – the phenomenon in conflict with the public safety concerns;
- besides applying a sufficient societal burden in the form of convictions, the society can additionally limit the full exercise by the ex-offenders of their skills and talents, absorbing the costs of their productivity;
- if there is no chance for a fresh start and if the criminal record can merely diminish any life chances, then this constitutes a disproportionate punishment.<sup>134</sup>

These considerations, besides a disproportionate argument, are rather policy-related. Taken cumulatively with the privacy concerns, however, these

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<sup>132</sup> Marc A. Franklin and Diane Johnsen, Expunging Criminal Records: Concealment and Dishonesty in an Open Society, 9, *Hofstra Law Review* (1980), 733

<sup>133</sup> Bernard Kogon, Donald L. Loughery, *Sealing and Expungement of Criminal Records-- The Big Lie*, 61(3) *Journal of Criminal Law and Criminology* (1971), 391

<sup>134</sup> Ericka Adams, Elsa Y. Chen, and Rosella Chapman, Erasing the Mark of a Criminal Past: Ex-Offenders’ Expectations and Experiences with Record Clearance, 19(1) *Punishment & Society* (2017), 23; TJ McIntyre, Ian O’Donnell, Criminals, Data Protection, and the Right to a Second Chance, 58 *Irish Jurist* (2017), 2

considerations can rebut the dishonesty counter-argument. Negative outcomes of a convictions are a valid reason to set a provision: a person, whose conviction becomes spent, is considered to have never committed any crime. To reiterate, it is generally agreed that when a conviction becomes spent, (i) a person paid their debt to the society and should be able to get on with their lives, (ii) availability of criminal data presents the most burdensome criminal charge outcome and contributes to recidivism.<sup>135</sup>

Whereas there is a rationale to limit access to the COD, the online dimension presents a serious challenge here. In short, it is enough for a media outlet or for an individual person to communicate such [criminal] information so that ‘the footprints of [criminal] record will remain spread all over the web, just a click away’.<sup>136</sup> That said, without ‘creating serious problems for the freedom of expression, the laws *per se* cannot fix the existing problems’.<sup>137</sup>

Potentially, the government ordered erasures or rectifications will create even more ‘footprints’ on the web – the opposite effect from what a data subject primarily desired. As a result, such entitlements, as the right to be forgotten, might be attractive, ‘but are difficult to achieve, given the nature of technologies which delete but do not forget’,<sup>138</sup> just by the very nature of the internet infrastructure.

Attempting ‘to silence media’, once found a public interest in a criminal story, may have a detrimental impact: increased number of publications of your personal information, by virtue of the increased public interest, previously gradually and constantly reducing. An illustrative example is a recent case, decided by the ECtHR – W.W. and M.L. v. Germany (translated in the Appendix), concerning two notorious murderers, who killed a German actor in 1990. After attempting to anonymize their names within a number of publications, they caused a detrimental effect. For example, the New York Times, a newspaper with worldwide influence, published an article ‘Two German Killers Demanding Anonymity Sue Wikipedia’s

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<sup>135</sup> Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or is There a Chance for a Second Act in America?* 49, Loyola University Chicago Law Journal (2017), 2

<sup>136</sup> *Ibid.*, at 3

<sup>137</sup> *Ibid.*, at 50

<sup>138</sup> Fuster, *supra* n. 88, at 247

Parent’, revealing their names, i.e. Wolfgang Werlé and Manfred Lauber, and their story.<sup>139</sup>

Nothing suggests changing such Digital Age *status quo*. The internet inherently implies ‘unlimited storage of information, sorted efficiently and located effortlessly’; ‘malleable’ character of the data, easily portable, processed and accessed by any person; anybody serving as a potential publisher; and data serving as a new oil of economic productivity.<sup>140</sup>

Put this within the framework of a ‘global village’, where there is no need to be famous to be invaded,<sup>141</sup> the internet creates a digital portrait of a person, storing all the people’s past transgressions, and remains so, regardless of the risks for a person to be judged out of context.<sup>142</sup> As the information online can be chaotic, even non-conviction or dropped charges cases may impose a stigma on the individual.<sup>143</sup> In their criticism, the authors are sure that the emerging mechanisms, albeit being designed to address privacy-related concerns,<sup>144</sup> will not change such *status quo* or, more generally, the rules of such global village, no matter how one tries.

If one tries to interfere with such *status quo*, this will be merely the attempt to interfere with ‘private governance, essential for the free speech, where companies by themselves regulate the matters, related to free speech and privacy’.<sup>145</sup> In Europe, ‘such measures are explained by the absence of a technical capacity to monitor the internet and to protect the right to be forgotten on their own’.<sup>146</sup>

This paper considers such criticism as essential for understanding the present discussion. This discussion requires understanding an increased responsibility, put

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<sup>139</sup> The New York Times, Two German Killers Demanding Anonymity Sue Wikipedia’s Parent, <https://www.nytimes.com/2009/11/13/us/13wiki.html>

<sup>140</sup> James H. Moor, *Towards a Theory of Privacy in the Information Age* (Computers and Society, 1997) 27; Mariarosaria Taddeo, *The Struggle Between Liberties and Authorities in the Information Age* (Science and Engineering Ethics, Volume 21, Number 5, 2015), 1125; See also a generate debate in Hijmans, supra n. 43, at 1-3, 18; Foley, supra n. 44, at 274; Bygrave, supra n. 91, at 18

<sup>141</sup> Solove, supra n. 49, at 15--17

<sup>142</sup> Ibid, at 17

<sup>143</sup> Kessler, supra n.18, at 408

<sup>144</sup> Bygrave, supra n. 91, at 8, 20; Stefan Kulk, Privacy, Freedom of Expression, and the Right to Be Forgotten in Europe in Cambridge Handbook of Consumer Privacy, eds. Jules Polonetsky, Omer Tene, and Evan Selinger (Cambridge University Press, 2017), 13

<sup>145</sup> See in Jack M. Balkin, *Free Speech is a Triangle*, 118(2011) Columbia Law Review (2018)

<sup>146</sup> Ibid, at 2029



on any publisher. As the publisher has an instrument to create a permanent online portrait, almost impossible to be erased, albeit unlimitedly damaging one's life till the very end. The discussion, likewise, requires considering a scenario when traditional privacy *contra* freedom of expression balancing formula becomes insufficient to meet the Digital Age challenges.

### **Chapter 1 Concluding Remarks**

Online presence of the COD implies a conflict between the privacy and the freedom of expression. The positions of both rights can, however, change with the passage of time, as a public interest, as a rule, decreases, whilst the reasonable expectation of privacy increases.

While a balance remains the question of individual circumstances, including the passage of time, the court's response to the balance is unlikely to respond to the existing challenges. The existing challenges include (i) the need for the consideration of the legitimate interests, existing outside the conflict between two fundamental rights, but even more (ii) practical impossibility to achieve the desired purpose of 'silencing the past', particularly because of (ii.1) the architecture of the internet and (ii.2) potential increase of a public interest if the individual attempts to limit the freedom of expression.

## 2. A Balanced Approach in the Cases against Publishers

### 2.1. A Balancing Formula Involving Two Fundamental Rights

Privacy and the freedom of expression comprehensively intersect.<sup>147</sup> On the one hand, there is interdependence and mutual support between them when privacy facilitates the unhindered freedom of expression.<sup>148</sup> For example, the anonymized and encrypted spread of the information on corruption within the government. On the other hand, the rights at hand clash. Any attempt to limit access to the COD inevitably conflicts with the attempt to spread such information in the public or other interest.<sup>149</sup> When such conflict arises, the authors support either approach – prevalence of the freedom of expression<sup>150</sup> or privacy protection.<sup>151</sup> They often support such approaches as a matter of principle, regardless of individual circumstances.

This paper, however, attempts to consider individual circumstances. The reason for this is to reach a balance between two fundamental rights, two horizontal values of equal standing,<sup>152</sup> the rights necessary for the online persona.<sup>153</sup>

Balancing two fundamental rights, I should address some preliminary remarks, explaining more generally the approaches, followed in this paper. First, no automatic predetermined choice in favour of one of the rights is consistent with the human rights law.<sup>154</sup> Second, the States have a margin of appreciation on how to reconcile two rights, pursuant to a national balancing formula.<sup>155</sup> The creation of a formula depends on the weight given to each of them in specific context and other

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<sup>147</sup> See Barendt, *supra* n. 45, at 165; Hijmans, *supra* n. 43, at 228

<sup>148</sup> Jozeph A. Cannataci *et al*, *Privacy, Free Expression and Transparency* (Paris: UNESCO Publishing, 2016), 79

<sup>149</sup> *Ibid*, at 80

<sup>150</sup> Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52(5) *Stanford Law Review* (2000), 1560

<sup>151</sup> Solove, *supra* n. 49, at 16; Joseph, *supra* n., at 22

<sup>152</sup> *Ibid*, 96

<sup>153</sup> Taddeo, *supra* n. 127

<sup>154</sup> Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116(16) *Harvard Law Review* (2002), 44

<sup>155</sup> *Ibid*, at 42, 44

important factors of a given case.<sup>156</sup> What the construction of a formula gives as is the consideration of different types of speech (political expression, commercial expression, and so on)<sup>157</sup> and the consideration of different aspects of the COD: time spent after a conviction, ex-convicts' conduct, their ties within a family and other societal interests, a gravity and notoriety of an offence etc. In a balancing formula, one can attempt to respond whether limitation of access to the COD can benefit resocialisation or, on the contrary, prevent a deterrence function.

After a consideration of an individual case, we should come up with the, what Barak calls, principled balancing. An example of a principled balancing would be a possibility to interference with the freedom of expression to protect the reputation and the rights of others, as embodied in Art. 10(2) of the ECHR. Principled balancing applies also in cases of interference with the privacy of a public figure. Under such circumstances, as a rule, a public interest shall prevail over the privacy interests of such an individual.

A challenge is, however, the following: how should we approach dozens of situations, occurring in practice concerning the unknown ex-convicts of different ages and their COD, varying in gravity, notoriety etc.? One way is to approach each case with a formula, developed on the *ad hoc* basis. The legal certainty will be, however, inevitably harmed.<sup>158</sup> The other solution is to develop the general criteria to use, assessing individual cases. Regardless of a subject matter, Smet proposes general criteria for a resolution of a human rights conflict.<sup>159</sup> These include (i) negative consequentialist considerations (which harm is harmed more if refused protection), (ii) involvement of additional rights to a dispute,<sup>160</sup> (iii) general interest involvement, (iv) purpose assessment, i.e. whether a right is exercised for the purpose, it was created for, (v) responsibility criterion, i.e. 'where the right is exercised irresponsibly, preference might be given to the adverse right'.<sup>161</sup>

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<sup>156</sup> Ibid, at 95

<sup>157</sup> Ibid, at 95

<sup>158</sup> Ibid, at 96

<sup>159</sup> Stijn Smet, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review* (2010), 202-228

<sup>160</sup> Ibid, at 190

<sup>161</sup> Ibid, at 191

Besides the above considerations, this paper will rely on the need to apply the measures, which are the least intrusive for both rights,<sup>162</sup> and follow the approach, that the present conflict is better decided in horizontal relations (between private persons) and not necessarily via the legal instruments.<sup>163</sup>

## **2.2. European Court of Human Rights: Applying the Well-Established Case-Law to the COD**

### **2.2.1. Traditional Approaches of the ECtHR**

In *Delfi, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* and, recently, in *Pihl* (all concerning defamatory or hate speech comments), the Court recognised the risks, entailed by a digital environment for both rights at stake, particularly if any of them is not afforded sufficient protection. For this reason, the Court's balancing formula does not depend on who applied to the Court – a publisher under Art 10 or a victim of a publication under Art 8.<sup>164</sup> Still, how to balance – is the question left to domestic authorities insofar such balance is consistent with the criteria of the Court.<sup>165</sup> The Court's criteria are consistent with the theoretical works in the area of both rights.

First, the Court recognises the importance of both rights. In the freedom of expression context, the Court traditionally holds that the freedom of expression is important for the democratic society, its progress, and for the individual self-fulfilment.<sup>166</sup> For this reason, the ECtHR affords sufficient protection to both a right to disseminate information and to the right to receive it.<sup>167</sup> The Court significantly protects the media freedom insofar 'it acts in good faith and provides accurate and reliable information in accordance with the ethics of journalism'.<sup>168</sup>

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<sup>162</sup> Haber, *supra* n. 114, at 364

<sup>163</sup> Hijmans, *supra* n. 43, at 79; Jack M. Balkin, The Future of Free Expression in the Digital Age, 36 *Pepperdine Law Review* (2008), 117

<sup>164</sup> *Delfi AS v. Estonia* [GC], app. no 64569, 16 June 2015, para. 139 ('Delfi'); *Pihl v. Sweden*, app. no. 74742, 7 February 2017, para. 27 ('Pihl'); *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v. Hungary*, app. no. 22947/13, ECtHR, 2 February 2016

<sup>165</sup> *Delfi*, *supra* n. 164, at 139

<sup>166</sup> *Rekvényi v. Hungary* [GC] no. 25390/94, ECtHR, para. 42

<sup>167</sup> *M.L. and W.W. v. Germany*, *supra* n. 41, para. 89; *Axel Springer AG*, *supra* n. 67, paras 79-81; *Oster*, *supra* n. 53 at 83 [citing *Loersch* and *Nouvelle Association du Courrier* and *Faccio* cases]

<sup>168</sup> William Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2017), 458

Second, the freedom of expression protection applies to the archiving of past publications. In a number of cases, the Court held that archiving is ‘an ancillary, but important function when once published information remains available to the public, contributing to the preservation and accessibility of news and information and being a valuable source for teaching and historical research, especially in that they are immediately accessible to the public and generally free of charge’.<sup>169</sup>

Third, the Court, nevertheless, held that, despite entering a public domain, reproduction of certain information may be restricted, particularly ‘to prevent further airing of the details of an individual's private life, which do not come within the scope of any political or public debate on a matter of general importance’.<sup>170</sup> By extension, if a publication is not supported by a serious public interest, then ‘the individual's right to the effective protection of his or her private life prevails over the journalist's freedom of expression’.<sup>171</sup> A general example of such situation, often given by the Court, is an attempt to fulfil a readership curiosity.

Fourth, the COD will fall within the passage of ‘the rights of the others’ in the wording of Art. 10(2) of the ECHR as a legitimate purpose to limit the freedom of expression. In practice, however, an applicant shall produce serious reasons to limit the freedom of expression.<sup>172</sup> The burden, put on the applicant, is even greater insofar a State applied the Court’s balancing formula.<sup>173</sup> The applicant’s criticism of the media’s reporting methods is unlikely to satisfy the respective burden. Particularly, in view of the Court’s holding that ‘neither a State nor the Court should substitute its own views for those of the press as to what technique of reporting should be adopted in a particular case’.<sup>174</sup> Definitely, this holding applies to an editorial decision to use one’s name in a publication or to report a crime. Interference with the respective publication is inconsistent with the media freedom, unless such

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<sup>169</sup> See *Times Newspapers Ltd v. The United Kingdom* (nos 1 and 2), app. nos. 3002 / 03 and 23676/03, ECtHR, 2009, paras 27 and 45

<sup>170</sup> *Aleksey Ovchinnikov v. Russia*, app. no. 24061/04, 16 December 2010, para. 50

<sup>171</sup> *Ibid*, at 50

<sup>172</sup> *Gagdalen Jozwiak, Balancing The Rights to Data Protection and Freedom of Expression and Information in the EU*; *Schabas*, supra n. 153, at 458; *Barendt*, supra n. 45, at 7

<sup>173</sup> *Axel Springer*, supra n. 67, at 78

<sup>174</sup> *Eerikäinen and Others v. Finland*, app. no. 3514/02, 10 February 2009, para. 65

publication is arbitrary and imbalanced. We can, however, argue that this holding is not sufficient when the applicant challenges a criminal story, published a long time ago. Instead of criticising the primary media techniques, the petitioner puts in question the presence of the COD, long after the initial story. Nevertheless, the Court will scrutinize such attempts as well. Applying negative consequentialist arguments, the Court can hold that ‘removal of data may hinder the public access to information and its dissemination, protected under the ECHR Art. 10.’<sup>175</sup>

Fifth, on numerous occasions, the Court saw the rationale behind the use of the COD. In *Jankauskas*, the Court accepted the argument that such data can characterise a fulfilment or non-fulfilment of a criterion of high moral standards, while entering into the Lithuanian Bar Association Council, although the conviction became spent by that time.<sup>176</sup> In *Achour*, the Court accepted the possibility to take into consideration the past convictions by the courts, even if the convictions become spent, without violation of the principle of *non bis in idem*.<sup>177</sup>

Generally, the ECHR system already seems problematic, from the standpoint of a petitioner, seeking to limit access to the COD. Despite a serious burden, put on the petitioner, the system is known for the delays in dealing with individual cases. Since the present situation, as a rule, falls within the 4<sup>th</sup> priority group (‘Potentially well-founded applications based on other Articles’), nothing suggests that the Court will consider within the time, reasonably expected by the petitioner. Delays, priority policy, together with the instruments the Court has, raise serious doubts as to whether the ECtHR is an effective mechanism to deal with the conflict at issue.

### **2.2.1. Axel Springer AG v. Germany**

In the case at hand, the Grand Chamber assessed whether a publication of a criminal story was justifiable. The criminal story concerned the arrest for the possession of cocaine of a famous (in the past) German actor. In this paper, it is important to refer to the criteria, the Court established for a balancing exercise.

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<sup>175</sup> See *Times Newspapers Ltd*, supra n.148, para. 27

<sup>176</sup> See *Jankauskas v. Lithuania*, app. no. 50446/09, 27 June 2017, ECtHR

<sup>177</sup> See *Achour v. France*, app. no. 67335/01, 29 March 2006, ECtHR

First, the ECtHR assessed a contribution to a debate of a general interest that depends on the circumstances of a case.<sup>178</sup> As a rule and as highlighted in this paper, crimes are within a general interest.<sup>179</sup>

Second, the Court addressed a status of a person concerned by answering how known is a person and what is a subject of the report.<sup>180</sup> In this assessment, the Court is to define whether an individual is a public figure or a private individual. A private individual can claim a wider protection of their privacy rights under Art. 8.<sup>181</sup> A different element of this criterion is a subject matter of the report, i.e. whether these are linked to a public interest, whether they can contribute to a debate of a general interest.<sup>182</sup> Attempts to satisfy readership curiosity do not qualify for a wide protection under Art. 10.<sup>183</sup>

Third, the Court assessed the prior conduct of a person concerned. This assessment is carried out in the context whether such conduct gave rise to a larger public interest.<sup>184</sup> For example, prior interviews with a person regarding subject matter of the report and prior release of the relevant information may be the relevant factors to consider.

Fourth, the Court assessed the method of obtaining information and its veracity.<sup>185</sup> The essence of this part is to see whether the media ‘acted in good faith and on accurate factual basis and provide reliable and precise information, in accordance with ethics of journalism’.<sup>186</sup> Should there be doubts in this presumption, the Court can subject a publication to a greater scrutiny.

Fifth, the Court assessed the content, form and consequences of a publication. In this part, the Court assesses what exactly is reported (e.g. whether scope of the personal data reported is justified) and the manner in which the report is

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<sup>178</sup> *Axel Springer AG v. Germany* [GC], app. no. 39954/08, 7 February 2012, ECtHR, para. 90 (*‘Axel Springer’*)

<sup>179</sup> *Ibid*, at para. 90

<sup>180</sup> *Ibid*, at para. 91

<sup>181</sup> *Ibid*, at para. 91

<sup>182</sup> *Ibid*, at para. 91

<sup>183</sup> *Ibid*, at para. 91

<sup>184</sup> *Ibid*, at para. 91

<sup>185</sup> *Ibid*, at para. 93

<sup>186</sup> *Ibid*, at para. 93

disseminated.<sup>187</sup> The relevant factor is a degree of circulation, namely whether the media is a local or national one.<sup>188</sup>

These factors will be relevant in different parts of the paper. *In casu*, the Court ruled in favour of the freedom of expression which here concerned a publication, which was within a public interest, concerned a public figure and was made in a good faith and in accordance with the media standards.

### **2.2.2. Węgrzynowski and Smolczewski v. Poland**

The case concerned an archived publication, previously recognised as defamatory by the domestic court. Despite the domestic ruling, the publication remained available on the newspaper's website.<sup>189</sup> The applicants initiated domestic proceeding to obtain an order to delete the publication from the website. The petition was rejected, as its fulfilment would have amounted to censorship and rewriting history, incompatible with the Constitution of Poland.<sup>190</sup> Higher courts also rejected the petition, despite applicants' arguments that the article on the newspaper's website infringed their personal rights.<sup>191</sup>

The ECtHR declared one of the application inadmissible (based on procedural grounds) and considered only one of them. The Court held that the internet archives fall within the ambit of the protection afforded by Art. 10 of the ECHR,<sup>192</sup> whilst the refusal to fulfil a request to delete information, albeit defamatory, does not constitute a violation of Art. 8 of the ECHR.<sup>193</sup> In this paper, the following is to be noted:

First, the Court acknowledges the inherent risks in 'rewriting the history and removing all traces of past publication'.<sup>194</sup> Secondly and more importantly, the Court held that, generally, this is not for the judicial authorities 'to order the removal of all traces of a publication as if it had never existed'.<sup>195</sup> Therefore and lastly, the Court held that there are alternative forums and remedies to address such situations,

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<sup>187</sup> Ibid, at para. 94

<sup>188</sup> Ibid, at para. 94

<sup>189</sup> See *Węgrzynowski and Smolczewski v. Poland*, app. no. 33846/07, 16 July 2013, ECtHR

<sup>190</sup> Ibid, at para. 11

<sup>191</sup> Ibid, at para. 17

<sup>192</sup> Ibid, at para. 59

<sup>193</sup> Ibid, at para. 70

<sup>194</sup> Ibid, at para. 65

<sup>195</sup> Ibid, at para. 65



including domestic courts. Specifically, the Court held that ‘alleged violations of rights protected under Art. 8 of the Convention should be redressed by adequate remedies available under domestic law’.<sup>196</sup> As an example, the Warsaw Court of Appeal ‘observed that it would be desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in which the courts had allowed the applicants’ claim for the protection of their personal rights claim’.<sup>197</sup>

In the present case, it is important to note that the applicants did not call upon either the ECtHR or domestic courts to rectify a publication or attach addendum regarding a trial outcome. As the Court observed, ‘the applicant did not submit a specific request for the information to be rectified by means of the addition of a reference to the judgments in his favour’.<sup>198</sup> The applicant did not, likewise, show that the domestic framework did not enable him to make such a request.<sup>199</sup> As a conclusion, the Court held that the requests to completely delete information are disproportionate vis-à-vis the freedom of expression. The Court, same as in the *M.L. and W.W.*, implicitly addresses the problem that it is not an appropriate forum to deal with such the questions. This is important, in view of the alternatives to the judicial measures, discussed in this paper.

### **2.2.3. M.L. and W.W. case**

In the past, the Court extended Art. 8(1) private life protection to the COD, but vis-à-vis a State. The present case is an example where the criminal data are afforded Art. 8(1) protection in the horizontal relations context.

*M.L. and W.W. v. Germany* case, decided in 2018, concerned two notorious murderers, who, just after their release, requested to remove their names from a number of publications. The Court held that the interference with privacy here is not the fact of a primary publication, but ‘a decision to keep specific information on the website even if it is not intended to attract public attention’.<sup>200</sup>

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<sup>196</sup> Ibid, at para 65

<sup>197</sup> Ibid, at para 65

<sup>198</sup> Ibid, at para. 67

<sup>199</sup> Ibid, at para. 67

<sup>200</sup> *M.L. and W.W.*, supra n. 41, para. 97

The Court did not develop a new test, but applied the existing Arts 8-10 framework to assess whether the matter contributed to a debate of a general interest, how well was the person known and other elements, addressed below. It is likely that this test applies to any further attempts to limit access to the COD, including through anonymization, delisting, or deindexing.

First, crimes and criminal convictions are within a debate of general interest and can remain so with a passage of time. The present case was not an exception from this general rule, in view of a gravity of the criminal offence at hand.<sup>201</sup> In the instant case, the victim of a murder (an actor) was popular in Germany. Consequently, by murdering him, the applicants entered a public stage, acquiring the status of public figures.

Second, other factors were also relevant to conclude that there was a sufficient public interest. Primarily, the applicants' conduct. Being imprisoned, the applicants numerously asked to reopen a trial and gave interviews, denying their guilt. Such attempts created a basis for new publications. All these factors attracted significant attention from the general public, although the applicants were not popular before the murder.<sup>202</sup>

The second argument that raised the notoriety in this case was the several attempts to reopen the case and addressing this matter to the press by themselves. Such attempts, in the words of the domestic courts, covered 'the use of all imaginable remedies to reopen the case'.<sup>203</sup> That is why it is unlikely that the applicants could have had a serious expectation of privacy to discount the anonymization of the reports. Such attempts also led to the affirmative answer from the Court's side regarding the question of prior conduct of the applicants – the conduct which attracted attention. This conclusion was accompanied by the facts of the case that the applicants gave a series of interviews, certain of which have been published on the website of the applicants' lawyer.

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<sup>201</sup> Ibid, at para 97

<sup>202</sup> *M.L. and W.W.*, supra n. 41, at para. 106

<sup>203</sup> Ibid, at para. 109

Third, the Court held that even when a public loses touch with such events, and the public cannot recall the events in detail, still, a public interest here is to enable someone to research the past events, particularly bearing in mind the notoriety of a crime. The media is bound to fulfil such interest. This is, however, without limitation to the growing conflict that arises with a passage of time. The conflict consisting in an individual's interest 'not to be confronted with their act, with a view to his reintegration into society'.

Fourth, the argument in favour of the contested publications was their quality. The publications balanced both sides of a trial, discussed the individual stories of the applicants. The publications did not depict the applicants in a false light and did not public any information, besides a crime, that could damage applicants' reputation.

Fifth, the impact of a publication on the applicants was not severe. Attempting to remove their names from the publications, the applicants did not have serious expectation of privacy at that time – the moment just after their release. By extension, the publishers limited the accessibility to specific articles, particularly by requiring paid access to them.<sup>204</sup> Likewise, the publications at issue were located in the 'old reports' section.<sup>205</sup> At the end, the Court held that the applicants did not refer their case to the search engines 'to reduce the detectability of information about their persons'.<sup>206</sup>

The final ruling is that 'the applicants were not mere private persons, unknown to the public at the time of the introduction of their requests for anonymity'.<sup>207</sup> The publications, contested by the applicants, did not interfere with the applicants' privacy to the extent, inconsistent with the media professional limits. Therefore, the Court ruled in favour of Art. 10.

The present judgment reiterates: a petitioner shall provide compelling reasons to limit the freedom of expression. The threshold is high. The Court, however, did

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<sup>204</sup> Ibid, at paras 112-113

<sup>205</sup> Ibid, at paras 112-113

<sup>206</sup> Ibid, at para. 114

<sup>207</sup> Ibid, at para. 107

not have any problems in *M.L. and W.W.*, as the case dealt with a list of favourable arguments for the freedom of expression. First and foremost, the case concerned the media expression. The publishers did not neglect their duties and responsibilities. In particular, they based their publication on reliable sources, provided comprehensive view on a criminal trial, particularly referred to the position of the defence. Generally, the publishers pursued a public interest, existing clearly at the moment, when the applicants attempted to have their names removed from the publications.

The events of a crime are also *contra* anonymization. The victim was a public figure. There always remains a public interest in researching the events of the past. To reconstruct such events, names of the murderers can be important.

Moreover, the reality made the request also unreasonable. At that time, numerous media published their story. The persons, not qualifying as media, similarly shared the information about the applicants' personalities. If the Court ruled in favour of privacy, this would be apparently imbalanced. On the one hand, this would seriously interfere with editorial policies of a list of publishers and would be hardly justified, in view of a public interest in this story. On the other hand, this would not accommodate the initial privacy interest of the applicants, in view of a great number of other publications, posts and comments, discussing their personalities. Possibly, such situation was the reason why the Court mentioned that the 'applicants did not even attempt to lodge a request to the search engine to limit their detectability'. Definitely, such request could have covered the overall privacy interest of the applicants, in contrast to judicial proceedings against few publishers. Nevertheless, even if they had used this alternative mechanism, the latter should have resulted in a similar outcome in light of the public interest, protecting any such publications.

### **2.3. The Supreme Court of Belgium: Le Soir Case**

Belgian courts dealt with the balancing issue in the *Le Soir* case. The case arose before the Cour de cassation de Belgique. The publisher lodged a cassation complaint after the court of appeal rejected to annul the first-instance court order,

requiring the newspaper ‘Le Soir’ to anonymize the name and surname of the applicant in its publication.

In short, the case concerned a past publication by a newspaper ‘Le Soir’, with applicant’s name and surname included, connected with the incident involving Mr. Olivier G that resulted in two deaths. The applicant was involved in a careless driving under influence leading to casualties. He was, then, convicted. By the time of lodging his request to remove information from the ‘Le Soir’ online portal, the respective conviction had been spent.

The case contrasts from M.L. and W.W. in numerous respects. Firstly, a petitioner was a private individual, not known to the general public even after a crime. Secondly, there has been a sufficient lapse of time between a publication and the request. Thirdly, the applicant demonstrated a strong privacy case and his rehabilitation after the crime. Fourthly, a publication could retain its initial purpose even in the absence of the applicants’ credentials. All these affected the ruling, which was opposite to the German case as well.

The applicant primarily required deleting the article. In the alternative, he requested the anonymization. The applicant argued that the availability of the information seriously damaged his reputation, protected under Art. 8 of the ECHR. The courts upheld only the latter request.

The Court of Cassation first addressed the issue of the legality principle (‘based on the law’). The Court held that ‘a right to be forgotten has been widely recognized as an integral part of the right to respect for private life under Art. 8, Art. 22 of the Constitution and Art. 17 of the ICCPR; therefore, an interference is based on the law’.<sup>208</sup> Later, the Court used ‘the rights of others’ to justify the existence of a legitimate aim.

Primarily, Le Soir submitted a defence that ‘a right to be forgotten applies only if the case concerns republication of old information, but not the access to archives’. Referring to *Google Spain*, the Court disregarded this approach, saying

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<sup>208</sup> Belgian Court of Cassation, Cass. 29 April 2016, n° C.15.0052.F, 11; See also in Mindy Weston, *The Right to Be Forgotten: Analyzing Conflicts Between Free Expression and Privacy Rights*, Brigham Young University (2017)

that the right at hand ‘is deduced from the effect of the search tool which puts ‘in’ information that would otherwise be invisible on the Web’.<sup>209</sup> Since an archived article is ‘searchable’ and identifies a specific individual, then the individual can invoke the Article 8 rights, including a right to be forgotten. Other parts of the case addressed the proportionality analysis.

First, to invoke ‘a right to be forgotten’ protection against media, there should be an initial lawful disclosure of the facts (*une divulgation initiale licite des faits*). This seems to be a precisely correct introduction. Be it an unlawful disclosure, an individual would be authorised to use a different legal remedy to safeguard their rights. But, as we see throughout the case-law, disclosure of information on sentence, prosecution, conviction is almost universally in consonance with the lawfulness.

Second, the court addressed the public interest element. To assess the public interest, the court should ensure that (i) ‘there is not contemporary interest in disclosure and there is lack of historical interest in the facts; (ii) that there is certain lapse of time between a publication and an erasure request, (iii) that a person concerned has no public life, but has an interest in re-socialization and has paid their debt (*ait apuré sa dette*)’.<sup>210</sup>

All three elements are inter-connected. Public figure status increases a public interest in one’s past, present and future. *Vice versa* argumentation applies to a person not public. A great lapse between a disclosure and a request can mean that the information at issue bears no interest for the public.

In terms of an individual’s status, the Court held that the individual ‘did not exercise any public office’, calling his position ‘as a mere status of a doctor’. In that light, the court found the availability of such information, with the identity revealed, for twenty years after the event took place, to be illegitimate and disproportionate.<sup>211</sup> Important *obiter dictum* of the court is the absence of any added value in the inclusion of an individual’s name to such publication. Whereas it *per se* does not contribute to a public interest, it, simultaneously, is likely to ‘indefinitely and

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<sup>209</sup> Ibid, at 12

<sup>210</sup> Ibid, at 13

<sup>211</sup> Ibid, at 13

seriously damage the individual's reputation by creating a virtual criminal record, albeit the individual having been already rehabilitated and having paid their societal debt'.<sup>212</sup>

*In casu*, the newspaper tried to make a freedom of expression consequentialist argument, emphasizing on the outcomes of the deletion of a name. Allegedly, in the absence of an offender's name, the publication will become irrelevant. In more general terms, the media outlet tried to defend the publication by submitting the argument that it has a duty to safeguard the historic memory in the complete and faithful manner. The court, however, held that anonymization will not strike at the very essence of the publication – a tragic accident resulting from driving under influence. Instead, the anonymization will lead to the removal of the data, possibly stigmatizing the individual. What is more, the newspaper can remain the original both digital and printed version be there a need in future to look into the story in a complete manner.

Regarding the harm for one's reputation, the court did not establish a hard standard of proof. The court upheld the motion, because a request was duly motivated by the professional and family situation. This was without any specific harm or outcomes resulting from the publication. Regarding the media's responsibilities, the court, additionally, held that 'the newspaper did not act as would have behaved any normally prudent and diligent publisher placed under the same circumstances'.<sup>213</sup> As a result, the Court upheld the rulings of lower instances and granted anonymization to the individual.

Hence, the case shows that the courts tend to look at the same aspects of the SCC: the passage of time, individual circumstances, the *post factum* conduct, the possibility to fulfil the purpose of a publication if the data are removed. Contrary to M.L. and W.W., *Le Soir* presents a much stronger case for the privacy side. An individual was not a public figure under any circumstances. His conduct during the sentence and afterwards did not increase a public interest. The crime was not

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<sup>212</sup> Ibid, at 13

<sup>213</sup> Ibid, at 14

notorious in Belgium and outside. Importantly, the individual's conviction was spent, and, nowadays, a person was considered as never charged, accused or sentenced. At the same time, a name in the publication did not significantly facilitate the purpose behind the publication. Whilst almost nobody can have any interest in researching the past of a regular individual (a name is, therefore, unimportant), the publication may retain the need to perform a function of giving a society the understanding what the consequences of careless driving are. The latter function is perfectly performed, in the absence of a name in the publication. What is important is that in the case at hand there were no signs of an increased public interest just after a release of a person or his conduct after the release. Absence of a public interest significantly affected the finding. To the extent that the Court held that the newspaper did not act in a reasonable manner refusing to grant anonymization.

#### **2.4. The Spanish Balancing Formula**

The widely-discussed *Google Spain* case has its roots in Spain. First time Spain faced the balancing dilemma, however, was in *A & B v. Ediciones El Pais SL*. The case concerned an online publication regarding the events of the late 80's about the plaintiffs then convicted of drug-smuggling.<sup>214</sup> After the release, both reintegrated into the society and were successful in different aspects, including personal and professional ones. In the absence of any limitation (such as blocked or paid access), the newspaper opened its online portal with such past information on it; such state of affairs made the names of both plaintiffs easily searchable in connection to the past crimes.<sup>215</sup>

After unsuccessful attempts to reach compromise with a newspaper, the plaintiffs won the case in lower courts that ordered the newspaper to enter into 'no index' function to remove appearance of plaintiffs' names in the search engine;

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<sup>214</sup> Hugh Tomlinson, *Case Law, Spain: A and B v Ediciones El Pais, Newspaper Archive to be Hidden from Internet Searches But No "Re-Writing of History,"* at <https://inform.wordpress.com/2015/11/19/case-law-spain-a-and-b-vediciones-el-pais-newspaper-archive-to-be-hidden-from-internet-searches-but-no-re-writing-of-history-hughtomlinson-qc/>

<sup>215</sup> Mindy Weston, *The Right to Be Forgotten: Analyzing Conflicts Between Free Expression and Privacy Rights*, Brigham Young University (2017), 7



although, the data could be still stored in the online archives. The Case went to the Supreme Court of Spain that reached the following holdings.

First, a balancing formula should apply to weight the rights and legal interests at stake to decide whether the processing of data was lawful.<sup>216</sup> Secondly, the publication that does not involve public figures and refer to a 20-year old story lacks historical interest justification; therefore, its link to plaintiffs' names and its appearance on the search results constitute a disproportionate interference with the applicants' rights.<sup>217</sup> Thirdly, the processing was, therefore, unlawful and the newspaper had to 'adopt technical measures so the data will not appear on search engines'.<sup>218</sup> Fourthly, however, in accord with the ECtHR jurisprudence, the 'judicial authorities cannot be involved in rewriting history—the internal website search ability where the pages were originally published are not comparable to search engines'.<sup>219</sup> That is why the Supreme Court did not rule to completely remove the data under consideration.

## **2.5. The Italian Balancing Formula**

The Guardian commented on the Italian approach as putting 'an expiry date on the news, as if that is a yogurt or milk'.<sup>220</sup> What exactly does the Italian courts elaborated? In the matters, related to a public interest, the Italian Supreme Court (*Corte di cassazione*) established its approach in the late 90's in the decision 3679/1998:

'It is not lawful to disseminate again, after a substantial time, a news story that had been lawfully published in the past, except when the facts previously published, due to other events that have occurred, again become current and a new interest in

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<sup>216</sup> Ibid, at 8

<sup>217</sup> Ibid, at 8

<sup>218</sup> Ibid, at 8

<sup>219</sup> Ibid, at 8

<sup>220</sup> The Guardian, How Italian Courts Used the Right to be Forgotten to Put an Expiry Date on News, <https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news>

accessing such information arises even if not closely related to the simultaneity of the disclosure and the event'.<sup>221</sup>

In the recent jurisprudence, the Italian authorities established a concept of 'a right not be found/seen online'. This approach is present in a number of cases. In the Supreme Court Judgment no. 5525, the problem was a decontextualized publication, approached by the court from the 'real and true identity standpoint'. The publication concerned the true facts regarding the arrest of a politician, who was later accused of corruption, but, at the end, acquitted. The court did not put in dispute either the protection of digital archives under the Art. 10 or individual's privacy here under Art. 8 of the ECHR. In search for the balance, however, and safeguarding the public interest, the Court elaborated on the aspect of 'the right to be forgotten' that is the 'the right to a contextualized and updated information'. Unless news is corrected by the consequent development of a story, the news does not meet the data protection requirements, becoming 'biased and inaccurate, therefore, untrue'.<sup>222</sup> That said, the Supreme Court held that a past publication should be contextualized 'in light of the current truth'. As follows from the subsequent developments of the said practice, the respective burden to contextualize and update is put 'on the publishers and archives owners', whilst it might be satisfied through 'the insertion of a link apt to contextualize the news along the evolution of the events'.<sup>223</sup>

The afore-discussed solution is interesting in many respects. From the standpoint of justifications, discussed in the 1<sup>st</sup> chapter, a publication shows the whole picture of the events, particularly those succeeding the fact discussed, contributes to the truth argument, facilitates the argument from democracy, increasing the quality of public's judgments (audience gets true and accurate information). At the same time, it enables to safeguard a public image of the individual in the public eyes and prevent the harm to reputation.

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<sup>221</sup> Italian Supreme Court decision no. 3679/1998 as cited in Tiberi, G, The 'Right to be Forgotten' as the Right to Remove Inconvenient Journalism? An Italian Perspective on the Balancing between the Right to be Forgotten and the Freedom of Expression, <https://blogdroiteuropeen.files.wordpress.com/2017/05/article-giulia-26-mai-final.pdf>

<sup>222</sup> Marco Bassini, La Corte d'appello di Milano sulla contestualizzazione delle notizie diffamatorie sugli archivi online dei giornali, IV-V, *Diritto dell'informazione e dell'informatica* (2014), 831

<sup>223</sup> *Ibid*, at 831

This approach can serve as one of the solutions in the cases involving the COD. For example, there can be an update that ‘the respective conviction was spent and a person shall be considered as not committing any crimes’. One can argue, however, that this will perform an opposite function, reminding everyone, familiarised with the publication, that the person is an ex-offender.

In the case 23771/2015, connected with the publication accusing a lawyer ‘in facilitating the activities of a criminal gang’, the Court of Rome clarified when harmful materials can be erased or deleted. The court held that, prior to the request, two conditions are to be satisfied. First, ‘the facts that the news concerned must not be recent; and) the facts in question must be of no or limited public interest’.<sup>224</sup> The assessment of these criteria depends on individual case. *In casu*, a publication concerned a public figure and a debate of general interest on the Italian mafia; therefore, there was no basis to override the freedom of expression.

In the most recent Supreme Court 13161/16 judgment (2016), the court upheld the order to remove data, issued in 2010, and a penalty in the amount of EUR 5,000. The case concerned a balance between a right to be forgotten and freedom of expression in the context of a removal of publication from the newspaper’s archives regarding past (2008) criminal proceedings against the restaurant, not yet ended in courts. At the outset, it is clear that the publication did not concern the events from a distant past. Nevertheless, the court ruled against the freedom of expression because of the reputation damage, caused by a publication.

The court agreed that the damage was caused by two primary factors: ‘the news article was easily searchable and accessible’ and the “widespread readership of the local online newspaper” provided by its online publication’.<sup>225</sup>

The *Corte di cassazione* does not, however, present any clear analysis to follow. There was no attempt to follow the ECHR’s analysis, the *Google Spain* CJEU case or the preceding *Le Soir* case. The Supreme Court’s emphasis on the

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<sup>224</sup> Tribunale di Roma 3 December 2015 no 23771 as cited in Francesco Di Ciommo, Privacy in Europe After Regulation (EU) No 2016/679: What Will Remain of the Right to Be Forgotten? 3(2) *The Italian Law Journal* (2017), 645

<sup>225</sup> Tiberi, *supra* n. 177, at 9

easily accessible character of publication was to emphasize a gravity of interference with the protected rights. Citing the Directive, the domestic data protection law, *Google Spain* case, the Supreme Court surprisingly does not give due consideration to the freedom of expression. Surprisingly, because the Court cited the derogation clause under the Directive as regards journalistic purposes and refers to the examples that highlight a great public interest in the publication. Particularly, a publication was indexed in the search engine just after the website of a restaurant and was recent (2,5-year period passed after the publication).

The court mainly stressed on the negative consequences, caused by a publication, particularly ‘the widespread local circulation of the online newspaper’.<sup>226</sup> In response to a public interest defence, the court held that ‘the sufficient time had elapsed since the date of publication to have satisfied the public interests underlying the journalistic right’.<sup>227</sup>

The judgment inherently creates the door for the attempts to exercise Art. 8 of the ECHR sooner, than in other jurisdictions. The judgment, however, is inconsistent with the applicable human rights framework. The court ignored the freedom of expression value. The judgment lacks legal reasoning and ignores the alternative ways of solving the issue, including archiving the information and delisting certain information from the website. The order to remove data, recently published, cannot be considered as a least restrictive measure in the conflict at hand.

## **Chapter 2 Concluding Remarks**

In accord with the theoretical works, the ECtHR gives equal weight to both the freedom of expression and the right to privacy as being the fundamental rights. The Strasbourg Court approaches a COD publication, using the balancing formula, developed in *von Hannover* and *Axel Springer* cases. The most important factor is a public interest, behind the availability of COD online. In the only ECtHR case, dealing with such issues (*M.L. and W.W. v. Germany*), the Court ruled in favour of

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<sup>226</sup> La Corte Suprema di Cassazione, no. 13161/16, 6

<sup>227</sup> *Ibid*, at 6

the freedom of expression because of the notoriety of a crime and the murderers, who were still known to the general public on the date of a judgment.

The Belgian *Le Soir* and the Spanish cases resulted in the ruling in favour of privacy. The Belgian case, however, significantly differed from M.L. and W.W. Firstly, an individual concerned was not a public figure. Secondly, there has been a sufficient lapse of time between a publication and the request; for the time being, a publication did not bear a sufficient public interest. Thirdly, the applicant demonstrated a strong privacy case and his rehabilitation after the crime. Fourthly, a publication could retain its initial purpose even in the absence of the applicants' credentials. All these affected the ruling, which was opposite to the German case as well.

The Italian Supreme Court established its approach in 13161/16 judgment. The judgment does not introduce a good example how to approach the dilemma, since the court disregarded a strong public interest, behind a publication. At the same time, the lower Italian courts established certain approaches that can accommodate the COD and the freedom of expression. In particular, when the courts obliged publishers to provide contextualised information. Accordingly, in a publication about a conviction, a publisher can or shall add the subsequent developments per convict's request or at its own initiative. For example, the publisher can add that a conviction became spent or that it was squashed by a higher court. This approach can reasonably balance both fundamental rights at issue.

## 3. A Balanced Approach in the Cases against the Search Engine

### 3.1. The EU and the CJEU

#### 3.1.1. The EU Law on the protection of personal data

All the EU Member States are also the Contracting Parties to the ECHR. Therefore, such States follow the afore-discussed approaches of the ECtHR. The CJEU does not ignore this fact; in its jurisprudence, the Luxembourg Court traditionally follows the ECtHR case-law.<sup>228</sup> The *Google Spain* case, however, is rather an exception. The CJEU did not apply Arts 8 and 10 test. Instead, the court concentrated on the privacy interests of an individual. In *NT1* and *NT2* case, the EWHC also concentrated on a right to privacy aspect. A rationale for this consists in the parties to a dispute. These are a data subject and a search engine (instead of a publisher). The courts do not provide a search engine with the freedom of expression protection, despite a fact that action against the search engine ‘concerns freedom of expression and information from many angles’, as argued by the Advocate General in the Opinion to *Google Spain*.<sup>229</sup>

The ECHR does not expressly provide a right to data protection. Instead, EU law guarantees expressly both a right to privacy and to data protection.<sup>230</sup> The right to data protection ‘incorporates the idea of a fundamental right to effective legal protection, and has an indirect horizontal application, being applicable to all cases of use of personal information’.<sup>231</sup> In addition, Art. 8 of the CFR provides some specific guarantees, including data subject rights and principles of data processing.<sup>232</sup> The data processing principles include lawfulness, fairness, transparency, purpose limitation, data accuracy, data minimization, storage

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<sup>228</sup> Juliane Kokott, Christoph Sobotta, The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR, 3(4) International Data Privacy Law (2013), 223

<sup>229</sup> *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, CJEU [GC], Advocate General, para. 120

<sup>230</sup> CFR, Arts. 7, 8

<sup>231</sup> See Hijmans, supra n. 43, at 30-31, 38-39,47

<sup>232</sup> Ibid, at 223

limitation, integrity and confidentiality and accountability.<sup>233</sup> The rights of a data subject are a right to object, access, erasure etc. As such guarantees can seriously limit the freedom of expression, the EU law provides a safeguard clause to exclude the media expression from the application of both – the principles and rights of a data subject in the following way.

The GDPR obliges the Member States ‘to reconcile the right to the protection of personal data with the right to freedom of expression and information’.<sup>234</sup> In the context of journalism, the Member States have to make exemptions or derogations from seven different chapters of the Regulation if ‘they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information’.<sup>235</sup> The Working Party called upon to interpret the journalism in the context of the GDPR broadly ‘in order to take into account of the importance of the right to freedom of expression in every democratic society’.<sup>236</sup> It was also clear at the outset that the object and purpose of the GDPR was not to harm the freedom of expression. The civil society organizations urged that the ‘GDPR shall not be used as a tool to silence journalists, whilst the Regulation shall be applied solely in a manner, compliant with all the European human rights framework, including CFR and the ECHR’.<sup>237</sup>

Logically, the GDPR does not give a clear guidance which derogations or exemptions to make, highlighting only the chapters to consider. Seeing the necessity element in the body of a safeguard clause, it is obvious that a blank exemption or derogation might not suffice a further scrutiny, particularly if it is manifestly unreasonable.

The chapters of interest are II and III concerning principles of data processing and rights of the data subjects respectively. Specifically, the present paper’s subject matter, the access to past criminal data, is connected with the principles of purpose

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<sup>233</sup> GDPR, Art. 5

<sup>234</sup> Ibid, Art. 85(1)

<sup>235</sup> Ibid, Art. 85(2)

<sup>236</sup> Working Party 29, Recital 153 to the General Data Protection Regulation

<sup>237</sup> Privacy International, Data Protection Law is not a Tool to Undermine Freedom of the Media, <https://www.privacyinternational.org/advocacy-briefing/2455/data-protection-law-not-tool-undermine-freedom-media?fbclid=IwAR09ub7763wffX1WBC-MH6O5X-eTfpwHYkVGO3jked9BHw2dOQ2wHEtxlqE>

limitation, data minimization, accuracy and storage limitation, whilst being also linked to the rectification and erasure, provided under Articles 16 to 20 of the GDPR.

In this regard, the GDPR itself contains the important insights for the present topic. First and foremost, common measures taken by online media are not considered to be automatically inconsistent with the GDPR principles just because the action itself differs from the original one intended. Arts. 5(b) (purpose limitation) and 5(e) (storage limitation) provide that ‘further processing for archiving purposes in the public interest shall not be considered incompatible with the initial purposes and that personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest insofar the archiving (in public interest) is carried out in accordance with Article 89’.<sup>238</sup> That said, to waive the respective principles, largely connected with the long-lasting storage of data and provision access thereto, the archiving shall be in accordance with Article 89 and be in the public interest.

Art. 89 (3) reiterates that for the archiving purposes, it is possible to waive specific rights of a data subject, including erasure and rectification, given that the exercise of such rights ‘is likely to undermine or seriously impair the achievement of specific purpose’ and that ‘derogations are necessary for the fulfilment of those purposes’.<sup>239</sup> Art. 89 (1) sets an additional requirement that is putting organizational and technical measures in place, whilst mentioning pseudo anonymization as a measure possibly suiting these purposes, but only if such measure does not undermine the pursued purposes.<sup>240</sup>

Particularly, under Art. 89(1), ‘where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner’.<sup>241</sup> That said, even when archiving and even when this is in public interest to continue enabling access

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<sup>238</sup> GDPR, Art. 5

<sup>239</sup> Ibid, Art. 89

<sup>240</sup> Ibid, Art. 89

<sup>241</sup> Ibid, Art. 89



to certain information, the GDPR tries to reconcile this with a possibility to limit personal data presence in such archives.

What is also relevant to say is that other principles of data processing, including data minimization and accuracy, do not contain an exemption, connected with the archiving. Therefore, at least if a State does not make a derogation or exemption from them, there is no embodied clause giving State a power to disregard them.

Importantly, as explained by the ICO, the UK data protection watchdog, exemptions ‘should not routinely be relied upon or applied in a blanket fashion; instead, you must consider each exemption on a case-by-case basis’.<sup>242</sup> Further, let’s briefly take into consideration how the United Kingdom adopted the media (special purposes) exemption under the domestic Data Protection Act 2018.

The Data Protection Act 2018 exempts an organization ‘from all the individual rights, except rights related to automated individual decision-making including profiling (is not of interest in this paper) and all the principles, except for security and accountability, but all this applies on a condition (i) compliance with these provisions would be incompatible with the special purposes, (ii) the processing is being carried out with a view to the publication of some journalistic material (the purpose); and (iii) you reasonably believe that the publication of the material would be in the public interest, taking into account the special importance of the general public interest in freedom of expression, any specific public interest in the particular subject, and the potential to harm individuals (in fact, a balance test)’.<sup>243</sup> By extension, in each single case, an organization shall be able to explain why the exemption is necessary – a task tough to easily achieve dealing with the past criminal convictions.

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<sup>242</sup> ICO, Exemptions, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/exemptions/>

<sup>243</sup> ICO, Exemptions, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/exemptions/>

At the same time, if we presume that an individual, having any personal criminal data available on the internet, would decide to take a benefit from the data protection rules, embodied in the GDPR, the following is relevant.

A person could rely on the applicable data protection principles, including accuracy, data minimization and storage limitation. The accuracy may come into existence with a right to rectify. This corresponds to the media guidelines, including the BBC Editorial Guidelines (Section 3), enshrining the accuracy principle. That said, the individual can, particularly, request to amend the publication containing inaccurate description of the past criminal record. This may be taken in conjunction with storage limitation and data minimization principles, and, if the data do not correspond the actual description of the events, the right to be forgotten.

Therefore, it should be understood that the CJEU relies on the specific framework, in which the data protection and privacy are given considerable weight. Whilst freedom of expression is equally protected, the Court has an additional privacy argument to consider (the GDPR).

### **3.1.2. Data Protection and COD**

McIntyre and O'Donnell argued that data protection principles and rules may be used in the COD context.<sup>244</sup> The authors took into considerations the position of the Working Party 29 ('WP 29'), responsible for the GDPR drafting. The drafters issued a guidance where they stated that the questions regarding public availability of information about offender and their offences is left upon the appreciation of the MS.<sup>245</sup> The WP 29 noted, however, that a de-listing of search results is considered to be likely to happen in the cases of 'relatively minor offences that happened a long time ago, whilst being less likely to happen to more serious ones, suggesting, still-case case-by-case consideration'.<sup>246</sup>

In consonance with such a position of the WP 29, Google confirmed that it will delist the requests on a condition certain domestic rehabilitation rules apply,

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<sup>244</sup> TJ McIntyre, Ian O'Donnell, Criminals, Data Protection, and the Right to a Second Chance, 58 *Irish Jurist* (2017)

<sup>245</sup> Article 29 Data Protection Working Party, Guidelines, 20.

<sup>246</sup> *Ibid*

requiring, however, an individual assessment and presentation of arguments how the availability of information negatively affects the ex-offender.<sup>247</sup>

Transforming such rationale to a case law, the conclusions of the EWHC in *NT1 and NT2* case are worth recalling, where the court ruled that the criminal offence data were irrelevant and outdated. Broadening this approach, there is a clear intersection between the principles of data minimisation, accuracy and storage limitation, on the one hand, and past COD, on the other hand. In this regard, it is important to reiterate that the persons, acting in pursuit of journalistic purposes, are generally exempt from such rules.

As elaborated by the ICO, data minimisation principle would require to process the data to the extent the latter are adequate, i.e. sufficient to fulfil a state purpose, relevant, having ‘a rational link to that purpose, and limited to what is necessary, requiring not to hold more than is necessary for the specific purpose’.<sup>248</sup> *NT1-NT2* and *Le Soir* cases give some guidance how the data minimisation suits a privacy claim. Given that a primary publication about a criminal offence, containing one’s name, can serve a deterrence purpose, the *post factum* conduct can make a publication irrelevant to achieve this societal purpose, for example, when a conviction is spent and a person does not hold a public figure status. The principle can also be applicable to argue that a publication can perform its primary purpose, in the absence of one’s personal data, as was concluded in *Le Soir* case. In any event, a case-by-case assessment is required to see whether data minimisation can provide a protection for ex-convict.

Accuracy principle requires the data not to be incorrect or misleading, and careful consideration whether the data have not become so with a passage of time.<sup>249</sup> In addition, the individual has a right to rectification, aimed at amending the inaccurate or incomplete data. Together, these two instruments can be applicable

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<sup>247</sup> Google, How Individual Privacy Impacts Search, 1 November 2015, available at <https://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en> (accessed 10 February 2017)

<sup>248</sup> ICO, Principle(c): Data Minimisation, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation/>

<sup>249</sup> ICO, Principle(d): Accuracy, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/principles/accuracy/>

towards the COD. For example, there may be a special situation when the data about a first-instance indictment is available on the internet, albeit being reversed by the court of appeal. Same may be true about any other data, amended by higher courts, affected by, for example, ECtHR etc. The individual may be interested in the restoration of the proper image of their 'online persona' (in Taddeo's words). To achieve this, accuracy principle can be invoked, in conjunction with a right to rectification. As argued further, vis-à-vis a publisher, media often proposes to attach a link to or to add a supplementary statement of the new data about a conviction after a primary publication to make a story complete. This can be a balanced solution in a freedom of expression-privacy debate. However, as noted above, the media is exempt from the accuracy principle as well as from the need to fulfil a rectification request. That said, however, the exemption is applicable to the extent media's refusal is justifiable.

Storage limitation principle sets a rule that your processing of personal data should not be longer than necessary to achieve the primary purposes.<sup>250</sup> A possible implication in the criminal data context can be, definitely, the argument that when a conviction is expunged, further processing is not necessary. Nevertheless, here a due consideration should be given to the existence of any public interest behind their availability, on the one side, and the harm, caused by their availability, on the other.

Lastly, an ex-convict is empowered to apply the afore-discussed principles through the data subject rights they possess. Especially, a right to rectification to supplement a criminal store or amend it be it inaccurate; a right to erasure, or to be forgotten, to have the data erased, given these are processed, among others, in an unbalanced manner (a privacy interest prevails); a right to object in order to stop personal data processing, even if they are processed in a public interest. In the last case, one can provide the compelling reasons to overweight such public interest. This may occur, among others, in the cases of processing of criminal data about a minor.

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<sup>250</sup> ICO, Principle(e): Storage Limitation, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/principles/storage-limitation/>

The data protection instrument can be beneficial vis-à-vis a search engine or any other person, not protecting under the media expression. Although these instruments can be applicable against media as well, here a potential for the rectification or erasure of the COD will largely depend on the guidelines and editorial codes of the publishers, addressed in the next section.

### 3.1.3. *Google Spain* case

The Court is yet to decide on the questions, connected to the right to erasure in the COD context. But, surely, its further judgments will be in accord with *Google Spain* – the case concerning the newspaper announcement about a real estate auction to recover the social security debts of the applicant taking place 16 years before the dispute that could be found through Google.<sup>251</sup>

Whilst the ECtHR in its jurisprudence concentrated on the access to data archives and the applicable freedom of expression principles, the CJEU put more emphasis on the privacy matters. Primarily, the CJEU relies on the fact that placing the private information online (on a website) amounts to the processing of personal data.<sup>252</sup> This alone requires the further application of the data protection laws – then Directive and now the GDPR.

In *Google Spain* case, the Court elaborated the following balancing formula: a ‘legitimate interest of internet users potentially interested in having certain information’, implicitly referring to freedom of expression and information, and ‘data subject’s fundamental right to privacy and data protection’.<sup>253</sup> The Court held that, as a rule, the data subject’s rights ‘override the interests of internet users; however, there still should be considered the following factors, including nature of information and its sensitivity for a data subject’s private life and interest of a public in having such information, which may vary depending ‘on the role played by the data subject in public life’.<sup>254</sup>

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<sup>251</sup> ICO, Exemptions, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/exemptions/>

<sup>252</sup> Lindqvist v. Sweden, Case C-101/01, CJEU, paras 26-27

<sup>253</sup> *Google Spain*, supra n. 185, at para. 81

<sup>254</sup> *Ibid*, at 81

Ruling in favour of the data subject, the Court held that search engine facilities significantly interfere with the privacy of an individual, enabling ‘to establish a more or less detailed profile of a data subject’.<sup>255</sup> Such protection against the search engine does not require prior attempts to initiate a dispute against a publisher, as such complexity can diminish ‘effective and complete protection of one’s privacy’.<sup>256</sup>

Analysing the case, one can argue that the holding would have been different, given that it had been initiated against a publisher, exempt from the data protection rules. The Court did not deny this fact. However, in the present circumstances, the Court did not find serious arguments to dismiss a delisting request.

The Court’s holdings are, however, important in the cases involving publishers as well. The case concerned the old data, not characterising a petitioner at the moment when the request was made. What is more, such information did not constitute any public interest. At the same time, it remained sensitive for the data subject’s private life.<sup>257</sup> Since the Court did not order any removal or anonymization of information from the websites, it held that its judgment does not hinder the freedom of expression. What was decided is that only a person’s name was not indexed (in search engine); the information, at the same time, was not delisted. That said, on a condition one is interested in searching these specific events of the past, it remains possible. The same is not true about the applicant; the search requests with his name will not list the pages with applicant’s personal data, linked to bankruptcy information.

Comparing the balance in the Italian Supreme Court case (where Google Spain was cited) and the present case, it is clear that the case at hand is more balanced. Whilst request to de-index of a name does not, at least seriously, interfere with the freedom of expression in the broadest sense; same is not true about the order to delete the information or even anonymize. The latter is not only a direct interference with the freedom of expression; but also a substitution of the media techniques and (potentially) unbalanced approach.

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<sup>255</sup> Kulk, *supra* n. 130, 16

<sup>256</sup> *Ibid*, 84

<sup>257</sup> *Ibid*, 98

In the literature, *Google Spain* is, nevertheless, criticised. Kulk wrote that the ruling hinders the freedom of expression in three ways, not highlighted by the Court.

First, those offering information, such as publishers and journalists, have a right to freedom of expression. As noted, the right to freedom of expression protects not only the expression (such as a publication), but also the means of communicating that expression. Therefore, if the delisting makes it more difficult to find the publication, the freedom to impart information is interfered with.<sup>258</sup> However, what may be argued in response is that the publication *per se* is not removed from the search and is not de-indexed. The primary purpose of a publication can, still, be achieved. At the same time, no serious public interest stands behind the name of the applicant, added to a publication. That said, even if the ruling interferes with the means of communicating information, it does not face a serious public interest counter-argument.

Second, search engine users have a right to receive information.<sup>259</sup> Same as in the previous case. Generally, the past publications are not removed, access to them is not denied. Only applicant's 'online persona' is not easily traced. At the same time, the publications, if one is interested in such past events, are easily found on the internet.

Third, a search engine operator exercises its freedom of expression when it presents its search results; an organised list of search results could be considered a form of expression.<sup>260</sup> This argument is developed by Peers, Kulk and Borgesius. According to the Peers, the CJEU did not look at the case through the prism of the search engine's role in facilitating the journalistic purposes, separately protected under the applicable laws. In other words, 'it is not Google to qualify as a journalist; but Google is a crucial intermediary for journalists'.<sup>261</sup> As the Court previously protected sending tax information by text message under the realm of journalism,

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<sup>258</sup> Kulk, *supra* n. 130, at 19-20

<sup>259</sup> *Ibid*, at 19-20

<sup>260</sup> *Ibid*, at 19-20

<sup>261</sup> Steve Peers, *The CJEU's Google Spain Judgment: Failing to Balance Privacy and Freedom of Expression* (EU Law Analysis, 2014) n.p.

the author argues why the same rationale does not suit the present case.<sup>262</sup> Kulk and Borgesius argue ‘why the previous approach of the Court was ignored – the one established in *Satamedia* granting the media exemption a wide definition as well as the preparatory works which suggested that search engine shall benefit from the exemption to strike a balance’.<sup>263</sup> From this paper perspective, now we see that the Court limited the scope of a journalism exemption. The rationale can be the nature of search engine vis-à-vis the publishers. Whilst for the search engine it is an auxiliary function to facilitate spread of information, the journalists do this as their primary and only job.

Balkin presented a different critical analysis of the *Google Spain*.<sup>264</sup> Balkin agreed with the rationale behind a measure ordered, as, instead, ‘to require newspapers to take down stories would appear to be a serious intrusion into the freedom of the press’.<sup>265</sup> The issues, however, are the ‘collateral censorship, threats to the global public good of the internet and coopting private governance’.<sup>266</sup> The author calls the exercise of a right to be forgotten against a search engine provider as a classical example collateral censorship, resulting in the situation when ‘most people are not able to find information’.<sup>267</sup> This, together with other potential measures against search engines, including blocking global filtering, in turn, allegedly diminishes the global public good of the internet.<sup>268</sup> Lastly, such pressure from government is considered as an attempt to coopt private infrastructure owners and their capacities for private governance.<sup>269</sup>

The European approach is not without criticism. Nevertheless, without the additional duties and responsibilities, put on such data controllers, as search engines and media, an individual remains without protection in the online environment. This

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<sup>262</sup> Steve Peers, *The CJEU’s Google Spain Judgment: Failing to Balance Privacy and Freedom of Expression* (EU Law Analysis, 2014) n.p.

<sup>263</sup> Kulk, *supra* n. 130, at 8

<sup>264</sup> See Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51(1149) *University of California* (2018); See also Neil M. Richards, *Why Data Privacy Law is (Mostly) Constitutional*, 56(4) *William & Mary Law Review* (2015)

<sup>265</sup> *Ibid*, at 1202

<sup>266</sup> *Ibid*, at 1202-1208

<sup>267</sup> Balkin, *supra* n., at 1204

<sup>268</sup> *Ibid*, at 1206

<sup>269</sup> *Ibid*, at 1206



mere fact justifies the interference, but on a condition that such interference is the least intrusive in the interests at issue.

The *Google Spain* is one example which measures to take. The case creates a door to minimise search engine impact on one's private life. Not granting a complete chance to be forgotten (the original page remains in any event traceable), the search engine does not index one's name, at least within the EU (for now).

A few reservations to the ruling should be noted. First, even if such measures apply to the COD, the latter will not disappear completely. As held in *Le Soir*, a publisher can always research such events by itself; same can do the users, as the internet architecture does not enable to remove the data completely. This is a sufficient safeguard for a public interest and freedom of expression. For example, in the cases, involving a public figure, it remains possible to trace the past information. Second, the ruling will not lead to automatic fulfilment of de-indexing requests. As later confirmed by the CJEU in *Manni* case, where a request was rejected, 'the petitioner has to provide the compelling and legitimate reasons why the private interest shall override the public one'.<sup>270</sup> Thirdly, the ruling is without limitation to the well-elaborated approaches regarding ECHR Articles 8 and 10 balance when one would seek to enjoy data subject's rights vis-à-vis a publisher or anyone, enjoying the freedom of expression.

### **3.2. The United Kingdom Balancing Formula in NT1 and NT2 case**

The comprehensive debate whether to delist and de-index criminal records took place in *NT1 and NT2 v. Google LLC* case. The case is notable in its approach – differentiation between the applicants, depending on a number of factors. This alone supports that premise that the cases, involving the COD, require some degree of flexibility. The case also reveals that there are numerous factors the courts can take into consideration to either satisfy or reject a request.

Precisely, the case concerned the SCC regarding the events, occurring 27 years before the request. Both crimes (conspiracy in doing business), now spent,

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<sup>270</sup> Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni, C-398/15, para. 65

resulted in short terms of imprisonment. The information was published by the media. By virtue of such publications, such information was easily traceable in a search engine.

A cause of action was the inaccuracy of the information about offending: information (that is not) just old, but out of date, and irrelevant, of no public interest, and/or otherwise an illegitimate interference with their rights.<sup>271</sup> The Court applied numerous sources of law: EU secondary law, including the Directive and Charter, the CJEU judgments, the ECHR Arts. 8 and 10, and, logically, domestic precedents. Some of the Court's approaches reiterate the afore-discussed positions of the regional tribunals. In its analysis, however, the EWHC approached the dilemma in a more comprehensive manner.

Prior to the consideration of the relevant elements of the test, applicable to the SCC, this paper addresses one preliminary remark. That is whether the search engine can expect a journalism exemption. The EWHC's answer to this question was negative, same as before the CJEU. The Court held that the concept of journalism is not 'so elastic to embrace every activity that has to do with conveying information or opinions... when Google responds to a search on an individual's name by facilitating access to journalistic content, this is purely accidental'.<sup>272</sup> The EWHC also held that the processing of journalistic content by Google does not pursue the journalistic purposes, but different commercial purposes.<sup>273</sup>

The High Court held that past criminal records fall under the realm of privacy, albeit not afforded such protection just after being subject to a criminal sanction.<sup>274</sup> The reason is increased expectation of privacy, driven by the following factors. First, the passage of time. Second, rehabilitation, considered as a critical point – point when a state formally gives ex-offender a second chance. When both facts are present, this creates a strong argument under the Art. 8 of the ECHR, equally applicable to 'any use or disclosure of information about crime, convictions or

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<sup>271</sup> *NT1 and NT2 case*, supra n. 20, para. 2

<sup>272</sup> Kelly M. Hagedorn, *Right to be Forgotten Confirmed by English High Court – but not in All Cases*, <https://www.lexology.com/library/detail.aspx?g=aaddc2c1-1e6f-4cda-a4c7-2e4506f75dec>

<sup>273</sup> *Ibid*

<sup>274</sup> *Re Guardian News and Media Ltd. [2010] UKSC 1; [2010] 2 A.C. 697, at [66]*

sentence'.<sup>275</sup> Given that this does not grant an automatically applicable possibility to be forgotten, such Art. 8 rights, albeit strong, will still need to be balanced against the freedom of expression and other relevant factors. In developing a balancing formula, the Court held the following.

First, the EWHC analysed a role, played by a claimant, in a public life. Passage of time is a relevant factor here, as it reduces a public role played; but, still usually does not completely eliminate it.<sup>276</sup> *In casu*, a commission of a crime entails a public figure status, but with a limited role in a public life, decreased by the passage of time.

Second, the EWHC assessed the nature of the information at hand. A general rule is as follows: 'If a claimant is a public figure and the information is not genuinely private, there is a strong argument against privacy protection'.<sup>277</sup> Such rule follows from the distinction in the functions, performed by different types of information: one information contributes to a public debate, whilst other mainly reveals the details of an individual private life.<sup>278</sup> These rules are in consonance with above-made conclusions in this paper. *In casu*, the High Court held that the information was essentially public, related to the operation of business and not connected to the private life.<sup>279</sup> Taken this in conjunction with a first conclusion, there is little room for privacy protection. Given that Google's defence was allegedly weak, the EWHC, however, assessed 11 more elements to strike a fair balance between the interests at hand.

Primary, the EWHC considered the 'mitigating factors'. Among others, these are a status of a person and the nature of information, which can increase the weight of privacy rights. In particular, individual's characteristics can contribute to an increased protection. For example, this concerns an inherent vulnerability, traditionally covering the minors.<sup>280</sup>

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<sup>275</sup> *NT1 and NT2 case*, supra n.20

<sup>276</sup> *NT1 and NT2 case*, supra n. 20, at paras. 170, 210

<sup>277</sup> *Ibid.* at para. 139

<sup>278</sup> *NT1 and NT2 case*, at para. 139

<sup>279</sup> *Ibid.* at para. 170

<sup>280</sup> *Ibid.* at para. 211

Nevertheless, a decisive factor is the reasonable expectation of privacy (its degree). In the instant case, a first claimant committed an offence in the way that could not expect the application of the ROA. That said, the *T1* could not expect the rehabilitation under the law at hand. On the contrary, *T2* could have expected the application of the ROA: ‘his conviction was always going to be spent’.<sup>281</sup>

Furthermore, besides the differences in the degree of privacy expectation, there was a different harm, caused by criminal convictions disclosure. *T2* presented evidence of a negative impact of the information on *T2*’s business, possible influence on his young family. Instead *T1* failed to submit the evidence revealing the harm, caused by the respective materials.

The EWHC also considered the convictions details and *post factum* conduct of the petitioners, responding, in particular, to a deterrence counter-argument. *NT2*’s conduct, at the outset, revealed that there is a low risk of wrongdoing repetition: ‘*NT2* pleaded guilty, expressed genuine remorse and did not commit any wrongdoings after the conviction’.<sup>282</sup> These factors do not limit increased the strength of *NT2*’s defence; however, they create an added value of the privacy position. In this light, the availability of the COD did not bear societal benefits (deterrence).<sup>283</sup> In view of these considerations, it was not necessary for a publication to deter a repeated criminal activity on the part of *NT2*, as such activity was unlikely.

Against this, *NT1* ‘has not accepted his guilt and showed no remorse over any of these matters’.<sup>284</sup> That said, the societal benefits behind availability of information increased, whereas the privacy case of the *NT1*, with low expectation of privacy and low degree of harm, was weak. This resulted in the rejection of *NT1*’s claim and ruling in favour of Google LLC.

At the end, the EWHC applied the data protection rules to the case. The Court held that the information about *NT2* became ‘out of date’ (a conviction is spent), ‘irrelevant’ (does not characterize an applicant any longer) and ‘of no sufficient

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<sup>281</sup> Ibid, at para. 222

<sup>282</sup> *NT1 and NT2 case*, at para. 222(4)

<sup>283</sup> Ibid, at para. 166(4)

<sup>284</sup> Ibid, at para. 170

legitimate interest to users' (no deterrence or warning function); no reasons to justify its availability were presented.<sup>285</sup>

Therefore, the *NT1* and *NT2* case attempts to put in one place a wide list of conflicting factors: resocialisation and reintegration of ex-convicts and their expectation of privacy, both conflicting with a public interest to know and in deterrence. Similar to the Supreme Court of Belgium, the EWHC assessed whether the individuals paid their social debt and whether the disclosure of the SCC causes harm to their reputation and other protected privacy rights. If all the factors indicate that a person significantly changed their conduct, this will present a strong privacy case to limit, in Jacobs' words, the *de facto* permanent collateral consequences of a sentence,<sup>286</sup> having a form of the online publications about a crime.

### **Chapter 3 Concluding Remarks**

A search engine does not qualify for the media expression protection. Despite facilitating the freedom of expression, the search engine performs this function accidentally and in addition to its main commercial functions, not connected to journalism.

Whilst characterised as collateral censorship by some, a limited protection of an opposite side (of the search engine) creates an alternative solution how to limit accessibility of the COD. As held by the CJEU in *Google Spain*, this method does not require a prior attempt to exercise data subject's rights vis-à-vis a publisher. Potential requests can include the request to de-index or to de-list. Consequently, if satisfied, the name of a person, who presented justifiable arguments in protection of privacy, will not be traceable in the search engine.

Both the CJEU and EWHC set, however, a standard to satisfy by a petitioner – the need to provide compelling reasons to limit the COD accessibility. Therefore, there is no compelling to delete, delist or deindex information in every single case. The courts assessed whether there was any legitimate interest behind a publication. The answer to this question impacts the rest of the analysis. In the absence of a

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<sup>285</sup> Ibid, at para. 223

<sup>286</sup> Jacobs, *supra* n. 10

serious interest, as happened to all three individuals, affected by the judgments at hand, the courts move to a privacy argument. To assess the privacy side, the courts should analyse such factors, as a status of data subject (notoriety of a crime and of a criminal), the time lapsed after a conviction, conduct during a trial (whether guilt was admitted) and after a conviction (to assess whether there is a social interest in deterrence), impact of data on the vital interest of the individual – family, business etc. In England, an additional relevant factor was the ROA 1974. Its application to *NT2* meant that a reasonable expectation of privacy increased. The judgements demonstrate that the list of relevant factors can be extended at the discretion of a court. The judgments, likewise, reveal that there is a more effective method to remove the ‘online footprints’ of an individual without (seriously) harming a freedom of expression. That is a request against a search engine provider. If fulfilled, the outcomes may be the same, as with the newspaper in the pre-digital age, i.e. it exists and is traceable; but it will not be a first piece of information one will associate the individual with after making a search request. Unless required by the public legitimate interests.

## 4. Ukraine: Developing a Balancing Formula

Ukraine is yet to establish its approach in the cases, involving the COD. This chapter summarises all the afore-discussed aspects of the COD and SCC, relevant to reach a balanced decision. The below considerations are relevant for the courts, the media and other private actors facing a balancing dilemma concerning the COD, particularly SCC.

### 4.1. A Balancing Formula: Assessing a Public Interest

In sub-section 1.2.3., this paper addressed the interplay between the public interest and the information about crimes. This thesis does not dispute that there is a strong public interest in the course of criminal proceedings and during rendering a conviction, driven by an open justice principle. This shall ensure the society sees the result of the work of law enforcement authorities. Depending on the notoriety of a crime and a conduct of the convict (constant requests for re-trial, public denials of guilt etc.), the public interest can exist in the course of imprisonment and after the release. A relevant factor to assess the public interest (to know) is the primary and subsequent media coverage of the criminal story. As in *M.L. and W.W.*, it is relevant to consider whether further conduct of a convict gave rise to the publications, interviews etc. If so, this can extend the period when the strong public interest exists.

Likewise, following the ECtHR's approach in *Österreichischer Rundfunk* case, it is relevant to 'assess the degree of notoriety of the person concerned, the lapse of time since the conviction and the release, the nature of the crime, the connection between the contents of the report and [...] the completeness and correctness of the accompanying text'.<sup>287</sup>

In the digital environment, the public interest can be also objectively assessed. For example, search engine can produce the statistical data regarding specific COD: how many times and from which IPs the information was traceable, whether the search requests concerned an individual or the past events etc. This may be an important factor to measure the existence of a public interest behind the story.

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<sup>287</sup> *Österreichischer Rundfunk v. Austria*, app. no. 35841/02, 7 December 2006, ECtHR

One can also assess the public interest, from a different standpoint. In particular, whether the society as such is interested in the availability of the COD to deter future crimes and other wrongdoings. In *NT1* and *NT2* and in *Le Soir*, the courts considered this aspect. A possible way to assess the public interest here is through the *post factum* conduct of an individual. If the conduct reveals that the individual accepted the guilt and was not involved in any subsequent criminal activity, then, there is a basis to conclude that there are no strong arguments for the availability of the COD by reason of deterrence.

These considerations do not limit the existence of a public interest in a list of other classical examples, for example a public figure status, inherently entailing a public interest.

#### **4.2. A Balancing Formula: Assessing a Status of a Victim**

The data protection rules and rehabilitation laws incorporate provisions, differentiating among the data subjects. This affords an increased protection for the vulnerable groups, including minors. The main purpose in the balance at hand is to define whether the convict is a public figure or a mere private individual. Additional considerations concern the features of such convict, particularly age.

##### **4.2.1. Minors**

Minors constitute a vulnerable group, by virtue of, inter alia, ‘inability to look after themselves, [...] emotional and educational immaturity that make children to some extent dependent’.<sup>288</sup> Children’s specific needs in the digital environment are to be considered,<sup>289</sup> as uncontrolled and indifferent processing of data can influence children during the lifetime,<sup>290</sup> damaging their reputation and personality’.<sup>291</sup> That is why such risks are to be assessed prior to the COD disclosure.<sup>292</sup> This is in accord

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<sup>288</sup> Francesca Ippolito, (De)Constructing Children’s Vulnerability under European Law (Oxford: Hart Publishing, 2015), 23

<sup>289</sup> Dorde Krivokapic; Jelena Adamovic, Impact of General Data Protection Regulation on Children’s Rights in Digital Environment, 2016 Annals Fac. L. Belgrade Int’l Ed. 205 (2016), 214

<sup>290</sup> Stacey B. Steinberg, Sharenting: Children’s Privacy in The Age of Social Media, [http://law.emory.edu/elj/\\_documents/volumes/66/4/steinberg.pdf](http://law.emory.edu/elj/_documents/volumes/66/4/steinberg.pdf)

<sup>291</sup> Milda Macenaite, From Universal Towards Child-Specific Protection of the Right To Privacy Online: Dilemmas in the EU General Data Protection Regulation, 19(5), New Media & Society (2017), 765-166

<sup>292</sup> ICO, Children, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/applications/children/>



with the CRC, requiring consideration of the best interest of a child and their privacy protection,<sup>293</sup> and the data protection laws, setting privileged regime of protection for minors.

A separate protection of minors' privacy in the COD context is embodied in ROA 1974 and the Irish Children Act of 2001, both setting reduced rehabilitation periods, as well as the US State expungement laws, preventing the disclosure of the minors' identity in the course of criminal proceedings.<sup>294</sup>

Minors' privacy protection in the COD context was also addressed by the ECtHR in *Ovchinnikov* case, concerning the publication of the information about two minors in the, allegedly, defamatory article, attacking two Russian judges (relatives of the respective minors).<sup>295</sup> This information was published in the absence of any other publicly available information about the link of two minors to the events. The Court held that the information, once entered a public domain, can be justifiably required to be removed. *In casu*, a significant aspect was that 'a minor, a grandson of a judge, was not prosecutable under the domestic law and was never charged with a criminal offence; likewise, no criminal proceedings were opened against him'.<sup>296</sup> For this reason, the case is distinguishable from those cases where the journalists reported on ongoing criminal proceedings, constituting the matters of public concern.<sup>297</sup> In this case, however, 'journalist's right to impart information on a serious criminal offence must yield to the minor's right to the effective protection of his private life',<sup>298</sup> that was sufficiently harmed by numerous naming in the press after the incident. The Court held that the publication did not contribute to a discussion of a matter of legitimate public concern, and the liability imposed on a publisher was necessary to prevent further publications and airing the personal information.<sup>299</sup>

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<sup>293</sup> Benjamin Shmueli, Aylet Blecher-Prigat, Privacy for Children, 42(759) *Columbia Human Rights Law Review* (2011)

<sup>294</sup> McIntyre and O'Donnell, supra n. 120 [S.258(1)(b) of the Children Act 2001 excludes offences required to be tried by the Central Criminal Court]

<sup>295</sup> *Ovchinnikov*, supra n. 155, at 47

<sup>296</sup> *Ibid*, at para. 51

<sup>297</sup> *Ibid*, at para. 51

<sup>298</sup> *Ibid*, at para. 51

<sup>299</sup> *Ovchinnikov*, supra n. 155, at para. 52

The media self-regulation is also aimed at protecting the minors' interests. Traditionally, sufficient reasons shall exist to proceed with a publication of a material, containing the COD, associated with the personal information of a minor. For example, in the Editorial Guidelines, the Guardian separately addresses the questions of children, those under the age of 16. In particular, 'articles that include significant intrusions into children's private lives without their understanding and consent need a strong public interest justification. In view of the longevity of online material, editors should consider whether children's identities should be obscured to protect them from embarrassment or harm as they grow older'.<sup>300</sup> The consideration is taken also by the BBC in its Editorial Guidelines. Specifically, in section 9.4.22, it is enshrined that 'when considering whether or not to identify children and young people involved in anti-social or criminal behaviour, we should take due account of their interests, specifically the age of the child or young person, the nature or seriousness of the behaviour and possible consequences of (child's) identification'.<sup>301</sup> The provision ends with a general rule that the publisher should not normally identify a minor in connection with crime or anti-social behaviour.

There is some criticism of this approach, in view of 'potential dynamics'. For example, an unknown child may become a public figure, and his or her data may therefore change status from private (worth deleting) to something worth public interest (worth preserving).<sup>302</sup> Others authors voice to highlight that the children do not care about their privacy as much as the adults might; that said, there should be no separate protection of minors. This criticism is, however, also rebutted. Shmueli and Blecher-Prigat suggest that there is no credible empirical evidence to reveal such correlation between the age and the indifferent attitude towards the privacy.<sup>303</sup> But even given that children do not voice serious concerns about their privacy due to their age, this still is not a valid argument to deny protection; instead, this requires additional and special care to prevent the harm, caused by the COD in future.

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<sup>300</sup> The Guardian, *supra* n. 71

<sup>301</sup> BBC, *supra* n. 7 [children and young people as contributors]

<sup>302</sup> See in Peter Blume, *The Data Subject*, 1(4), *European Data Protection Law Review* (2015)

<sup>303</sup> Shmueli, Blecher-Prigat, *supra* n. 222, at 760

In this part, the paper highlights that the balancing exercise, involving children, is a more nuanced work. To prevent permanent stigma for the lifespan, an effective solution can be found in the alternative remedied, identified in the 4<sup>th</sup> chapter of this paper.

#### 4.2.2. Public Figures

To be given a status of a ‘public figure’ an individual should play a role in public life, regardless of a domain, i.e. be it politics, economy, arts, social sphere or any other; in other words, a person shall enter a public scene’.<sup>304</sup>

Despite public figures’ strong interest in sealing their criminal data (career purposes), their petitions are often rejected. Such negative outcome happened to the Turkish President Erdoğan, who applied to the ECtHR three times.<sup>305</sup> The petitions are rejected by virtue of a) high public interest in knowing such data and b) importance of such a factor for assessing the suitability of a person for specific positions, especially if these are elective. Such considerations are in consonance with the freedom of expression doctrine and the applicable case-law.

According to Wacks, ‘public figures, by virtue of their role, are liable to be accorded less protection’, as generally required by the democratic values and ideals supporting the free exchange of information on matters relevant to the organization of the economic, social and political life to scrutinize those performing public functions’.<sup>306</sup> The consideration is here given to the traditional justifications of the freedom of expression – primarily those of democracy and truth. That said, the politicians, specifically the elected or to be elected, are of primary target of such less protection.

In the case of *G.D. v. Bernard Kenny and the Hudson County Democratic Organization*, decided by the Supreme Court of New Jersey, a candidate was publicly criticised by the opponents for hiring a person with a criminal conviction, although such convictions were expunged. The person, hired and having an

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<sup>304</sup> Oster, supra n. 53, at 156 [citing CoE Res. 1165 para 7]

<sup>305</sup> Euronews, President Erdoğan Applied to ECHR Three Times Before, <https://tr.euronews.com/2018/11/21/erdogan-bizi-baglamaz-dedigi-aihm-e-kac-kez-basvurdu>

<sup>306</sup> Wacks, supra n. 86, at 160; Oster, supra n. 53, at 156

expunged conviction, argued that any such accusation was ‘simply false and the dissemination of the expunged information violated his privacy rights’.<sup>307</sup> In response, the Supreme Court did not grant the privacy protection to the person because of the fact that the applicant ‘had no reasonable expectation of privacy that information so long in the public domain before the entry of the expungement order would be erased from the public’s mind or from papers already widely disseminated’.<sup>308</sup> That said, a person’s public status and the association thereof with a criminal conviction prior to their erasure prevented the individual from even being afforded the privacy protection.

Public figures can, however, expect some degree of protection of their personality rights, including the right to privacy and reputation.<sup>309</sup> In practice, one can argue that he or she does not qualify for a public figure status, as was in *Standard Verlags GmbH v. Austria* case, where the ECtHR held that ‘that a claimant, as a senior employee of the bank in issue, was not a ‘public figure’, nor did the fact that his father had been a politician make him a public figure’.<sup>310</sup> Should the Court held otherwise, the individual is unlikely to expect high degree of protection of private life.<sup>311</sup>

In practice, there has been a dilemma concerning a minor, considered to be a public figure, and a publication, interfering with his private life. In such cases, the age, however, does not afford as sufficient protection, as in regular cases. An example is a judgment in *Spelman v. Express Newspapers*. In the case mentioned, a victim, a 17-year old, was a sportsman playing on a high-level. By so doing, according to the High Court, ‘a participant gives up control over many aspects of private life’.<sup>312</sup> By extension, his sporting life and effect it might have upon the

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<sup>307</sup> Supreme Court of New Jersey, G.D. v. Bernard Kenny and the Hudson County Democratic Organization, A-85, January 31, 2011

<sup>308</sup> Supreme Court of New Jersey, G.D. v. Bernard Kenny and the Hudson County Democratic Organization, A-85, January 31, 2011

<sup>309</sup> Wacks, *supra* n. 86, at 157

<sup>310</sup> *Standard Verlags GmbH v. Austria* (No.3), app. no. 34702/07, 10 January 2012, ECtHR, para. 38

<sup>311</sup> *Minelli v. Switzerland* (dec.), app. no. 14991/02, 14 June 2005

<sup>312</sup> See in *Spelman v. Express Newspapers* [2012] EWHC 355 (QB)

player contributes to a debate of general interest about a person to be regarded as exercising a public function'.<sup>313</sup>

That said, in Ukraine, where the courts are bound by the ECtHR judgments, it is primarily worth considering whether the individuals' status *per se* imply increased degree of privacy protection or not.

#### **4.3. A Balancing Formula: Assessing Other Factors**

Reporting the facts is afforded sufficient protection.<sup>314</sup> This is relevant in the context of COD that, as a rule, constitutes the true facts, not losing this status with the passage of time. Publications can, however, vary, and certain information may be reported incorrectly or incompletely. Likewise, the media can report the information, extracted from the closed judicial hearings. Both situations can decrease the freedom of expression protected. What is also relevant to consider is the contents. In particular, to what extent is it justifiable to add a wide list of personal data, including, for example, name and surname plus one's address? The test to apply is whether such data *per se* are necessary to fulfil a public interest.

*Le Soir*, *NT1* and *NT2*, *M.L.* and *W.W.* and other cases under consideration drew attention to the outcomes of a publication and its public accessibility. The individual bears a burden of proof to show how the publicly available COD harm the vital interests, including family life and reputation, employment possibilities and resocialisation. This list is not exhaustive, but should be linked to the harm, including moral, caused to the ex-convict.

In the SCC context, it is also relevant to assess how an individual behaved after a conviction and whether there is a basis to conclude that the one has re-socialised and rehabilitated or that there is still a need for deterrence against potential wrongdoings. A passage of time affects a conflict between the rights at hand. Individual's expectation of privacy increases, particularly when a conviction is spent, whereas a public interest can, instead, decrease. The domestic laws, aimed at reintegration and resocialization of an individual, can increase the reasonable

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<sup>313</sup> Ibid

<sup>314</sup> Oster, *supra* n. 53, at 167-168

expectations of privacy and the chances of an individual to limit the access to the criminal pass, not necessarily limiting the guarantees, afforded to the media. Ukraine's legal framework does not create a special regime, aimed at reintegration of the individual. The laws set general rules when collateral consequences of a sentence terminate (the Criminal Code) and reiterate the general principles of data processing, set in the Directive 95/46/EC and Convention No. 108. The latter mean that Ukraine has also provided the exception from general data protection rules if the processing is carried out for journalistic purposes. Other laws can be also relevant. Among others, these are the exceptions to a public hearing rule that applies in cases (i) involving minors, (ii) concerning sexual offences, (iii) and a list of other cases where a judge can decide to carry out the proceedings in camera.<sup>315</sup> Publication of such COD can decrease the freedom of expression protection in the context of 'manner and contents of publication' element of the ECtHR test.

#### **4.4. A Balancing Formula: Choosing a Remedy**

Last matter it to consider a remedy against unlimited accessibility of the COD. Following the rationale in *Węgrzynowski* and *Smolczewski* case, Balkin's criticism and the idea of the media self-regulation, I should reject the idea that online publication, even archived long time ago, can be fully deleted as disproportionate interference with the media expression. This is true given that a publication concerned true COD, published without a breach of the law.

One of the most suggested remedies is, however, to contextualise the data, adding the lacking details. As the Ukrainian media, same as other European ones, share the view regarding accuracy and relevance,<sup>316</sup> it is in consonance with such principle to request further updating links to add to primary publication. These can be the links to consequent development of a criminal story (annulled or altered judgments) or, as in the US, addendums that a conviction became spent if requested by an individual. Following *Le Soir* case, a possible measure can be further storage of past publication, but without indicating one's personal data or

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<sup>315</sup> Ukraine's Code of Criminal Procedure, Art. 27

<sup>316</sup> П'ятий канал, Засади редакційної політики «5 каналу», <https://www.5.ua/about/redaktsiyna-polityka>; Радіо свобода, Наш кодекс, <https://www.radiosvoboda.org/p/5623.html>

anonymising/pseudo-anonymising them. This safeguard a public interest to know about the past events, but, likewise, safeguard's one privacy interest. This action is, however, worthless if the event had a broad media coverage; therefore, to really limit accessibility of the data, the individual will have to negotiate such steps with many publishers or a State would have to order anonymization vis-à-vis a list of publishers. Since a broad media coverage *per se* may prove the existence of a public interest,<sup>317</sup> such measures of a State can be inconsistent with the media expression guarantees.

Additionally, in choosing a remedy, a rationale of the ECtHR shall be kept in mind: 'neither a State nor the Court should substitute its own views for those of the press as to what technique of reporting should be adopted in a particular case'.<sup>318</sup> That said, it shall be primarily upon the media to consider such requests. Only on a condition media manifestly fails to consider the requests, one's privacy should be protected by the judiciary.

In any event, any person, responsible to decide upon such question, should consider the SCC as a sufficient factor that an individual has paid a social debt. That said, they can minimize the (often described as permanent) collateral consequences of a conviction in the form of criminal data, traceable online. Unless there are strong public interests in storing such data instead of mere curiosity, the media and a State should find proportionate measures to accommodate both sides, as a rule, without a removal of a primary publication.

#### **4.5. Alternative Approaches**

The practice shows that attempts to sue a media outlet result in increased public interest to the subject matter of a publication. To fulfil such emerging (re-emerging) public interest, media can prepare a new publication concerning such individual's attempts. Because of their conduct, the individuals facilitate the increased protection of the freedom of expression in such cases. This happens, however, when individual try to achieve the opposite result – limit access to the past COD.

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<sup>317</sup> ICO, The Public Interest Test, [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)

<sup>318</sup> *Eerikäinen*, supra n. 159, at para. 65

Conclusively, it may be argued that the improper strategy to protect privacy can, in advance, hinder the privacy position and make a balance exercise a problematic task. In particular, a large number of cases, including *M.L. and W.W.*, dealt with a situation when the judgment, even if rendered in favour of the applicants, would not change a reality. The reality, in which the search engine is full of the results with applicants' names and their criminal background. This all shifts the emphasis regarding an effective remedy to use in order to search the balance in this case. The remedy that would not automatically increase a public interest, but allow the parties to a dispute to properly weight all the arguments for and against. The search for such remedy is task, which the ECtHR implicitly assigned to the potential petitioners.

#### **4.5.1. Media Self-Regulation**

This paper already addressed some aspects of how the press responds to the criminal offence data, addressing the editorial regulation of this issue. In this part, the paper addresses the rationale why the media can resolve a conflict at hand by itself.

A prevention is the best means how to avoid future human rights conflicts. Should media act in good faith and in accord with its duties and responsibilities (inherent in the permanent availability of the personal data, added to a publication), the future complaint (request, legal action) is unlikely to arise. In the alternative, even if the complaint is made, the latter is unlikely to succeed, as seen in *Axel Springer* and *M.L. and W.W.*, where a balanced report of a criminal story, driven by a public interest, did not raise any issues before the ECtHR. Same is not true in *Le Soir*, where, instead of anonymization or other measures vis-à-vis personal data of a private individual, the newspaper decided to proceed with the storage of a criminal story in the absence of a public interest. The courts' holdings in both cases were different: in first two, the ECtHR held that the media adhered to their duties and responsibilities; instead, in *Le Soir*, the Belgian Supreme Court held that the newspaper did not act in accord with such duties and responsibilities.

These primary considerations imply: if media acts *bona fide*, then, its publication qualifies for a significant protection under the media expression



provisions. First such protection is the media exemption from the general rules on data processing. In practice, media can disregard data protection principles and data subject rights, discussed above, but to the extent, necessary for its purposes.

The authors generally support the premise that the media has all the necessary resources and rules to balance the competing interests by themselves. The following arguments support this position.

First, in the professional ethics, guidelines, policies and rules, a clear understanding of ‘both longevity and ready accessibility in the context of online news’ is provided.<sup>319</sup> An illustrative example is the US Society of Professional Journalists *Code of Ethics*, under which ‘journalists should balance a suspect’s right to a fair trial with the public’s right to know and consider the implications of identifying criminal suspects before they face legal charge’.<sup>320</sup>

Second, there are additional policies, related to the updates and corrections. As a rule, the media tries to ‘provide updated and more complete information as appropriate’.<sup>321</sup> For example, the New York Times agree, but on rare occasion, to add ‘an addendum to crime stories if the subject contacts the Times to say he or she was acquitted, or that charges were dropped, applying this to major crimes only and requiring the person involved to supply copies of related legal documents as proof’.<sup>322</sup>

Third, as was previously argued, media traditionally balances privacy interests before publication, specifically in the contexts of vulnerable groups, such as children. Examples are given in the Annex 2 to the paper. In the European context, particularly, media follows specific CoE guidelines, in particular Recommendation Rec(2003)13 regarding the principles concerning the provision of information through the media in relation to criminal proceedings. In its case-law, the ECtHR previously referred to the Recommendation which requires respecting the ‘presumption of innocence, providing accurate information and protecting privacy

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<sup>319</sup> Brogan, supra n. 122, at 51

<sup>320</sup> Ibid, at 51

<sup>321</sup> Society of Professional Journalists, Code of Ethics, <https://www.spj.org/ethicscode.asp>

<sup>322</sup> Ibid

in the context of on-going criminal proceeding with special care towards minors and other vulnerable groups'.<sup>323</sup>

That said, what the media often does is leaving the original report on the events with a brief addendum to such report, likewise easily accessible, provided that 'the individual, who is the subject of the online report, submits to the publisher a court order or other law-enforcement-authenticated document indicating that the individual's record has been expunged pursuant to an expungement statute, or that other similar action (such as pardon, commutation, or even the entry of a certificate of rehabilitation) has occurred'.<sup>324</sup>

Such balanced approach is driven by the following. A person becomes rehabilitated in the eyes of a public without harming the freedom of expression and without hiding the truth or rewriting the history. In the European context, to the extent GDPR applies, an individual can achieve such a result through the exercise of a data subject rights, specifically a right to rectification, arguing that the information is incomplete. Such method is the least intrusive for the media, since it both a) follows its editorial guidelines, where update of information is considered as one of the media pillars; b) minimizes the harm, caused to a private life of an individual. Needless to say that if the ex-convict provided compelling reasons, supporting the request, the media cannot unjustifiably reject it. Otherwise, the individual can exercise its right to access to court and effective remedy to sue the media, not acting in a good faith. That said, the individual has, however, a burden of proof to provide compelling reasons why their request should have been fulfilled. This is without limitation to the protection of one's private life against media interference in the cases where media breached its duties and responsibilities or refused to act pursuant to its own editorial policy.

The examples may include the refusal to update the COD with the data about further developments of the proceedings (annulled or amended sentence), correct the inaccurate data or take other actions, without which the publication is not in accord

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<sup>323</sup> Recommendation Rec(2003)13 concerning the principles concerning the provision of information through the media in relation to criminal proceedings, Principles 3, 4, 8 as cited in *Axel Springer*, supra n. 67, at para. 50

<sup>324</sup> Brogan, supra n. 122, at 54

with the media standards and principles. For other actions, including limitation of accessibility, it is more reasonable to take other measures, not related to a direct interference with the media expression.

In any event, media attempts to retain access to the primary publications even if these were delisted under the GDPR. The example is BBC publishing the delisted reports on a monthly basis; as a rule, these concern the data regarding past wrongdoings and crimes.<sup>325</sup> This also suggests that this is primary upon the media to assess the public interest behind a story. In the absence of violation of media duties and responsibilities, no interference with media expression is possible, unless compelling reasons are provided by a petitioner.

#### **4.5.2. Private Governance**

Unless qualified for the media exemption, the private companies can still rely on their own approaches regarding personal data. Such companies include Google, Facebook and other technology companies. In Balkin's words, these companies should be regarded as governors of social spaces, since they control the platforms facilitating communication.<sup>326</sup> It is not in dispute that a fast reaction of the technology companies to, for example, past COD disclosure can safeguard all the interest at issue more effectively, than any other measure, discussed. This is explained by the status of such companies as the infrastructure owners. That said, they possess 'technical capacities for identifying and removing content far outstrip those of most countries; hence it is easier to get private companies to perform these tasks for the government'.<sup>327</sup>

As a result of the natural development, the large technologies companies understood that their purpose it to govern, particularly large collections of personal data. Klonick described such natural development as occurring by accident, 'when social media companies sought to enforce their terms-of-service agreements and had

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<sup>325</sup> See, among others, BBC, July 2018: List of BBC web pages which have been removed from Google's search results, <http://www.bbc.co.uk/blogs/internet/entries/5252ea88-753b-49b9-8a7d-cd26cb9031c8>

<sup>326</sup> Balkin, *supra* n. at 2025

<sup>327</sup> *Ibid*, at 2019

to respond to pressure from various nation-states to control or curb speech that these countries regarded as illegal or undesirable'.<sup>328</sup>

This implied additional duties and responsibilities on the part of such companies. One of them is ex post review of content by human moderators.<sup>329</sup> This, together with other functions of such companies, 'created private bureaucracies, the effectively governing structures'.<sup>330</sup>

Such governing structures are driven, in particular, by market incentives and other external factors.<sup>331</sup> Data protection mechanisms and cyber security are not an exception. To respond to such emerging challenges, such companies design the 'simple, easily understandable, and easy-to-apply rules that can be followed uniformly'.<sup>332</sup> In such policies, every end-user is a potential reporting device to maintain such policies and standards.<sup>333</sup> These are the users, who help such companies, as Facebook, to monitor and enforce their community standards. The problem is, however, that the governance of such companies is considered to be autocratic; therefore, 'their governance policies are, for the most part, nontransparent and waived whenever necessary or convenient'.<sup>334</sup> The outcome of that is, as Balkin argues, is that 'companies often make special exceptions for powerful and influential actors and organizations; but if the speaker is a puny anonymity, it is far more likely that a social media company will sanction or ban the speaker'.<sup>335</sup> The companies, allegedly, fail to apply the legal terms in consonance with the relevant jurisprudence; instead, vaguely interpreting them to govern its community.<sup>336</sup>

Such approaches are, however, not without a remedy nowadays. Not only the data protection instruments can affect the community standards and policies, but also a more direct interference of a State in the affairs of a company. The latter is

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<sup>328</sup> Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018)

<sup>329</sup> *Ibid*

<sup>330</sup> Balkin, *supra* n., at 2018

<sup>331</sup> *Ibid*, at 2018

<sup>332</sup> *Ibid*, at 2018

<sup>333</sup> *Ibid*, at 2018

<sup>334</sup> *Ibid*, at 2018

<sup>335</sup> *Ibid*, at 2025 [citing Klonick, *Abrams v. the United States* and other supportive sources]

<sup>336</sup> *Ibid*, at 2025

represented by the German NetzDG law. The law was passed ‘to co-opt social media companies into monitoring and taking down prohibited content in Germany, including hate speech’ even if the content does not qualify as the hate speech under the social media policy.<sup>337</sup> The authorities can issue to remove manifestly unlawful speech; a failure to comply with the notice results in the sanctions against the company.<sup>338</sup> The alleged rationale for such measures is impossibility of certain States to take such measures by themselves, since they lack the technical capacity to perform this task. Similar to the response to the right to be forgotten, Balkin calls such measures as nothing, but a collateral censorship (request to erase a content on a pain of fine).<sup>339</sup> An alternative view is to argue that such laws are rather an ‘agreement between a State and private companies in which the companies act as private bureaucracy that implements the State’s policy, particularly regarding the prohibited speech’.<sup>340</sup>

Without additionally focusing on a role, played by private companies, it is worth briefly referring to the policies, developed by such companies. Particularly, it is of our interest how these companies can respond to the COD-related requests.

Google, main target of the requests, provides only an overview of its approaches without revealing the applicable rules. The company allegedly follows from the Article 29 Working Party guidelines (the organ, responsible for drafting the GDPR) and carries out manual review of each application.<sup>341</sup> The outcome is a decision either satisfying the request or rejecting it (with a brief explanation of the reasons to reject).<sup>342</sup> The company reveals, however, the grounds when it will not delist web pages. One of the most important reason is the existence of a strong public interest ‘that depends on diverse factors including—but not limited to—whether the content relates to the requester’s professional life, a past crime, political office, position in

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<sup>337</sup> Balkin, *supra n.* at 2030; Jenny Gesley, *Germany: Social Media Platforms to Be Held Accountable for Hosted Content Under Facebook Act*, Global Legal Monitor (2017), <http://www.loc.gov/law/foreign-news/article/germany-social-media-platforms-to-be-heldaccountable-for-hosted-content-under-facebook-act/>

<sup>338</sup> Balkin, *supra n.*, at 2030

<sup>339</sup> *Ibid.*, at 2030

<sup>340</sup> *Ibid.*, at 2030

<sup>341</sup> Google, Search Removals under European Privacy Law, <https://transparencyreport.google.com/eu-privacy/overview?hl=en>

<sup>342</sup> *Ibid.*

public life, or whether the content is self-authored content, consists of government documents, or is journalistic in nature'.<sup>343</sup>

The data-driven research shows, however, that Google generally removes such COD which can be considered as (i) lacking a public interest or (ii) their removal is *prima facie* justifiable. These include 'the content that relates to minors or to minor crimes that occurred when the requester was a minor, acquittals, exonerations, and spent convictions for crimes as well as accusations that are proven false in the court of law'.<sup>344</sup>

In assessing these grounds, the private companies can follow the approaches of the ECtHR, CJEU, EWHC and other domestic supreme courts. The result will be, however, a faster and more effective protection. Such request will not, likewise, lead to the increased public interest solely by virtue of submitting a request, as this often happens in the cases against publishers. In assessing the existence of a public interest, the Google can track a number of search requests regarding an individual or his/her distant past.

Should the private companies manifestly fail to balance the interest at issue, the petitioners can exercise their right to access to court and to effective remedy. One example is worth consideration. In the case *CG v. Facebook Ireland Ltd.*, the private individuals created a group on Facebook, where the information about XY was posted, including the name, photograph, and his previous criminal convictions, including six charge of indecent assaults, six charges of gross indecency with a child, committed in 80's.<sup>345</sup> The person spent the time in prison.

Second post in the group concerned an individual, sentenced to 10 years of imprisonment in 2007. In fact, the group administrators merely copied the newspaper article with the story about the second offender. Both posts attracted much attention and resulted in threats to both offenders. The victims attempted to obtain the URLs of those who posted comments and threats via requests to

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<sup>343</sup> Google, Search Removals under European Privacy Law, <https://transparencyreport.google.com/eu-privacy/overview?hl=en>

<sup>344</sup> Minhui Xue, Gabriel Magno, Evandro Cunha, Virgilio Almeida, Keith W. Ross, *The Right to be Forgotten in the Media: A Data-Driven Study*, 4 Proceedings on Privacy Enhancing Technologies (2016), 391

<sup>345</sup> See Court of Appeal in Northern Ireland, *CG v. Facebook Ireland Limited*, MOR10142, 21 December 2016

Facebook. The social network, however, refused to do so. As a result, the victims sued Facebook as an intermediary. Following a precedent in *Murray v Express Newspapers* [2008], the Court of Appeal held the aspects of the case to assess: individual's attributes, the nature of the activity in which the applicant had been involved, the place where it (intrusion) had happened and the nature and purpose of the privacy intrusion.<sup>346</sup> In assessing these elements, the court held that the data revealed enabled to identify exactly where the individual live that could pose serious threat to him; in the absence of any effective measures to protect the privacy on the part of social network, the court held Facebook liable for the misuse of information.<sup>347</sup>

The self-regulation part of this paper reveals: one of the solutions to safeguard privacy vis-à-vis a public interest is through complaining to the owners of the technical capacities (infrastructure). With the incentives and developments, such companies attempt to adhere to the applicable laws, in particular in the area of the data protection. In contrast to the courts, however, their response to requests will be faster and its outcome can be more satisfactory, than the court judgment, passed with a delay and attracting additional attention and interest. In any event, should the private companies fail to balance the competing interests, one can apply to a court based on the fundamental right to access to court and to effective remedy.

#### **4.5.3. Resocialisation and Rehabilitation Policy**

As in the case of media self-regulation, a State can prevent the ex-convictions' stigmatisation issues, resulting from COD permanent availability. A State can take the measures in accordance with the basic reintegration premise: 'Reintegration rests on the fulfilment of a necessary condition: the punishment must *end* at some point to allow for the possibility of reintegration'.<sup>348</sup>

As the private actors attempt to respond to the state laws and policies to achieve compliance (discussed in 4.5.2.), State's actions can be effective,

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<sup>346</sup> Court of Appeal in Northern Ireland, *CG v. Facebook Ireland Limited*, MOR10142, 21 December 2016

<sup>347</sup> *Ibid*, at paras 39, 96

<sup>348</sup> Jean-Paul Brodeur, *Comparative Penology in Perspective cited in Michael Pinard, Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85, *New York University Law Review* (2010), 502

particularly in the area of protection of vulnerable groups, including minors. As argued in *NT1* and *NT2*, domestic laws can also increase the privacy protection in future when one asks to de-list pages or de-index their names concerning the web pages with distant past information.

After referring to the *NT1* and *NT2* case, it is relevant to discuss in detail the English example. In the United Kingdom there is a separate statutory regulation to rehabilitate offenders. In 1974, England passed the Rehabilitation of Offenders Act (the 'ROA'). Its purpose was simple: to rehabilitate (i) the offenders (ii) who have not been reconvicted of (iii) any serious offence (iv) within the periods, set by the law.<sup>349</sup> On a condition an offender fulfils the aforesaid requirements, convictions become spent. In turn, the ex-offender is treated as a person, who 'has never committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction'.<sup>350</sup> Conclusively, no one can obliged an ex-offender to disclose any such information or punish for a failure to disclose such data.<sup>351</sup> Necessarily, existence of such a law creates an increased expectation of privacy among ex-offenders. The law creates an expectation of a second chance on a condition the *post factum* conduct proves one's rehabilitation.

The ROA is, however, subject to limitations. England's ROA 'allows an individual to expunge his or her conviction in certain circumstances; the person is not sentenced to more than thirty months in prison and must have made it through the applicable rehabilitation period without reoffending'.<sup>352</sup> The statute excludes certain crims from its protection, including life imprisonment. Importantly, the statute also differentiates between different offenders. There are different rehabilitation periods for those under 18 (as a rule, such periods are reduced by half). Therefore, under the ROA, a state grants an ex-offender a second chance in the eyes of the public, given that a person proved to be law-abiding. To ensure the second

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<sup>349</sup> Rehabilitation of Offenders Act 1974, Preamble

<sup>350</sup> Ibid, Art. 4(1)

<sup>351</sup> Ibid, Art. 4(2)

<sup>352</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85, New York University Law Review (2010), 502



chance, the law provides the criminal responsibility for the unauthorized disclosures; however, again, with some exceptions for the media.

Another State with a rehabilitation policy is Spain. Spain is notable, as in its domestic jurisprudence the criminal data often obtain the confidentiality status and are often protected vis-à-vis the media. The Spanish Constitution sets the principle of rehabilitation and reintegration of the ex-convicts in addition to the right of privacy.<sup>353</sup> A possibility to obtain data about convictions from the national registry is restricted to a list of public authorities. Altogether, such laws create, in legal terms, a reasonable expectation of privacy. In Spain, this protected the ex-convicts from media and employers' in a number of cases, particularly before the Supreme Court of Spain.<sup>354</sup> Similar policy exists in Germany with 'the constitutionally guaranteed right to re-socialisation with a strong emphasis on the personality right (to be left alone)'.<sup>355</sup>

A consideration should be also given to the laws and jurisprudence in the US. In the majority of States, there is a statutory procedure of criminal records expungement – erasure them from the governmental records, carried out either automatically or per request. This is in addition to strict media standards among the US media outlets. The eligibility criteria can vary, and certain convictions are not subject to expungement. By extension, certain States offer a simplified procedure for the juvenile delinquents (Virginia) and take measures not to disclose the data about the criminal proceedings, involving minors, to the general public in order to prevent the dissemination of such information by the media.<sup>356</sup>

However, at least in the US, if media accessed and published the criminal information, a person is unlikely to succeed in a lawsuit against the media, even if the data are expunged. This is by virtue of the First Amendment, in favour of which

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<sup>353</sup> See in Jacobs, Larrauri, supra n. 18, at 14

<sup>354</sup> See Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 7a ), 6 April 2001 and Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 1a ) STS, 3 March 1995 in Jacobs, Larrauri, supra n. 18, at 6, 8

<sup>355</sup> Christine Morgenstern, *Judicial Rehabilitation in Germany -- The Use of Criminal Records and the Removal of Recorded Convictions*, 3(1) European Journal of Probation (2011), 33

<sup>356</sup> Restoration of Rights Project, 50-State Comparison: Judicial Expungement, Sealing, and Set-Aside, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>

the domestic courts rule in such cases. That said, in the US, the only chance to practically seal the records is to do it via the law prior to the media's access to such data.<sup>357</sup>

Even if the data are disclosed, the expungement procedure can minimise the risks of stigmatisation in a different manner. For example, through the issuance of the certificates of rehabilitation, available, in particular, online. Such certificates are often used in the course of employment and for other purposes, given that a person's convictions became expunged. Their contents may vary. For example, in *Doe* case, Judge Gleeson awarded certificate of rehabilitation with the wording 'this certificate I am awarding Doe will convey to others that the same court that held Doe accountable for her criminal acts has now concluded after careful scrutiny that she is rehabilitated; the Court is recommending that a person be welcomed to participate in society in the ways the rest of us do'.<sup>358</sup> This approach can be useful to persuade the employers and the general public that the individual has changed. The correlation of such reports and the preservation of the ex-offenders' vital interest has been proven empirically.<sup>359</sup> Such a report can be added as an annex to the online publication or result in the correction of a publication.

#### **Chapter 4 Concluding Remarks**

This paper came up with a list of factors to consider to balance the rights at issue, including primarily a public interest and an offender's status. Whereas minors qualify for a special protection (*Ovchinnikov*), same is not true about public figures and less true about private individuals (*Axel Springer* case). Additional factors to consider are the contents and manner of a publication and the specific COD-related factors, including the passage of time, the notoriety of a crime, the *post factum* conduct of an individual, the harm, caused by such data to individual's vital interests, and the existence of the legislative framework, designed to protect such social group.

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<sup>357</sup> See Bradleigh Chance, Expunging Criminal Records: Journalists Worry Laws Make Criminal Records Sealing too Easy, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2014/expunging-criminal-records>

<sup>358</sup> Brogan, *supra* n. 122, at 55

<sup>359</sup> Peter Leasure, Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35(11) *Yale Law & Policy Review* *Inter alia* (2016), 17-18, 22

It is also important to choose a proportionate remedy to address the conflict between the rights. Such can include rectifications and anonymization measures as well as addendum attachments, given that a balance between the rights justifies them.

That said, however, the proceedings before the ECtHR, CJEU and domestic courts last for a long period. M.L. and W.W. case took almost 8 years to adjudicate. Needless to say that during this overall period, the COD (one's distant past) constantly harm one's private life, possibly preventing desirable employment, social relationships etc. It is also likely that a petition against a publisher will not succeed, being considered, at least in *Węgrzynowski and Smolczewski* case, as an attempt 'to rewrite the history'. Such negative outcomes are true in the cases when the data are inaccurate or incomplete, when the COD are false or simply excessive. Same did not occur in the pre-digital age era when, as I argued in the first chapter, the information became sealed within a few days after the newspaper publication.

Digital-age considerations drive to search alternative solutions, the use of which can more effectively reconcile the interests at issue. These solutions include the media self-regulation, private governance and the public policy in the area of resocialisation and reintegration. First method implies the proper safeguards that the media in advance sets to avoid imbalanced interference with privacy at the outset. For example, media is unlikely to reveal the identity of a minor, despite a public interest, giving minor a second chance. Second method applies to the contemporary technology companies, not afforded media expression protection. Having technical capacities, the social networks and search engine providers can reconsider the interests at hand and offer such remedies as de-listing, de-indexing, erasure etc. should the data be without a serious public interest behind. A third alternative is a public policy in conjunction with the relevant court practice, similar to the one in the United States, United Kingdom or Spain. In fact, States can in advance prevent the revealing of the identity of the criminals to avoid further unlimited dissemination of such data long after the release from a prison. By virtue of their efficacy, such alternative solutions have been implicitly called as more preferable to the judicial proceedings by the ECtHR.

## Conclusion

In this paper, I have made the following conclusions.

The digital age introduced significant challenges for the protection of one's privacy, especially in horizontal relations. The degree of such challenges was not predicted in advance. The present challenges, in the COD context, differ from the pre-digital age situation, when on the next day after a publication, the criminal story was tough to trace back. The 'death of privacy' metaphor is only one of few conclusions, made by the authors. Nevertheless, in consonance with the human rights law, there should be an attempt to strike a fair balance.

The balance should be achieved between Arts 8 and 10 of the ECHR respectively. As established in the contemporary approaches of the ECtHR, the past criminal data are afforded the privacy given that certain time has lapsed and there is a reasonable expectation of privacy on the part of an individual. On the other hand, publication, storage, and archiving of the criminal data by the press is covered by the freedom of expression.

Both sides have the strong arguments in their defence. Privacy is protected, from the standpoint of intimacy, social relationship, resocialization, dignity and other justifications. In turn, the freedom of expression is defended from the traditional truth and democracy arguments as well as the public discourse theory standpoint. The assessment of both sides of the aisle presents a nuanced task to cope with.

The balance between the rights, often to be exercised by the courts, is, however, partially prevented by internet infrastructure (remove, but do not forget) and the probability that such attempts 'to silence media' will result in the increased public interest and a consequent rejection of an individual request.

The case-law of the ECtHR supports the premise that there is low probability to succeed before the courts, trying to directly interfere with the freedom of expression. This is evidenced by the cases of *Axel Springer*, *Węgrzynowski* and *Smolczewski*, and *M.L. and W.W.* In all three, the Court ruled in favour of the

freedom of expression in light of a public interest in reporting crimes and disproportionate interference with the freedom of expression should the Court decide in favour of Art. 8.

The ECtHR's case-law presents, however, guidance to use within different forums, including before the search engine providers. The factors to be assessed are the existence of a public interest, the status of an individual concerned, prior conduct of an individual, form and manner of a publication etc.

In *Le Soir*, the Belgian Supreme Court applied the privacy considerations vis-à-vis a media outlet to order anonymization of a name in a criminal story. The reason is a passage of time, decreased public interest, absence of a public figure status and a harm, caused by the public permanent availability of the COD.

First alternative method (to judiciary) is to request de-listing or de-indexing through a search engine provider. As ruled in *Google Spain* and in *NT1 and NT2* cases, this dispute resolution method does not require a prior attempt to exercise data subject's rights vis-à-vis a publisher. If de-indexing request is fulfilled, one's name, linked to a publication, will not be traceable via a search engine. In such cases, following the guidance of the CJEU and EWHC, there should be an assessment of a legitimate interest behind a publication and, then, the privacy considerations. In the absence of a serious public interest, the following should be considered: a status of data subject (logically, notoriety of a crime should be also considered), the time lapsed after the conviction, the conduct of such individuals (whether the data would serve any important purpose, particularly to deter such persons), impact of data on the vital interest of the individual – family, business etc.

It was argued that there are additional factors to consider, including the applicable laws, aimed at resocialisation and reintegration, such as the ROA 1974, the vulnerability of a victim (particular, if the one is a minor), accuracy and completeness of information.

The paper highlighted that the privacy requests should be rejected given that there is a sufficient public interest behind a publication, for example, in deterrence or the interest to know if the data concern an elective political figure. In the absence

of a strong public interest, however, the privacy complaints should be comprehensively considered and fulfilled, unless require full erasure of a publication,

In light of the digital age challenges, it was also argued that the proper forums to consider such matters are the media *per se*, responsible for a primary assessment of a public interest, and the technological companies, possessing capacities to process, particularly rectify the data. It was also argued that States can prevent such conflicts if they implement the separate policies, designed to prevent disclosures of the COD in certain instances, as in the United States.

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# Appendices

## Annex 1

The case of ‘M.L. and W.W. v. Germany’ (Excerpts)

*(translated from French)*

### FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant and the second applicant were born in 1953 and 1954 and live in Munich and Erding respectively.

7. The applicants are half-brothers. On 21 May 1993, after a criminal trial [...] they were sentenced to life imprisonment for the murder, that took place in 1991, of the very popular actor WS. Their appeal on the matters of law was dismissed in 1994. On 1 March 2000, the Federal Constitutional Court decided not to consider their constitutional complaints (Nos. 2 BvR 2017/94 and 2039/94) against the decisions of the criminal courts. The application, lodged by the applicants before the Court in connection to this procedure (no. 61180/00), was rejected on 7 November 2000 by a committee of three judges on the ground that the applicants had not lodged their constitutional complaints in accordance with procedural rules, laid down in the Federal Constitutional Court Act (unpublished decision).

8. The applicants lodged several applications for review (Wiederaufnahme) of the proceedings, the last of which, introduced in 2004, was rejected in 2005. In the course of the latter proceedings, the applicants turned to the press, providing the media with the documents relating to the revision procedure and other unspecified documents.

9. The first applicant and the second applicant were released on probation in August 2007 and January 2008 respectively.

#### A. The proceedings at issue

##### 1. *The first proceeding*

##### a) The contentious report

10. On 14 July 2000, the radio station Deutschlandradio [...] published a report entitled 'W.S. murdered ten years ago'. It stated, with the full names of the applicants:

*'After a six-month criminal trial based on evidence, S.'s companion, W., and L.'s brother, were sentenced to life imprisonment. Both are still protesting their innocence and have been rejected this year by the Federal Constitutional Court for their request to reopen the trial'.*

11. The transcript of this report was still available on the archive pages of the radio station's website, in the section 'Less recent information', at least until 2007.

#### (b) Decisions of the Regional Court and the Court of Appeal

12. On an unspecified date in 2007, the applicants sued the radio station in the Hamburg Regional Court for the purpose of anonymising the personal data in files relating to them which had appeared on the website of the Commission. station.

13. By two judgments of 29 February 2008, the Regional Court fulfilled their motion pursuant to Articles 823 § 1 and 1004 (by analogy) of the Civil Code (see "Domestic Law", paragraphs 48-49 below). The court held that that the applicants' interest in no longer being confronted with their act so long after their conviction prevailed over the public interest in being informed of the applicants' involvement in that act.

14. By two judgments of 29 July 2008, the Hamburg Court of Appeal upheld the judgments. It concludes that the provision of this old information had infringed the applicants' personality rights. In that regard, it noted, *inter alia*, that in 2007 the applicants, who were about to be released, could benefit from special protection so that they could no longer face their criminal act in view of the reintegration in the society objective. It stated that they were no longer obliged to accept the making available to the public of these reports as soon as they had been prosecuted and sentenced for this crime, that they had thus been sanctioned by the society and that the public had been sufficiently informed about the case. It added that the interference in the exercise of the right to freedom of expression of the radio station was minimal on the grounds that the dissemination of the disputed information was

not prohibited, but only subject to the condition of not mentioning the names of the applicants.

15. The Court of Appeal stated that the fact that information on the Internet was often made available to users over the long term and that it was visibly old did not change that conclusion. It noted that, for the person requesting anonymity, the recent or old character of the report in which his identity was disclosed made no difference. On the other hand, according to the Court of Appeal, what was decisive in ensuring the reintegration of the person concerned into society was the question of whether the information that mentioned his name was still accessible or not, even if information published on Internet generally had a lower degree of diffusion than information broadcast by television, radio or the press. The Court of Appeal also noted the risk that other persons, such as a neighbour, an employer or co-workers, could identify the names of the applicants and contribute to a further spread of old information on the applicants' involvement in crime, thus jeopardizing their resocialization.

16. The Court of Appeal further stated that the fact that the applicants had turned to the public during the last revision procedure in 2005 - which would have given rise to reports about them and on this procedure - did not change its conclusions on the ground that the parties had acted in a specific context which had ended with the completion of the review procedure. It added that the radio station was also responsible for the interference in the applicants' right and that it could not claim that the disputed information was contained only in digital archives. According to the Court of Appeal, the archived information was accessible in the same way as any other information available on the radio station's website. The Court of Appeal also noted that the obligation to anonymize information would not lead to falsifying the historical truth as soon as it was only a matter of omitting a detail of the report.

17. The Court of Appeal allowed the appeal on points of law.

(c) The judgments of the Federal Court of Justice

18. By two decrees of principle of 15 December 2009, the Federal Court of Justice granted cassation appeals by the radio station (our VIs ZR 227/08 and 228/08), and

it overturned the decisions of the court of appeal. Appeal and the Regional Court. It first observed that the making available of the information at issue constituted an interference with the exercise of the right to the protection of personality (Allgemeines Persönlichkeitsrecht) and the applicants' right to respect for their private life under Articles 1 § 1 and 2 § 1 of the Basic Law as well as Article 8 of the Convention, rights to be weighed against the right to freedom of expression and the freedom of the press as guaranteed by Article 5 § 1 of the Basic Law and Article 10 of the Convention (see "Domestic Law", paragraph 46 below). It specified that, because of its special nature, the scope of the right to the protection of the personality was not defined in advance but that it should be appreciated by putting this right in balance with the divergent interests at stake, and that, in doing so, the judge must take into account the particular circumstances of the case and the rights and freedoms protected by the Convention.

19. For the Federal Court of Justice, the Court of Appeal had not sufficiently taken into account the right to freedom of expression of the radio station and, which was part of the latter's mission, public interest in being informed. Referring to the criteria established in this respect by the Federal Constitutional Court and its own case law, the Federal Court of Justice pointed out, inter alia, that reporting truthful facts could undermine the personality right when the weight of the harm they caused was greater than that of the public interest in knowing the truth, for example when the broadcast was of considerable significance or when the report stigmatized the person concerned and thus had the effect of isolating it socially. [The Court] said reporting on criminal offenses, however, was part of contemporary history, which the media would have been accountable for. In this regard, she said that the more the case came out of ordinary crime, the greater the public interest in being informed. [The Court] added that, in the case of news reporting, the public's interest in being informed generally prevailed over the right of the person concerned to protect his or her personality. According to the Federal Court of Justice, anyone who broke the law and injured others had to expect not only criminal sanctions, but also reports on them in the media.

20. The Federal Court of Justice then stated that, over time, the interest of the person concerned to no longer be liable to his fault gained more weight. According to the Federal Court of Justice, once the perpetrator of a crime has been sentenced and the public has been sufficiently informed, repeated interference with the right to personal protection can no longer be easily justified under the law. Interest of the person to be reintegrated into society. Referring to the case-law of the Federal Constitutional Court and the judgment of the Court in the case of *Österreichischer Rundfunk v. Austria* (no. 35841/02, § 68, 7 December 2006), the Federal Court of Justice pointed out that, even if the offender had served his sentence, he could not claim an absolute right to no longer be confronted with his fault. It stated that the judge was called upon to consider the seriousness of the infringement of the personality right and the offender's interest in resocializing, and that in this regard it was necessary to take into account the manner in which the person concerned was portrayed in the story and, in particular, the degree of dissemination of the story.

21. Applying these principles to the case before it, the Federal Court of Justice found that the applicants' right to the protection of their personality had to give way to the right to freedom of expression of the radio station and to the interests of the public to be informed. It acknowledged that the applicants' interest in being no longer reported in connection with their crime was high since it had been committed long before and that the applicants had been released from prison, the first applicant in August 2007 and the second in January 2008. However, according to the Federal Court of Justice, in the circumstances of the case, the disputed passage in the report of 14 July 2000 did not significantly affect the applicants' personality rights. (erheblich), on the ground that it was not such as to put the applicants 'in the queue for eternity' or to drag them into the limelight (ins Licht der Öffentlichkeit zerren) in a way that would stigmatize them again as criminals.

22. The Federal Court of Justice first noted that the impugned passage truthfully reflected a murder - that of a very popular actor - which had focused the public's attention. [the Court] noted that the passage contained, with restraint and objectivity, the circumstances of the crime, the conviction and the proceedings. According to the



Federal Court of Justice, the passage in question did not stigmatize the applicants as the perpetrators of the crime or the murderers, but stated that the two brothers had been convicted of murder following a six-month criminal trial who had relied entirely on evidence and [who] always protested their guilt, which, in the eyes of the Federal Court of Justice, left the reader with the possibility of thinking that they had been wrongly convicted. According to the Federal Court of Justice, there was no doubt that, on the day the on-line transcript of the report was posted on the radio's website, the identification of the applicants in the radio program was justified. given the seriousness of the crime, the notoriety of the victim, the considerable resonance that the crime had encountered in the public and the fact that the applicants had tried after 2000 to have their conviction annulled, using all available remedies and imaginable (alle denkbaren Rechtsbehelfe).

23. The Federal Court of Justice added that the manner in which the transcription of the report had been posted on the Deutschlandradio portal had resulted in limited distribution. In his view, unlike the prime-time television report, which was the subject of a landmark decision of the Federal Constitutional Court of 5 June 1973 (No. 1 BvR 536/72 - Lebach judgment), the transcript could only be found on the Internet portal by Internet users actively seeking information on the subject in question: it would not have been found on the Internet pages of the radio station devoted to news information likely to jump in the eyes of Internet users, but it should have been searched under the heading 'old information' (Altmeldungen) and would have been marked as such in a clear and visible.

24. The Federal Court of Justice also pointed out that the public had a legitimate interest not only in being informed about current events, but also in researching past events. Thus, according to the Federal Court of Justice, in the exercise of their freedom of expression, the media fulfilled their mission of informing the public and participating in the formation of democratic opinion also when they made available to Internet old information. According to the Federal Court, this was particularly true in the case of the radio station - a legal entity under public law - implicated, the latter's mission including the constitution of archives. The Federal Court of Justice

found that a general prohibition to consult or an obligation to erase any report concerning criminals named in Internet archives would erase history and mislead the author infringement of total immunity in this respect. However, according to the Federal Court, the offender could not avail himself of such a right.

25. The Federal Court of Justice finally noted that a prohibition such as the one sought by the applicants would have deterrent effects on freedom of expression and freedom of the press: if they were prohibited from making available the transcripts of old radio programs whose legality had not been questioned, the media as Deutschlandradio would be better able to assume their mission of information vis-à-vis the public, even though this mission would have been entrusted to them by constitutional law. It stated that the resulting obligation for the radio, namely the regular checking of all its archives, would unduly restrict its freedom of expression and its freedom of the press. Considering the investment in time and personnel that such control would require, the Federal Court of Justice found that there was a real risk that Deutschlandradio would stop archiving its reports or omit to include elements - such as the name of the persons concerned - likely to make these illicit reports later, when the public had a worthy interest of protection to be able to access them.

26. The Federal Court of Justice added that it reached the same conclusion in the light of the principles established by the data protection legislation. In that regard, it observed that the making available of the information at issue was subject to the privilege of the media enshrined in Article 5 § 1, second sentence, of the Basic Law. Consequently, the provision of information on a radio station's Internet page was not subject to obtaining the consent of the person concerned or to an explicit authorization by law. The Federal Court of Justice pointed out that, if they were deprived of the possibility of taking, processing and using personal data without the consent of the person concerned, neither the press nor the radio stations could do their job. journalistic work and were thus unable to perform their duties, recognized and guaranteed by Article 5 § 1 of the Basic Law, Article 10 § 1 of the Convention or Article 11 of the Charter of Fundamental Rights. of the European Union, which

would have included not only the posting of a report, but also the sustainable availability of the report, despite the time elapsed since the first posting of the transcript, namely nine years in this case. [The Court] added that the radio station had put the transcript of the report online exclusively for journalistic purposes and had therefore acted within the framework of the mission entrusted to it by constitutional law, namely public information. and the formation of democratic opinion in exercising its freedom of expression.

d) The decision of the Federal Constitutional Court

27. On 6 July 2010, the Federal Constitutional Court decided not to admit the constitutional complaints lodged by the applicants [...]. The Court stated that it refrained from giving reasons for her decisions (Nos. BvR 535/10 and 547/10).

2. The second procedure

(a) The disputed articles

28. On the Internet portal of the weekly magazine Der Spiegel was a file entitled "W. S. - A Hammer Murder". This file included five articles that appeared between 1991 and 1993 in both the print and the online edition of the magazine. Access to this file was subject to the payment of a certain sum. The articles contained in this file gave a detailed account of the murder of WS, the life of WS, the criminal investigation and the evidence of the prosecution authorities, the holding of the criminal trial and, in this respect, concerning the edition of Spiegel No. 49/1992 of 30 November 1992, certain details of the applicants' lives, mentioning their full names. Thus, it was stated that the second applicant was from a disrupted family (zerrüttet) of six children from a Bavarian village named city, that he had been placed at the age of five in a home, that he had learned what it was to be a homosexual and, above all, how to sell oneself at best. Similarly, the article stated that he had worked as a hairdresser and taxi driver before being hired at a service station whose owner, Mrs. W., a wealthy widow who had remained childless and who was also a friend of WS's mother, adopted him when he was 24 years old. The first applicant, according to the article, was working for a small fee in a brewery run by his half-brother. The article also gave some details, given by the witnesses during

their testimony, including the manner in which the first applicant was seen by his half brother.

29. Two of the articles in this issue (in edition No. 39/1992 of 21 September and No. 49/1992 of 30 November 1992) were accompanied by photographs showing the two applicants in the courtroom of the Criminal Court, and then the first applicant with a prison officer and finally the second applicant with WS.

b) The decisions of the Regional Courts and the Court of Appeal

30. In 2007, on an unspecified date, the applicants lodged an application for legal aid with the Frankfurt Regional Court in order to bring the Der Spiegel magazine to court.

31. On 4 June 2007 the Frankfurt Regional Court dismissed the application on the ground that it was not likely to succeed.

32. The applicants then made a similar application to the Hamburg Regional Court, which granted legal aid.

33. By two judgments of 18 January 2008, the Regional Court of Hamburg granted the applicants' request and ordered the magazine to put an end to the public's access to the litigation file insofar as it showed photographs of applicants and indicated their names.

34. On 29 July 2008, the Hamburg Court of Appeal upheld the judgments of the Regional Court on the same grounds as those set out in its judgments of the same day (see paragraphs 14-16 above). It stated that the applicants had the right to assign the magazine to the regional court before which their application was most likely to succeed.

(c) The judgments of the Federal Court of Justice

35. On 9 February 2010, the Federal Court of Justice granted cassation appeals to Der Spiegel magazine (our VIs ZR 244/08 and 243/08) and dismissed the applicants' claims.

*i. Reasoning on articles*

36. With regard to the press articles contained in the case at issue, the Federal Court of Justice essentially adopted the same reasoning as it had followed in its judgments

of 15 December 2009 (see paragraphs 18-26 above). With regard to the content of the articles in question, [the Court] stated that, contrary to what the applicants claimed, they did not classify them as murderers in a highly touted manner, but they indicated that they were accused of murder and that they had been sentenced on that account; it added that the articles at issue set out the applicants' attitude to the facts alleged against them and referred to circumstances which had not been clarified, which, in the view of the Federal Court of Justice, left to the readers the possibility that the applicants had been wrongly convicted. With regard to the degree of dissemination of the reports, [the Court] pointed out that the consultation of the litigation file paid off, which further restricted accessibility. [the Court] pointed out that the offender had no right to a general ban on viewing a report about criminals by name or an obligation to delete such reports. [the Court] added that this was especially true when it was a serious capital crime that had attracted special public attention.

*ii. Reasoning about photos*

37. With regard to the photographs in question, the Federal Court of Justice recalled that it had developed a concept of staggered protection (*abgestuftes Schutzkonzept*) from Articles 22 and 23 of the Copyright Act [...], to which it had provided clarifications following the judgment of the Court *Von Hannover c. 59320/00*, ECHR 2004 VI), in response to the reservations of principle that the Court had expressed therein. It recalled that, according to this concept of protection, the publication of images of a person who, by reason of its importance in contemporary history, should in principle tolerate the distribution of photographs representing him (Article 23 § 1 no. 1 of the Copyright Act) was nevertheless unlawful if the legitimate interests of that person were affected (Article 23 § 2 of the same Law). [The Court] finally recalled that there could be no exception to the obligation to obtain the agreement of the person only when it was a report on an important event in contemporary history (*Von Hannover c Germany (No. 2) [GC]*, Nos. 40660/08 and 60641/08, §§ 29-35, ECHR 2012).

38. Applying these criteria to the case submitted to it, the Federal Court of Justice noted that the photographs showed the applicants in the box of the accused in the courtroom of the Regional Court, then the first applicant in the company of a prison officer and the second applicant in the company of WS She considered that they came to illustrate the articles and to emphasize the authenticity of the reports, and that, since they had been taken in the context of the event being reported on - namely the criminal proceedings, a circumstance which generally made their publication lawful - they did not affect the applicants more than a photograph showing their profile and taken in a neutral context. She observed that the photographs in question did not present the applicants in an unfavorable way, that they did not touch their private sphere and that their dissemination did not put the applicants "forever in the name of" or did not present them in the eyes of the public in a way that stigmatized them again as criminals. [the Court] added that the photos, which dated back to 1992 and which only showed the appearance of the applicants at that time, accompanied articles that were clearly designated as old reports of limited scope. It concludes that, having regard to all the circumstances of the case, the applicants had no legitimate interest, within the meaning of Article 23 § 2 of the Copyright Act, to prohibit publication contentious photos.

d) The decision of the Federal Constitutional Court

39. On 6 July 2010, the Federal Constitutional Court decided not to admit the constitutional complaints lodged by the applicants, not to grant them legal aid and not to commit them to legal counsel. The Court refrained from giving reasons for its decisions (Nos. BvR 924/10 and 923/10).

3. The third procedure

40. In 2007, on an unspecified date, the applicants lodged an application against the newspaper Mannheimer Morgen to the Hamburg Regional Court. On the Internet portal of the daily newspaper ([www.morgenweb.de](http://www.morgenweb.de)), in the 'Less recent information' section, there was until 2007 an information dating back to May 22, 2001. This section could only be accessed by people with a special access rights such as daily subscribers and buyers of certain other printed media. All Internet users,

however, had access to a teaser that indicated the subject of the texts available in the section. The catchphrase that referred to the May 22, 2001, information contained the full names of the applicants and was worded as follows:

*‘The proceedings against the two convicted assassins of the very popular actor W.S. will not be reopened for the time being. The Augsburg Regional Court rejected a request for revision of the brothers W.W. and M.L. They would appeal this decision to the Munich Court of Appeal.’*

41. By two judgments of 16 November 2007, the Regional Court satisfied the applicants' request.

42. On 19 August 2008, the Hamburg Court of Appeal upheld these judgments on the same grounds as those set out in its judgments of 29 July 2008 (see paragraphs 14-16 above).

43. On 20 April 2010, the Federal Court of Justice granted cassation appeals by the newspaper (our VIs ZR 245/08 and 246/08) and dismissed the applicants' applications on the same grounds as those set out in its judgments of 9 February 2010 (see paragraphs 35-36 above).

44. On 23 June 2010, the Federal Constitutional Court decided not to admit the constitutional complaints lodged by the applicants, not to grant them legal aid and not to commit them to legal counsel. The Court stated that it refrained from giving reasons for its decisions (1 BvR 1316/10 and 1315/10).

4. Other proceedings initiated by the applicants

45. The Federal Court of Justice has subsequently confirmed its case-law in other proceedings initiated by the applicants (our VIs ZR 345/09 and 347/09, 1 February 2011, our VIs VIs 114/09 and 115/09, 22 February 2011, and No. VI ZR 217/08, 8 May 2012 concerning the second applicant). In a judgment of 22 February 2011 concerning the second applicant and concerning an article in the daily Frankfurter Allgemeine Zeitung of 14 January 2005, the Federal Court of Justice observed that, according to the findings of the Regional Court, the applicant had been sent in August and November 2004 to the daily Süddeutsche Zeitung and invited it to continue reporting on it. The newspaper had responded to the request by publishing an article

(including text and photos) on the second applicant. The Federal Court of Justice concluded that, in the light of these circumstances, the public's interest in being fully informed (umfassend) of the crime had not diminished or at least had resumed in the summer 2004, which would also have been demonstrated by the many reports on the subject that were found until June 2006 on the web page of the second applicant's criminal lawyer. Therefore, according to the Federal Court of Justice, the applicant was at this time a public focus and had not been unlawfully dragged into the limelight by the publication of the article (No. VI ZR 346/09).

## **LAW**

### **I. ON THE JOINING OF REQUESTS**

64. In view of the similarity of the present complaints with respect to the facts and the substantive issues they raise, the Court considers it appropriate to join them, pursuant to Rule 42 § 1 of the Rules of Court.

### **II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

65. The applicants complained of the refusal of the Federal Court of Justice to prohibit the media from keeping, on their Internet portal, at the disposal of Internet users, the transcription of the broadcast of the radio station Deutschlandfunk broadcast on the facts and the reports published in the old editions of Spiegel or Mannheimer Morgen respectively concerning the applicants' criminal trial and their conviction for murder at the end of this criminal trial. They allege a violation of their right to respect for private life as provided for in Article 8 of the Convention, the relevant part of which reads as follows:

*‘1. Everyone has the right to respect for his private and family life (...)  
2. There shall be interference by a public authority in the exercise of this right only insofar as such interference is provided for by law and constitutes a measure which, in a democratic society, is necessary (... ) the protection of the rights and freedoms of others’*

66. The Government objects.

#### **A. Admissibility**



67. Noting that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they do not face any other ground of inadmissibility, the Court declares them admissible.

## **B. Merits**

1. The observations of the parties

### a) The applicants

68. The applicants complained of having been confronted again with their crime when, following their conviction dating back more than 15 years, they had served their sentence and prepared for their reintegration into society. They believe that the fact that Internet users have access to their archives has the effect of stigmatizing them again. In this regard, they consider that, as long as an article on the sentencing of a person, pronounced years ago, is available on an Internet portal, it will be read in the same way by a neighbor or an employer, was written recently or at the time of the conviction. In both cases, the person concerned would be marked with the seal of murderer.

69. In addition, the applicants criticize the Federal Court of Justice for having disregarded the dangers specific to the Internet era, and they refer to its reference to the 1973 judgment of the Federal Constitutional Court in Lebach. They argue that the report in question in the Lebach case had unquestionably reached an important degree of dissemination when it was presented on one of the three public channels existing at that time. However, according to the applicants, a television program is forgotten after a certain period of time, while search engines on the Internet would at any time be able to obtain information, free of charge, quickly and everywhere from anywhere in the world. precise event. Dissemination on the Internet would therefore be regarded as a lasting violation of the right to respect for private life.

70. The applicants fear that they will never be able to erase the seal of the murderer they have been marked and to see any new social ties made worse by the information - relative to the past but always accessible - about their conviction. They point out that one cannot, as the Federal Court of Justice and the Government would have done, waved the red rag of erasure of history when it comes to nothing more,

according to the applicants, to ask to anonymize the persons mentioned in a report on a given event. They add in this respect that they do not specifically intend to be part of contemporary history.

71. Moreover, the applicants refute the argument of the Federal Court of Justice and the Government that the obligation to check all its archives regularly would unduly restrict the freedom of expression of the press. They consider that their request is not intended to oblige the media systematically to check all their archives at regular intervals, but to do so only in case of express request for anonymity formulated by the person targeted by a report. They argue that such a duty of verification also exists in other areas and that the costs of the application in question could be borne by the plaintiff in order to reduce any potential deterrent effect on the press. Moreover, according to the applicants, the concept of 'deterrent effect' referred to by the Federal Court of Justice does not apply when two freedoms guaranteed by the Convention conflict.

72. In addition, the applicants are of the opinion that the interest of the media in broadcasting the reports in question is low. They wonder whether, twenty years after their conviction, there was still a particular public interest in being informed about the event in question. They believe that this interest would be satisfied in the same way if they were rendered anonymous in the reports, which would require, in their words, only a minimal technical intervention.

73. In response to the Government's comments, the complainants maintain that search engines do not regularly make copies of the content of the Internet, which would keep all information unlimited, but only provide for caching mechanisms which save and keep available certain contents for a certain duration. Finally, they point out that even if 100% anonymisation is not possible, it is not a question of giving up all kinds of anonymisation. They believe that, on the contrary, the media now available from the Internet archives should be obliged to do everything in their power to limit the dissemination of information whose anonymization has been requested.

74. The applicants further submit that the exhaustion of all the remedies available under German law with a view to obtaining the reopening of their criminal proceedings does not deprive them of the right to respect for their private life.

(b) The Government

75. The Government stresses the importance of the role of digital archives for collective memory in that they would contribute to documenting contemporary history by preserving their printed material and information published only in digital versions. The government believes that imposing a permanent obligation on the media to control their digital archives to anonymise reports would be an excessive interference. The government states that, contrary to the applicants' contention, such an obligation would require the media to make considerable efforts in terms of both personnel and technical resources, all the more so since the quantity of digital archives would be constantly increasing.

76. In this regard, the Government states that the introduction of an automatic deletion or anonymisation of reports after a certain period of time would not solve the problem raised by the present complaints. Indeed, the government considers that the answer to the question of whether, in the name of the right to the protection of personality, a given report should be made anonymous would depend on a number of specific circumstances specific to each report and the intensity of the interference in the competing rights at stake. The government added that such an examination could only be done by qualified and competent persons to carry out the necessary balancing.

77. The Government further contends that to accept such requests would not only result in a rewriting of history, as the Advocate General also pointed out in his conclusions in the Google Spain case, but would also include the risk that, given the necessary technical and human investment, the media could be forced to restrict the use of digital archives, or even to abandon them, and the publication of individualized reports concerning the right to the protection of the personality targeted persons.

78. The Government also wishes to draw attention to the fact that States are confronted with rapid technical developments in all areas of the Internet and that, in the absence of a common European standard, they enjoy wide discretion to regulate the legal issues raised. A right to be forgotten would not be guaranteed as such. Directive 95/46 / EC and the Federal Data Protection Act (which transformed this Directive) only provide for the conditions under which personal data must be erased.

79. In response to the applicants' observations, the Government states that, while the search for information or a name in the digital archive is very easy and fast, it is primarily due to the existence of search engines. The government added that without them, research would be as tedious as it thought 'classic' research before the Internet age and that it would pose fewer fundamental rights problems. The government recalled that, once published on the Internet, information could always be found even if it was erased from the website that originally posted it online. According to the Government, at regular intervals, search engines copy Internet content and save it on their servers. As a result, people targeted by a publication on the Internet would be obliged to address a multitude of actors to obtain the deletion of a publication or their name from a given publication.

80. The Government considers that the Federal Court of Justice has weighed the competing interests at stake in accordance with the criteria established by the case-law of the Court. It states that, while recognizing the applicants' interest in social reintegration, the Federal Court of Justice held that the reports at issue gave truthful and objective information concerning a capital event, namely the murder of a popular actor. The Government points out that, still for the Federal Court of Justice, the reports, despite their location on the Internet, had a limited circulation. Indeed, the reports would have been clearly marked visually as being old reports and would have been identifiable only by people seeking them in a targeted way, and nothing would have been done to draw the readers' attention to them. In addition, access to articles in Spiegel's online archive would have paid off. The Government adds that the applicants did not adduce any evidence to assess the ease with which the reports

could be found and in which position they appeared for example on a search list on Google.

81. Lastly, the Government considers that it was the applicants themselves who, thirteen years after the crime and ten years after their conviction, aroused renewed public interest by filing applications for the reopening of their criminal proceedings and, above all, by taking the initiative to send documents to the press, particularly with regard to requests to reopen their trial, until 2004. In particular, the Government states that in a letter dated 31 August 2004 to the weekly *Der Spiegel*, the first applicant expressly requested that the press inform the public. For the Government, therefore, the media had no reason to believe that the applicants wanted to have anything to do with the press as they approached their release.

82. With regard to photos, the Government submitted that the balancing exercise carried out by the Federal Court of Justice was also in line with the Convention and the Court's case-law. The Government argues in this respect that the photographs showed the applicants in the courtroom of the criminal court or in the company of WS or a prison officer and that they therefore had a direct link with the subject-matter of the disputed articles, namely, the criminal trial, and, finally, that they brought the contemporary historical truth in a neutral and objective manner.

## 2. Comments from third parties

83. Third parties indicate that the right to publish whole names is an integral part of the media's freedom of expression and that it allows them to fulfil their task of informing the public on any matter of interest. public. They also emphasize the importance for the press of being able to build digital archives, which would have largely replaced the classical archives and would be almost the only source for contemporary history research. They add that the accuracy of archives is crucial for historical documentation, collective memory and public debate.

84. The third parties also insist that it would be impossible for them to examine permanently their archived material for possible illicit or illicit content. The obligation to perform such a task would be beyond their means and would be suspended above them like a sword of Damocles. For example, the *Spiegel* online

archives contain about one million documents and about 1,500 new documents are added each week; the archives of Deutschlandradio, they, grow daily of 220 audio files and 85 text files.

85. Finally, the third parties point out that the publications at issue in the present cases can no longer be found on the Internet using search engines. They specify that, although two articles published by Spiegel online can still be found when the search is made from the name of the murdered actor, the names of the applicants do not appear however in full. They add that, for the most part, the research results obtained relate more to procedural aspects than the crime itself, including reports on requests for anonymity of published articles. Finally, in view of their statistical research, they consider that the interest of Internet users for the disputed articles remained insignificant.

### 3. The Court's assessment

#### a) The general principles

86. The Court reiterates that the concept of 'private life' is a broad notion, not susceptible of exhaustive definition, which covers the physical and moral integrity of the person and may therefore encompass multiple aspects of the identity of the person, such as identification and sexual orientation, name, or elements related to the right to the image. This concept includes personal information that an individual may legitimately expect to be published without his or her consent (Flinkkilä and others v. Finland, No. 25576/04, § 75, 6 April 2010, and Saaristo and Others v. Finland, No. 184/06, § 61, October 12, 2010).

87. The Court also recalls that privacy considerations come into play in situations where information has been collected about a particular person, where personal data has been processed or used and where the material has been made public in a manner or to a degree that exceeds what the parties could reasonably expect. It recognized that the protection of personal data plays a fundamental role in the exercise of the right to respect for private and family life enshrined in Article 8 of the Convention (Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC ], No. 931/13, § 136, ECHR 2017 (excerpts)). In that judgment the Court further held that Article 8

of the Convention enshrines the right to a form of informational self-determination, which entitles individuals to invoke their right to privacy with respect to data which, although neutral, are collected, processed and disseminated to the community, according to forms or modalities such that their rights under Article 8 may be at stake (*ibid.*, § 137).

88. However, in order for Article 8 to be taken into account, the attack on personal reputation must reach a certain level of seriousness and have been carried out in such a way as to prejudice the personal enjoyment of the right to respect for private life. Similarly, that provision cannot be relied upon to complain of an injury to his reputation which would result in a foreseeable manner from his own actions, such as a criminal offense (*Axel Springer AG v. Germany* [GC], No. 39954/08, § 83, February 7, 2012).

89. The Court notes that applications such as those in this case call for an examination of the proper balance to be struck between the applicants' right to respect for their private lives, guaranteed by Article 8 of the Convention, and freedom of expression of the radio station and publishing houses and the freedom of information of the public, guaranteed by Article 10 of the Convention. In this examination, the Court must, in particular, have regard to the positive obligations incumbent upon the State under Article 8 of the Convention (*X and Y v. The Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Von Hannover (No. 2)* [GC], cited above, § 98) and the principles it has established in its consistent jurisprudence on the essential role that the press plays in a democratic society and which includes the drafting of minutes and comments on court proceedings. It cannot be said that the issues before the courts cannot, before or at the same time, be discussed elsewhere, whether in specialized journals, in the press or in the general public. The role of the media in communicating such information and ideas is complemented by the right of the public to receive it. If it were otherwise, the press could not play its indispensable role as a watchdog (*Axel Springer AG*, cited above, §§ 79-81). Moreover, it is not for the Court, nor indeed for the domestic courts, to substitute for the press in the choice of the mode of reporting to be adopted in a given case (*Jersild*

v. Denmark, 23 September 1994, § 31, Series A No. 298, and *Mosley v. The United Kingdom*, No. 48009/08, § 113, May 10, 2011).

90. In addition to this primary role of the press, there is an ancillary, but nevertheless important, function of building up archives from already published information and making them available to the public. In this respect, the Court recalls that the provision of archives on the Internet contributes greatly to the preservation and accessibility of news and information. Digital archives are indeed a valuable source for teaching and historical research, especially in that they are immediately accessible to the public and generally free of charge (*Times Newspapers Ltd v. The United Kingdom* (nos 1 and 2), our 3002 / 03 and 23676/03, §§ 27 and 45, ECHR 2009, and *Węgrzynowski and Smolczewski v. Poland*, No. 33846/07, § 59, 16 July 2013, see also Recommendation Rec (2000) 13 of the Committee of Ministers - paragraph 54 above).

91. The Court also considers it useful to recall in this context that websites are information and communication tools which are particularly distinguished from the written press, in particular as regards their capacity to store and disseminate information, and that online communications and their content are much more likely than the press to undermine the exercise and enjoyment of fundamental rights and freedoms, in particular the right to respect for private life (*Delfi AS v. Estonia* [GC], No. 64569/09, § 133, ECHR 2015, *Drafting Committee of Pravoye Delo and Shtekel v. Ukraine*, No. 33014/05, § 63, ECHR 2011 (extracts), and *Cicad v. Switzerland*, No. 17676/09, § 59, June 7, 2016), especially because of the important role played by search engines.

92. The choice of measures to ensure compliance with article 8 of the Convention in interindividual relations is, in principle, within the Contracting States' margin of appreciation, whether the obligations of the State are positive or negative. This margin is in principle the same as that available to States under Article 10 of the Convention in assessing the necessity and extent of an interference with the freedom of expression protected by that article (*Von Hannover* (no 2), cited above, § 106,



Axel Springer AG, cited above, § 87, and Couderc and Hachette Filipacchi Associés v. France [GC], No. 40454/07, § 91, ECHR 2015 (excerpts)).

93. However, the margin of appreciation goes hand in hand with European supervision of both the law and the decisions that apply to it, even when they come from an independent court. In the exercise of its power of review, the Court's task is not to take the place of national courts, but it is incumbent upon it to ascertain, in the light of the case as a whole, whether the decisions have made their discretion consistent with the provisions relied on in the Convention (Von Hannover (no. 2), cited above, § 105, and Axel Springer AG, cited above, § 86).

94. If the balancing by the national authorities was done in accordance with the criteria established by the case-law of the Court, there must be serious reasons for it to substitute its opinion for that of the domestic courts (MGN Limited v United Kingdom, No. 39401/04, §§ 150 and 155, January 18, 2011, and Bédat v. Switzerland [GC], No. 56925/08, § 54, ECHR 2016). In other words, the Court generally recognizes that the State has a wide margin of appreciation when it must strike a balance between private interests or different rights protected by the Convention (Delfi AS, cited above, § 139, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, No. 22947/13, § 59, February 2, 2016, and Fürst-Pfeifer v. Austria, Nos. 33677/10 and 52340/10, § 40, May 17, 2016).

95. The Court has already had the opportunity to set out the relevant principles which should guide its assessment - and, above all, that of the domestic courts - of necessity. It has thus laid down a number of criteria in the context of balancing the rights at stake. The relevant criteria that have hitherto been defined in this way are the contribution to a debate of general interest, the notoriety of the person concerned, the object of the report, the previous behavior of the person concerned, the content, the form and the repercussions of the publication, as well as, where appropriate, the circumstances of taking the photographs (Satakunnan Markkinapörssi Oy and Satamedia Oy, cited above, § 165, and the references cited therein).

96. The Court considers that the criteria thus defined can be transposed to the present case, even if some of them may be more or less relevant in the particular

circumstances of the case (ibid., § 166; 45791/13, § 55, 20 March 2018, Axel Springer and RTL Television GmbH v. Germany, No. 51405/12, § 42, 21 September 2017).

b) Application of these principles to this case

97. The Court notes first of all that it is above all because of the search engines that information on applicants made available by the media concerned can easily be identified by Internet users. Nevertheless, the initial interference with the applicants' exercise of their right to respect for private life results from the decision of the media concerned to publish this information and, above all, to keep it available on their websites. even if it is not intended to attract public attention, search engines only amplify the scope of the interference in question. That being said, because of this amplifying effect on the degree of dissemination of information and the nature of the activity in which the publication of information about the data subject occurs, the search engine's obligations towards the person concerned by the information may be different from those of the publisher at the origin of the information. Therefore, balancing the interests at stake may lead to different results depending on whether there is a demand for deletion directed against the original publisher of the information whose activity is generally at the heart of what the freedom of expression intends to protect, or against a search engine whose main interest is not to publish the initial information on the person concerned, but in particular to allow, on the one hand, to identify any information available on this person and, on the other hand, to establish a profile of this person (in this respect see also the CJEU judgment of 13 May 2014, number C-131/12, - paragraphs 59-62). above).

*i. Contribution to a debate of general interest*

98. With regard to the question of the existence of a debate of general interest, the Court observes that the Federal Court of Justice noted the considerable interest that the crime and the criminal trial had aroused at the time in the seriousness of the facts and the notoriety of the victim, and noted that the applicants had tried beyond 2000 to obtain the reopening of their trial. The High Court also emphasized the truthful and objective nature of the reports. The Court can subscribe to this analysis since the

public has in principle an interest in being informed about criminal proceedings and able to obtain information in this respect, especially when they relate to a particularly serious judicial considerable attention (see, for example, *Schweizerische Radio und Fernsehgesellschaft SRG v. Switzerland*, No. 34124/06, § 56, 21 June 2012, and *Egeland and Hanseid v. Norway*, No. 34438/04, § 58, April 16, 2009) . This does not only concern reports published during the criminal trial in question but may also include, depending on the circumstances of the case, reports reporting a request to reopen this trial a few years after the conviction.

99. The Court notes that the present complaints are unique in that it is not the lawfulness of the reports when they are first published or made available on the Internet portals of the media concerned that the applicants question, but the possibility of access to these reports long afterwards and, in particular, as the expected date of their release from prison approaches. It must therefore examine the question of whether the making available of the contentious reports continued to contribute to a debate of general interest.

100. The Court recalls that, after the lapse of a certain period of time and in particular when a sentenced person is about to leave prison, the interest of that person is not to be confronted with his or her act with a view to its reinstatement in society (*Österreichischer Rundfunk v. Austria*, no 35841/02, § 68, December 7, 2006, and *Österreichischer Rundfunk*, cited above, see also, *mutatis mutandis*, *Segerstedt-Wiberg and Others v. Sweden*, No. 62332 / 00, §§ 90-91, ECHR 2006-VII). This may be all the more true after the final release of a convicted person. Similarly, the extent of the public interest in criminal proceedings varies, since it may change during the proceedings depending, *inter alia*, on the circumstances of the case (*Axel Springer AG*, cited above, § 96).

101. Returning to the present case, the Court observes that the Federal Court of Justice, while recognizing the applicants' high interest in no longer facing their conviction, pointed out that the public had an interest not only in being informed about news event, but also to be able to research past events. The Federal Court also

recalled that the media's mission was to participate in the formation of democratic opinion by making available to the public old information stored in their archives.

102. The Court fully agrees with this conclusion. It has indeed ceased to emphasize the essential role played by the press in a democratic society (*Sunday Times v. The United Kingdom* (No. 1), 26 April 1979, § 65, Series A No. 30), and also by through its Internet sites and through the creation of digital archives that greatly contribute to improving public access to information and its dissemination (*Times Newspapers Ltd* (nos. 1 and 2), cited above, § 27, and *Węgrzynowski and Smolczewski*, cited above, § 65). Moreover, according to the case law of the Court, the legitimate interest of the public to access public electronic press archives is protected by Article 10 of the Convention (*ibid.*). And any measure limiting access to information which the public is entitled to receive must be justified by particularly compelling reasons (*Timpul Info-Magazin and Anghel v. Moldova*, No. 42864/05, § 31, 27 November 2007, and *Times Newspapers Ltd* (nos. ), cited above, § 41).

103. In this context, the Court observes that the Federal Court pointed out the risk of a deterrent effect on the freedom of expression of the press in the event of reception of applications such as that of the applicants, in particular the risk of that the media, for lack of sufficient staff and time to consider such requests, be led to no longer include in their reports of identifying elements likely to become later illicit.

104. The Court notes that the applicants do not request that the media systematically and permanently check their archives, but that they carry out such verification only in the case of an express individual request. That being said, it cannot rule out the existence of the risk to the press referred to by the Federal Court. Indeed, the obligation to examine at a later stage the lawfulness of a report following a request from the person concerned, which implies, as the Government has rightly pointed out, a balancing of the all the interests at stake, would involve the risk that the press refrain from keeping reports in its online archives or that it omits individualized elements in reports likely to be the subject of such a request. While recognizing the importance of the rights of a person who has been published on the Internet, these rights must also be weighed against the public's right to learn about past and future

events. contemporary history, especially with the help of the digital archives of the press. In this respect, the Court recalls that it must exercise the utmost caution when examining, under Article 10 of the Convention, measures or sanctions imposed on the press which are deter it from participating in the discussion of problems of legitimate public interest (*Bladet Tromsø and Stensaas v. Norway* [GC], No. 21980/93, § 64, ECHR 1999-III, and *Times Newspapers Ltd* (nos. 1 and 2), cited above, § 41).

105. In so far as the applicants underline that they do not request that the reports in question be deleted, but only that their names no longer appear, the Court notes that the anonymisation of a report is certainly a less intrusive measure to freedom of expression. expression of the entire report (see, *mutatis mutandis*, *Times Newspapers Ltd* (nos. 1 and 2), cited above, § 47). It recalls, however, that the manner of dealing with a subject is a matter of journalistic freedom and that Article 10 of the Convention leaves it to the journalists to decide which details should be published to ensure the credibility of a publication provided that the choices they operate in this respect on the basis of the rules of ethics and professional conduct of their profession (*Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 186). The Court agrees with the third-party media that the inclusion in a report of individualized elements, such as the full name of the person concerned, is an important aspect of the work of the press (*Fuchsman v. Germany*, no. 71233/13, § 37, 19 October 2017), and even more so in the case of reports on criminal proceedings which have aroused considerable interest. It concludes that, in the present case, the availability of the contentious reports on the media websites at the time of the submission of the applicants' applications always contributed to a debate of general interest that the passage of a period of time from a few years did not disappear.

*ii. Notoriety of the person concerned and the object of the report*

106. As regards the applicants' notoriety, the Court notes that the German courts have not made an explicit decision on the subject. It observes, however, that the reputation of the persons concerned was closely linked to the commission by them

of the murder and to the subsequent criminal trial. Therefore, while there appears to be no evidence that the applicants were known to the public before their crime, they nevertheless gained notoriety during the trial, which, according to the findings of the civil courts, attracted considerable attention from the court. public opinion because of the nature and circumstances of the crime and the celebrity of the victim. If, subsequently and with the passage of time, the public interest in the crime and hence the notoriety of the applicants has declined, the Court observes that the applicants experienced a rise in notoriety after having tried several times to obtain the reopening of their criminal trial and after having addressed the press on this subject. The Court concludes that the applicants were not mere private persons unknown to the public at the time of the introduction of their requests for anonymity.

107. With regard to the subject matter of the reports, the Court notes that these related either to the holding of the criminal trial at the time, or to one of the applicants' requests for the reopening of the trial, as much elements likely to contribute to a debate in a democratic society. It refers in this respect to its conclusions (see paragraph 111 below).

*iii. The prior conduct of the person in respect of the media*

108. With regard to the applicants' conduct since their conviction, the Court observes, as noted by the Federal Court, that the applicants have brought all the 'possible and imaginable' judicial remedies for the reopening of their proceedings. criminal. Moreover, as the Government pointed out, during their last request for review in 2004, that is to say two and a half and three years respectively before their release, the applicants turned to the press, to which they transmitted a number of documents partly related to their request for revision, while inviting him to keep the public informed. Furthermore, it is also interesting to note that, as stated by the Federal Court of Justice in its judgment of 22 February 2011 concerning the second applicant (see paragraph 45 above), it could be found that until 2006, on the website of the criminal lawyer of the second applicant, many reports on his client.

109. In this context, while it cannot be said that a convicted person - who, moreover, protests his innocence - to use the judicial remedies available under domestic law to

challenge his conviction, the Court notes that the applicants went far beyond the mere use of the remedies available in German criminal law. In particular, because of their behavior, particularly with regard to the press, the applicants' interest in no longer being confronted with their conviction by means of archived information on the Internet portals of a certain number of media was less important. importance in this case. The Court concludes that the applicants, even at the approach of their release, therefore had only a limited legitimate expectation (see, *mutatis mutandis*, *Axel Springer AG*, cited above, § 101) to discount the anonymisation of reports, even a right to digital oblivion.

*iv. The content, form and impact of the publication*

110. The Court reiterates that the way in which the report or photo is published and whose person is presented to it may also be taken into account. Similarly, the extent of dissemination of the report or photo may also be important, depending on whether it is a national or local newspaper, large or small (*Von Hannover* (no. ), cited above, § 112, and the references cited therein).

111. With regard to the purpose, content and form of the cases at issue, the Court considers that the manner in which the Federal Court of Justice has enjoyed reports by *Deutschlandradio* and *Annheimer Morgen* can not be open to criticism. These are texts that have been written by the media in the exercise of their freedom of expression, which objectively relate a court decision and whose truthfulness and lawfulness origin have no have been challenged (see, conversely, *Węgrzynowski and Smolczewski*, cited above, § 60). As regards the *Spiegel* online case, the Court accepts that certain articles, in particular that published in the 30 November 1992 edition (see paragraph 28 above), may give rise to questions because of the nature of the information given. That said, it observes that the details of the lives of the accused reported by the author are part of the information that a criminal judge must regularly consider in assessing the circumstances of the crime and the individual elements of guilt, and which, as a rule, are debated during public hearings. Moreover, these articles do not reflect an intention to present the applicants in a deprecatory manner or to damage their reputation (*Lillo Stenberg and Sæther v. Norway*, No.

13258/09, § 41, January 16, 2014, and *Sihler-Jauch and Jauch v. Germany* (dec.), Nos. 68273/10 and 34194/11, § 38, May 24, 2016).

112. As regards the degree of dissemination of the publications at issue, the Court notes that the Federal Court held that, unlike a television broadcast at prime time, the information at issue had limited circulation. because of their limited accessibility and their location not on the pages devoted to news on the Internet portals of the media concerned, but in sections clearly indicating that they were old reports. The applicants contest this reasoning and criticize the Federal Court of Justice in particular for having ignored the realities of the Internet era and for having underestimated the dangers linked to the durability of the information contained on this medium, notably due to the existence of powerful and effective search engines.

113. The Court observes that, because of their location on the Internet portals, the contentious reports were not likely to attract the attention of those Internet users who were not looking for information on the applicants (see, a contrario and mutatis mutandis, *Raelian Movement v. Switzerland* [GC], No. 16354/06, § 69, ECHR 2012). Similarly, the Court sees no evidence that continued access to these reports was intended to propagate information about the applicants again. To that extent, the Court may follow the findings of the Federal Court of Justice that the degree of dissemination of the reports was limited (Fuchsmann, cited above, § 52), especially since some of the information was subject to additional restrictions (paid access in the case of *Spiegel online* or subscribed to subscribers in the case of *Mannheimer Morgen*).

14. To the extent that the applicants argue that this method of measuring the degree of diffusion does not take into account the ubiquitous and ubiquitous nature of the Internet and, hence, the possibility, irrespective of the degree of initial diffusion, of finding information about the Court, while being aware of the sustainable accessibility of any information once published on the Internet, notes that the applicants have not made known the attempts they would have made contact with operators of search engines to reduce the detectability of information about their persons (Fuchsmann, cited above, § 53, and *Phil v. Sweden* (dec.), No. 74742/14,



February 7, 2017). Moreover, the Court considers that it is not called upon to rule on the possibility, for the domestic courts, of ordering measures less detrimental to the freedom of expression of the media in question who have not done so. the subject of a hearing before them during the domestic proceedings or, moreover, during the proceedings before the Court.

*v. The circumstances of taking photos*

115. Lastly, with regard to the photographs in question (see paragraphs 37-38 above), the Court notes that neither the applicants nor the civil courts have decided on the circumstances of their taking. However, it does not see any compromising elements in these photographs and observes, as the Federal Court of Justice has rightly pointed out, that the images showed the applicants in their appearance in 1994, thirteen years before their release, which decreases the likelihood of being recognized by third parties on the basis of photos.

**Conclusion**

116. Given the margin of appreciation of the national authorities in this regard when balancing competing interests, the importance of keeping reports available whose lawfulness when they are published is not disputed and the behavior Applicants to the press, the Court considers that there are no serious reasons why it should substitute its opinion for that of the Federal Court of Justice. It can not therefore be said that, in refusing to comply with the applicants 'claim, the Federal Court failed to fulfil the positive obligations of the German State to protect the applicants' right to respect for their private life within the meaning of Article 8 of the Convention. Accordingly, there has been no violation of this provision.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. Decides to join the applications;
2. Declare the applicants admissible;
3. Holds that there has been no violation of Article 8 of the Convention.

Done in French, then notified in writing on 28 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

## Annex 2



**Resource:** [abcnews.go.com/Technology/12-year-sentenced-washington-cyberstalking-case/story?id=14072315](https://abcnews.go.com/Technology/12-year-sentenced-washington-cyberstalking-case/story?id=14072315)

**Description:** a publication does not reveal the identity of the offender either through a photo or through other personal data. This prevents future tracing of the wrongdoing of then minor. The criminal data are, likewise, expunged by the state.

### Minor on scooter kills 18-month-old

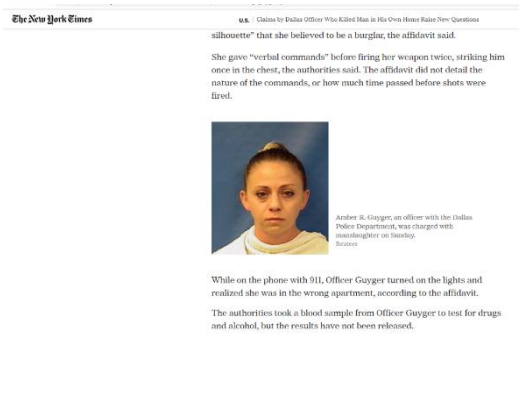
TNN | Updated: Nov 30, 2018, 01:03 IST



NEW DELHI: A 15-year-old boy hit and killed an 18-month-old child with his mini scooter in northeast Delhi's Khajuri Khas on Thursday evening. The victim was playing outside his house when the accident happened.

**Resource:** [timesofindia.indiatimes.com/city/delhi/minor-on-scooter-kills-18-month-old/articleshow/66872583.cms](https://timesofindia.indiatimes.com/city/delhi/minor-on-scooter-kills-18-month-old/articleshow/66872583.cms)

**Description:** the purpose of a publication is to show the consequences of reckless driving, not to stigmatise a minor. A publication does not reveal the identity of the offender either through a photo or through other personal data. This prevents future tracing of the wrongdoing of then minor.



**Resource:** <https://www.nytimes.com/2018/09/24/us/amber-guyger-fired-botham-jean.html>

**Description:** a notorious murder of a neighbour by an off-duty police officer. A great public interest to policemen acting *ultra vires* determines the scope of a personal data in a publication.



**Resource:** <https://www.bbc.com/news/uk-england-birmingham-46511617>

**Description:** a notorious murder, but involving a minor, who is a suspect in the case at hand. Despite a public interest, the law limits such disclosures. The media follows such standards.

A 16-year-old boy accused of the rape and murder of a 14-year-old girl will not give evidence in his defence, his lawyer has said.

The boy, who cannot be named, denies murdering Viktorija Sokolova at West Park, Wolverhampton, in April.

The jury at Wolverhampton Crown Court were told earlier to draw "such inferences