European Court of Human Rights: M.L. and W.W. v. Germany

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Since the judgment by the Court of Justice of the European Union (CJEU) in the case of Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (see IRIS 2014-6/3), and the explicit recognition in Article 17 of the General Data Protection Regulation (2016/679) of the right to erasure ("the right to be forgotten - see IRIS 2018-6/7), the European Court of Human Rights (ECtHR) has introduced and applied important principles with regard to the "right to be forgotten" with respect to both Article 8 (the right to respect for private life) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights (ECHR). In its judgment of 28 June 2018, the ECtHR dismissed a "right to be forgotten" application under Article 8 in respect of online information published on German media portals concerning the conviction for murder of two persons, M.L. and W.W.

The case concerned the refusal by the German Federal Court of Justice to issue an injunction prohibiting three different media organisations from continuing to allow Internet users access to documentation about a murder case, which listed the full names of the convicted murderers. In 1993 M.L. and W.W. were convicted of murdering a popular actor and sentenced to life imprisonment. When they were released on probation in 2007 and 2008, M.L. and W.W. brought proceedings against the radio station Deutschlandradio, the weekly magazine Der Spiegel, and the daily newspaper Mannheimer Morgen, requesting the anonymisation of the personal data in the documentation on them which had appeared on those media organisations' respective Internet sites. In first-instance and appeal judgments the courts granted W.L.'s and W.W.'s requests, considering in particular that their interest in no longer being confronted with their past actions so long after their convictions prevailed over the public interest in being informed. However, the Federal Court of Justice overturned those decisions on the grounds that insufficient account had been taken of the media's right to freedom of expression and, with regard to the mission of the media, the public's interest in being informed.

Relying on Article 8 of the ECHR, M.L. and W.W. lodged an application with the ECtHR, complaining of a violation of their right to privacy constituted by the refusal of the German Federal Court of Justice to issue an injunction prohibiting the defendant media from keeping on their respective Internet portals personal

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data concerning M.L.'s and W.W.'s criminal trial and conviction for murder. The ECtHR considered that although it was primarily on account of search engines that the information about the murder case could easily be obtained by Internet users, the interference complained of by M.L. and W.W. resulted from the decision by the media organisations themselves to publish and conserve this material on their respective websites; the search engines hence merely amplified the scope of the interference. It also observed that M.L. and W.W. were not asking for the removal of the reports in question, but only that they be anonymised, and that rendering material anonymous was a less restrictive measure in terms of press freedom than the removal of an entire article. On the other hand the substantial contribution made by Internet archives to preserving and making available news and information was to be taken into account, as archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The ECtHR confirmed that the media have the task of participating in the creation of democratic opinion, by making available to the public old news items that they have preserved in their archives.

The ECtHR next examined the relevant criteria applied in other cases when balancing Article 8 and Article 10 rights, focusing on (1) the contribution to a debate of public interest, (2) the degree of notoriety of M.L. and W.W., (3) their prior conduct in relation to the media, and (4) the content, form and consequences of online reports (containing M.L. and W.W.'s names and photographs) at issue.

The ECtHR reiterated that the approach to covering any subject is a matter of journalistic freedom, leaving it to journalists to decide what details ought to be published, provided that these decisions corresponded to the profession's ethical norms. The inclusion in a report of individualised information, such as the full name of the person in question, is an important aspect of the press's work, especially when reporting on criminal proceedings which have attracted considerable attention and contributed to a debate of public interest that remains undiminished with the passage of time. As to how well known M.L. and W.W. were, the ECtHR observed that they were not simply private individuals who were unknown to the public at the time their request for anonymity was made. The reports in question concerned either the conduct of their criminal trial, or one of their requests for the reopening of that trial, and thus constituted information capable of contributing to a debate in a democratic society. The ECtHR also noted that at an earlier stage, some years before their release on probation, M.L. and W.W. had themselves contacted the press, transmitting a number of documents while inviting journalists to keep the public informed about their requests to reopen the case. According to the ECtHR, this attitude put a different perspective on their hope of obtaining anonymity in the media reports, or on the right to be forgotten online. With regard to the content and form of the contested

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documentation, the ECtHR considered that the texts at issue described a judicial decision in an objective and non-denigrating manner, the original truthfulness or lawfulness of which had never been challenged. It found that the dissemination of the contested publications had been limited in scope, especially as some of the material was subject to restrictions such as paid access or a subscription. The ECtHR also referred to the fact that M.L. and W.W. did not provide information about any attempts made by them to contact search engine operators with a view to making it harder to trace information about them.

In conclusion, having regard to the margin of appreciation left to the national authorities when weighing up divergent interests, the importance of maintaining the accessibility of press reports that have been recognised as lawful, and M.L.'s and W.W.'s conduct vis-à-vis the press, the ECtHR, unanimously, considered that there were no substantial grounds for it to substitute its view for that of the German Federal Court of Justice. Hence the ECtHR concluded that there had been no violation of Article 8 of the ECHR.

Arrêt de la Cour européenne des droits de l'homme, cinquième section, affaire M.L. et W.W. c. Allemagne, requêtes nos 60798/10 et 65599/10, rendu le 28 juin 2018

Judgment by the European Court of Human Rights, Fifth Section, case of M.L. and W.W. v. Germany, Application nos. 60798/10 and 65599/10, 28 June 2018

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