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## **The right to be forgotten concerning the criminal past. Developments in the case law of the European Court of Human Rights with particular reference to the anonymisation of digital press archives**

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### **Abstract**

Do offenders have a right “to be forgotten”? What is the content of this right, and against whom can it be exercised? These questions have become more pressing with the irruption of new information and communication technologies, which entail a new risk of perpetuating a virtual criminal record. The growing role of the digital archives of the press has led some jurisdictions to adopt different measures to anonymise or de-reference personal data. The Strasbourg Court, historically reluctant to accept any interference with the initial publication of personal data concerning convicted offenders, has recently dealt with the compatibility of different measures involving the anonymisation or de-indexing of news articles in the digital archives. This contribution describes these recent legal developments, focusing on the criteria developed by Strasbourg to assess the legitimacy of anonymisation measures adopted by States in response to right-to-be-forgotten requests against the media.

### **Key words**

Right to be forgotten; reintegration; European Court of Human Rights; *Hurbain v. Belgium*

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## Resumen

¿Tienen los delincuentes derecho “al olvido”? ¿Cuál es el contenido de este derecho y ante quién puede ejercerse? Estas cuestiones se han hecho más acuciantes con la irrupción de las nuevas tecnologías de la información y la comunicación, que entrañan un nuevo riesgo de perpetuación de un historial criminal virtual. El creciente papel de las hemerotecas digitales de la prensa ha llevado a algunas jurisdicciones a adoptar diferentes medidas para anonimizar o desindexar los datos personales. El Tribunal de Estrasburgo, históricamente reacio a aceptar cualquier injerencia en la publicación inicial de los datos personales de los condenados, se ha ocupado recientemente de la compatibilidad de diferentes medidas de anonimización o desindexación de artículos periodísticos contenidos en las hemerotecas digitales. Esta contribución describe esta reciente evolución jurídica, centrándose en los criterios desarrollados por Estrasburgo para evaluar la legitimidad de las medidas de anonimización adoptadas por los Estados ante las solicitudes de derecho al olvido contra los medios de comunicación.

## Palabras clave

Derecho al olvido; reinserción; Tribunal Europeo de Derechos Humanos; *Hurbain c. Bélgica*

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## 1. Introduction

Across different European jurisdictions, convicted persons face significant challenges in reintegrating into society after serving their sentences. One of the barriers to reintegration post-sentence is the continued availability of criminal history information, a problem that has gained a new dimension in the context of the digital society. Indeed, the irruption of information and communications technologies, particularly of search engines, has multiplied the accessibility to personal data, generally, and to information about citizens' criminal history, specifically.<sup>1</sup> This widespread availability and use of search engines has exacerbated the risk of creating a virtual criminal record, which is universally accessible just by writing the person's full name. Even in jurisdictions where criminal records are generally not accessible by the public, criminal history information, despite formal legal rehabilitation, can easily resurface online (Corda and Lageson 2019, p. 3). In this sense, websites are tools for information and communication that are remarkably distinct from print media, especially in terms of their ability to store and disseminate information, and that online communications represent a much higher risk than paper publications for the exercise and enjoyment of fundamental rights and freedoms.

In this sense, much attention has been paid to the stigmatising effects of criminal records, understood as the official register of citizens' convictions managed by State actors. Indeed, a superficial comparison of the public availability of criminal records across Europe and the United States of America unequivocally leads to the conclusion that, in the U.S., there is a pronounced inclination towards maintaining transparency regarding criminal records.<sup>2</sup> The disclosure of such information to the public is often justified on grounds of free speech, principles of open government, and concerns for public safety. In this regard, access to criminal history records (including arrests) is widely facilitated through different institutional and commercial means (court databases, governmental repositories, specific offender registry websites, etc.).<sup>3</sup> In addition, private companies are increasingly taking part in managing and even producing criminal records through capturing and aggregating data from both public and private sources.<sup>4</sup> In Europe, the

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<sup>1</sup> In this sense, the emergence of a right to be forgotten can be seen as a means to recover the effects that the passage of time and physical space produce in social relationships. In this sense, the passage of time has made possible the cancellation of criminal records and the limitation of *ius puniendi* through statutes of limitation. As Lucas Murillo de la Cueva suggests, "in the digital universe there is no oblivion in the sense that nothing that has been processed disappears, but can be retrieved, normally in real time": see Murillo de la Cueva 2023, 79.

<sup>2</sup> As Lageson has shown, the actors of the American criminal justice system of the digital age act under the principle of the almost absolute publicity of criminal records: "It is within the current limits of law for police, courts, jails, and prisons to post criminal record information on the internet, replete with personal identifiers such as photographs, birthdates, and home addresses. Because most criminal Justice data are classified as a public record, Freedom of Information laws allow regular people and data companies alike to obtain criminal records at increasingly larger scales. The First Amendment further protects publication of public records, whether by a traditional newspaper, a community blogger, or a crime watch mobile app. Criminal records are thus re-created as they are copied and disseminated by various public and private parties, rendering the destruction of the original record largely ineffective in ameliorating stigma". See Lageson 2020, p. 7.

<sup>3</sup> In this regard, see Jacobs 2015, pp. 70-90, with a synthetic account of the privatisation of criminal records in the United States and the resulting boom of the "industry" of criminal background checking.

<sup>4</sup> In this sense, Corda and Lageson 2019, p. 2.

publicity of criminal records is much more limited, and strict safeguards are required to access this information and erase criminal records after a certain period of time. Despite these differences, the last two decades in Europe have seen a more stringent policy concerning criminal records, with both the European Union and the Council of Europe adopting legislation creating registries targeting specific offenders (most notably, sexual offences) and focusing on vetting access to certain employments.<sup>5</sup>

However, the classical notion of criminal records is insufficient to capture the distinct problem of the continued availability of information regarding the criminal past of the legally rehabilitated citizen, a problem which brings private actors into the picture (search engines, media companies and, more generally, any data controller or processor). In Europe, the last decade has seen critical regulatory developments which have led to the recognition of a “right to be forgotten” (RTBF). Across different domestic jurisdictions, this right has long been recognised in domestic jurisprudence,<sup>6</sup> albeit not necessarily under this term. However, the emergence of this right is far from unproblematic and begs new questions when applied to criminal history information. Do convicted citizens have an absolute right “to be forgotten” after serving their sentence? Who can this right be enforced against? Are private actors –such as media companies or search engines– obligated to erase or anonymise personal data regarding past crimes or convictions? And, crucially, how is this right to be balanced against the imperatives of free speech, the freedom of the press to inform about criminality, and the right of the public to be informed about these events? This contribution will try to shed some light on these general questions through the particular issue of the anonymisation measures applied to digital press archives, focusing on the recent case law developments at the Strasbourg Court (section 3). However, we will first address the foundation of the RTBF under EU law, as it has been applied to search engines (section 2).

## **2. The birth of the right to be forgotten in EU law: the de-listing by search engines in the *Google Spain* judgment**

As will be seen, an influential development of the right has been powered by the Court of Justice of the European Union (CJEU) in relation to the search engine operators’ obligations in this field (de-listing or de-referencing) and the consequent recognition under EU law of a right to erasure, including the personal information about the criminal past. On the other hand, the European Court of Human Rights has focused on the application of the right to be forgotten (RTBF) in the context of journalistic activities

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<sup>5</sup> See Jacobs and Larrauri 2015. The most notable example of this trend at the EU level is the 2011 Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (2011/92/EU, Official Journal L 335, 17.12.2011.), which replaced the Council Framework Decision (2004/68/JHA). This Directive harmonised substantive criminal law in the field of child sexual abuse and exploitation, child pornography, and solicitation of children for sexual purposes. Crucially, it obliges Member States to enact legislation aimed at ensuring that persons convicted for the sexual offences defined by the Directive are temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children, which may be achieved through the creation of administrative sex offender registries. As a result, for example, in 2015 Spain created the Central Sex-offenders Registry, which includes any conviction for a sexual offence and establishes a blanket 30-year cancellation period when the relevant offence was committed against a minor.

<sup>6</sup> In this sense, see Frosio 2017, p. 313, referring to the acknowledgement of “informational self-determination” by the German Constitutional Court in the 1980s.

covering criminal matters, as well as the role of their digital archives in preserving information on criminal proceedings. The Strasbourg Court has developed decisive criteria for balancing the conflicting Article 8 and Article 10 rights. Taking these recent legal developments into account, this contribution addresses the right “to be forgotten” from the particular lens of European Human Rights Law, focusing in particular on the legal obligations of the media when faced with de-indexing or anonymisation requests.

The CJEU has underlined the fact that how search engines organise and aggregate information published online to facilitate access to their users “may result in [obtaining] through the list of results a structured overview of the information relating to that individual (...) enabling them to establish a more or less detailed profile on the data subject”.<sup>7</sup> This qualitative leap in the data processing carried out by search engines underlies the recognition of a right to be forgotten by the CJEU in the *Google Spain* judgment, with the Court emphasising the different legitimate grounds and consequences in data processing carried out by search engines and original publishers.<sup>8</sup>

In *M.L. and W.W. v. Germany* (2018) the ECtHR also underlined this distinction between the initial publication of (accurate) information about the criminal past and the information processing by search engines. According to the Strasbourg Court, the “amplifying effect on the dissemination of information” in search engines’ data processing meant that their obligations towards the data subject could differ from those of the original publisher. The stark consequence of the distinction established by the Court is that “the balancing of the interests at stake may result in different outcomes depending on whether a request for deletion concerns the original publisher of the information, whose activity is generally at the heart of what freedom of expression is intended to protect, or a search engine whose main interest is not in publishing the initial information about the person concerned, but in particular in facilitating identification of any available information on that person and establishing a profile of him or her” (*M.L. and W.W. v. Germany*, §97).

In its landmark judgment in the *Google Spain* case, the CJEU was tasked with determining the scope of rights and responsibilities concerning Internet search engines under EU data protection law. The dispute stemmed from a complaint filed by a Spanish national with the Spanish Data Protection Agency (AEPD) against a Spanish newspaper and Google. The applicant objected to Google’s search results displaying links to newspaper pages mentioning his full name in connection with a public auction following legal proceedings for the recovery of social security debts. Mr Costeja had requested the newspaper to remove or modify the pages containing his data (anonymisation) or to use other available tools to safeguard his data. He had also asked Google to eliminate or conceal his personal data from search results. Although the Data Protection Agency had dismissed the complaint against the newspaper, stating the initial publication was lawful, it upheld the complaint against Google. It ordered the search engine to adopt the

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<sup>7</sup> In *Google Spain SL* (2014), §37, the Court went on to say that this form of processing personal data “enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet (...) and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous”.

<sup>8</sup> *Google Spain*, cit., §§85-87. More recently, *GC and others* (2019), §§36-37.

measures necessary to withdraw personal data relating to the applicant from its index and prevent data access. Google contested this decision before the domestic courts, leading to a referral to the CJEU for a preliminary ruling. Concerning the right to be forgotten, the domestic court asked if the rights to erasure and blocking of data and the right to object recognised by the data protection Directive<sup>9</sup> extended “to enabling the data subject to address himself to search engines to prevent indexing of the information relating to him personally, published on third parties’ web pages (...) when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though third parties have lawfully published the information (*Google Spain*, §20).

In its judgment, the CJEU determined that a search engine operator’s activities constituted “data processing”, making the operator the “controller” under Directive 95/46/EC,<sup>10</sup> regardless of whether the data was already available on the internet and unaltered by the search engine. Recognising that search engines’ actions differed from website publishers and affected individuals’ fundamental rights, the CJEU stressed that these operators must ensure that the directive’s safeguards are fully enforced. Furthermore, the Court highlighted the challenge of protecting individuals’ data privacy if they had to rely solely on website publishers for data removal, given the ease of information replication across various sites. Therefore, the Court ruled that search engine operators must remove links to web pages from search results if they contain information about an individual, even if the information was published lawfully and had not been erased from those pages. In this line, the Court rejected the idea that search engines could invoke the derogations “for journalistic purposes” foreseen in the data protection regulations that allow the media to process personal data legitimately (*Google Spain*, §85).

Additionally, the CJEU emphasised that initially lawful data processing might become incompatible if it becomes unnecessary, inadequate, irrelevant, excessive, or no longer serves the initial purposes. Under the right to private life and personal data protection recognised in Articles 7 and 8 of the EU Charter of Fundamental Rights, individuals have the right to request that information linked to their name no longer be publicly accessible through search engine results. As a general rule, search engines are under an obligation to remove from the list of results following a search made using a person’s name the links to web pages published by third parties and containing information relating to that person, even if no harm has been caused to the data subject.<sup>11</sup> This right is unaffected by the lawful nature of the initial publication and applies even if the original source is publicly available. The CJEU emphasised that these rights generally outweigh the economic interests of search engine operators and the public’s interest in accessing such information. However, the CJEU also noted that a balance between the concerned person’s interests and the public’s right to information might vary based on the nature and sensitivity of the data concerning the individual’s private life and their role in public

<sup>9</sup> These rights were provided for in Article 12(b) and Article 14.1(a) of Directive 95/46,

<sup>10</sup> Directive 95/46/EC, which was replaced by the Regulation (EU) 2016/679.

<sup>11</sup> *Google Spain*, §96: “(...) when appraising such requests (...), it should in particular be examined whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject”.

life.<sup>12</sup> In the specific case of Mr Costeja, the Court declared that the sensitiveness of the information contained in the search results (a real-estate auction connected with attachment proceedings for the recovery of social security debts) and the time elapsed since the initial publication of the news articles (16 years), the data subject had a right to be forgotten. Google was obliged to de-index his data from the search engine (*Google Spain*, §98).

As a direct consequence of the *Google Spain* judgment, the 2016 EU General Data Protection Regulation (GDPR) has expressly recognised a right to be forgotten under the heading “*Right to erasure (‘right to be forgotten’)*” in Article 17 of the Regulation. This provision recognises the data subject’s right to obtain from the controller the erasure of personal data without undue delay if any of the specified grounds apply. The first of these grounds refers to the situation where “the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed”. However, Article 17(3) also expressly disapplies the RTBF where the processing of personal data is necessary “for exercising the right of freedom of expression and information” or “for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes (...)”. It, therefore, requires, in these cases, a balance to be struck between the fundamental right to privacy and data protection (articles 7 and 8 of the EU Charter) and the freedom of information (Article 11 of the Charter). In addition, the GDPR contains a specific mandate to domestic authorities to protect the processing of data collected “in the audiovisual field and in news archives and press libraries” (journalistic activities, interpreted in a broad sense) by establishing the necessary exemptions and derogations for balancing fundamental rights (Recital 153, GDPR).

The criteria applicable to the balancing exercise required by the *Google Spain* judgment for considering de-listing requests lodged against search engine operators were further detailed by the renowned “Article 29” Data Protection Working Party<sup>13</sup> in their 2014 Guidelines on the implementation of the *Google Spain* judgment (Article 29 WP 225, 14/EN). Fundamentally, the Guidelines came to clarify that individuals seeking to exercise the RTBF are not obliged to contact the original website to exercise their rights towards search engines “either previously or simultaneously” and may choose to select one or several search engines.<sup>14</sup> The Guidelines offer some specific criteria –presented as

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<sup>12</sup> *Google Spain*, §81: “In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject’s fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject’s rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life”.

<sup>13</sup> The Article 29 Working Party is an independent EU advisory body composed of one representative of the data protection authority of each EU Member State, the European Data Protection Supervisor and the European Commission.

<sup>14</sup> Guidelines on the implementation of the Court of Justice of the European Union judgment on *Google Spain*, paras. 11-12: “The individual may consider that it is better, given the circumstances of the case, to first



questions— that should guide the assessment of domestic data protection authorities in the balance between the right of the public to be informed and of the free speech rights of the media and the individual's RTBF as a manifestation of his privacy and data protection rights. The relevant criteria can be summarised as follows: whether the result relates to a natural person (individual) and the search results come up against a search on their name; whether the person is a public figure; whether he is a minor; the accuracy and relevance of the data; the classification of the data as "sensitive"; whether the data is up to date and is being made available for longer than necessary in relation to the purpose of the processing; whether the data is causing harm to the person and has a disproportionately negative impact on his privacy; whether the information linked puts the person at risk; the context in which information was published (made public voluntarily, intended to be made public); whether the original content was published for journalistic purposes; whether the publisher has a legal power or obligation to make the data publicly available; and whether the data relates to a criminal offence.<sup>15</sup>

As established in the *Google Spain* judgment, proof of harm is not a requisite for delisting, although the concurrence of this factor would weigh strongly in favour of adopting the measure.<sup>16</sup> Concerning information related to criminal offences, the Working Party recognises the diversity of national approaches on the public availability of "information about offenders and their offences", and therefore, these cases will have to be dealt with "in accordance with the relevant national principles and approaches". However, the Working Party also points out the seriousness of the offence and the passage of time as factors that should be taken into account, as a general rule, by data protection agencies.<sup>17</sup>

Finally, it should be pointed out that, whilst the *Google Spain* judgment represented a fundamental step towards recognising a right to be forgotten through delisting or deindexing measures, it also legitimises a problematic delegation of powers to search engine operators. These operators retain ample discretion to assess individual requests and determine the applicable criteria for anonymisation.<sup>18</sup> This discretion includes

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contact the original webmaster to request the deletion of information or the application of 'no index' protocols to it, but the judgment does not require this (...) an individual may choose how to exercise his or her rights in relation to search engines by selecting one or several of them. By making a request to one or several search engines the individual is making an assessment of the impact of the appearance of the controverted information in one or several of the search engines and, consequently, makes a decision on the remedies that may be sufficient to diminish or eliminate that impact".

<sup>15</sup> Guidelines on the implementation of the Court of Justice of the European Union judgment on *Google Spain*, Part II (pp. 13-20).

<sup>16</sup> Guidelines on the implementation of the Court of Justice of the European Union judgment on *Google Spain*, p. 18. The Working Party considers that "The data might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanour which is no longer – or may never have been – the subject of public debate and where there is no wider public interest in the availability of the information".

<sup>17</sup> Guidelines on the implementation of the Court of Justice of the European Union judgment on *Google Spain*, p. 20: "(...) As a rule, DPAs are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis".

<sup>18</sup> In this sense, see Lageson 2020, pp. 149-153, who points out that Google has not disclosed its internal process for removal criteria or to prioritize requests.

evaluating whether the criminal past of a person who has been legally rehabilitated remains of public interest and should, therefore, be retained online.<sup>19</sup>

### **3. The right to be forgotten under European human rights law. Information concerning the criminal past stored in digital web archives**

As seen above, the jurisprudence of the CJEU has been focused exclusively on the RTBF as applied before the search engine operators (most prominently, Google and its subsidiaries), leaving aside the possibility of exercising this right before the communication media. In contrast, in the case law of the European Court of Human Rights, the majority of cases on the RTBF have involved interference with the initial publication by the media of information reporting on criminal matters (including the opening of police investigations, criminal proceedings, convictions or the release from prison).<sup>20</sup> More recently, the Strasbourg Court has applied the RTBF concerning the anonymisation of lawfully published judicial information stored in digital press archives (*Hurbain v. Belgium*, 2023) and to the de-referencing of lawfully published but no longer relevant judicial information (*Biancardi v. Italy*, 2021). Both recent cases establish an important precedent for the legal obligations of the media when faced with citizens' express requests to anonymise or de-index judicial information which was lawfully published but is alleged to be a source of harm to the concerned person's reputation. It is worth noting that while legal instruments tend to use the terms "de-listing", "de-indexing", and "de-referencing" somewhat interchangeably, the Strasbourg Court has adopted the term "delisting" to refer to measures taken by search engine operators and the term "de-indexing" to denote measures put in place by the news publisher responsible for the website on which the article in question is archived (*Hurbain v. Belgium*, 2023, §175).

#### *3.1. De-referencing versus anonymisation: the Biancardi v. Italy case (2021)*

Strasbourg's scrutiny of de-referencing or de-indexing measures is much more permissive than its approach to any measure involving anonymisation or direct interference with initial publications. Until the *Hurbain* case, the Court had outrightly refused to declare that the right to private life could imply an obligation to remove or alter the content of news or articles stored in digital archives. In this line, the Court seems to reject any measure requiring the removal or alteration of published content. For instance, in *Fuchsmann v. Germany*, it declared compatible with article 8, the domestic

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<sup>19</sup> See the discussion of the internal Google Guidelines in Corda and Lageson 2019, p. 11: "These guidelines thus suggest that Google is willing to interpret, tweak and ultimately challenge policy and legislative determinations made at the national level regarding the management of criminal records of people who have been deemed legally rehabilitated. Simply, the company assesses whether it is in the public interest to remove a link to criminal history information that, under national law, should be squarely forgotten".

<sup>20</sup> See, for instance, *Axel Springer v. Germany*, concerning the publication of two articles in a magazine relating to the arrest and conviction of a well-known actor for a minor drug offence; *Fuchsmann v. Germany*, about the publication of a newspaper article reporting on a police investigation for involvement in crimes linked to organized criminality; *News Verlags GmbH & Co. Kg v. Austria* App no 31457/96 (ECtHR, First Section, 11 January 2000), about the publication, at the time of his trial, of the photo and full name of a person convicted under the National Socialism Prohibition Act; and, similarly, but concerning a publication years after the release of the convicted person, *Mediengruppe Österreich GmbH v. Austria* App no 37713/18 (ECtHR, Fourth Section, 26 April 2022).

decision to deny an injunction against the New York Times to erase from a journal article certain statements about the alleged criminal activities of the applicant, who had been accused of involvement in gold smuggling and embezzlement and of being linked to Russian organised crime. In application of the *Axel Springer* criteria (§89 et seq) the Court agreed with domestic courts in finding that the allegations of corruption constituted a matter of great public interest, which included mentioning the suspect by name. It underlined that this interest extended to maintaining information in the digital archives as “an important source for education and historical research” (*Axel Springer*, §39). It further agreed with domestic courts that the applicant had to be considered a public figure as he was a businessman internationally active in the media sector; that the publications had sufficient factual basis because they were based on “sufficiently credible sources”; and that the stories lacked any “polemic statements and insinuations” and did not divulge any intimate private details (*Axel Springer*, §§34–53). Interestingly, when assessing the impact of the publication on the applicant’s private life, the Court pointed out the lack of information on “any efforts made to have the link to the article removed from online search engines” (*Axel Springer*, §53). When confronted with a request to alter or censor journalistic information in digital archives, the Strasbourg Court is not willing to transpose the principles established for the RTBF in the CJEU case law, instead applying the “ordinary” *Axel Springer* balancing criteria developed for conflicts involving the initial publication of information.

Similarly, the complete removal of content was rejected in *Węgrzynowski and Smolczewski v. Poland* in 2013.<sup>21</sup> In that case, the initial publication of a newspaper article containing allegations about the fortune made by the applicants “by assisting politicians in dubious business deals” had been declared unlawful by domestic courts. They had found that the article was defamatory, as it had been based on insufficient information. They ordered the payment of compensation and the publication of an apology in the newspaper. In subsequent civil proceedings, Polish courts refused to grant the injunction demanded by the applicants, who sought the removal of the article from the newspaper’s digital archives, as this would amount to “censorship and rewriting history” (*Węgrzynowski and Smolczewski v. Poland*, §12). In the same vein, the judgment of the ECtHR in that case –rendered before the adoption of the CJEU *Google Spain* decision–underlined the critical role public archives have in maintaining and making available to the public archives containing previously reported news, affirming that it is not for judicial authorities to order the “removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations” (*Węgrzynowski and Smolczewski v. Poland*, §65). However, the Court referred with approval to the alternative pointed out by domestic courts of rectifying the digital article by inserting “a footnote or link informing the reader about the judgments [declaring the original publication defamatory]”

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<sup>21</sup> *Węgrzynowski and Smolczewski v. Poland*. Albeit in a different context, in the case of *Times Newspapers* (2009), the Court approved the approach taken by domestic courts in rejecting the removal of the archived content and considered that the requirement to “publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press” did not constitute a disproportionate interference with the right to freedom of expression (§47).

(*Węgrzynowski and Smolczewski v. Poland*, §59), in contrast with the measure of erasure or removal.

In any event, it is apparent that the ECtHR sees de-referencing as a less severe interference with freedom of expression, even where the right to be forgotten is exercised directly before the publisher of information. In *Biancardi v. Italy* (2021),<sup>22</sup> the Court has upheld, for the first time, a domestic decision ordering a newspaper to de-index an article, finding that not only Internet search engine providers but also the administrators of journalistic archives accessible through the Internet can be required to de-index documents. The applicant, Mr. Biancardi, was the editor-in-chief of an online newspaper, where an article was published detailing a fight followed by a stabbing that occurred at a restaurant, along with the subsequent legal proceedings. Both the restaurant and one of the accused parties requested the de-indexing of the article from the internet. Initially declining, the applicant eventually de-indexed the article after eight months in an attempt to resolve the case brought before the domestic courts.

What was at the heart of this case was not the lawfulness of the initial publication or its maintenance on the newspaper's digital archive but the length and facility of access to the full name of the accused and his restaurant. The concerned person argued that the newspaper had failed, despite his formal request, to take technological measures of de-indexing. As a result, for an excessive period of eight months, the information about the criminal proceedings (by then obsolete) remained accessible by simply typing the name of the restaurant or the accused into search engines like Google.<sup>23</sup>

The most striking aspect of the judgment is the resounding assertion of the Strasbourg Court that the obligations to take de-indexing measures extend to the administrators of digital media outlets.<sup>24</sup> On the other hand, the Court contrasts the facts in *Biancardi* with the *Axel Springer* case, where the person concerned was considered a well-known television actor and, therefore, a public figure. The fact that the person concerned was "a private individual not acting within a public context" (*Biancardi v. Italy*, §62) is decisive for the Court to depart from its more demanding *Axel Springer* balancing principles, limiting its assessment to determine whether the reasons adduced by domestic courts to establish civil liability were "relevant and sufficient" (*Biancardi v. Italy*, §63). In this line, it divides its analysis into three criteria: the length of time the article was kept online, the sensitiveness of the data at issue and the gravity of the sanction imposed on the media company.

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<sup>22</sup> *Biancardi v. Italy* (2021). See the case comment by Van der Kerkof (2022).

<sup>23</sup> Eight months after the formal request to de-index the article had been made, Biancardi indicated to the District Court that he had de-indexed the contentious article "with a view to settling the case". However, the domestic courts found Biancardi liable under civil law for failing to de-index the article promptly and was ordered to pay a total of 10,000 euros as compensation for non-pecuniary damage (*Biancardi v. Italy*, §§8-12).

<sup>24</sup> *Biancardi v. Italy*, §51: "In this respect, the Court shares the Government's position that the finding of the applicant's liability had been a consequence of the failure to de-index from the Internet search engine the tags to the article published by the applicant (which would have prevented anyone accessing it by simply typing out the name of V.X. or of his restaurant), and that the obligation to de-index material could be imposed not only on Internet search engine providers, but also on the administrators of newspaper or journalistic archives accessible through the Internet (...)". See, in this respect, the case comment by Gumzej (2023).

The Court considered that, although the criminal proceedings against the concerned person had still been pending when the domestic courts ordered the newspaper to de-reference the personal data in the article, the information contained therein had not been updated since the events. In addition, despite the formal notice that the concerned persons had sent to the newspaper requesting the removal of the article from the Internet, the publication had remained online and quickly accessible for eight months (*Biancardi v. Italy*, §65). In that regard, both the domestic legal framework and the international legal instruments supported the idea that the relevance of the applicant's right to disseminate information decreased over time, compared to the plaintiff's right to respect his reputation (*Biancardi v. Italy*, §66).

About the sensitiveness of the data in question – information about ongoing criminal proceedings instituted due to a fight between family members at their restaurant – the Court cites the CJEU case law on de-referencing of sensitive data (*GC and others*), where it found that journalistic information on (criminal) legal proceedings against individuals, as well as data relating to any resulting conviction, was sensitive data specially protected by the data protection legislation. The search engine, when faced with a de-referencing request “concerning an earlier stage of the proceedings and no longer corresponding to the current situation,” had to assess whether the data subject had a right to “no longer being linked with his or her name by a list of results displayed following a search carried out on the basis of that name”. This decision had to be taken “in the light of all the circumstances of the case, such as, in particular, the nature and seriousness of the offence in question, the progress and the outcome of the proceedings, the time elapsed, the part played by the data subject in public life and his past conduct, the public's interest at the time of the request, the content and form of the publication and the consequences of publication for the data subject” (*GC and others*, §77). Although the Court in *Biancardi* takes care to cite the relevant CJEU authorities, it is shocking to find no express reference in the judgment to the criteria developed by the Court of Justice in cases concerning de-referencing by search engines. The nature and seriousness of the relevant criminal offence constitute an important factor under the *Google Spain* doctrine and Strasbourg's assessment of anonymisation requests under the *Hurbain* principles, as shown below.

Finally, the Court also referred to the seriousness of the sanction imposed on the newspaper, which was civil (and not criminal) and was “not excessive” in the case circumstances (*Biancardi v. Italy*, §68). Throughout its judgment, the Court insists that de-indexing was a less stringent measure for freedom of the press compared to the removal or anonymisation of the article,<sup>25</sup> which constitutes a decisive factor in concluding that the finding of liability for failing to de-index the information on criminal proceedings for a considerable time, despite an express request to that effect.

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<sup>25</sup> *Biancardi v. Italy*, §§58-60, 70: “In the instant case, the Court acknowledges that the applicant was found to be liable solely on account of the first requirement – that is to say no requirement to permanently remove the article was at issue before the domestic courts. Nor was any intervention regarding the anonymisation of the online article in question at issue in this case. (...) In the Court's view, this is an important starting-point from which to define the interference with the applicant's freedom of expression and to identify, accordingly, the applicable principles in order to assess the proportionality of that interference” (§§59, 60).

### 3.2. *The landmark judgment of the Grand Chamber in Hurbain v. Belgium (2023)*

In the *Hurbain* case, the Court clarified its case law on the right to be forgotten concerning anonymising personal data in digital press archives. In its landmark judgment, the Grand Chamber has upheld for the first time the conventionality of a measure which involves the direct removal or alteration of information published lawfully by a media company in its online archives. For two decades, the Court has developed a comprehensive case law in cases concerning restrictions affecting the initial publication of journalistic reports about ongoing criminal investigations or recent convictions, albeit in very different contexts or factual situations.<sup>26</sup>

The dispute in *Hurbain* revolves around the continued online availability of an article originally published in 1994 in the print version of *Le Soir*, a prominent French-language newspaper in Belgium. The article covered a fatal car accident leading to two deaths and three injuries caused by a doctor named G., who drove under the influence of alcohol. G. was convicted in 2000 and sentenced to a suspended term of two years imprisonment, being fully rehabilitated in 2006.

The article in question was incorporated into *Le Soir's* digital archives in 2008, and had since then been freely accessible online. In 2010, G. made a first application to the legal representatives of *Le Soir* requesting the removal of the article from the newspaper's digital archives or, subsidiarily, anonymising the article by replacing G.'s first name and surname with its initials. G. first brought unsuccessful proceedings before the Belgian Council for Journalistic Ethics (CDJ), a self-regulatory body of the French and German-speaking media, and subsequently succeeded in civil judicial proceedings in domestic courts.

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<sup>26</sup> The Courts' initial case law on the "right to be forgotten", although without making recourse to that expression, can be traced back to a series of applications lodged by the Austrian public broadcasting corporation (ORF) arguing that different judicial anonymisation measures were incompatible with article 10 of the Convention. The first case was *News Verlags Gmbh & Co. Kg v. Austria* App no 31457/96 (ECtHR, First Section, 11 January 2000), concerning the publication of the picture of a person linked to the Austrian neo-Nazi movement who was subject to a criminal investigation for a series of letter bombings. Although the Court found that the absolute prohibition on the publication of the subject's picture was disproportionate and violated article 10 of the Convention, it also recognised that "there may be good reasons for prohibiting the publication of a suspect's picture in itself, depending on the nature of the offence at issue and the particular circumstances of the case" (§68). Following this line of reasoning, in the later case of *Österreichischer Rundfunk v. Austria (no. 1)* App no 57597/00 (ECtHR, Fourth Section, 25 May 2004), which concerned the same person, the Court declared the judicial prohibition of publishing his picture after his release on parole compatible with the Convention, considering that the subject's interests in reintegrating into society after having been released on parole "outweighed the public interest in the disclosure of his picture" (p. 11). In this second case, the Court also considered that the prohibition to publish was not absolute but was tailored to ensure that the public as informed of all the relevant facts, namely that the subject had been acquitted under the letter-bombing conspiracy charge and that he had already served his sentence. However, in the third case of *Österreichischer Rundfunk v. Austria (no. 2)* App no 35841/02 (ECtHR, First Section, 7 December 2006) also concerning the publication by the same company of a picture after the release on parole of the head of a neo-Nazi organisation, the Court declared a violation of article 10, in account of the absolute nature of the prohibition to publish, as well as the public notoriety of the perpetrator ("a well-known member of the Neo-Nazi scene"), the seriousness of the crime, the short period elapsed since his release on parole (three weeks) and that the information accompanying the picture was complete and factually correct.

In his submissions before the domestic courts in May 2012, G. argued that when his name and surname were typed into search engines like Google –and also on the newspaper’s internal search engine– the article mentioned above came up among the first results, which run counter to his right to be forgotten. G. argued that, as a result, he feared being dismissed or losing patients. He therefore asked the (civil) First Instance Court to order the publisher to anonymise the electronic archived version of the article or, in the alternative, to order the addition of a noindex tag to prevent the article “from appearing on the list of results when G.’s name was typed into the search engine of the newspaper’s website”. *Le Soir* argued that it had notified the search engine to deindex G.’s data in the article and that Google had refused the request, so it was for G. to lodge proceedings against the search engine. In subsequent proceedings, the company also argued, albeit without providing conclusive evidence, the technical impossibility of “altering” archived articles in its digital database and that the inclusion of a noindex tag indicating to the search engine to deindex personal data was “liable to lead to problems on the website” and required to open a user account with the search engine (*Hurbain v. Belgium* [GC], §23).

In January 2013, the First Instance Court rendered its judgment and ordered *Le Soir* to replace G.’s first name and surname with the letter X in the digital version of the article featured on the newspaper’s website and “in any other database for which he was responsible”. The company appealed the decision to the Liège Court of Appeal, which dismissed the appeal by judgment in September 2014. The Court considered that G. had a right to be forgotten, which constituted an integral part of the right to private life enshrined in Article 8 of the Convention and that the principles established about search engines in the *Google Spain* judgment of the Court of Justice of the European Union could also be applied to the dispute between a publisher and a private citizen. Using the criteria laid down by the CJEU and ECtHR case law, the Court of Appeal balanced G.’s private life interests (art. 8 ECHR) and the right to freedom of expression of the media outlet (art. 10 ECHR). It found that the anonymisation measure satisfied the criteria for claiming a RTBF because “keeping the article in question online without rendering it anonymous, many years after the events it reported on, is liable to cause [G.] disproportionate harm when weighed against the benefits of strict observance of [*Le Soir*’s] right to freedom of expression”, concluding that the measure was “the most effective means of protecting [G.]’s privacy without interfering to a disproportionate extent with [*Le Soir*’s]’s freedom of expression” (*Hurbain v. Belgium* [GC], §29). The company eventually complied with the court order and anonymised the article from the online accessible version in November 2014.<sup>27</sup>

The newspaper’s publisher, Mr Hurbain, turned to the European Court of Human Rights, arguing that the anonymisation order given by the Liège Court of Appeal violated his right to freedom of expression, freedom of the press and freedom to impart information recognised under article 10 of the Convention. In 2021, the Strasbourg Court gave its Chamber judgment in the case of *Hurbain v. Belgium* (2021) declaring that the

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<sup>27</sup> G. brought further proceedings against *Le Soir* seeking the enforcement of the judgment (§§39-45). The anonymised online version included a note referring to the judicial decision and the possibility to consult the full version by sending an email. Still in 2021, before the Grand Chamber, G. pointed out that the original version of the article appeared when a search was conducted through the newspaper’s internal search engine, although not on Google. The article was anonymised again in January 2022.

anonymisation order was compatible with Article 10 as it had constituted a lawful interference in pursuing the legitimate aim of protecting G.'s right to respect for his private life under article 8. Applying the principles established by the Court in the context of initial publication (the *Axel Springer* criteria), the Chamber found that the anonymisation order had been "necessary in a democratic society" because the domestic courts had adequately balanced the conflicting rights. Anonymisation represented the most effective measure to protect G.'s private life without disproportionately interfering with *Le Soir's* freedom of expression, considering that the original version of the archives had been kept intact.

### 3.2.1. The novel criteria for assessing measures involving the anonymisation of digital archives directed against publishers

In *Hurbain*, the Grand Chamber has developed the guiding criteria for balancing articles 8 and 10 rights in right-to-be-forgotten requests directed against the digital archives of the press.<sup>28</sup> The Chamber's judgment, in that case, had applied the classic *Von-Hannover* or *Axel Springer* criteria developed concerning interferences with initial publication, namely: "the contribution to a debate of public interest; whether the person concerned is well known; the subject of the news report; the prior conduct of the person concerned; the way in which the information was obtained and its veracity; the content, form and consequences of the publication; and the severity of the measure imposed on the applicant" (*Axel Springer*, §§89-95, *M.L. and W.W. v. Germany*, §96, *Von Hannover v. Germany* (no. 2), §106). However, the Grand Chamber decided that the classic balancing criteria developed for cases of initial publication needed to be adjusted in view of the specific nature of digital journalistic archives:

... the balancing of these various rights of equal value to be carried out in the context of a request to alter journalistic content that is archived online should take into account the following criteria: (i) the nature of the archived information; (ii) the time that has elapsed since the events and since the initial and online publication; (iii) the contemporary interest of the information; (iv) whether the person claiming entitlement to be forgotten is well-known and his or her conduct since the events; (v) the negative repercussions of the continued availability of the information online; (vi) the degree of accessibility of the information in the digital archives; and (vii) the impact of the measure on freedom of expression and more specifically on freedom of the press.

If one takes a closer look at the criteria developed by the Court in the context of the anonymisation of digital archives, and despite the apparent overhaul, the Grand Chamber's decision is limited to incorporating two new criteria which were not applicable in initial publications, namely: the time elapsed since the events, since the initial publication and the online publication of the information; and the negative consequences of continued availability of information online. The passage of time and the consequences for the concerned person's private life are two novel considerations that must guide the decision on anonymisation requests directed against digital

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<sup>28</sup> The Chamber judgment in the case had stuck to the *Von Hannover / Axel Springer* general criteria on balancing Article 8 and Article 10 rights. The Grand Chamber departed from the *Axel Springer* criteria, which had been decided in the context of the initial publication of journalistic reports relating to an ongoing criminal investigation of a well-known German actor and the subsequent criminal conviction. See the Chamber judgment in *Hurbain v. Belgium* (2021) [Third Section], §93 et seq.



archives. The rest of the “classical” *Axel Springer* criteria, although slightly reformulated, continue to be applicable in the context of digital archives: the contemporary (public) interest of the publication,<sup>29</sup> the nature of the archived information (whether sensitive or private),<sup>30</sup> the degree of accessibility,<sup>31</sup> the degree to which the person concerned is well-known and his or her conduct since the (criminal) events, and the impact of the anonymisation measure on freedom of expression. In turn, the way in which information has been obtained and its veracity are irrelevant in cases like *Hurbain*, where the lawfulness and accuracy of the judicial facts related to the original publication were undisputed.

The Court does not establish an order of precedence or emphasise any of the relevant balancing factors, instead indicating that typically, “several criteria” will need to be taken into account simultaneously” in balancing private life against freedom of expression in a given case (see *Hurbain* [GC], §206). Its subsidiary review is limited to ascertaining whether the assessment of conflicting interests carried out by domestic authorities was consistent with the criteria set out by the Court and whether the weight attributed to either of the conflicting rights was “excessive”, taking into account that individual states are allowed a margin of appreciation to choose the means calculated to secure Convention rights (see *Hurbain* [GC], §§201, 206, 213). However, at the same time, the Court establishes a principle of preservation of the integrity of the press archives and subjects the balancing exercise to a test of strict necessity (see below, at 3.2.2.).

- A) the nature of the archived information: the seriousness of the offence as an overarching criterion

Generally, the Court has recognised that the freedom of the press in Article 10 of the Convention gives the media ample room to decide what information should be published “to ensure an article’s credibility, provided that the choices which they make [are] based on their profession’s ethical rules and codes of conduct” (*Hurbain v. Belgium* [GC], §216). In the context of reporting on criminal proceedings, the media can, therefore, choose to include “individualised information such as the full name of the person concerned (...) both at the time of initial publication and at the time of entry in the online archives”.<sup>32</sup> In this regard, the Court refers to the relevant soft law instruments of the Council of Europe,<sup>33</sup> which stress the importance of the role played by the media in

<sup>29</sup> In *Hurbain v. Belgium* [GC], the Grand Chamber emphasises the “contemporaneity” of the public interest or the contribution to a public debate of the information in question (§§222–225). In *Axel Springer*, the Court referred to the “contribution to a debate of public interest” as one of the relevant factors in the balancing exercise §94).

<sup>30</sup> In *Axel Springer*, these aspects are analysed under the heading “Content, form and consequences of publication” (§§94, 108).

<sup>31</sup> In *Axel Springer*, the degree or extent to which the article has been disseminated is analysed together with the content and form of the publication under the heading of “Content, form and consequences of publication” (§§94, 108).

<sup>32</sup> *Hurbain v. Belgium* [GC], §216, citing its precedent in *Fuchsmann*, §37, where it accepted that there was a public interest in the inclusion of the applicant’s full name in a newspaper article concerning his alleged involvement in serious organised criminality.

<sup>33</sup> Although, perhaps because of its antiquity, the judgment does not include any reference to Recommendation No. R (84) 10 of the Committee of Ministers to Member States, on the criminal record and rehabilitation of convicted persons (Adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers’ Deputies), which emphasised the importance of regulating the use of criminal records for the process of social reintegration, going as far as to recommend States to enact legislation

informing the public on criminal proceedings, “making the deterrent function of criminal law visible and ensuring public scrutiny of the functioning of the criminal justice system”.<sup>34</sup> Therefore, despite the classification by the Court of personal data relating to criminal proceedings as “sensitive” (*Hurbain v. Belgium* [GC], §215, citing *Biancardi v. Italy*, §67), the specific function of the press in informing society on criminal matters constitutes a legitimate ground to publish personal data, as well as an exemption from the right to be forgotten, as recognised under European Union law (see above, section 2).

In *Hurbain*, the Court accepted that the information on the criminal events –the homicides caused by G.’s reckless driving– published by *Le Soir* was of a judicial nature and factually accurate, the news pieces in question presenting the accident in “a succinct and objective manner”.<sup>35</sup> In this regard, the Grand Chamber also refers to the circumstances of the offence as relevant factors within the analysis of the nature of the content. In particular, the nature and seriousness of the offence, as well as the publicity of the events at the time of their initial publication, are relevant factors in the determination of the public or private nature of the archived information:

The Court considers that the judicial nature of the information in question raises the issue, among others, of the nature and seriousness of the offence that was the subject of the original article. The Court has previously used this criterion in its case law and by other courts in Europe in examining similar cases. (...) However, in the Court’s view, the facts reported on, although tragic, do not fall into the category of offences whose significance, owing to their seriousness, is unaltered by the passage of time. It should also be observed that the events giving rise to G.’s conviction were not the subject of any media coverage, except the article in question, and that the case did not attract widespread publicity either at the time of the events reported on or when the archived version of the article was placed online (...). (*Hurbain v. Belgium* [GC], §§218-219 (internal citations omitted))

In this passage, the Court refers to the gravity and social impact of the criminal offence as an essential factor in determining its public nature, which aligns with both ECtHR and CJEU case law.<sup>36</sup> In contrast with its precedent in *M.L. and W.W. v. Germany* –where

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providing that “rehabilitation implies prohibition of any reference to the convictions of a rehabilitated person except on compelling grounds” (no. 13).

<sup>34</sup> See Recommendation Rec(2003)13. In particular, when outlining the relevant legal framework and practice in the *Hurbain* case, the Court transcribes principle 1, entitled “Information of the public via the media” and which states: “The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles”.

<sup>35</sup> *Hurbain v. Belgium* [GC], §219. See, in contrast, *Węgrzynowski and Smolczewski v. Poland*, cit., §60, where domestic courts had declared that the publication of the article had breached the applicants’ Article 8 rights.

<sup>36</sup> Explicit references to the nature and seriousness of the past offence in other “right to be forgotten” cases are rare. However, in *Österreichischer Rundfunk v. Austria* (no. 2), cit., the Court explicitly mention the “political nature” of the crime and its seriousness (§§65–68), finding that the injunction against the Austrian public broadcaster prohibiting the publication of the offender’s picture was contrary to the Convention. The concerned person had been convicted under the National Socialist Prohibition Act and sentenced to eleven years’ imprisonment, the criminal proceedings conducted in this case being among the most important ones under the Prohibition Act. More recently, in *Mediengruppe Österreich GmbH v. Austria*, a similar case, the Court has recalled that “a person expressing extremist views lays himself open to public scrutiny” and that “this must apply all the more to persons who did not only express extremist views but who committed

the applicants had been convicted for the murder of a very famous actor and sentenced to life imprisonment (*M.L. and W.W. v. Germany*, §10, 22) –the Court in *Hurbain* was not dealing with reports about an offence “whose significance, owing to [its] seriousness, is unaltered by the passage of time” (*Hurbain v. Belgium* [GC], §219). In addition, the news reports about the accident “were not the subject of any media coverage except the article in question, and the case did not attract widespread publicity”.

B) The passage of time and the “contemporary interest” of the information

In *Hurbain*, the Grand Chamber confirms that the passage of time since the information’s initial publication and online publication constitutes a relevant criterion for assessing the proportionality of the interference with digital press archives. This recognition is essential because it approaches the principles applicable to the anonymisation of digital press archives to those consolidated for de-indexing cases (the *Google Spain* principles).

In the Court’s view, the relevance of information is often closely linked to its topicality. Contrary to the applicant’s assertions (...), it considers that the passage of a significant length of time has an impact on the question of whether a person should have a “right to be forgotten”. Like the Government, it notes that the passage of time since initial publication is one of the criteria national courts in Europe highlighted in cases concerning the same issue (...). (*Hurbain v. Belgium* [GC], §220)

In its case law, the Court has accepted that the balance between Article 8 and Article 10 rights is dynamic and will change over time. In general, the relevance of the right to disseminate information decreases over time, compared to the concerned person’s right to respect for his reputation.<sup>37</sup> In this context, the passage of time will reduce the topicality of the information and, therefore, the contemporary public interest when the request for anonymisation is made. Conversely, the passage of time increases the individual’s legitimate interest in reintegrating into society “without being permanently reminded of his past”.<sup>38</sup> Equally, whilst the Court refers to the “contemporary interest of the information” as a guiding criterion, it has admitted that in the case of digital press archives, that information “is rarely of topical relevance” and that their contribution to a debate of public interest “is not decisive in most cases”.<sup>39</sup> Nevertheless, the information may still be of historical, research or statistical interest as far as it is “relevant for the purposes of placing recent events in context in order to understand them better” (*Hurbain v. Belgium* [GC], §211). As Judge Krenč points out in his concurring opinion, the

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severe crimes such as those under the Prohibition Act that run counter to the letter and the spirit of the Convention” (§58).

<sup>37</sup> See, among other authorities, *Axel Springer v. Germany*, §96: “The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence (...). That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings” (internal references omitted).

<sup>38</sup> *Hurbain v. Belgium* [GC], §221. In the specific case of *Hurbain*, the domestic courts took into account that, at the moment that the anonymisation request was made, the time elapsed from the initial publication of the news article (sixteen years) had been significant and that the convicted person had been legally rehabilitated.

<sup>39</sup> *Hurbain v. Belgium* [GC], §224. As the Court points out, public interest may still persist long time after the publication in question, in cases where the information attracts the attention of the public to a significant degree, affects the well-being of citizens or the life of the community. Also, new developments in the criminal case can revive its public interest (§§223–224).

crux here is not whether the news article itself is of any historical or scientific interest but, instead, whether including the full name of the person concerned is of such interest.<sup>40</sup>

In close link with the “contemporary interest” analysis, the Court has referred to the popularity or public profile of the person concerned, as well as the individual’s conduct since the events, as factors which determine the weight of the public interest in the continued online availability of personal information. In this point, the Court in *Hurbain* repeatedly contrasts the fact that G. is an “anonymous” citizen with the public notoriety of the persons in the case of *M.L. and W.W. v. Germany*, where the applicants’ criminal behaviour and judicial proceedings had made the front page nationwide; and who had, in addition, made considerable efforts to stay in the public light few years before their application “to be forgotten”, by forwarding documents to the press and inviting the media to keep the public informed about their efforts to have the criminal proceedings reopened (*M.L. and W.W. v. Germany*, §§108-109). Indeed, the Court has been reluctant to interfere with the freedom of the press in cases where the person subject of the report was widely known to the public or held a public function. For instance, in *Axel Springer v. Germany*, the offender had been an actor with a starring role in a top-rated German television show, where he played the role of a police officer.<sup>41</sup>

- c) The negative repercussions on the reintegration into society of the individual affected by the publication

The Court includes the “negative repercussions of the continued availability of the information online” as a novel factor for the balancing exercise to be carried out by the press and domestic authorities when facing a duly substantiated anonymisation request. Unlike in the case of de-indexing or de-listing (*Biancardi v. Italy*, §§63-68), anonymisation of content stored in digital press archives is subject to a finding of “serious harm”.<sup>42</sup> In this respect, the Court underlines that the interference on a person’s reputation must reach a “minimum level of severity” to trigger Article 8.<sup>43</sup> The Court is cautious here by insisting that the fact that the person concerned has been legally rehabilitated does not give him or her an automatic entitlement “to be forgotten” directly enforceable against the press. In this line, the Court recalls the principle that Article 8 cannot be relied upon

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<sup>40</sup> Concurring opinion of Judge Krenč in *Hurbain v. Belgium* [GC], §18.

<sup>41</sup> *Axel Springer v. Germany*, §§97–99. In that case, the Strasbourg Court insisted that the assessment of whether a person is “well-known” or has a public profile in application of the balancing criteria is a matter that corresponds, in principle, to domestic courts. The Court therefore accepted the arguments given by domestic courts and considered that, even though a distinction between an actor and the character he or she plays can be made, given the very specific situation of that case the person concerned was “sufficiently well known to qualify as a public figure”. Also, outside of the information about judicial proceedings, see the renowned case of *Von Hannover (no. 2)*, cit., where the fact that the person is well-known, his or her role or function in society, constitutes an important criterion linked to the contribution to a debate of public interest of the publication in question

<sup>42</sup> *Hurbain v. Belgium* [GC], §232: “(...) in the present case, which concerns the anonymisation of content stored in a digital press archive rather than a request for delisting addressed to a search engine (...) in order to justify the alteration of an article stored in a digital press archive, the person concerned must be able to make a duly substantiated claim of serious harm to his or her private life”.

<sup>43</sup> *Hurbain v. Belgium* [GC], §231: “(...) in cases concerning the protection of a person’s social or professional reputation under Article 8 of the Convention, the Court has held that an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life”.

to complain of a loss of reputation resulting from “one’s own actions”, including the commission of a criminal offence. This doctrine of the “foreseeable consequences” comprises not only the reputational damage inherent to the conviction but also “any personal, social, psychological and economic suffering that could be foreseeable consequences of the commission of a criminal offence”.<sup>44</sup> However, the Grand Chamber connects the assessment of “serious harm” to the negative impact of the published information on the reintegration process of the individual:

In this connection, with regard to judicial information, the Court considers it important in assessing the damage to the person concerned to take into account the consequences of the continued availability of the information for that person’s reintegration into society (...). Against this background, and in close conjunction with the length of time that has elapsed since the information was published, it should be ascertained whether the person’s conviction has been removed from the criminal records and he or she has been rehabilitated, bearing in mind that what is at stake here is not just the interest of the convicted person but also that of society itself, and that individuals who have been convicted may legitimately aspire to being fully reintegrated into society once their sentence has been served (...). Nevertheless, in the Court’s view, the fact that a person has been rehabilitated cannot by itself justify recognising a ‘right to be forgotten’. (*Hurbain v. Belgium* [GC], §233)

Therefore, the reintegration of the convicted person into society plays a crucial role in recognising a right “to be forgotten” concerning the criminal past. The length of time that has elapsed since the publication is relevant, as is the legal rehabilitation of the individual, for instance, the erasure of criminal records and other rehabilitative figures under domestic law.<sup>45</sup> Here, reintegration is grounded, explicitly, not only on the individual interest of the person concerned but also in the collective interest of society in facilitating the restoration of the citizen’s full legal status after having served the sentence.<sup>46</sup> In the particular case under review in *Hurbain*, the domestic courts explicitly referred to the harm derived from the continued availability of his personal information in the online article, which created a kind of “virtual criminal record” because a search

<sup>44</sup> *Hurbain v. Belgium* [GC], §189, citing *Denisov v. Ukraine* (2018), §98, with further references.

<sup>45</sup> In this sense, see the judgment of the High Court of England and Wales in the case of *NT1 and NT2 v. Google LLC* [2018] EWHC 799, cited with approval by the Grand Chamber, which recognised that legal rehabilitation (the fact that criminal records are “spent”) is a relevant factor in the balancing exercise: “As a matter of principle, the fact that the conviction is spent will normally be a weighty factor against the further use or disclosure of information about those matters, in ways other than those specifically envisaged by Parliament. The starting point, after all, is the general policy or principle in favour of that information being “forgotten” (...). That policy has if anything become weightier over time. It is likely that in many cases the particular circumstances of the individual offender will support the application of that general principle to his or her case. But the specific rights asserted by the individual concerned will still need to be evaluated, and weighed against any competing free speech or freedom of information considerations, or other relevant factors, that may arise in the particular case [at para. 166(2), Warby J]. Note, however, that the judgment dismissed the appeal by one of the appellants, NT1, arguing that, despite his legal rehabilitation, he was still conducting business in the same field, so the publicity of his criminal record “serves the purpose of minimising the risk that he will continue to mislead”, adding that “He has not accepted his guilt, has misled the public and this Court, and shows no remorse over any of these matters”.

<sup>46</sup> This is consistent with a rights-based model of rehabilitation proposed by authors such as Rotman (1990). With respect to imprisonment, rehabilitation as an individual right presupposes the recognition of fundamental rights and encompasses the protection of the prisoner in the areas of health, education, training, and work. However, rehabilitation should also extend post-release to the complete restoration of the citizenship status that was restricted by the conviction.

of his full name on the newspaper's internal search engine or on Google immediately brought up the article. Furthermore, G.'s position as a doctor amplified the impact of the information and "was liable to stigmatise him, seriously damage his reputation and prevent him from reintegrating into society normally".<sup>47</sup>

In direct connection with the consequences for the reintegration of the person into society, the Court refers to the "degree of accessibility of the information in the digital archives" (*Hurbain v. Belgium* [GC], §§236-239). Oddly, the Court does include the level of impact of the publisher in question (e.g., territorial scope, audience level, number of visits, etc.) as a relevant factor under this accessibility criterion. The assessment is instead limited to ascertaining whether the archived article is "available without restrictions and free of charge or access is confined to subscribers or otherwise restricted" (*Hurbain v. Belgium* [GC], §238). In the case of *Hurbain*, the relevant article had been freely available to the general public on *Le Soir's* website, in contrast with *M.L. and W.W. v. Germany*, where access to specific articles was behind a paywall or confined to subscribers (*M.L. and W.W. v. Germany*, §113).

### 3.2.2. A genuine emphasis on the integrity of digital press archives?

In the last step of the balancing exercise, the Court refers to the impact of the anonymisation measure on the freedom of the press protected by Article 10. In *Hurbain*, the Grand Chamber emphasises throughout its judgment the importance of the preservation of the integrity of journalistic digital archives, establishing a principle of preservation and a test of "strict necessity" in respect of any interference:

Accordingly, although in the context of a balancing exercise between the right to freedom of expression and the right to respect for private life, these two rights are to be regarded as being of equal value, it does not follow that the criteria to be applied in conducting that exercise all carry the same weight. In this context, in fact, *the principle of preservation of the integrity of press archives must be upheld*, which implies ensuring that the alteration and, *a fortiori*, the removal of archived content is limited to what is *strictly necessary* to prevent any *chilling effect* such measures may have on the performance by the press of its task of imparting information and maintaining archives. Hence, in applying the criteria mentioned above, particular attention should be paid to properly balancing, on the one hand, the interests of the individuals requesting the alteration or removal of an article concerning them in the press archives and, on the other hand, the impact of such requests on the news publishers concerned and also, as the case may be, on the functioning of the press as described above. (*Hurbain v. Belgium* [GC], §211 (emphasis added))

Formally, the passages reproduced above reaffirm the importance of the integrity of press archives as a guiding principle, and this emphasis on the importance of the integrity of journalistic archives leads the Court to demand domestic authorities to "give preference to the measure best suited to [preserve the right to private life] and least restrictive of the press freedom" (*Hurbain* [GC], §242). The Court underlines that in addition to its primary function as a "public watchdog", the press has a secondary but

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<sup>47</sup> *Hurbain v. Belgium* [GC], §§29, 31, 234. In this sense, it is clear that disclosing information about the criminal past of citizens has a major impact on their chances of social reintegration, since it hinders notably the possibilities of the rehabilitated person to achieve the basic conditions for the development of a "normal" life. See, amongst the Spanish criminal law scholars, Alonso Rimo 2015, 568.

important role in maintaining archives containing news which has previously been reported and making them available to the public, as well as the importance of digital archives to preserving and producing news and information (*M.L. and W.W. v. Germany*, §90, *Hurbain v. Belgium* [GC], §180).

However, at the same time, the Grand Chamber recognises that the concerned person can alternatively exercise the right “to be forgotten” before the search engine or the publisher without being obliged to contact the search engine before applying to the publisher. Indeed, the Grand Chamber asserts that these are two different forms of data processing, each with its grounds of legitimacy and different impacts on the individual’s rights and interests.<sup>48</sup> As Judge Krenč points out in his concurring opinion, “dismissing out of hand any possibility of conducting a balancing exercise, in the name of an absolute principle of the integrity of digital archives, could prove problematic in terms of the competing requirements of Article 8, which, according to [the case law of the ECtHR] deserve equal respect”.<sup>49</sup>

On the other hand, the test of “strict necessity” and the Court’s insistence on the overriding value of the integrity of press archives would seem to contradict the application of this nominally restrictive standard to the facts under consideration in *Hurbain*. Here, the Strasbourg Court is satisfied with the loose scrutiny carried out by Belgian courts, who found that the anonymisation measure was “less detrimental to freedom of expression than the removal of an entire article” and that the principle of integrity was preserved because anonymisation implied “simply for the electronic version to be rendered anonymous [while] the paper archives remained intact” (*Hurbain* [GC], §§29, 249-251). In this line, the Grand Chamber notes with approval the fact that “the original, non-anonymised, version of the article is still available in print form and can be consulted by any person who is interested, thus fulfilling its inherent role as an archive record” (*Hurbain* [GC], §252). The assessment carried out by domestic courts was not “arbitrary or manifestly unreasonable”, and the “possible chilling effect on freedom of the press” stemmed from an obligation inherent in the “duties and responsibilities” of the press (*Hurbain* [GC], §§253-254). The Court comes to this conclusion despite the crucial fact that G., the concerned person, had not sought any de-indexing measure against the search engine and that the domestic courts had squarely considered that the most effective means to protect G.’s privacy was to anonymise the digital version, which still guaranteed “the integrity of the original digital version”.

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<sup>48</sup> *Hurbain v. Belgium* [GC], §208: “(...) data subjects are not obliged to contact the original website, either beforehand or simultaneously, in order to exercise their right vis-à-vis search engines, as these are two different forms of processing, each with its own grounds of legitimacy and different impacts on the individual’s rights and interests (...) Likewise, the examination of an action against the publisher of a news website cannot be made contingent on a prior request for delisting” (internal references omitted).

<sup>49</sup> Concurring opinion of Judge Krenč in *Hurbain v. Belgium* [GC], §22. A “blanket” dismissal of the possibility of any anonymisation measure begs the question of the effectiveness of de-referencing by search engines. In this respect, even if the search engine operator grants the request for de-listing, the fact remains that de-listing occurs for that specific engine and, for certain search engines, de-listing does not have to be global but limited in territorial scope. See Antani 2015.

#### 4. Conclusions

Until very recently, the exercise of the right to be forgotten as applied to information about the criminal past was strictly circumscribed to search engines, according to their obligations under EU data protection law to adopt measures of de-listing or de-referencing of personal data where the right to privacy outweighed the interest of the public to access that information. The very recent developments in the case law of the European Court of Human Rights show that the publishers of judicial information –more specifically, media outlets– may also be under the obligation, in certain circumstances, to take measures to protect the reputation of citizens as a dimension of their right to private life under Article 8 of the Convention. Indeed, the scope of the European Court of Human Rights case law is not all-embracing. One should not lose sight of the fact that its interpretive task is limited by the principle of subsidiarity, primarily for domestic authorities to guarantee the effective application of fundamental rights recognised by the Convention and to ensure adherence to the Convention standards as interpreted by the Court<sup>50</sup>. Similarly, the Strasbourg Court has insisted that under the Convention, Member States enjoy a margin of appreciation in selecting the means to secure compliance with Article 8 and reach a “fair balance” between freedom of expression and the right to privacy (*Hurbain v. Belgium* [GC], §201; *Couderc and Hachette Filipacchi Associés* (2015), §90-93).

Under the European Convention of Human Rights, the so-called right to be forgotten has not been recognised as a self-standing or autonomous right under Article 8 of the Convention (the right to private and family life). In fact, the Strasbourg Court has been reluctant to recognise a “self-standing right” to be forgotten even where it has declared the conventionality of measures of de-referencing or anonymisation.<sup>51</sup>

In general, the Strasbourg Court has strictly scrutinised any measure involving the direct interference content published in digital press archives. Departing from previous case law, *Hurbain* upholds for the first time an anonymisation measure interfering directly with the content of a digital press archive containing a lawfully published article. As the CJEU has done, Strasbourg has considered the qualitative difference in the continued availability of information about the person’s criminal past online and in a physical archive. It would be unfair to maintain a “virtual criminal record” whereby the offender’s reputation would remain perpetually linked to the crime he committed despite his rehabilitation.<sup>52</sup> The crucial difference between the right to be forgotten developed by the ECJ in *Google Spain* and subsequent case law, and the ruling in *Hurbain* in relation to digital press archives, lies in the fact that while in applications for de-listing against search engines, the rights of the data subject will generally prevail over the rights

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<sup>50</sup> In this regard, see the recent emphasis on the subsidiary role of the Court introduced by Protocol no. 15 to the European Convention on Human Rights, which reads as follows: “(...) the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

<sup>51</sup> *Hurbain* [GC], §199: “(...) In the Court’s view, a claim of entitlement to be forgotten does not amount to a self-standing right protected by the Convention and, to the extent that it is covered by Article 8, can concern only certain situations and items of information.”

<sup>52</sup> In this line, see Ní Chinnéide 2023.



of the search engine operator and the general public; Strasbourg in *Hurbain* requires domestic courts to conduct a proper balancing exercise between Articles 8 and 10 (Ní Chinnéide 2023) and emphasises the importance of preserving the integrity of digital archives. In any event, *Hurbain* diverges from the previous case law in *M.L. and W.W. v. Germany*, where the Court had readily accepted the argument of the risk of chilling effect adduced by domestic courts, finding that the sole fact of requiring the press to conduct a balancing exercise when faced with an express individual request “would entail a risk that the press might refrain from keeping reports in its online archives or that it would omit individualised elements in reports likely to be the subject of such a request”.<sup>53</sup>

Crucially, the direct interference with digital press archives has been seen by many commentators as a dangerous movement in Strasbourg’s case law.<sup>54</sup> The criticism of the notion of a right to be forgotten is not new, as critics have seen it as an open door to censure<sup>55</sup> or, even worse, as a danger to “corrupt history”.<sup>56</sup> Even within the Court, the strongly dissenting opinion of Judge Ranzoni in the Grand Chamber’s judgment in *Hurbain*,<sup>57</sup> joined by four judges in the minority, shows that the debate on the scope of this “right” is particularly intense when the right to be forgotten is exercised before the press. The fundamental concern which transpires from the powerful dissent relates to the chilling effect and the burden on the media that the recognition of such a right entails.<sup>58</sup> As a result, the dissenters consider that the search engines should be, in any case, the “first port of call” in applications for the right to be forgotten and propose to recognise a “right to remember” under article 10, emphasising the integrity of digital press archives as a crucial guiding principle which should only be overridden in exceptional cases.<sup>59</sup>

However, it may be argued that opening the door to anonymisation measures is well-grounded. Delisting is not always a feasible or effective measure for protecting the

<sup>53</sup> *M.L. and W.W. v. Germany*, §§103-104. The Court therefore applied “the most careful scrutiny under Article 10” to the anonymisation sought by applicants in that case.

<sup>54</sup> For instance, in relation to the *Biancardi* decision, see Monti 2021, concluding that Strasbourg’s ruling “contributes to condemning the whole of society to the barbarity of ignorance and lays the foundations for the largest indirect censorship crackdown of our times”.

<sup>55</sup> See, even before the *Google Spain* judgment, in the context of the debate on the recognition of a right to be forgotten in EU legislation, Rosen 2012. In response to the *Google Spain* decision, see, for instance, the very critical review in Kulk and Zuiderveen Borgesius 2014.

<sup>56</sup> King 2014. In this line, for an example of the strong reaction in U.S. media to the *Google Spain* ruling, see the *NY Times* editorial of February 4<sup>th</sup> 2015: “The European position is deeply troubling because it could lead to censorship by public officials who want to whitewash the past. It also sets a terrible example for officials in other countries who might also want to demand that Internet companies remove links they don’t like.”

<sup>57</sup> *Hurbain* [GC], Dissenting opinion of Judge Ranzoni, joined by judges Küris, Grozev, Eicke and Schembri Orland.

<sup>58</sup> *Hurbain* [GC], Dissenting opinion of Judge Ranzoni, joined by judges Küris, Grozev, Eicke and Schembri Orland, §5: “Do we wish to allow a situation in which the media are required in future, on a virtually permanent basis, to make subsequent changes to articles that were originally published in a lawful manner? What would the consequences be? I believe, in particular, that if the media were to face a constant threat of being compelled to alter the content of previously published material, they would feel obliged to display far greater restraint in their coverage of events. They would also have a powerful incentive to agree to requests for the alteration of archived information in order to avoid costly court proceedings and the risk of being on the losing side in those proceedings. All these factors would undermine the role of the press as defined by the Court’s settled case-law and would undoubtedly have a chilling effect (...)”.

<sup>59</sup> See the well-constructed (and restrictive) proposal advanced by the dissenting opinion at §§10-14.

private life interests of the rehabilitated person. As many authors have pointed out, delisting is structurally limited to the European version of search engines and can easily be circumvented by readily available technologies such as Virtual Private Networks (VPNs) (Frosio 2017, pp. 329–334, Lageson 2020, p. 152). I believe the Court’s current position on the right to be forgotten does not justify any alarm. The Court has been extremely cautious when opening the door to exercise the RTBF before the media. As Judge Krenč argues in his clarifying concurring opinion in *Hurbain*, the Strasbourg Court has not imposed an obligation on the press to systematically anonymise all the material in their online archives.<sup>60</sup> In *Hurbain*, the Grand Chamber has established with clarity that neither search engines nor the press are under an obligation to proactively monitor the continued public interest of information on criminal proceedings that has been lawfully published. Imposing such a burden would, as the Court has rightly argued, have a chilling effect on freedom of expression, as it would entail “a risk that the press may refrain in future from keeping reports in its online archives, or that it will omit individualised elements in articles that are likely to be the subject of such a request”.<sup>61</sup> The obligation is, therefore, limited to cases where the data subject has made an express request for anonymisation or de-indexing (*Hurbain v. Belgium* [GC], §209). The Court has insisted that Article 8 does not include a self-standing fundamental right “to be forgotten” and that such a right is limited to “certain situations and items of information” (*Hurbain v. Belgium* [GC], §199). In this regard, whilst information on criminal proceedings may be considered objectively sensitive (*Biancardi*, §§64, 67), the express requirement to substantiate a minimum level of harm to reputation in anonymisation requests (*Hurbain* [GC], §§189, 231–232) acts as an essential safeguard against censure.

On the contrary, one can argue that the Court’s new standard for reviewing anonymisation measures which directly interfere with digital archives remains very strict. Even if substantial harm caused by the continued online availability of judicial information is proven by the person concerned, the publisher and, where relevant, domestic courts have to balance the person’s interests against the rest of the criteria established by the Court, namely: the time elapsed since initial publication, the contemporary public interest at the time of the request, the public profile of the person concerned and the availability of alternative measures to anonymisation (*Hurbain* [GC], §205). In anonymisation cases, the general principle stemming from the Court’s reasoning is that the passage of time and the progress towards reintegration (usually materialised in the attainment of legal rehabilitation) tip the balance towards protecting the citizen’s private life. However, the passing reference to “offences whose significance is unaltered by the passage of time” begs the question of the applicability of a RTBF to the criminal past when the relevant offence is extremely serious or has attracted massive media coverage.<sup>62</sup> Indeed, *Hurbain* is a case where the interest in reintegration concurs

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<sup>60</sup> Concurring opinion of Judge Krenč in *Hurbain v. Belgium* [GC], §33.

<sup>61</sup> *Hurbain v. Belgium* [GC], §209, citing precedent in *M.L. and W.W. v. Germany*, §104.

<sup>62</sup> For instance, in *Mediengruppe Österreich GmbH v. Austria*, the Court decided –by majority– that the domestic court’s injunction prohibiting the publication of a photo of a convict under the National Socialism Prohibition Act, twenty years after his conviction and having obtained legal rehabilitation, did not violate the freedom of expression of the applicant newspaper. Here, the Strasbourg Court gave importance to “the fact that H.S.’s conviction under the Prohibition Act had already been deleted from his criminal record at the time of the publication in question (§§36, 70). The restrictive approach in respect of serious offences

with particular force (the past conviction was for a ‘not so serious’ reckless offence, the person is not widely known, the request is considered almost twenty years after events, and serious harm to his reputation could be presumed due to his professional position as a doctor).<sup>63</sup> Also, the Court in *Hurbain* controlled domestic judicial decisions, which granted the anonymisation request and gave domestic authorities a certain margin of appreciation for conducting its review on the necessity of the interference.<sup>64</sup>

Another common (and unnoticed) theme of the right to be forgotten cases in Strasbourg’s case law is the more sparse reliance on the principle of reintegration, at least if one contrasts this group of cases with the Court’s doctrine on life imprisonment and long-term imprisonment.<sup>65</sup> Whereas the emerging legal consensus on rehabilitation in European prison law has guided the Court in developing a “right to hope” concerning life sentences,<sup>66</sup> reintegration is rarely mentioned. It is “lost” among a plethora of balancing criteria.<sup>67</sup> However, the RTBF in the field of the person’s criminal past is partially grounded on the principle of reintegration into society and the recovery of full-fledged citizenship.

Navigating this complex and polarised debate on the responsibility of the media when balancing the conflicting interests when faced with de-referencing or anonymisation requests, the Strasbourg Court has strived for a delicate equilibrium between protecting the rights of the individual to privacy and data protection on the one hand, and guaranteeing the public’s right to access information of public interest, on the other.

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would seem to be the tone in domestic jurisdictions, even in relation to delisting measures: for instance, in a widely publicised judicial decision in Spain, the National High Court (*Audiencia Nacional*) has rejected the appeal against the decision made by Google to deny delisting different pieces of news in a high-profile murder case, on the basis of the “special public repercussion” of the crime, the media coverage it attracted, the “particular abhorrence” sexual offences cause in society, and the lack of a sufficient period of time elapsed since release from prison [SAN 1211/2024, de 6 de febrero - ECLI:ES:AN:2024:1211].

<sup>63</sup> Similarly, see De la Durantaye 2023, p. 134, arguing that the different approach in the cases of *M.L.* and *Hurbain* could be explained by differences in the crimes that had given rise to the initial reporting: “*M.L.* and *W.W.* had been convicted of a murder, and thus of an intentional and very grave crime which sparked additional public interest because the victim was a famous actor. By contrast, *G.* had negligently caused a car accident with terrible consequences. There is room for debate as to whether the initial publication of *G.*’s full name had been lawful. In granting *G.* the right to have the articles anonymised, both the Belgian courts and the ECtHR may well have forced the publisher to right an old wrong”.

<sup>64</sup> *Hurbain* [GC], §201. Without ignoring the well-established principle that “the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher” and that “the margin of appreciation should in theory be the same in both cases” (see, for instance, *Couderc and Hachette Filipacchi Associés v. France*, §91); it seems open to doubt whether the Grand Chamber would have declared a violation of Article 8 in this case if the domestic courts had rejected *G.*’s application for an anonymisation order and if he had been the applicant before the Strasbourg Court.

<sup>65</sup> On the development of reintegration as a basic principle of European prison law and policy, see Van Zyl Smit and Snacken 2009, pp. 105-108.

<sup>66</sup> See, only to cite the most important, *Vinter and others v. the United Kingdom* Apps nos 66069/09, 130/10 and 3896/10 (ECtHR, Grand Chamber, 9 July 2013), §114 et seq.; *Murray v. the Netherlands* App no 10511/10 (ECtHR, Grand Chamber, 26 April 2016), §101 et seq.

<sup>67</sup> In *Hurbain v. Belgium* [GC], the Court considers reintegration as an important factor to assess the damage of continued availability of information, within the criterion of “The negative repercussions of the continued availability of the information online”. However, the Court is keen to point out that “the fact that a person has been rehabilitated cannot by itself justify recognising a right to be forgotten”. In *Biancardi v. Italy*, the Court simply does not mention reintegration or rehabilitation.

Overall, the recent development of its case law deserves a relatively positive account, as the Court has widened the scope of the right to be forgotten, taking stock of the extraordinary risks to the effective rehabilitation post-sentence in the internet era. By demanding that the media conduct a careful balancing exercise on a case-by-case basis upon the express request of the affected person, the Court facilitates the complete restoration of the citizenship of the legally rehabilitated person, reducing the stigma attached to a conviction and lessening the risk of societal discrimination against the individual.<sup>68</sup>

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<sup>68</sup> See, referring to legal rehabilitation in the context of the erasure of criminal records, Raynor and Robinson 2005, 10-11.

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