In: 26 (2) *Maastricht Journal of European and Comparative Law* 183 (2019)

Data protection, anonymity, and courts

*Michal Bobek**

A few months ago, I participated in a conference at the Luxembourg Max Planck Institute for Procedural Law. The topic was 'Open Justice'. One contribution caught my attention in particular: that of Jean-Claude Wiwinius, the president of the Luxembourgish Supreme Court. Pondering on access and transparency in civil proceedings, he warned against the 'over-anonymization' of judicial decisions. He suggested that the right balance must be struck between the protection of personal data, on the one hand, and the publication of judgments, on the other. With a pinch of something that, if read between the lines, might be perceived as jealousy, he mentions having recently participated in the opening of the judicial year at the European Court of Human Rights (ECtHR) where President Raimondi (of the ECtHR) and President Lenaerts (of the Court of Justice of the European Union) were quoting the key judgments from their respective jurisdictions by the name of the parties. He points out the ease with which international courts might quickly quote their judgments in this way.

I know that feeling. Coming from the Czech judicial system, which shares the Germanic/Austrian heritage of judicial anonymity, we felt similar jealousy in early 2000, when deciding how to (re)structure the way judgments would be published, and looked at the practice of both European courts, as well as a number of national systems. In the past, Czech tradition has dictated that all names be anonymized. In the title (header) of the judgment, for the purposes of publication in court reports,[1] a person was anonymized by the adoption of her initials. In the text of the judgment, the persons participating in the judicial proceedings were also anonymized, or preferably referred to by the 'generic function' they had within those proceedings: the applicant, the respondent, the accused, the joint party, and so on, without actually using their real names.

This particular style has a long history: it can be found in the court reports from the Czechoslovak interwar period (1918 to 1938), but also, for example, in Austria.[2] In the Communist period, judicial 'anonymity' adopted - for rather obvious reasons - new and rather surprising dimensions: not only were the names of parties and other persons participating in the proceedings anonymized - including legal persons - but some zealous anonymizers would also anonymize the names of judges participating in the decision, as well as redacting or deleting the facts of the case. Eventually, what was published in the official court reports

* All opinions expressed are strictly personal to the author.

[1] Naturally only after a full judgment, containing all the information, would be signed by the judge or chamber in question, publicly pronounced, and served on the parties.

[2] Thanks to Alex (Österreichische Nationalbibliothek, 'Historische Rechts- und Gesetzestexte Online', http://alex.onb.ac.at), a collection of the Austrian National Library, the court reports of the Imperial Court (*Reichsgericht*) between 1869–1918, as well as those of the Administrative Court (*Verwaltungsgerichtshof*) between 1876–1934 can be viewed online.

would often be a truncated statement of 'what the law is supposed to be', decreed independently of and separated from any facts, context, and the details of a particular case.

In discussions after 1989, two types of arguments gained ground and led to the gradual de-anonymizing of judgments: these being of constitutional and pragmatic nature.[3] At the *constitutional* level, the reasons for a political push and a value-driven departure from Communist judicial secrecy was rather self-evident. Justice must not only be made in public, its outcomes must also be made subject to full public review and scrutiny. Beyond that, however, it was also suggested that the basis for judicial legitimacy and effective judicial law-making in the individual case are the facts and the details of the individual case. The further a judicial decision departs from, hides, or disregards the facts and the circumstances of the case, the less legitimate it is as a judicial decision. At the level of supreme jurisdictions, judgments that are devoid of facts and details become decrees by quasi-legislative assemblies.[4]

The pragmatic reasons for de-anonymization were twofold: technical and systemic. On the *technical* side, the anonymization of decisions is quite dull but labour-demanding work that yields meagre results and is prone to mistakes. Moreover, judicial hearings are by default public, where the names of the parties of course are fully disclosed, unless the identity of a party or a witness is specifically protected. In addition, as per Article 96(2) of the Czech Constitution, a judicial decision must always be pronounced publicly, even if the public has been, for whatever reason, excluded from attending part of or all of the hearing. The combination of these factors, together with the (then) incoming internet boom, meant in practical terms that the Czech courts were spending quite some money and human resources on becoming increasingly ridiculous. Not only were there entire lists of amusing anonymizations, which always served as a good starting joke at any legal dinner party, but even in those cases where it was not immediately obvious who was 'hiding' under those initials, it normally took only a quick internet search to find out the identity of the persons in question, if one wished to do so.

Finally, there were also pragmatic considerations relating to the *system* of case law and work with it that called for a departure from anonymization, in particular at the supreme judicial level. Stated in a nutshell, numbers do not make precedents. Names and individual stories may, but a list of anonymous numbers never will. Without cases that are easy to refer to, normally by the name of the claimant, it is very difficult to have a sustained and reasonable judicial discourse about case law. Jean-Claude Wiwinius, quoted in the opening paragraph, already alluded to that by highlighting the ease of referring to and thus discussing the case-law of the ECtHR and the Court of Justice. By way of contrast, one realizes rather quickly

---

[3] For a review of the discussions, see e.g. L. Derka and Z. Kühn, 'Je anonymizace publikovaných soudních rozhodnutí vskutku nutná?', 14 *Jurisprudence* (2005), p. 21; or Z. Kühn and H. Baňouch, 'O publikaci a citaci judikatury aneb proč je někdy judikatura jako císařovy nové šaty', 13 *Právní rozhledy* (2005), p. 484.

[4] For the same reasons, the instrument of 'legal resolutions' or 'interpretative statements' issued by supreme jurisdictions, whereby (typically) a division of a supreme court or the plenary would provide binding interpretation of the law it chooses *outside* of any pending judicial proceedings before it, has been viewed with quite some caution or directly discontinued in a number of those systems. In English, see e.g. Z. Kühn, 'The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts', 2 *Croatian Yearbook of European Law and Policy* (2008), p. 19.

that it is virtually impossible to have a discussion in the courtroom, or with students or one´s colleagues, on the delicacies of the approach that, for example, the (Czech) Supreme Administrative Court originally embraced in 9 Afs 407/2015-118, but then came 6 Afs 56/2016-98, to which 5 Afs 369/2016-225 added another condition, while of course the systemic consistency with 2 Ans 36/2014-66 ought to be maintained, with all of those naturally being referred to on the spot from the top of one's head.[5]

It was perhaps on this account that also the more sceptical and traditional judges started seeing that without names that enable ease of reference, the impact of their work is constantly being undermined. Without a reasonably easy and reliable reference system, few lawyers refer to individual cases in their submissions. Instead, there are vague references to 'established case law', with the need for a judicial response in decisions repeating the same content again, and again, and again. In addition, a precedent is a story. It is the accuracy, detail and the distinct elements of that story that not only make a case memorable, but which also help to convince the reader and provide that case with the necessary legitimacy. Again, judicial legitimacy is case based. The inability to refer to and have a reasonably easy discourse about individual cases hinders those cases from becoming individual precedents.[6]

For such systemic reasons, but also seeing that on a more practical level, even if the entire world knew that Flaminio Costa was a lawyer from Milan who refused to pay an electricity invoice amounting to 1925 lira;[7] that Ian William Cowan was a UK national subject to violent assault at a metro station exit during a brief stay in Paris;[8] that Tanja Kreil was trained in electronics and applied for voluntary service in the German Bundeswehr but was rejected because of her sex;[9] or that Johannes Martinus Lemmens was caught drunk driving in Maastricht, but, when facing criminal charges for that offence, rather cleverly wondered whether his breath had been validly tested with a breath-analysis apparatus that had 'not been notified to Brussels';[10] it does not appear (or it has certainly never come to light) that their personal lives were ruined because their name has been associated with a leading case. That is even more strongly the case with regard to the case law of the ECtHR, in which an even greater number of information provided could be classified as 'sensitive', ranging from the information that Frau Dorothea Vogt was a Communist (would be teacher) from Jever in Lower Saxony;[11] to the fact that Anthony Tyrer was birched at school when he was 15 years

[5] In some of the legal systems of the Germanic legal family, the legal scholarship (or sometimes even the court itself) is then forced to give imaginary (or subject-matter descriptive) names to such cases, in order to have the possibility of at least some kind of referencing system. The discussion then becomes between the 'Sugar Quota III' decision as opposed to 'Milk Quota IV (from 2011)', in the light of 'Sugar Quota V'.

[6] After all, it is not without reason that those systems that recognise and accept the value of single precedent must have accordingly advanced reference systems for case-law that are easily identifiable and recognisable. For an (older but still remarkable) comparative study in this regard, see N. MacCormick and R.S. Summers, *Interpreting Precedents: A Comparative Study* (Aldershot, 1997).

[7] Case 6/64 *Costa*, EU:C:1964:66.

[8] Case 186/87 *Cowan*, EU:C:1989:47.

[9] Case C-285/98 *Kreil*, EU:C:2000:2.

[10] Case C-226/97 *Lemmens*, EU:C:1998:296.

[11] ECtHR, *Vogt v. Germany*, Judgment of 26 September 1995, Application No. 17851/91.

old;[12] or that Christine Goodwin was a post-operative male to female transsexual;[13] as well as so much other sensitive data regarding issues of religion, sexuality, race, health, and other deeply personal circumstances.

However, in all those cases, or sometimes even particularly in such cases, it is fair to assume that a number of those persons, be it before the European courts but also in similar leading cases in national supreme jurisdictions, would - instead of seeking anonymity - in fact protest if their name were to be removed from 'their' case. It is thus often not just the systemic requirements of the judicial function, but also its individual actors that categorically demand public justice and public satisfaction, or even wish to be publicly associated with certain causes.

Moreover, an additional factor is the level of a court in a judicial system or hierarchy. Certainly, all courts operate in the public interest. Equally, bringing an individual case will be in the private interest of the claimant. However, the equilibrium between those and other interests in an individual case is likely to change with the case's progression in the relevant judicial system. At the first instance level, the interest in litigation is predominantly private. At the appellate level, that private interest becomes mixed with the public interest in controlling and correcting an individual decision. At the level of supreme courts, however, the interest becomes predominantly public: to clarify, unify and further develop the law, with, arguably, the private interests in the individual case retreating to the background.[14] This shifting balance should then also be reflected in the degree of appropriate anonymization: a first instance divorce decision is clearly a rather private matter, not necessarily to be publically known, and perhaps, unless there is a categorically formulated control requirement in a legal system, should not be published. By way of contrast, a landmark case of a supreme jurisdiction on family law that will form the law for years to come is a very different matter.

All those and other considerations led the Czech supreme jurisdiction to gradual retreat from anonymization. For a person who hails from such a background, it is indeed rather surprising to encounter not (dis)similar discussions some twenty years later at the European level, this time around in the context of the new General Data Protection Regulation (GDPR)[15] and/or the right to be (judicially) forgotten[16] that are said to impose anonymity of all natural persons in judicial proceedings.[17] Certainly, with new development in ICT, the emphases and balance might change over time. But also there, in my strictly personal view, I believe that the correct

---

[12] Including the fact that the birching raised, but did not cut, the applicant's skin and he was sore for about a week and a half afterwards. EctHR, *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, Application No. 585/67.

[13] ECtHR, *Christine Goodwin v. the United Kingdom*, Judgment of 11 July 2002, Application No. 28957/95.

[14] Further see e.g. J.A. Jolowicz, 'The Role of Supreme Court at the National and International Level', in P. Yessiou-Faltsi (ed.), *The Role of Supreme Courts at the National and International Level: Reports for the Thessaloniki International Colloquium, 21-25 May 1997* (Sakkoulas Publications, 1998).

[15] Regulation No. 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, [2016] OJ L 119/1 (General Data Protection Regulation).

[16] Case C-131/12 *Google Spain and Google*, EU:C:2014:317.

[17] See the press release of the Court of Justice of the EU, 'From 1 July 2018, requests for preliminary rulings involving natural persons will be anonymised', *CJEU* (2018), https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180096en.pdf.

balance referred to Jean-Claude Wiwinius still needs to be found. I wish to make three remarks in this regard.

First, judicial openness and transparency must remain the rule from which derogations might naturally be possible in individual cases. Such a possibility already exists in the European systems as well as on the national level. In cases where special interests so require,[18] the anonymity of a private party can and will be granted. However, unless judicial openness is to mean something rather different for the future, it is hardly possible for anonymity to become the rule and openness the exception. There is no *general* right to an *anonymous* trial, with the claimant stepping into the public agora effectively demanding private justice, hidden from public view and control. Ever since antiquity, reborn after the end of cabinet justice, Star Chamber(s), and other tried and dismissed visions of secretive justice,[19] the key condition and the source of judicial legitimacy has been the *default transparency* of judicial proceedings and their outcome.

Second, it still remains to be explored how precisely and to what extent the GDPR is applicable to judicial work and if so, what exactly it requires from courts when they are acting in their *judicial capacity*.

On the one hand, unless a judge is seen as a computer, it is doubtful how far judging an individual case and drafting an individual decision in that case is actually the 'processing of personal data wholly or partly by automated means' in the sense of Article 2(1) of the GDPR. Of course, the judgment is likely to be typed up on a computer. But does that mean that anything done by an individual on a computer amounts to the processing of personal data? Since any aspect of any activity today will, sooner or later, be connected to a computer, then everything in the human society is in effect the processing of personal data by automated means.[20] Moreover, a judgment or information about parties will, sooner or later, become 'part of a filing system' in the sense of the same provision. But the inclusion of those data about the parties in a court's automated registry is simply a different operation than drafting a judgment.

---

[18] Ranging from interests such as the protection of minors or other vulnerable persons and their identity to the protection of business secrets and professional reputation, with the protection of the latter legitimate interests naturally not limited to just natural persons, but legal persons as well.

[19] For instance, in the practice of the Parlement de Paris in the 14th century, reasons for a decision had to be kept secret. They were seen as a part of the judicial deliberation process, which was to be kept confidential. See J.P. Dawson, *The Oracles of the Law* (The University of Michigan Law School, 1968), p. 286–287. Generally, see J. Krynen, *L´État de justice France, XIIIe–XXe siècle: L'idéologie de la magistrature ancienne* (Gallimard, 2009), p. 79 et seq. It was roughly from the end of the 18th century onwards that reasoning a judicial decision started being stated in full and in writing, see generally P. Godding, 'Jurisprudence et motivation des sentence, du moyen âge à la fin du 18e siècle', in C. Perelman and P. Foriers (eds.), *La motivation des décisions de justice* (Bruylant, 1978); T. Sauvel, 'Histoire du jugement motivé', 61 *Revue du droit public* (1955), p. 5.

[20] It is fair to acknowledge that part of this problem of 'application overreach' of the personal data legislation is due to the rather expansive case-law of the Court, which early on effectively negated the exceptions provided in Article 3 of the Directive 95/46. See in particular, Case C-101/01 *Lindqvist*, EU:C:2003:596, para. 37-48 and Joined Cases C-139/01, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others*, EU:C:2003:294, para. 41. By contrast, see the more cautious approach in Article 29 Working Party, 'Opinion 4/2007 on the concept of personal data', *Article 29 Working Party* (2007), https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf, p. 4-5.

It is thus necessary to be specific about what exact operation is supposed to be covered and why. Part of the problem in this regard is a somewhat static and party-centred vision of what constitutes personal data, and the ensuing sweeping vision of the notion of processing, not recognizing that the processing of personal data is a fragmented but dynamic notion. The key question is not 'who', but rather first 'what', and from that follows the question of 'who' for that specific type of operation. The notion of personal data and its processing ought to be operation-focused and driven.[21]

On the other hand, and perhaps more importantly, even if (an element of or even all) the judicial activity of the courts were found to fall under the GDPR, any potential processing of personal data carried out for that purpose is clearly lawful, without the consent of the data subject needed, under either Article 6(1)(c) or 6(1)(e) of the GDPR. The same is even valid for the processing of sensitive data under Article 9 of the GDPR, with Article 9(2)(f) of the GDPR explicitly excluding 'courts acting in their judicial capacity'. Finally, Article 55(3) of the GDPR, read in the light of its Recital 20, excludes the competence of data protection supervisory authorities to 'supervise processing operations of courts acting in their judicial capacity'.

Thus, even if the GDPR were said to be applicable to courts when acting in their judicial activity, the scope of any obligations arising thereunder appears to be notably 'light'. Any processing of 'normal' personal data as well as that of sensitive data in the course of judicial activity, including the publication of judgments which, on any reasonable construction, is part of the 'judicial activity' of a court, is *ex lege* lawful and permitted. That could hardly be any different: the essence of judging is solving individual disputes, in which personal data form the bedrock of reasoning, finding a solution, and the legitimacy of the judgment. Courts are not legislators and they are not entitled to decree legislation in the abstract.

That of course does not deprive the courts, even when acting within their judicial activity, from the obligation to protect the privacy of individual parties in individual cases, in which the conditions of the case require such protection. However, it is necessary to stress again that any such protection can already be accommodated within the standing procedural rules of a court, allowing for anonymity orders, non-disclosure of sensitive data or information and a number of other measures justified *in individual cases*.

The 'right to be forgotten' does not lead to a different result. Suffice to recall that pronouncement becomes relevant only *with passage of time*, after which the even initially lawful processing of accurate data may no longer be necessary in light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.[22] Again, leaving aside the issue as to how far such pronouncement could even be applicable to published case law that remains of ongoing

[21] Critically on this point see Opinion of Advocate General Bobek in Case C-40/17 *Fashion ID*, EU:C:2018:1039, para. 71-110.
[22] Case C-131/12 *Google Spain and Google*, EU:C:2014:317, para. 93 et seq.

relevance for quite some time, because its primary purpose is not to contain the information about the actors, but about the law, the 'right to be forgotten' after the appropriate passage of time could hardly be stretched to the 'right to pretend the one was never there' or even the 'right to ab initio anonymity'.

Third and final, since no generalized obligation of anonymization of judicial decisions follows, from my point of view, from the GDPR, the varied judicial and constitutional traditions of the Member States are to be fully respected, even (or rather in particular) in a multi-layered judicial system based on cooperation. The rules on drafting style for judgments, including the (non-)anonymization of parties and the referencing system for cases within each national system reflect deeper choices, values, and compromises, being of a much older date than any data protection rules on the European level. Moreover, insofar as it would indeed be applicable, even the GDPR allows for specific national measures adapting the application of its rules, thus allowing for the accommodation of such judicial diversity.[23]

The nature of the alternative, in which the efforts for a reasonable, in individual cases justified balance between open justice and transparency on the one hand, and privacy and the protection of the personal data, on the other, will be replaced by a Kafkian dystopia of NKs, Xs, Ys, XCs, LMs or LHs, with further additional factual elements likely to permit the identification of the individual persons censored away from an individual decision, might only be underlined by the fact that if such standards were to be applied, Kafka's Process[24] would also be in need of anonymization before it could ever be published as a judicial decision. Most readers of that novel, which is often referred to as the embodiment of remote, inaccessible and incomprehensible justice, might only remember the main character, Josef K. However, it would appear that Josef himself was improperly anonymized, as Josef was his ('real' first) name and 'K.' was merely an abbreviation of his surname. Different initials should have been used, in order to make sure that he could not be identified indirectly.[25] Moreover, as far as correct anonymization techniques were concerned, it clearly went further downhill from there: Mrs Grubach, watchman Franz, state prosecutor Hasterer, Ms Bürstner, Uncle Karl, and many others, were also improperly anonymized.

Leaving aside the issue of how and against whom those persons could bring a civil liability claim for damage caused by unlawful processing of their personal data, and the violation of their right to be (finally) forgotten, the rather perturbing concluding questions remains: how far down the personal data rabbit hole are we if Kafka's writings are now becoming an open, transparent novel, in need of 'proper' anonymization?

---

[23] See in particular Articles 6(2) and 6(3)(b) of the GDPR.
[24] F. Kafka, *Der Prozess* (Fisher, 1962).
[25] See further on the necessary robustness of efficient anonymization, Article 29 Working Party, 'Opinion 05/2014 on Anonymisation Techniques', *Article 29 Working Party* (2014), https://www.pdpjournals.com/docs/88197.pdf.