

Michał Tadeusz Najman

**Protection of the reputation of the deceased in Polish law.
*Postulates de lege ferenda.***

Summary

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dr hab. Joanna Wyporska-Frankiewicz prof. UŁ
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The legal protection of reputation in recent decades has been eagerly discussed in the legal literature. This seems to be related to the transfer of the burden of social life from the physical sphere to the virtual world, to which the development of technology and the spread of mass media have contributed. Undoubtedly, wider access to the Internet has a positive impact on the realization of the constitutional right to freedom of speech and expression. It allows people to present their views to a larger audience, which is might be difficult in the real-life. Nevertheless, it should be borne in mind that the more widespread use of mass communication also has disadvantages. One of them is that by anonymizing data online, it is possible to publish information that is derogatory to the honor of others. Polish legislator recognized this problem and in 2010 introduced Article 212 § 2 into the Criminal Code. However, protection of reputation is considered only in relation to living persons. The fact that after death the reputation that a person has earned throughout his life can also be violated is ignored. In polish law there is no legal means of posthumous protection of reputation. Without any legal consequences, especially when the deceased had no relatives, one's reputation can be breach. At best, the legal consequences of criminal or civil insult of a deceased in Polish law may indirectly occurs in civil law but only if the complainant proves that his or her right to veneration or worship of the deceased was violated. This construction appears to be flawed due to numerous doubts not only of a legal nature, but also of an axiological nature. First, it is based on the assumption that all personal goods end their existence with the death of a person. In the case of reputation, however, the problem is more complex, and some jurists advocate the opposite conclusion in this case, holding that posthumous reputation protection is permissible. Furthermore, that second resolution was implemented both in criminal and civil legal orders in many countries around the world.

Protection of the reputation of the deceased shall be identified as the research problem in this work. This issue has not yet been addressed in the Polish doctrine. Just few mentions of it are limited only to the statement that the "current state of the law does not allow infringement of the reputation of the deceased, neither in civil law nor in criminal law".

The research goal is to demonstrate that the protection of the reputation of the deceased is such a politically and legally important social issue that it should be introduced into the Polish legal order. In order to facilitate and realize the indicated

research assumption, the following is also proposed: first, a legal measure, in the form of the introduction of a legal norm granting personal goods to the deceased, and second, the introduction of a legal basis for an action for the protection of the personal goods of the deceased.

Presented problem and its solution bear significant legal and social importance. It is proposed to introduce into legal order an institution hitherto unknown in the Polish legal system, which grants legal protection to the personal goods of the deceased, while at the same time posing the threat of violating another constitutional freedom, which is the freedom to conduct scientific research, especially historical one. Additionally, the proposed solution, which is its main premise, will provide a legal basis for liability-both civil and indirectly criminal-for violating the reputation of a deceased person.

The conclusions are based on the analysis of primarily Polish-language, English-language and French-language literature. The presented proposal of legal regulation is also based on the analysis of criminal laws from over 40 countries: European, Asian, African and American, in which the problem of protecting the reputation of the deceased is legally regulated.

Dissertation consists of seven parts comprising chapters entitled: Protection of reputation of deceased as a problem of policy of law; The concept of reputation and the legal basis for its protection; Protection of reputation of deceased in criminal law - introductory remarks; Defamation of the deceased; Protection of reputation of deceased in civil law; Circumstances excluding unlawfulness when violating the reputation of deceased - a comparative analysis on the basis of criminal and civil law; Proposal for regulation - *postulates de lege ferenda*.

Chapter I presented problems related to the axiological basis of the protection of the deceased. It is first noted that the protection of the dead can follow a two-pronged course and include both the protection of the corpse and the protection of reputation. Such a distinction is crucial to focus only on the second type of protection, to which the dissertation is devoted. Protection of the corpse is a common offense in most, if not all, legal orders. Determining the object of protection of that crimes is difficult, especially when their verbal phrases such as the violation of honor, insulting the corpse, desecration of cemetery facilities, violation of bodily integrity of the corpse, showing disrespect to the corpse or disrespectful treatment of the grave or disrespecting the memory of the dead, are indicated as the executive action.

Hereinabove mentioned examples, shift that the orientation of the legal protection of the corpse to the protection of reputation, what suggests that despite the well-established view in the doctrine of the "impermanence" of personal property after the death, in the case of the protection of the corpse the literal interpretation of the provisions points to a different conclusion . However, the considerations carried out have been focused on the problem of violation of reputation in the strict sense, i.e. violation by insult in criminal law and civil law. In the following parts of this chapter, the legal means for the protection of the honor of the dead in criminal, civil and administrative law are discussed, as well as the functions performed by the protection of the honor of the dead. The genesis of the protection in question and its evolution are also presented - paying particular attention to the modifications of its legal justification.

Chapter II, devoted to the understanding of the concept of honor in law and the bases of its protection, provides a linguistic analysis of the title concept, with reference to its genesis in the Polish language. Then the legal bases for the protection of reputation in international, constitutional and domestic law were presented. Three ways of defining the concept of reputation in law were presented. The following sections of the chapter attempt to determine the borders of protection - both subjective and temporal - of the reputation of deceased persons. It first examines whether all subjects are subject to equal legal protection in the case of violation of reputation, and in particular whether the boarder of protection is shifted (wider or narrower) in the case of violation of the reputation of public figures like politicians or celebrities. Next, the subjective borders of the protection of the reputation of the deceased were indicated, with particular emphasis on the right to freedom of conscience and the right to freedom of expression.

Chapter III contains introductory remarks on the issue of the protection of the deceased in criminal law. First of all, it was made clear that the protection of the dead under criminal law proceeds in two ways: as the protection of the corpse and as the protection of intangible property vested in the deceased. This conclusion was based on an analysis of 40 Criminal Codes. It was proposed to divide crimes carried out on human corpses into: Crimes against the honor and inviolability of the integrity of the corpse, crimes against the place of rest, crimes of taking property from the corpse or place of rest, crimes of a sexual nature, crimes of a medical nature, crimes of a religious nature, crimes of a criminal procedural nature and crimes of an

administrative nature. The glaring discrepancy in the legal protection of human corpses and the honor of the dead is apparent here. At the same time, this chapter justifies the limitation of considerations adopted in the rest of the work. It points out the diversity of criminal behavior performed on corpses and the multiplicity of goods legally protected by the criminalization of such behavior. The richness of the discussed crimes forces the necessity of narrowing the conducted research to the analysis of only a small section of them, which in the case of this study is devoted to the posthumous protection of honor.

In Chapter IV, it was described in detail the prerequisites for criminal liability for criminal defamation of a deceased person. This part of the work also presents the author's proposal for understanding the concept of defamation in law and its classification. There were also presented a brief commentary-of the defamation of deceased as a crime in 24 countries.

The Chapter V presents the legal basis for the protection of personal goods in Polish civil law. Attention was also paid to the dissimilarities peculiar to the protection of deceased. Here both the concept of unlawfulness itself, as a prerequisite for the violation of reputation, and its relationship with the culpability of the perpetrator were presented. Next, the circumstances excluding the unlawfulness of acts violating the reputation of the deceased were indicated, such as consent to posthumous publication containing details of the deceased's life, which in public opinion are generally considered to violate reputation, or consent to the use of the corpse for artistic purposes . The civil law protection of the reputation of the deceased in selected legal orders was reviewed too. On this basis, specific forms of protection of the honor of the dead in civil law were distinguished. This protection, can be granted in law by indicating it explicitly in the law, as well as indirectly by not arising directly from the law, but resulting from established case law which can have two forms. The first grants protection to the deceased person, represented by the plaintiff, whose legal interest is not a prerequisite for the liability of the infringer. The second way, adopted in the Polish judicature, is to grant protection by extending protection to the personal property of the plaintiff (e.g., in the form of a cult of the memory of the deceased) violated by violating the reputation of the deceased person.

In Chapter VI were presented the circumstances excluding the illegality of reputation-infringing behavior in civil law and criminal law.

The dissertation ends with a Chapter VII. This part presents the author's proposed way of implementing into the Polish legal order legal solutions providing legal protection of the reputation of the deceased in civil and criminal law. It was recommended to introduce into the Polish legal order a statutory fiction of a deceased person, to whom the law grants personal goods inherent in living persons, as long as this does not contradict the essence of these goods. Such a solution will, it seems, be sufficient to extend the criminalization of defamation, including to deceased persons without the need for extensive changes to the existing legal regulation. Indeed, the phrase "person" used in the disposition of the norm of Article 212 § 1 of the Polish Criminal Code can be referred to both an individual and a deceased person. The legal normalization of the concept of deceased persons only serves to clarify the legal basis for the protection of the indicated goods, without the need to refer to exogenous factors (e.g., religious or worldview beliefs of the judge), including, above all, the protection of the rights of living persons. The essence of the introduction of the so-called legal fiction of the crippled subjectivity of the dead boils down to the protection of the interests of members of society by ensuring respect for the dead.