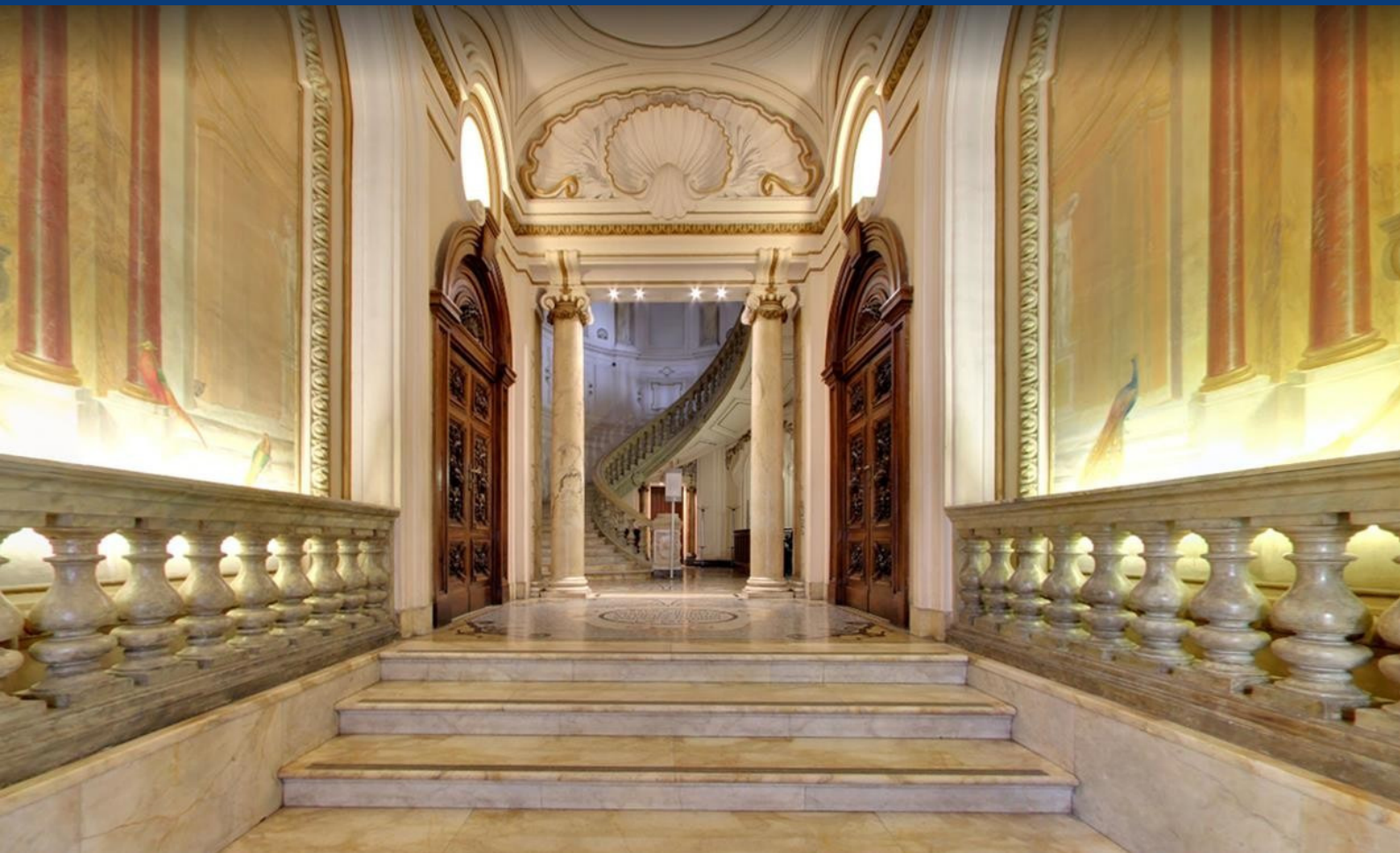


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The right to be forgotten comes of age

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Abstract

As time goes by, dust accumulates, feelings are diluted and dispersed, psychological and physical wounds heal, synapses get lost, memory vanishes, people forget (but the Internet does not). Oblivion is in the nature of things and should be dealt with as such. One can accept it, or fight, resist and (try to) remember. But what about a legal pretense to (force third parties to) cancel one’s past?

The starting point of the paper is a basic taxonomy, with three entries: (i) predigital, traditional right to be forgotten; (ii) European digital oblivion (right to delisting); (iii) possibly, a third frontier, still in search of definition, to be labelled provisionally as archival oblivion.

The three epiphanies refer to different settings, though partially converging and marginally overlapping. The overall picture looks confused and is somehow exposed to exasperated outcomes. But recent judicial efforts, in Italy and Germany, contribute to define a viable equilibrium.

Keywords:

right to be forgotten, privacy, personal data protection, freedom of information.

JEL classification:

K10; K36.

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1 A burning right

The triptych that the Italian Supreme Court (*Corte suprema di cassazione*, ‘Cassazione’)¹ designed in the last few months constitutes a worthy counterpart to the efforts of the German Federal Constitutional Court (*Bundesverfassungsgericht*, ‘BVerfG’), which has put together an even more impressive exploit: issuing three opinions in four months. See, in fact, BVerfG 6 November 2019, 1 BvR 16/13, *Recht auf Vergessen I*, and 1 BvR 276/17, *Recht auf Vergessen II*²: concerning, the first, the request – by an ex-lifer, sentenced in 1982 for a double murder during a transatlantic cruise of the sailing ship Apollonia and then released in 2002, after having served (part of) the penalty – for the removal of articles (dating back to the time of the trial and merged in 1999 in the online archive of the periodical *Der Spiegel*) which associated his name with the crime, whereas the other judgment dealt with the pretense of a manager to cancel an interview, taken seven years earlier as part of a television broadcast, whose core concerned ‘dirty tricks’ to get rid of employees no longer grateful³.

More recently, still another decision, BVerfG 25 February 2020, 1 BvR 1282/17⁴, rejected without uncertainty the request, submitted by the son of Erich Kiesl, mayor of Munich between 1978 and 1984, to erase, from a *Porträtbeitrag* of the parent (published in 1978, again by *Der Spiegel*), his name, reported together with that of his four brothers, arguing that the publicity of the family relationship is not in itself capable of generating significant consequences on the self-determination of the personality of the concerned plaintiff (rather, in the eyes of the Karlsruhe judges – see §15 –, what really mattered was the inconsistency of the interest underlying the request for de-indexing, given that the link reported as illegal appeared on the 5th page of the search results, more or less between the 40th and 50th place on the list).

These decisions embed a small, but unequivocal, moral: the right to be forgotten is (still) ‘on fire’. But why?

¹ Three rulings of the Cassazione within eight months. The decision of the joined sections of 22 July 2019, No. 19681, *Il Foro italiano*, 2019, I, 3071, with a note by R. PARDOLESI, *Oblivion and historiographical anonymity: “usque tandem...”*, was followed by the order of 27 March 2020, No. 7159, *id.*, 2020, I, 1549, with a note by A. PALMIERI - R. PARDOLESI, *Extreme polarity: oblivion and digital archives*, also commented by R. PARDOLESI - C. SCARPELLINO, *On the stratifications of the right to be forgotten: when yes and how*, in *Diritto di Internet*, 2020, 439, and by C. NAPOLITANO, *The right to be forgotten: the centrality of personal identity*, forthcoming in *Danno e responsabilità*, 2020). Still another order, No. 9147, has been issued on 19 May 2020.

² Both in *NJW*, 2020, 300 and 331.

³ For a first comment, extended to the profiles of *mittelbare Drittwirkung* of constitutional principles (on which it is worth referring, more generally, to J. NEUNER, *Das BVerfG im Labyrinth der Drittwirkung*, in *NJW*, 2020, 1851), see N. KLASS, *Das Recht auf Vergessen (-werden) und die Zeitlichkeit der Freiheit*, in *ZUM, Zeitschrift für Urheber- und Medienrecht*, 2020 (64), 265; G. BEKRITSKY, *BVerfG zum “Recht auf Vergessen”*, in *OnlineZeitschrift für Jurastudium, Staatsexamen und Referendariat*, 16 March 2020; E.M. HERZOG, *Dialogue and diversity. The “right to be forgotten” - Decisions of the Federal Constitutional Court*, in *MediaLaws*, 1/2020; S. ORY, *Das Äusserungsrecht auf dem Zeitstrahl*, in *AfP, Archiv für Pressenrecht*, 2020 (51), 19; as regards, in particular, the profiles of constitutional importance – incidentally, the first decision assumes, as a paradigm for the scrutiny of constitutional legitimacy, the principles established by the *Grundgesetz*, on the assumption that the relevant EU discipline leaves some decision-making margin to the Member States, while the second takes on full harmonization and, for the first time, induces the federal court to apply the European evaluation standards, reifying another episode of the tormented affair between BVerfG and CJEU – we limit ourselves here to referring to the seven contributions collected in the first 2020 issue of the *German Law Review*, starting, on p. 1, from that of D. BURCHARDT, *Backlash against the Court of Justice of the EU? The recent jurisprudence of the German Constitutional Court on EU fundamental rights as a standard of review*, as well as to R. HOFMANN, *Die Wandlung des Grundrechtsschutzes durch das Bundesverfassungsgericht - Recht auf Vergessen I und II als “Solange III”?*, in *KritV, Kritische Vierteljahresschrift für Gesetz*, 2019/4 (102), 277.

⁴ *NJW*, 2020, 1793.

2 Evolutionary processes of law, between harmonic developments and telluric upheavals (*i.e.* brief notes on the universe)

The thickening of pronouncements rendered by the Italian Supreme Court regarding the right to be forgotten is not the occasional product of bizarre astral conjunctions. Just as no such feature stands as a precondition for the specular succession, in a very short lapse of time, of judgments issued by the German Federal Constitutional Court. The two courts may, of course, exhibit different feelings, as will be highlighted; yet, their underlying reasons are presumably very close.

It is to be believed that the common *humus* is represented by the socio-cultural climate that recurs whenever the process of defining a newly coined subjective right is underway, regardless of its primitive matrix: whether the directive defined by the legislator or a judicial creation, or even the hybridization of the two trajectories, in search of a conformation that turns out to be no less delicate than the original validation. In such contexts, the jurisprudential contribution takes on the role of an experimental laboratory, aimed at testing to what extent the acknowledgment of a protected situation, where previously no appreciable legal answer was given, shall be pushed while, at the same time, safeguarding the compatibility of the new setting with the flaps of the system immediately engraved from the new that advances with the desire to find an adequate *Lebensraum*. Save the likely traumatic discovery that the implications of this rather punctual tentative course are, very often, widespread and lacerating, to the point of requiring recomposing efforts that nobody had foreseen.

All too obvious, somebody might contend: this is how the everlasting process of law works, albeit in less traumatic terms: in need of stability, firmness, predictability that will be called into question at the very moment in which one believes to have drawn on it. But it is easy to perceive – even if, in this notes, it can only be done in a desperately superficial way – that often the evolutionary paths we just mentioned do not necessarily take place through progressive and orderly sedimentations, with the harmony that somebody would assume – but it is really an unfounded myth! – connoting the growth of common law (within the limits in which it is still guided by the judges, with today’s dissenting opinion that prefigures the new ‘rationale’ of tomorrow). Rather, they advance according to the very nature of man, which proceeds by jerks and discards, sometimes with real leaps forward (in a vacuum?). As a result, situations of tangible uncertainty arise, which could open up to developments in a certain direction or fall back on containment lines against unexpected leaks forward. In those moments of extreme criticality, where the balances seem truly precarious and we are merely allowed to glimpse antithetical developments, the contribution of jurisprudence is pivotal. Still, it is fueled by the underlying disorientation of legal practitioners. The instability of the coordinates feeds the disputes. Which will produce directives, gradually more cohesive, just enough for the pressure to ease.

Exhaustively theorizing this plot would take too far. To exorcise the havoc of dealing in few lines with reflections that would rather postulate a much more sophisticated philosophical and sociological apparatus, it is a shamefully simpler option to rely on trivialization. This is possible by observing, for instance, that the approach we just sketched emerged (in an almost fideistic fashion), in Richard Posner’s ‘first way’ pages⁵,

⁵ R.A. POSNER, *Economic analysis of law*, Little Brown, 1972, 99 s.

that pointed to the evolutionary momentum of the case law (in the long run judges, who ‘do’ the law, replace inadequate responses with more appropriate decisions).

Lately, such perspective dressed up more solid arguments in the elaboration conducted by scholars who have outlined a model of spontaneous refinement of the judicial product, characterized by the fact that those who are not satisfied with the existing rules resort to litigation: this way, the investment of quarrelsome resources and the subsequent judicial regeneration progressively concur to rewrite weak and unsatisfactory solutions, steadily replacing them with more appropriate directives. Too bad that the authors just mentioned were inspired, more or less, by the idea that the imbalance worthy of being corrected arises from the failure to pursue the maximization of social well-being, understood as a mere summation of the available resources (without distinguishing between the Haves and the Have-nots) or, if the readers prefer, of the allocative efficiency, in which the hard core of what is now called, with a very critical spirit, the “synthesis” of the twentieth century has been expressed⁶.

In spite of different groundings, the widespread intuition remains that the unraveling of the jurisprudential results shows greater solicitations where more inadequate appear the solutions reached so far, legitimizing the quest for adjustments/corrections/recoveries. Changes occur, to put it in a nutshell, when there is a striking fracture, which generates expectations and fears. The intense work of jurisprudence will endeavor to bring everything back to some sort of system, at least local, up to define a shared social vision that, at least for a certain period, will dissipate litigation.

3 A star is born: the right to be forgotten

Suspecting that the premise has already been rather exhausting (in spite of our outrageous reductionism), we will now endeavor to drop the above-mentioned coordinates into our conceptual framework.

The right to be forgotten is undoubtedly the ‘newborn’ among the epiphanies of the juridically relevant attributes of the personality. It made its (domestic) debut in Cassazione in 1998, anticipated by a handful of lower courts judgments decided a few years earlier. In short, it is a ‘new entry’, which materialized when the Italian system came to terms with the undisputed legal blockbuster of the last half century, that is the right to privacy in the version of protection of personal data⁷. It is no coincidence, then, that the judgments which explore the applicative possibilities of the right to be forgotten try to reconstruct its gestation. The last judgment of the Italian Supreme Court does it, just as the previous ones. However, the most recent judicial testimony appears even more ambitious, because, in tracing the link of derivation of the right to be forgotten (in the traditional version of claim that a story, legitimately publicized in the past, be not subject to new diffusion, triggering the identification of the interested party, in the absence of a current public interest in the knowledge of that event) from the right to privacy (which in turn emerged with some difficulty in an

⁶ See, for a dazzling critical picture, J. BRITTON-PURDY, D. SINGH GREWAL, A. KAPCZYNSKI and K. SABEEL RAHMAN, *Building a law-and-political-economy framework: beyond the twentieth-century synthesis*, 129 *Yale Law Journal*, 1474 (2020).

⁷ On the staggering figures of this authentic global legislative blockbuster, it is proper to refer to the meticulous inventories of G. GREENLEAF: the most recent one – *Countries with data privacy laws by year 1973-2019*, www.ssrn.com, 10 May 2019 – counts 134 entries.

environment that tended to enhance the patrimonial aspects of the personality attributes), gets back to the *Caruso* case⁸.

Thus, we are really sent to prehistory, unless one decides to cross the Atlantic to revisit classics such as *Melvin v. Reid* and *Sidis v. New Yorker*⁹. The fact remains, however, that the right to be forgotten is reconstructed as a substantial budding of the right to privacy, embracing a ‘negative and static’ perspective, even if enriched by the ‘time factor’. A perspective that would change only with the emergence of new technologies and the completely innovative need they introduce, inspired by the willingness to control the flow of data concerning the person and, therefore, by informative and decisional self-determination, as a precipitate of an identity representation that cannot remain tied to previous and outdated connotations.

It is therefore possible to grasp a dynamic dimension, sublimated, in the discipline conveyed by the Directive 95/46/EC and by the subsequent Privacy Code, which survived by virtue of legislative surgery at the advent of Regulation 2016/679 (GDPR), by the principles of proportionality, relevance and non-excess of the processing of personal data. Here, then, the traditional right to be forgotten tends to be resolved in the new mold, which now relies on a (supposedly solid) legislative support: in so far it is no longer current and not updated or relevant, the data is suitable for disguising the representation of the person and is therefore susceptible to inspection, opposition, transformation, blocking and – final weapon – cancellation. This trajectory, already present in the discipline dictated by the 1995 Directive, has come to legislative consecration with Art. 17 of the aforementioned Regulation 2016/679, which speaks, precisely, of erasure, evoking, at the heading level, the “right to be forgotten”.

It is worth, at this point, to pause for a moment and indulge in a short diversion, which in turn would deserve much more in-depth attention. The reconstruction accredited by the Italian Supreme Court, totally based upon how, and to what extent, personal data should be processed, is contrasted and denied by the BVerfG¹⁰, which clarifies, in a very punctilious (and, nonetheless, reasonable) way, that it is necessary to distinguish the “*Recht auf informationelle Selbstbestimmung*”, to be understood essentially as a guarantee of protection against the manipulation and non-transparent use of personal data by third parties, including private individuals (§90), from the “*Schutz vor der Verarbeitung personenbezogener Berichte und Informationen als Ergebnis eines Kommunikationsprozesses*” – for those unfamiliar with Thomas Mann’s idiom, from the “protection against the processing of personal relationships and information as a result of a communication process” – which concerns the ‘visible’ dissemination of news, where the danger derives from the form and content of what is exposed to the public. “Protection against such threats is provided by manifestations of general personality law, regardless of the right to informative self-determination” (§91).

It follows that the constitutional criterion to be relied upon when dealing with oblivion should not be sought in the right to informational self-determination (but, as already seen, “*in den äußerungsrechtlichen Schutzgehalten des allgemeinen Persönlichkeitsrechts*”, §92). And it is rather symptomatic that this line of

⁸ Cass. 22 dicembre 1956, *Il Foro italiano*, 1957, I, 4.

⁹ Gabrielle Darley’s misadventures, revealed – including use of her true name, in order not to miss anything – in the movie “*The red kimono*”, and the intellectual prowess of the ‘wonder kid’, then turned into a disdainful isolation (the reasons for that have been canvassed widely by Robert Pirsig in “*Lila*”, a novel that dusts off his Phaedrus, without, however, featuring even a distant continuation of the wonderful “*Zen and the art of motorcycle maintenance*”) are part of the folklore of the topics. And they will be here assumed as notorious.

¹⁰ BVerfG 6 November 2019, 1 BvR 16/13, *Recht auf Vergessen I, cit.*

thought is consonant with the position expressed by the best American doctrine, seconding the idea that “[r]egulating the storage, sale, and manipulation of privately held data [...] is quite different from regulating public discussion based on otherwise public information”¹¹.

In short, the inaccurate personal data, which risks obstructing the development of the person’s identity, must be corrected, if it is the case, removed. But the news that one would like to ban from the circle of information available to the public is not (necessarily) inaccurate. And this implies that the corrective mechanisms work according to different logics. The domestic vision, marked by the Cassazione, seeks a homogenization which, in many respects, appears to be forcing; in addition, it aggregates the right to be forgotten to the disciplinary trajectory of the protection of personal data. But precisely from this anxiety to get back to a common matrix, which then reduces to flattening, derive the complications that, as will be seen in a while, have exasperated the instability of the overall painting and propitiated, in the sign of uncertainty, a thick litigation.

4 Jumping without a parachute: the misdeeds of a right in progress

In fact, the debate on the right to be forgotten has grafted onto the epochal upheaval produced by the introduction and progressive innervation of computer privacy. Reducing everything to the minimum terms, it is easy to agree that the elitist confidentiality of the past, which has struggled so much to escape the stigma for which “those who have been unable or did not want to keep the facts of their lives hidden can no longer pretend that the secret is preserved by the discretion of others”¹², left the field to a much more proletarianized dimension, where the *quisque de populo* worries that the endless wealth of personal information accumulated, for the most varied reasons (often, but not always, legitimate) in the various ravines of the digital universe, go so far as to expropriate his/her ability to self-determine. From this point of view, we behold an epochal upheaval: from the indifference (when not ideological hostility) of the majority, we moved on to the awareness that a large part of us now lives outside our control. Awareness gained quickly, until triggering real idiosyncratic reactions, bordering on maximalist fury. The fact is that privacy was out of the framework no later than fifty years ago, whereas today it marks the legal ways of our existence. In a nutshell: it was, for us, an *acquis communautaire*, therefore an imported product; yet we zealously introjected it, evolving from convinced and eager newcomers to the role of inspired and fervent shamans.

Returning to the most recent judgment of the Italian Supreme Court, the opinion captures, in pages of remarkable efficacy, the unraveling of the evolution by which the right to privacy changed its skin, going to focus on data processing and leading to a trailer of the right to be forgotten that exorcises the danger of “being exposed, without time limits, to a representation that is no longer current of one’s own person”, confirming “an image of the person different from the one currently existing, with damage to the personal

¹¹ R. POST - J.E. ROTHMAN, *The First Amendment and the right(s) of publicity*, www.ssrn.com, 2020 (to be published in the *Yale Law Journal*): “It is one thing to prevent Google from selling data gathered from its surveillance of our online searches; it is quite another to prevent Google from communicating to the general public otherwise publicly available information on the web. Freedom of public discourse entails the latter, but not the former” (p. 63 ff.).

¹² Cass. 4487/56, *cit.*, that did not fail to break a spear in favor of “curiosity” or “harmless gossip”, which are not high manifestations of the soul, but “do not in themselves give rise to a legal offense” and, we add on our own, are the spice of life.

identity and reputation that accompanies the new image”¹³: so far, with the only (but decisive) variation constituted by the reference to personal identity, we remain in the groove of tradition, while winking at the concurrent profile of the impact of the new information technologies, which is expected to activate a whole series of disciplinary connections: up to the consecration pursuant to Art. 17 GDPR. Except that, in the folds of the speech, the new digital ecosystem makes its weight felt. And we realize, then, that re-publication, with its typical temporal imprint (which left only the doubt as to what time frame was sufficient/necessary to corroborate the claim that news passes by force into oblivion), is no longer the keystone of the problem, because the simple fact that the information is posted in some ganglion of the network causes it to lose the ability to be forgotten. The everlasting exposure is no longer punctuated by the re-emergence of the news; it is, rather, inherent in the perennial accessibility of the data entered in a digital archive accessible online. With ostensibility brought to the nth degree by the indefatigable scrutiny of the crawlers of the generalist search engines, captained, it goes without saying, by Google and its extraordinary algorithm.

Here comes the short-circuit provoked by the *Google Spain* case¹⁴. The ruling of the Court of Justice of the European Union baptized the digital version of the right to be forgotten. It, at least apparently, would stand – in a metonymic form – in favor of the recognition of an (almost) absolute right to the cancellation of what is somehow disliked. Actually, one can rely on the authentic interpretation that the Kirchburg judges have offered in a ruling of a few months ago¹⁵: “[...] it should *inter alia* be examined whether the data subject has a right that the information in question relating to him or her personally should, at that point in time, no longer be linked to his or her name by a list of results displayed following a search made on the basis of his or her name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his or her fundamental rights under Articles 7 and 8 of the Charter [of EU fundamental rights], request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject’s name”.

The statement is drenched with maximalism. It implies that the interested party, whatever his motivation for deprecating the connection of his/her name to some fact – even if it is a pure whim –, has the right to prevail not only on the merely economic interest of the search engine manager, but also on the interest of the user of the search engine to be informed, as long as she/he is unable to invoke a particular

¹³ “The right to be forgotten, generated by jurisprudence and consolidated by legislation, however, [...] had to deal with the Internet, the network of networks, where everything that has been included on the web remains an unlimited and timeless memory, in other words, a repository of data of global dimensions [...]. In fact, in the web context, republication is no longer necessary, since the information, once inserted, is generally no longer deleted, but remains available [...]. If, then, in the original conception of the right to be forgotten, linked to the identity of the person and its confidentiality, we have regard to a reproposal to the public of a piece of information after some time, with new technologies, and in the presence of data on the web, what matters is not only, or necessarily, the reproposal of the facts but, rather, their permanent accessibility. The most important aspect in this second hypothesis is, therefore, given by the time of permanence of the information, since it is not so much and not only an event that comes to the attention of the public, but an event that potentially never came out from its attention”: so Cass. 7559/20, *cit.*, §5.3.

¹⁴ Judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, §99, in *Il Foro italiano*, 2014, IV, 295, comment by A. PALMIERI - R. PARDOLESI, *Right to be forgotten: il futuro dietro le spalle*. This is, in all probability, the most commented pronouncement ever: the court website diligently reports the details of 142 notations (but the list is flawed by default, if only because it does not mention the writings published by the *Il Foro italiano*).

¹⁵ Judgment of 24 September 2019, *Portée territoriale du déréférencement*, C-507/17, in *Il Foro italiano*, 2019, IV, 572, comment by R. PARDOLESI.

justification for the request for information (here the whole thing appears already debatable) and even on the freedom of speech of the content provider: with a green light to the wide-ranging pretense for de-indexing, presented as removal/cancellation, even if the remedy works regardless of the permanence of the data on the original website (evidently because there is a reason that ensures its legitimacy), simply neutralizing the link that connects the name of the person concerned to some results of a search on the net.

The rest of the story is known, without necessity to evoke it in detail. In the context of an EU discipline that was assumed to give it robust foundations, the requests for ‘cancellation’ (*recte*: delisting, dereferencing, *déréférencement*) literally exploded: millions of them, which Google had to manage on behalf of authorities that could never have sustained such a collision. Thus, began the witch hunt. Because we all have something to be ashamed of, traces that we would like scattered, removed, buried. Sometimes with respectable motivations, in other cases just because we would prefer this way. The times were changing. And the unexpected possibility arose to introduce a sort of eugenics of the rights of the personality, characterized by the possibility of deciding which data to reveal and which to conceal, if not, even, a spectacularly apologetic/hagiographic autobiographism. Law firms – they do their job, for heaven’s sake! – would have specialized in offering services intended to ‘whiten’ the online reputation of subjects with shady curricula.

The same disciplinary references would have been marginalized, when deviating from the mainstream: Art. 52 of the domestic Privacy Code, which establishes when – in case of publication of a judgment, which is a piece of history, as well as a service rendered to the community – the names of the parties must be obscured, has been progressively by-passed in the sign of the shibboleth ‘anonymize everything immediately’, never minds if the art of judging is not a private service for which the users absorb the costs (as is the case for arbitration), even less if the name of the parties might represent a legal research channel. Those who have experienced the adventure of working in a law review would have found themselves dealing with peremptory intimations to cancel judgments published, say, ten years ago or more, sometimes because there have been developments that have reversed the fate of that verdict – and, so far, there is still room for reasoning, perhaps remembering that tearing or burning the pages of printed paper is not a commendable way of promoting the personality of the individual, least of all democracy –, more often because they simply muddy goodwill; not to mention the cases in which removal is requested for a pending criminal trial or, as in the case referred to in the most recent judgment of the Cassazione, a brief time after its definition.

To keep it short, the mixture of instances of implementation of the new course of privacy and of demands for coercive forgetting (in a world, the network, which does not forget) has become explosive. The dispute has skyrocketed in every direction, with toxic result. Having lost the link with privacy, a ‘right of publicity’ in disguise has been passed, under the sign of power to control the circulation of information relating to the person.

5 How to recompose the picture

The Italian Supreme Court, especially in its last judgment, strives to curb excesses. It does so by capitalizing on what already stressed by Cass. 7559/20, according to which “there can be no real claim to the cancellation of one’s past”, whereas “the real problem is represented by the distortion of the subject’s image,

built up over time after the event forgotten, caused by the re-emergence of the news” (§5.5). The hinge is crucial. It converges on such an outcome (from the opposite perspective of a system that tends, by vocation, to favor the prevalence of the public interest in knowing about the anxiety of confidentiality of the private¹⁶) the BVerfG, *Recht auf Vergessen I, cit.*, as well, denying the hasty rejection (by the BGH ruling below) of the instance of the redeemed ex-lifer, contributes nevertheless to set the ground of a sensitive balance, specifying, on the one hand, that:

- “the general right of personality does not imply a right to be forgotten controlled in principle by the interested parties only. [...] What information is remembered as interesting, admirable, offensive or reprehensible is, in this respect, removed from the unilateral decision of the person involved. Therefore, the general right of personality does not imply the right to delete all personal information previously exchanged during the communication processes from the network”¹⁷; and, on the other hand, that:
- “due account must be taken of the protected content of the freedom of expression of thought and the press” (§110).

Further endorsement is provided by the Court of Justice¹⁸ – precisely the one that originally threw the stone into the pond – where it makes it clear (abandoning the manichæism that had induced it, five years ago, to rule that the only limit to the claim of delisting was represented by the role played in public life by the subject to whom the data refer in view of the preponderance of the interest of the community in having such information: §93) that: *a*) “the right to the protection of personal data is not an absolute prerogative, but must be considered in light of its social function and must be reconciled with other fundamental rights, in accordance with the principle of proportionality” (§60); and *b*), in any case, “pursuant to Article 9 of Directive 95/46 and Article 85 of the Regulation 2016/679, it is up to the Member States to provide, in particular for the treatment for exclusively journalistic purposes or for artistic or literary expression, the exemptions and derogations necessary to reconcile these rights with, in particular, freedom of information” (§67).

This way, needless to say, a resolute step is taken towards the reconquest of a more consistent scenario, which the most recent decision by the Cassazione consolidates by proposing the fragmentation of the case in two distinct segments: one focused on the theme of balancing the right to oblivion and the right to report, “the latter also declined as treatment of the news for historical-archival purposes and, again, for a further moment in which the search engine comes into play which, in its operation on the Internet, amplifies, in the effects, even the memory of the online archive of the newspaper in digital format”; the other aimed at identifying the most appropriate remedy, in the assumption that the offensiveness of data is not even in the mere permanence on the net, but in its modalities.

¹⁶ The evolution of German jurisprudential moves from the opposite polarity to the one determined in Italy. To put it briefly, there is a definite tendency to privilege the public interest in the knowledge and freedom of the media to collect/disclose the information necessary to guarantee the democratic circuit. Systematic testimony to this is the (vain) attempts by the proponents of the *Recht auf Vergessen (-werden)* to bypass the tendentially negative responses of the national courts by backing up with the European Court of Human Rights, which, however, in turn, has given credit to the prevailing jurisprudential orientation. As a particularly indicative finding, see European Court of Human Rights, 19 October 2017, *Fuchsmann c/o Germany*, and 28 June 2018, *M.L. and W.W. c/o Germany*.

¹⁷ BVerfG 6 November 2019, *Recht auf Vergessen I*, §109, which adds up: “In particular, there is no right to filter publicly accessible information on the basis of one’s own determination and on the basis of one’s ideas only, and to limit this information to the aspects that the interested parties consider relevant and appropriate to their personal image [...]”. To conclude, on this point: “*Das allgemeine Persönlichkeitsrecht ist kein Rechtstitel gegen ein Erinnern in historischer Verantwortung*”.

¹⁸ Judgment of 24 September 2019, C-507/17, *cit.*

As for the first profile, in the wake of what is spelled out by Cass. 7559/20, *cit.* – a further version of the right to be forgotten takes shape: still looking for conformation, so that, for convenience, it will be provisionally labelled as archival oblivion. The documentary vocation of the archives is out of question. As also reminded with studied emphasis by the BVerfG¹⁹, it serves the economic interests of the publisher, but it also satisfies the public interest in an easy acquisition of the information capital, not to mention its obvious relevance for research and of contemporary historiography. The *Cassazione*, for its part, does not skimp constitutional findings and regulatory references, which result in a petition of principle about the necessary balance between the archived data, with its past, and the right to be forgotten aimed at rectification/integration. The passage deserves to be reported: “For such a balance, the person protagonist of the news, without prejudice to the truth limits of the latter, will not be able to obtain the cancellation from the archive of an online newspaper invoking the right to be forgotten, and so much in the absolute documentary purpose of the archive itself, in its content, as a variation of the right to information”. The *strepitus fori* is attenuated. Back to viewing stars.

Having taken the first step, the other comes by itself, for intimate consistency. There is no *bonne-à-tout-faire* remedy. The archives – digital no less than paper or micro-filmed ones – are far from presenting themselves as a magmatic and indefinite mass. They reflect an organization which, even in its simplest form, *i.e.* stratification by insertion date, abides by a logical criterion, ensuring contextualization. The risk that the data is extrapolated and made substantially hollow/timeless becomes more consistent due to the use of search engines. It is true, in fact, that the greatest value, the one that ensures Google’s overwhelming success, lies precisely in the ability to define a ranking, tailored to the cognitive needs of those who use the search engine; and that without the support of search engines the network would be an almost impenetrable tower of Babel. But this does not mean that the permanent accessibility of information – a distinctive feature of the digital context in which we live – is strictly connected to its availability/recombinability at any time and for any purpose, in situations that lend themselves to severing any connection that goes beyond, let’s put, the mere basic data of the name of the interested person.

The consequences for public communication, observes the BVerfG, “*reichen weit und ändern die Bedingungen der freien Entfaltung der Persönlichkeit tiefgreifend*” (“are wide-ranging and profoundly change the conditions of free personality development”). To the point that, in the coeval decision *Recht auf Vergessen II, cit.*, the German Federal Constitutional Court feels obliged to deny the existence of a presumption under which the protection of the general right of the personality must tend to prevail: on the contrary, “just as individuals cannot unilaterally determine which information is disseminated in the context of public communication with the media [...], so they do not have such a power of determination with respect to search engine operators” (§121). This allows to house both the choice of delisting and that of imposing some method of updating the news, depending on the circumstances of the specific case.

Flexibility, indeed, is the password also for what concerns the determination of the crucial factor of the right to be forgotten as well: passage of time that, with the complicity of the synapses that evaporate, should

¹⁹ “The general accessibility of information via the Internet expands participation in the communication of knowledge and creates new opportunities for citizens to access information and send and receive information across national borders. These archives provide easy access to information and therefore constitute an important source for journalistic and contemporary history research. From this point of view, there is a remarkable interest in their completeness and truthfulness. They have an important role to play with respect to education and the preservation of democracy” (§113).

cover with dust and hide what is no longer grateful for us. Even in this case, however, preconstituted formulas cannot be given. And it is worth mentioning, once more, the BVerfG²⁰, which refuses to talk about years and months, especially with regard to the judicial report of criminal trials, and underlines how the decisive criterion should consist in the ability of the informational contribution to produce new or additional prejudice with respect to current information (§98). Just enough to believe that the extremes of oblivion do not stand with respect to a pending criminal judgment²¹, nor to a proceeding closed a few months ago²².

6 A reasonable recipe

Once the excesses have been laid down, the panorama gets calmed. In fact, a sort of scan is emerging (albeit with still stunted and relatively indistinct features) for *Fallgruppen*, types of cases: for each of them, a workable balance scheme is outlined, to be then dropped in the particular features of the specific case, with the corrective measures that may emerge as necessary. Some general guidelines can therefore be assessed.

- (A) In the confrontation between generic aspiration to control personal data and equally generic claim to be informed by Google and surroundings with regard to past events, for which there is no current public interest in knowledge (but only some curiosity, sometimes epidermal, perhaps futile and even morbid), the former tends to prevail (starting from the *Google Spain* ruling), in the sign of the idiosyncratic exercise of the right to control the flow of data concerning one's own person. And, since the *punctum dolens* is represented by the amplified visibility that the net allows for, the remedy of the delisting, drastic but sectorial, is preferred, as it does not call into question the presence of the data in the specialized source site, limiting itself to subtracting the information from the front sounding of horizontal search engines. Without losing sight of the possibility that the remedy is further articulated, on a technical level, perhaps by conveying the query based on the name of the person concerned towards updated results that respect the identity of the person concerned, or with other devices²³ (cryptographic coverage, pseudo-anonymisation, data degradation and other technological devilries) aimed at minimizing the foreclosure of the search engine users' right to information and the freedom of expression of content providers.
- (B) If, however, the conflict involves a plausible public interest in knowing (and making known), the latter will tend to prevail, even whereas, (B.1.), the (re)publication of the data is prejudicial (defamatory relapse, *vulnus* to private life, etc.) for the interested party. Obviously, however, (B.2.) if that emerging public interest evaporates over time – the public interest, evidently, is not established once and for all in terms of actuality –, we return, as in snakes and ladders, to the starting box, that is (A).
- (C) In the event that the conflict calls into question a documentary dataset, vocationally intended to store information for research purposes, etc., then the request for removal/cancellation becomes recessive, insofar as it claims to rewrite history as it pleases, and tends to give way to more targeted remedies: if

²⁰ Again, the allusion is made to the judgment *Recht auf Vergessen I*.

²¹ See Cass. 24 June 2016, No. 13161, *Il Foro italiano*, 2016, I, 272.

²² As in the case adjudged by Cass. 9147/20.

²³ Inventoried, e.g., by F. FARKE, J. RENSINGHOFF, M. DÜRSMUTH, T. GOSTOMZYK, *Recht auf Vergessen: Chancen und Grenzen der technischen Umsetzung*, in *DuD, Datenschutz und Datensicherheit*, 11/2019, 681, who do not fail to explore, moreover, the viability of semi-automatic data removal systems.

the data subject claims the current inaccuracy of the information stored due to events that occurred after its first disclosure, with consequent danger of prejudice to the integrity of his/her social image, she/he is offered the opportunity to cultivate the contextualization request, aimed at updating the data in view of the developments that occurred after its legitimate acquisition, according to a logic that reflects the right of rectification/reply contemplated by the law on the press. This is a delicate profile, because, in this way, the correspondence between paper support and its digital translation, traditionally invoked to justify the unchangeability of the archived data, is severed. However, it is clear that, if one cannot integrate what has been delivered to the page disseminated in the past (but only deny it retrospectively where there is an interest in doing it), information technology offers the opportunity to facilitate the recomposition of the appropriate framework.

- (D) In the case of news that are unequivocally false and detrimental to the reputation or other right of the person of interest, deletion from the computer archive is still possible (increasing the detachment from the paper counterpart, which cannot be effectively revamped the day after its diffusion). Yet, common sense suggests limiting the use of the demolition remedy to truly exceptional cases: the target should be proverbial fake news, which have no other goal than to denigrate without foundation. Also in this case, however, the impact of a denial, which denounces and condemns the offensive and truthless claim, should be assessed, if appropriate, discrediting those who propelled it, in the face of a mere act of censorship removal.

The lines hereby summarized stand, of course, on a high level of generality. Their application will still require a gentle descent into the folds of the concrete case. Factual elements will be crucial, elements which the BVerfG has tried to collect in a sort of toolbox available to the judge called to untie the contentious knot that opposes the individual's self-determination to the cognitive consciousness of the community. The inventory shows, first of all, the assessment of the passage of time compared to the original publication of the news, on the assumption of its initial lawfulness: this, of course, does not guarantee that such a quality will remain unchanged over time. Nonetheless, the publishing company can assume the persistence of that appreciation until the interested party denounces the supervening inadequacy. Which, against the penalty threatened by Cass. 5525/12 (which imposed on publishers the obligation to automatically update the information assets contained in the archive), suggests a "notice, evaluate and take down" regime, where the liability is triggered only as a by-product of the initiative of the interested party, in the event that it is unduly neglected. The extent of the *vulnus* inferred to the personal identity also matters, in the face of a faded public interest, which, however, may revive as a result of chained events or of the same public exposure, especially if voluntary, of the person who invokes oblivion. This might happen as well in the context of the re-emergence of the news, if a scandalmongering blog, aiming at provocation, or an evaluation portal, where the weight of the information dating back is diluted by the entry of recent news.

It should be kept in mind, however, that such an inventory, however painstaking, cannot tame the inexhaustible heterogeneity of reality. In the end, the warning sticks to the ultimate point, that the balancing decision must be taken in the light of a diligent appreciation of all significant circumstances. It is important, however, that this process takes place in an environment deprived of by the mortgage of forcing and adventurous applications. There will be no space for a new burning, Alexandria-style, of the documentary deposits of the third millennium.

Proceeding this way, the right to be forgotten, either traditional or digital, will get ripe and ready to be coherently received in the overall legal context.

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