Insights & Analyses

The Mobile Borders Between the Right to Be Forgotten and Freedom of Information

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Abstract

This essay investigates the topic of the right to be forgotten, off and online, in the context of freedom of information, proposing an innovative reconstruction that differs from the prevailing orientation, also accepted by the GDPR, which largely gives it priority over other fundamental rights. Stemming from a line of interpretation attentive to the values of personalism and solidarism (Art 2 of the Italian Constitution), the reconstruction seeks to demonstrate that, although it is an expression of human personality, the right to be forgotten must be seen in relation to the right to information (Art 21 of the Italian Constitution), which too is an indispensable tool for the cultural growth of the human person and the implementation of the principle of *favor veritatis*. This principle, which is at the basis of the current legal order, does not permit limitations with no axiological justification, unless a specific balancing operation, based on principles of proportionality and reasonableness, has been performed in advance.

I. From Privacy to the Right to Be Digitally Forgotten

Before taking on a physiognomy of its own and becoming a discipline in its own right, the right to be forgotten joined the legal landscape as one aspect of the right to privacy. After a lengthy process, where many scholars denied its recognition in the absence of an express general[1] legislative provision, the right to confidentiality gradually gained recognition in the more attentive case law and authoritative scholarship.[2] These authorities ground the right to confidentially

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[1] Cf Corte di Cassazione 22 December 1956 no 4487, *Giurisprudenza italiana*, I, 366 (1957), with a commentary by G. Pugliese, 'Una messa a punto della Cassazione sul preteso diritto alla riservatezza'. Similarly, see also A. Pace, *Problematica delle libertà costituzionali* (Palermo: CEDAM, 1983), 3; V. Ricciuto, 'I danni da dequalificazione professionale. A proposito della proliferazione delle fattispecie di danno' *Diritto dell'informazione e dell'informatica*, 657 (1993).

[2] In particular, A. Ravà, *Istituzioni di diritto privato* (Padova: CEDAM, 1938-XVI), 153; F. Carnelutti, 'Diritto alla vita privata' *Rivista trimestrale di diritto pubblico*, 3 (1955); G. Giampiccolo, 'La tutela giuridica della persona umana e il c.d. diritto alla riservatezza' *Rivista trimestrale di diritto e procedura civile*, 465 (1958); P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Jovene Editore, 1972), 175 and 370; Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, III, *Situazioni soggettive* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 5. In case law, see Corte di Cassazione 10 May 2001 no 6507, *Giustizia civile*, I, 2644 (2001). *Contra* Consiglio di Stato 6 October 2010 no 5881, *Foro amministrativo* C.d.S., 2928 (2003).

in the absolute principle of the protection and promotion of the human person, enshrined in Art 2 of the Italian Constitution, on the assumption that human personality constitutes a unitary value to be guaranteed in all its manifestations, whether typified or not.[3]

The Supreme Court of Cassation reaffirmed this orientation in 1998[4] when, for the first time, the right to be forgotten received expressed protection against the dissemination of defamatory news related to a person in print media.[5] It was formulated as a specification of confidentiality in the broader sense, to be protected whenever a person is harmed by the spreading (or publication) of information which, albeit true, nevertheless causes him or her harm.

There are two situations in which case law, in line with eminent legal scholarship,[6] grants the right to be forgotten prevalence over the protection of the interest of the community in remembering facts that happened or information inherent to the private sphere of an individual: when there is a disparity between fact or information and the situation of the person concerned today and in the absence of 'social utility', namely the public interest in remembering the fact or information. The right to be forgotten thus becomes a part of the system of constitutional safeguards relating to another fundamental right: the right to report news, an articulation of the freedom of manifestation of thought (Art 21 of the Italian Constitution)[7] defined as the right to inform and to be informed, an essential and indispensable instrument for the 'growth of the economic and social system today'.[8]

In the digital society, the right to be forgotten takes on more complex characteristics than those relating to the off-line dimension, both when, for example, it is the person concerned who directly posts information concerning him- or herself on the internet (eg, on social networks) and when it is spread by a third party.[9] Information published online enters the public domain in real

[3] See Corte di Cassazione 27 May 1975 no 2129, *Foro italiano*, I, 2895 (1976). This hermeneutical standpoint is still held today. See, among the more recent, Corte di Cassazione 19 July 2016 no 14694, available at www.dejure.it.

[4] See the definitive Corte di Cassazione 21 February 1994 no 657, *Giurisprudenza italiana*, I, 1, 298 (1995).

[5] See Corte di Cassazione 9 April 1998 no 3679, *Foro italiano*, I, 1834 (1998), with a commentary by P. Laghezza, 'Il diritto all'oblio esiste (e si vede)'.

[6] See G.B. Ferri, 'Diritto all'informazione e diritto all'oblio' *Rivista di diritto civile*, 807 (1990); G. Giacobbe, *Lezioni di diritto privato* (Torino: Giappichelli, 2006), 53.

[7] See Corte di Cassazione, 8 May 2012 no 6902, available at www.foroplus.it.

[8] Cf P. Perlingieri, 'L'informazione come bene giuridico' *Rassegna di diritto civile*, 326 (1990), now in P. Perlingieri ed, *Il diritto dei contratti fra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 337 (from which it is quoted). For a different reconstruction, see D. Messinetti, *Oggettività giuridica delle cose incorporali* (Milano: Giuffrè, 1970), 36.

[9] The specific topic of the right to be forgotten online has been the subject of extensive scholarly study. Of note, among others, are G. Finocchiaro, 'La memoria della rete e il diritto all'oblio' *Diritto dell'informazione e dell'informatica*, 391 (2010); F. Di Ciommo, 'Quello che il diritto non dice. Internet e oblio' *Danno e responsabiità*,1101 (2014); S. Martinelli, *Diritto all'oblio e motori di ricerca* (Milano: Giuffrè, 2017), 1; A. Sirotti Gaudenzi, *Diritto all'oblio:*

time,[10] and anyone can retrieve it by visiting the source website but, above all, through search engines capable of capturing and indexing information, which becomes technically impossible to hide, unless specific action is taken to remove it.

II. The Contribution of Italo-European Case Law

The contribution of Italian-European case law[11] played a fundamental role in establishing the right to be forgotten, even before legislation came into being. Until relatively recently, the Court of Justice of the European Union and the Italian Court of Cassation[12] held different positions regarding remedies; however, the most recent pronouncements seem to show the hoped-for convergence.[13]

The decisive turning point came with the well-known judgment of the Court of Justice of the European Union[14] confirming full recognition of the right to be forgotten, but it also introduced an unprecedented means of redress: the right to have information or news 'de-indexed' by a search engine. Essentially, a person intending to assert their right to be forgotten is entitled to ask search engines (eg Google, as in the case at hand) to delete from the list of results any links to data or information concerning them that appears when their name is entered. In the event of refusal, the interested party may appeal to the Data Protection Authority or, alternatively, to the judicial authorities. These authorities

responsabilità e risarcimento del danno (Rimini: Maggioli Editore, 2016), 1. Lastly, see also P. De Martinis, *Oblio, internet e tutele. L'inibitoria* (Napoli: Edizioni Scientifiche Italiane, 2021), 1.

[10] On this point, see G. Giannone Codiglione, *Internet e tutele di diritto civile* (Torino: Giappichelli, 2020), 136; F. Pizzetti, 'Il prisma del diritto all'oblio', in F. Pizzetti ed, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2003), 38; A. Mantelero, 'Il diritto all'oblio dalla carta stampata a Internet', in F. Pizzetti, n 10 above, 156; F. Russo, 'Diritto all'oblio e motori di ricerca: la prima pronuncia dei tribunali italiani dopo il caso Google Spain' *Danno e responsabilità*, 303 (2016).

[11] See M.G. Stanzione, 'Libertà di espressione e diritto alla privacy nel dialogo delle corti. Il caso del diritto all'oblio' *Europa e diritto privato*, 991 (2020).

[12] The obligation to de-index ordered by the Luxembourg Court in the well-known *Google Spain* ruling, which will be discussed later on (see n 14), was treated differently by the Court of Cassation, which only obliged the manager of the site to update any out-of-date information, as in Corte di Cassazione 5 April 2012 no 5525, available at www.dejure.it.

[13] The Corte di Cassazione, reaffirming that the right to be forgotten, 'closely linked to the rights to privacy and personal identity', must be balanced with the right to collective information, recognised the petitioner's right to have the article containing his personal information de-indexed from the search engine in order to prevent easy access to information concerning him by typing in keywords, see Corte di Cassazione 31 May 2021 no 15160, available at www.foroplus.it. Similarly, see also Corte di Cassazione, 30 August 2022, no 25481, available at www.foroplus.it.

[14] Case C-131/12 *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of 13 May 2014, available at www.eur-lex.europa.eu. Previously, the Court of Justice had dealt with privacy on the Internet in its decision case C-101/01, Judgment of 6 November 2003, *Danno e responsabilità*, 382 (2004), with a commentary by A. Giannaccari, 'Il trasferimento di dati personali in Internet' and T.M. Ubertazzi, 'Sul bilanciamento tra libertà di espressione e privacy'.

might disagree with the decision taken by the search engine operator and might order the deletion of the information.[15] Through this pronouncement, the European Court crystallised certain principles which lay down precise but, in some respects, questionable guidelines. First of all, a broad power of control is granted to a non-impartial actor, unsupported by adequate assessment criteria. The search engine is

> 'called upon to perform the difficult task of identifying the correct balance between the fundamental rights of the individual, deriving from Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, and the (potentially conflicting) legitimate interest of Internet users wishing to have access to that given information'.[16]

The search engine could, in fact, simply make the most convenient but not adequately thought-out decision, which, if the interested party's request was granted, would exclude any further review, thus precluding any action to protect other interests.

The other unconvincing aspect concerns the preference that the Court accords, as a matter of principle, to the individual's right to protect his or her personal sphere to the detriment of the interest of the community in having access to information, which outlines the contours of the balancing act that the judge will be called upon to perform. The lack of a requirement to ascertain that harm has actually been caused appears to reveal an intent to favour the protection of the right to be forgotten over other constitutional rights, regardless of any assessment of the individual case and exceeding the limits that the European legislator would soon lay down in the Art 17 GDPR.[17] A few years later, the European Court addressed the issue once more and reaffirmed Google's obligation to de-index, limiting it, however, to the European domains (eg, Google.it) but not the global one (Google.com),[18] on the assumption that extending this obligation outside Europe would create problems for national authorities.[19]

The European reconstruction thus took a different direction from that

[15] However, this deletion does not imply the deletion of the page on which the information is contained from the internet nor the deletion of other links to it, thus V. D'Antonio, in S. Sica and V. D'Antonio, 'La procedura di de-indicizzazione' *Diritto dell'informazione e dell'informatica*, 151 (2014).

[16] V. D'Antonio, n 15 above, 150.

[17] Para 3 states that the right to be forgotten must be reconciled with the limits of freedom of expression and information, as well as the interest of the public in the preservation of the data or information.

[18] Case C-507/17, Judgment of 24 September 2019, *Diritto e giustizia*, 171, 3 (2019), with a commentary by G. Milizia, 'Google deve indicizzare i dati sensibili degli interessati da tutte le sue "versioni europee" '.

[19] On the decision, see D. Messina, 'Diritto all'oblio e limite territoriale europeo: la sentenza della Corte di Giustizia UE C-507/17 del 24 settembre 2019' *De iustitia*, 1 (2020).

followed by the Italian Court of Cassation up until then.[20] Shortly beforehand, overturning the decision of Data Protection Authority, the Court of Cassation stated that, rather than addressing the search engine, interested parties could protect their right to be forgotten by turning directly to the website source but not to have the information cancelled; it could only ask to update the information, so that it would always reflect the applicant's current situation.[21]

After the GDPR[22] entered into force, this issue, particularly the question of balancing right to be forgotten vis-à-vis right to be informed, once more came to the attention of the Italian Court of Cassation. Initially, the Court affirmed the general prevalence of the right to be forgotten over the right to information.[23] Subsequently, however, it fully followed the European Court case law, including the matter of remedies. However, the Italian Court added some clarifications, which seem to demonstrate a tendency to reposition the right to be forgotten within the framework of constitutional protections, without endowing it with general preference. The Italian Court stated that

> 'de-indexing web content represents (...) the actual balancing point of the interests at stake. It constitutes, in fact, the solution that (...) achieves the aforementioned balance by excluding the extreme solutions configurable in the abstract (...)'.[24]

The positions adopted are thus moving increasingly towards a uniform line in the Italian-European sphere, both in terms of balancing criteria and remedies. It should also be recalled that the Court of Justice of the European Union s position has recently been also accepted by the European Court of Human Rights.[25] Setting aside the previously-accorded remedy of anonymisation,[26] the

[20] In the case law on the merits, the principles contained in the aforementioned decision of the Court of Justice were accepted, for the first time, by the Tribunale di Roma 3 December 2015 no 23771, *Danno e responsabilità*, 299 (2016), with a commentary by F. Russo, 'Diritto all'oblio e motori di ricerca: la prima pronuncia dei tribunali italiani dopo il caso google Spain'. However, in this case, it rejected the application for protection of the right to be forgotten.

[21] Cf Corte di Cassazione 5 April 2012 no 5525, n 12 above. On this point, see also F. Di Ciommo, 'Oblio e cronaca: rimessa alle Sezioni Unite la definizione dei criteri di bilanciamento' *Corriere giuridico*, 11 (2019).

[22] See para IV.

[23] Corte di Cassazione 20 March 2018 no 6919, available at www.foroplus.it. This principle was then confirmed by Corte di Cassazione Sezioni Unite 22 July 2019 no 19681, available at www.deiure.it with a commentary by R. Pardolesi, 'Oblio e anonimato storiografico: «usque tandem...»?'; also interesting is the commentary by C. Crea, 'Oblio, "cronaca rievocativa" e anonimato' in C. Granelli ed, *I nuovi orientamenti della cassazione civile* (Milano: Giuffrè, 2020), 34.

[24] Thus Corte di Cassazione 8 February 2022 no 3952, available in www.dirittodiinternet.it. Similarly, cf Corte di Cassazione, n 13 above, and in certain respects also Corte di Cassazione 9 May 2020 no 9147, available at www.foroplus.it.

[25]Eur. Court H.R., *Biancardi* v *Italia*, Judgment of 25 November 2021, available at www.dirittifondamentali.it.

[26] See Eur. Court H.R., *Hurbain* v *Belgium*, Judgment of 22 June 2021, available at

European Court of Human Rights conforms to the European approach of de-indexing, reaffirming the existing criteria based on which courts are called upon to strike a balance between the public interest of the right to information, the prominence of the person concerned, and the content, manner, and consequences of publication.

Also in the light of subsequent European legislation (Art 17 GDPR), two elements seem to have been established so far. The first is that, according to current provision, recognising the right to be forgotten always results from finding a balance between this and other fundamental rights. The second is that this interpretative technique does not operate in the abstract but considers the particularities of the case at hand.[27] This means that there can be no single and predetermined remedy; the solution must be found on the basis of the specificities of the case to which it is to be applied since '(i)t is not the interest that is structured around the remedy, but the remedy that is adapted according to the interests to be protected'.[28]

III. The Existing Legal Framework

While the right to privacy was first legally recognised in the international sphere, in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome in 1950 and ratified by Italy in 1955,[29] the right to be forgotten was granted legal recognition in 2016, through Reg 2016/679/EU (the GDPR, General Data Protection Regulation).[30]

www.giustiziacivile.com, in which was then referred to the Grand Chamber of the Eur. Court H.R. In this regard, see A. Malafronte, 'Rinviato alla Grande Camera della CEDU un rilevante caso in tema di tutela del diritto all'oblio in àmbito di contenuti ricercabili su Internet', available at www.giustiziacivile.com.

[27] Further, P. Perlingieri, *Il diritto civile nella legalità costituzionalesecondo il sistema italo-europeo delle fonti, II, Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 399.

[28] Again, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti, IV, Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 144.

[29] Art 8 para 1 states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The Strasbourg Convention drawn up by the Council of Europe in 1981 and ratified in Italy in 1989, which aims to protect 'fundamental rights and freedoms, and in particular the right to privacy, with regard to the automatic processing of personal data' (Art 1), takes its inspiration from this provision.

[30] Among the numerous studies devoted to the right to be forgotten in the light of recent European regulations, see, in particular, V. D'Antonio, 'Oblio e cancellazione dei dati nel diritto europeo' in S. Sica, V. D'Antonio and G.M. Riccio eds, *La nuova disciplina europea della* privacy (Padova: CEDAM, 2016), 197; F. Di Ciommo, 'Privacy in Europe after regulation (Eu) n. 2016/679: what will remain of the right to be forgotten?' *Italian Law Journal*, 623 (2017); Id, 'Il diritto all'oblio (oblito) nel Regolamento Ue 2016/679 sul trattamento dei dati personali' *Foro italiano*, 306 (2017); A. Thiene, 'Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo regolamento europeo' *Nuove leggi civili commentate*, 410

Art 17 is titled 'Right to erasure' and, in parenthesis to the side, 'right to be forgotten' in the English version.

The provision recognises the

> 'right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay'

if certain conditions are fulfilled (Art 17 para 1). Para 2 completes the rule, adding that the data controller must not only cancel information if he or she 'has made the personal data public(...)' and, 'in accordance with paragraph 1, to erase them', but also to

> 'inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data';

Para 3, lists the situations when it is considered necessary to process personal information.

The provision in question has not been received with unanimous enthusiasm by legal scholars, especially with regard to the remedies granted to the data subject, given that anything uploaded on the internet will remain there forever; it will be copied automatically by other sites or servers and, using search engines, anyone will be able to find the information or news with a click. It should be remarked that merely obliging the data controller to delete data may be insufficient to protect the data subject, who might, in this case, obtain more effective protection by requesting de-indexing from the search engine, for example. Nevertheless, the right to de-indexing is not expressly provided for in the remedies system of European law, which renders the latter incomplete and deficient.[31] This observation brings the role of the courts and the dividing line between exegesis and interpretation[32] back to the fore. While interpretation functions to connect law and fact and aims to situate a regulatory provision within the legal system for practical purposes,[33] ie, to identify, on the basis of

(2017); D. Barbierato, 'Osservazioni sul diritto all'oblio e la (mancata) novità del regolamento Ue 2016/679 sulla protezione dei dati personali' *Responsabilità civile e previdenza*, 2100 (2017).

[31] Again F. Di Ciommo, n 21 above, 18. Sharing this view, M.A. Livi, 'Sub artt. 16 e 17 Rettifica e cancellazione', in A. Barba and S. Pagliantini eds, *Delle persone*, *Leggi collegate*, II, in *Commentario del codice civile* directed by E. Gabrielli (Torino: UTET, 2019), 306.

[32] On this issue, please refer to the valuable insights of P. Perlingieri, 'Il diritto civile tra regole di dettaglio e princípi fondamentali. "Dall'interpretazione esegetica all'interpretazione sistematica" ', in Id ed, *Lezioni (1969-2019)*, III *(2011-2019)* (Napoli: Edizioni Scientifiche Italiane, 2020), 395.

[33] See P. Perlingieri, *Il diritto civile* n 27 above, 341; Id, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 307 (2010), now in P. Perlingieri ed, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2012) 320,

reasonability, the rule most suited to the case at hand,[34] hermeneutic activity must not be limited to a literal interpretation of the wording. Thus, the wording of the legislation certainly constitutes a starting point, which, however, when interpreted from a 'systematic and axiological'[35] standpoint, also makes it possible to apply remedies which, despite not being expressly contemplated, may be the most reasonable and proportionate in a specific circumstance.[36] Consequently, the 'obstacle' of the wording that would prevent recourse to the requirement to de-index, even if not provided for, is deprived of foundation if – in the case at hand – this proved to be the most axiologically appropriate means of protection.[37]However, the 'de-index' is a tool protection recognized to the data subject from the GDPR, even without an express rule. The Guidelines 5/2019[38] provide that

> 'the Right to request delisting implies two rights (Right to Object and Right to Erasure GDPR). Indeed, the application of Article 21 is expressly foreseen as the third ground for the Right to erasure. As a result, both Article 17 and Article 21 GDPR can serve as a legal basis for delisting requests' (p 5).

It also establishes that

> 'delisting requests do not result in the personal data being completely erased. Indeed, the personal data will neither be erased from the source webside nor from the index and cache of the search engine provider'.[39]

(from which it is quoted); A. Federico, 'Applicazione dei princípi generali e funzione nomofilattica' *Rassegna di diritto civile*, 797 (2018); P. Femia (ed), *Drittwirkung: princípi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018) VII .

[34] 'It represents the constant and necessary connector between a specific case and the legal system of reference, making it possible to choose, from several possible solutions, the one that is most consistent, appropriate, and congruent with the interests involved and the regulatory values present in a given system' (author's translation), significantly G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 121.

[35] Cf P. Perlingieri, 'L'interpretazione della legge come sistematica e assiologica. Il broccardo in claris non fit interpretatio, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985), now in P. Perlingieri ed, *Interpretazione e legalità costituzionale* n 33 above, 153 (from which it is quoted).

[36] '[T]he remedy is an instrument, the possible response that the legal system offers to instances deserving protection. It is not the interest that is structured around the remedy, but the remedy that is modulated according to the interests to be protected', as P. Perlingieri observes, *Il diritto civile* n 28 above, 144, but, extensively, see also Id, 'Il "giusto rimedio" nel diritto civile' *Il giusto processo civile*, 1 (2011).

[37] Again, P. Perlingieri, *Il diritto civile* n 27 above, 333.

[38] See Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1), adopted on 7 July 2020, available at https://edpb.europa.eu.

[39] "For example, a data subject may seek the delisting of personal data from a search engine's index which have originated from a media outlet, such as a newspaper article. In this instance, the link to the personal data may be delisted from the search engine's undex;

Only in exceptional cases, the search engine providers must 'to carry out actual and full erasure in their indexes or caches'.[40]

The search engine provider is obliged to respond to the request of the interested party no later than one month from receipt of the same, unless extended by a further thirty days.[41] If it refuses to act on the request, it «shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request». So, the data subject can lodge a 'complaint with a supervisory authority and seek a judicial remedy' (Art 12 para 4, GDPR).

IV. A Comparison with Other Contexts: Europe and the US

The ruling of the Court of Justice mentioned above initiated a gradual process of harmonisation in the European context and led to the regulatory uniformity endorsed by the enactment of the GDPR.[42]

However, the subject of the right to be forgotten extends beyond the European borders and, assuming a global dimension, comes up against interpretative trends of a different nature, especially in the English-speaking world and, in particular, the United States of America. In Europe, the introduction of Art 17 GDPR codified a position long held in numerous European Member States, favouring the recognition of the right to be forgotten, even in the absence of any express legal provision to that effect. As in Italy, national data protection laws in Spain, France, and Germany do not explicitly provide for the right to be forgotten. However, they do establish time limits within which data subjects' personal information may be retained. Albeit with some different stipulations, the various national courts contributed significantly to configuring the right to be forgotten as a fundamental right[43] well before the European Regulation came into force, a right to be balanced, with the right to freedom of information. This approach is also firmly upheld by German case law. In this regard, it is worth recalling two twin judgments through which, in relation to the right to be forgotten, the Federal Constitutional Court (BVerfG) highlighted the age-old distinction between harmonised and non-harmonised European law, identifying different balancing parameters: the European

however, the article in question will still remain within the control of the media outlet and may remain publicly available and accessible, even if no longer visible in search results based on queries that include in principle the data subject's name." (point 9, Guidelines 5/2019).

[40] "For example, in the event that search engine providers would stop respecting robots.txt requests implemented by the original publisher, they would actually have a duty to fully erase the URL to the content, as opposed to delist which is mainly based on data subject's name" (point 10, Guidelines 5/2019).

[41] Art 12 para 3 GDPR.

[42] See para II and III.

[43] On these aspects, see the extensive O. Pollicino and M. Bassini, 'Diritto all'oblio: i più recenti spunti ricostruttivi nella dimensione comparata ed europea', in F. Pizzetti ed, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2013), 185.

Charter of Fundamental Rights for the former, and the German Basic Law (Grundgesetz) for the latter.[44]

The pressing need to ensure the privacy of the interested party, especially in the online dimension, seems to have increased the European tendency to favour, in substance, the right to be forgotten over the freedom of information, except in exceptional circumstances that might justify limitations. The opposite view is found, instead, in the United States, where the conception of privacy is not connected to human dignity; instead, it is 'prevalently centred on the protection of the individual's living space' and stems from

> 'the absolute pre-eminence of freedom of expression [which] limits the scope of privacy protection with respect to the publication of personal information through any type of media, including the Internet'.[45]

In the US view, the protection of the individual's private sphere also comes second to the freedom of economic action of traders, except in some particular sectors, such as genetic data or technological innovation, which must be free and without authorisation, 'permissionless innovation', as the slogan of Vinton Cerf, one of the inventors of the Internet, expressed it.[46] The distance between the legal culture of the United States and that in the European Union inevitably leads to divergent corollaries, giving rise to interesting points for reflection.

V. The Right to Be Forgotten, Freedom of Information, and Constitutionality

Unquestionably, recognising the right to be forgotten as a tool to protect an individual's private sphere and personal identity represents a major step forward. It is worth remembering that, first, the right to privacy – and then the

[44] See BverfG, 6 November 2019, 1 BvR 16/13 (*Right to be forgotten* I) and BvR 276/17 (*Right to be forgotten* II) available at www.bundesverfassungsgericht.de. In the first decision (BvR 16/13), on the assumption that the question did not technically concern the right to privacy, but rather 'more general rights of the personality', which are not fully harmonised within the EU, the Court held that the hermeneutical benchmark should be the German Basic Law (*Grundgesetz*). In the second decision, (BvR 276/17), on the other hand, concerning the right to the protection of personal information, the subject of fully harmonised legislation at European level, the Court held that balance had to be found on the basis of the Nice Charter. See, among others, M. Goldmann, 'As Darkness Deepens: The Right to be Forgotten in the Context of Authoritarian Constitutionalism' *German Law Journal*, 45 (2020); F. Fabbrini and E. Celeste, 'The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders' *German Law Journal*, 21, 55 (2020).

[45] Cf G. Sartor and M. Viola De Azedevedo Cunha, 'Il caso Google e i rapporti regolatori USA/EU' *Rivista diritto dell'informazione e dell'informatica*, 658 (2014). On this issue, see also the precise observations of C. Crea, 'The Right to Be Forgotten: la prospettiva italiana e la dialettica tra modello americano ed europeo' *Rivista giuridica del Molise e del Sannio*, 2933 (2017).

[46] Again, G. Sartor and M. Viola De Azedevedo Cunha, n 45 above, 661.

right to be forgotten – have acquired legal bearing, even beyond the legislatively regulated cases. In fact they are considered an expression of the human person, deserving protection as an individual by virtue of personalism, which, in a *unicum* with solidarism, constitutes the mainstay of the regulatory system in force. It must be emphasised, however, that the same principles underlie other safeguards, some of which are expressly enshrined in the Italian and European charters of fundamental rights, while others are derived through interpretation. The result is a composite framework of protections which does not allow the construction of an a priori hierarchical scale within it regardless of the specifics of a particular situation. The recognition of one safeguard rather than another cannot be left to the arbitrariness of courts but must always be the outcome of a balancing act that will vary according to the specific case before them.

The right to be forgotten is antithetical to the many manifestations of the freedom of information, also guaranteed by the Italian Constitution (Art 21), at the basis of every democratic society.[47] Case law has repeatedly confirmed this. The right to be forgotten[48] 'is linked, in a dialectical pair, to the right to report news', which is an expression of freedom of thought and must be balanced[49] against it. The Italian Court of Cassation had already affirmed this by speaking of the fundamentally relevant relationship between the right to report news, 'placed at the service of the public interest of information' and the right to be forgotten 'put in place to protect the privacy of the individual'.[50] It is therefore necessary to resort to the so-called criterion of 'mobile hierarchy' in cases where there is

> 'a clash between two constitutionally protected rights, that is, between equally protected values, (…), the judge having to proceed as and when required (…) to identify the interest to privilege after a balanced comparison of the rights at stake (…)'.[51]

[47] P. Perlingieri, 'Informazione, libertà di stampa e dignità della persona', *Rassegna di diritto civile*, 624 (1986), now in P. Perlingieri ed, *Lezioni (1969-2019)*, I, *(1969-2004)* (Napoli: Edizioni Scientifiche Italiane, 2020), 117, from which it is quoted. In agreement, L. Boneschi, 'L'informazione come essenza della democrazia moderna: la strada della disciplina giuridica per difendere i valori della persona e per attaccare il "potere" dei mezzi di comunicazione', in G. Alpa, M. Bessone, L. Boneschi and G. Caiazza eds, *L'informazione e i diritti della persona* (Napoli: Jovene, 1983), 4.

[48] Corte di Cassazione Sezioni Unite, n 23 above.

[49] This thesis was put forward in the 1990s by G.B. Ferri, n 6 above, 801. On this particular aspect, see also S. Morelli, 'Fondamento costituzionale e tecniche di tutela dei diritti della personalità di nuova emersione (a proposito del c.d. "diritto all'oblio")' *Giustizia civile*, II, 515 (1997); G. Finocchiaro, 'Il diritto all'oblio nel quadro dei diritti della personalità', in C. Perlingieri and L. Ruggeri eds, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 139.

[50] Cf Corte di Cassazione 5 November 2018 no 28084, available at www.dejure.it.

[51] See Corte di Cassazione sezione lavoro 5 August 2010 no 18279, available at www.foroplus.it.

VI. Rethinking the Right to Be Forgotten from the Perspective of Reasonableness

Information is axiologically fundamental because it forms the bedrock of the *favor veritatis*, on which the Italian legal system is founded.[52]Hence the need to protect the current memory and, equally importantly, historical memory regarding facts, which represent 'an inalienable collective resource',[53] necessary for a community's cultural, economic, and social progress. The call for rigorous oversight of journalism and compliance with the obligations arising from it in order to ascertain that news, fed into the 'information machine' via the printed page but, even more so, through the internet, not only responds to truth and social utility expressed in a civilised manner but is also essential.[54]

The importance of the right to be forgotten and its protection, especially in the digital society, cannot justify it becoming an instrument for censoring information, because it would alter the truth of facts. The information heritage would be compromised to the considerable detriment of the community, which has a deserving interest that must be protected by stringent controls and strict penalties for those who release the information.[55]

Therefore, if lawful and correct, information is (and must be) an inalienable good of all and may not be elevated to the status of 'tyrannical cage',[56] from which individuals are forced to defend themselves. Thus, the envisaged 'rule-exception' relationship between the right to be forgotten and freedom of information is clearly without foundation. Undoubtedly, 'the right to be forgotten must be affirmed, but without undermining the right to information and its prevalence over any need for censorship'.[57] It 'may undermine *favor veritatis*: an event cannot be arbitrarily erased – (…) out of respect for historical truth, which must be preserved over time (…)',[58] so generalisations cannot be permitted.

The justification for this conclusion derives from the value scale created by the identifying principles of the Italian and European legal system. An

[52] Cf P. Perlingieri, 'L'informazione come bene giuridico' n 8 above, 337.

[53] P. Perlingieri, M. D'Ambrosio and C. Perlingieri, 'Diritto all'oblio', in P. Perlingieri (directed by), *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2022), 199.

[54] In addition to the three aforementioned criteria, which have long been identified in case law (see Corte di Cassazione 18 October 1984 no 5259 *Giustizia civile*, I, 2941 (1984), it must also be essential, as evidenced by P. Perlingieri, *Il diritto civile* n 2 above, 138.

[55] Again, P. Perlingieri, *Il diritto civile* n 2 above, 134. On this matter, see also L. Lonardo, *Informazione e persona. Conflitti di interessi e concorso di valori* (Napoli: Edizioni Scientifiche Italiane, 1999), 1.See also the later G. Biscontini and B. Marucci eds, *Lealtà dell'informazione e diritto di cronaca* (Napoli: Edizioni Scientifiche Italiane, 2022), 11.

[56] Cf S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: editori Laterza, 2016), 406.

[57] The former takes on the nature of an 'exceptional limitation' of the public interest in being aware of a fact or piece of news, which is axiologically justified only upon the outcome of a case-by-case balancing act according [to the criterion of] reasonableness. P. Perlingieri, M. D'Ambrosio and C. Perlingieri, n 53 above, 200.

[58] P. Perlingieri, *Il diritto civile* n 2 above, 123.

inadequately considered openness to recognising the right to be forgotten risks downgrading personalism – of which it is an expression – into selfish individualism, which is unquestionably unconstitutional. It is worth repeating that, under Article 2 of the Italian Constitution, personalism inseparably goes hand in hand with solidarism, which 'expresses cooperation and equality in affirming the fundamental rights of all'.[59]

The right to be forgotten must, therefore, necessarily be balanced, case by case, with other subjective situations worthy of protection, such as, for example, the right to inform and be informed.[60]Among the balancing criteria that have been identified in case law and designed to guide the work of the courts, the nature of the concrete interest underlying the recognition of the right to be forgotten assumes particular importance. Confidentiality vis-à-vis a person's assets is one thing, but confidentiality concerning the existential sphere is quite another. In the first case, there is no 'value to be preserved as secret'; in the second case, on the contrary, confidentiality is axiologically functional to the protection of the human person from the harm caused by revisiting information that, with time, is no longer of any interest for the community.[61]

Therefore, the nature of the interest to be protected constitutes a parameter that courts receive from the Italian Constitution itself and which, although sometimes overlooked, prevails when striking a balance. This convincing perspective has also been adopted in a recent ruling in which the Italian Court of Cassation denied the right to be forgotten to a person who believed he had been harmed by the manner in which the cancellation of a mortgage against him had been recorded.[62]According to the Court, a cancellation that leaves no trace of the past would distort the facts, 'making a tabula rasa of what has been'.[63]There is, here, a clear intention to consider *favor veritatis* pre-eminent over an interest relating to the patrimonial sphere of the individual.

VII. Concluding Remarks

The considerations expressed here, also supported by this last pronouncement,[64] lead to one conclusion. The 'dialectical pair' consisting of the right to be forgotten and freedom of information requires courts to perform a careful hermeneutic analysis. Far from any presumption of general absolutisation, courts are called upon to strike a balance between the opposing interests on a case-by-case basis and to identify the most suitable normative

[59] P. Perlingieri, *Il diritto civile* n 27 above, 159 and 162.

[60] See para V.

[61] Cf P. Perlingieri, *Il diritto civile* n 2 above, 123.

[62] They 'made it possible to know about the previous mortgage and thus enabled third parties to know that he had, at a specific time in his life, failed to pay some mortgage instalments'.

[63] Corte di Cassazione 18 May 2021 no 13524, available at www.dejure.it.

[64] Corte di Cassazione 18 May 2021 no 13524, n 63 above.

solution according to the criterion of reasonableness[65], aware that 'the need to preserve historical facts and *favor veritatis*'[66] justifies not protecting the right to be forgotten per se but the 'reasonable' right to be forgotten.

[65] See, importantly, G. Perlingieri, 'Reasonabless and Balancing in Recent Interpretation by the Italian Constitutional Court' *Italian Law Journal*, 385 (2018); Id, n 34 above, 141. On the subject, see also G. Vettori, 'Regole e princípi. Un decalogo' *Nuova giurisprudenza civile commentata*, II, 126 (2016).

[66] P. Perlingieri, M. D'Ambrosio and C. Perlingieri, n 53 above, 200.