CASES AND ISSUES OF THE RIGHT TO ERASURE (RIGHT TO BE FORGOTTEN) UNDER THE ARTICLE 17 OF REGULATION (EU) 2016/679[1]

Giulio Ramaccioni

Faculty of Law, University e-Campus, Novedrate, Italy

ABSTRACT

The subject of the research is the right to erasure (or the right to be forgotten) and its practical application. This right has now taken on great relevance in the European landscape thanks to Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Therefore, the study will be characterized by: (i) the analysis of the legislative frame of reference, represented by art. 17 of Regulation; (ii) the verification of the law in action[2], conducted through the study of five cases resolved out of court, which will allow us to identify the concrete operational rules adopted for their resolution:

1) the case of the online article about the collapse of well-known Italian company;
2) the case of the online article about rigged tenders;
3) the case of the website of the political party;
4) the case of the "Panama Papers";
5) the case of the website of an Italian region.

In this way, it will be possible to identify the legal problem characterizing the five cases in order to identify theconcrete operational rules adopted for their solution.

KEYWORDS

Right to erasure, Right to be forgotten, Privacy, Data protection, Human rights.

1. INTRODUCTION

The right to erasure of personal data is one of the most important new features of Regulation (EU) 2016/679 (GDPR). Article 17 of the Regulation also defines this right as the «right to be forgotten». This term refers to the right of any person to be forgotten by the network, and thus to prevent information about her or him, disclosed the past, from still being present after some time. In this regard, recital (65) of the Regulation states that: «A data subject should have the right to have personal data concerning him or her rectified and a "right to be forgotten" where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation […]».

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At an operational level, this right can be protected:

(i) by preventing search engines from retrieving from the web information about past events that directly concern us (see, EU Court of Justice, 13.05.2014, case *Google Spain and Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12; see, also, Italian Supreme Court, 08.06.2022, no. 1843);

(ii) or by specifically obliging digital publisher to deindex the article related to past facts (see, European Court of Human Right, 25.11.2021, case *Biancardi v. Italia*, application no. 77419/16; European Court of Human Right, 26.04.2022, case *M. Ö. GMBH v. Austria*, application no. 37713/18; and, as regard the Italian system, see Italian Supreme Court, 08.02.2022, no. 3952, which, with regards the powers of the Data Protection Authority in this matter, limited them to the de-indexing of the news, excluding the power to permanently delete it from the web).

How should this rule be applied in practice? Should the right to be forgotten be considered as an absolute right or should be balanced with other rights?

In order to try to answer these questions, the research will focus on the analysis of five cases settled out of court, in order to verify what is the behavior of the owner of the newspaper when faced with a request for deletion of personal data proposed on the basis of art. 17: *a)* the case of the online article about the collapse of a well-known Italian company; *b)* the case of the online article about rigged tenders; *c)* the case of the website of the political party; *d)* the case of the "Panama Papers"; *e)* the caseof the website of an Italian Region.

In this way, it will be possible to identify the legal problem characterizing the five cases in order to identify the concrete operational rules that have been adopted to resolve them.

2. THE CASE OF THE ONLINE ARTICLE ABOUT THE COLLAPSE OF A WELL-KNOWN COMPANY

2.1. The Description of the Case

Several people (among them, professionals, administrators and consultants) are involved in the legal proceedings resulting from the collapse of a well-known Italian company. The news has a considerable circulation in national and local newspapers. In fact, in 2010 a number of articles deal with the affair in relation to the decision taken by the judicial authorities, specifically indicating the names and surnames of the persons involved and their professions.

Ten years after such news, one of the convicted persons, whom we shall hereafter call *Caius*, by typing his name and surname on any of the common search engines, can still find articles dealing with the affair, which appear – linked, therefore, to his person and his professional work – on the first page and in the very first positions of the search results.

[1] This paper revises, updates and expands the report given at the 2nd LBIS Conference on Emerging Issues in Law, held in Istanbul,Turkey on July 14, 15 and 16, 2022.

2 "Law in action" is a legal theory that examines the role of law how it is actually applied and practiced in society. This term is contrasted with the term "law in the book", which describes all written-down laws, regulations and written legal customs. Besides, law in action scholars often draw from observations about the actual behavior exhibited by executives in legal institutions, courts and jurisprudence officials. Law in action is also concerned with the effect of laws on actual people in the real world as well as the impact of legal frameworks and societal interpretations of the rule of law.

2.2. The Complaint's Reasons and the Legal Problem Underlyingthe Case

Caius, in his communication to the publishers of the online articles, argues some reasons for the request for deletions or de-indexing of the examined article. In particular:

1) That also in the case of offences related to insolvency proceedings, according to the EU Court of Justice, 09.03.2017, C-398/15, a fair balance must always be sought between the interest in publicity of the news and the fundamental rights of the person concerned, stemming from articles 7 and 8 of the Charter of Fundamental Rights of the European Union.
2) That is also necessary to take into consideration the role that person plays in public life (which does not exist in the present case, given that *Caius* is a professional not known and not known to the general public, not even by reference to his profession).
3) That the time has elapsed since the publication of the articles (10 years) is such that the news has lost its topicality and public relevance, turning it into a purely private affair.
4) That the guidelines (no. 7/2020) published by the European Data Protection Board – EDPB[3] on 05.07.2020, clearly highlight some aspects that are relevant in this case:

   i) the data subject has the right to make a request for deletion/de-indexing to the publisher of the newspaper reporting the news online on more than one basis at the same time. For example, a data subject could request de-indexing because there is no longer a need for his or her data to be processed [this is the case under article 17 (1) (a)] and the same tome because he or she wants to exercise his or her right to object to the processing under article 21 GDPR;

   (ii) the latter provision allows a data subject to object to the processing of data on grounds relating to his or her particular situation with reference to article 21 GDPR, if there are no overriding legitimate grounds. In this context, Article 21 changed the burden of proof by establishing a presumption in favour of the data subject and instead obliging the data controller to prove «compelling legitimate grounds for processing»;

   iii) as a result, when a publisher of an online newspaper receives a request for removal on the basis of the data subject's particular situation, it must now demonstrate «compelling legitimate grounds» for listing the news item in the specific search result, which are «compelling legitimate grounds […] overriding the interests, rights and freedoms of the data subject» underarticle 21.
5) That, in any case, the publisher of the article must acknowledge *Caius*' request in writing in accordance with the indications provided by the Italian Data Protection Authority[4] (see, most recently, measure no. 116 of 25.03.2021 – web doc. no. 9577346) on the subject of the sanctionability of the publisher that fails to acknowledge the complaint's request.

2.3. The Legal Problem

The reason set forth by *Caius* – with numerous references to rules, case law and measures of independent Italian and European Authorities – illustrate better than any further comment or analysis the complex legal issues underlying the present case.

[3] The European Data Protection Board - EDPB is an independent European body that contributes to the consistent application of data protection rule across the EU and promotes cooperation between EU data protection authorities. It is composed of representative of national data protection authorities and the European Data Protection Supervisor.

2.4. The Decision of the Newspaper Publisher

The publishers concerned accept the request and de-index the link, considering this to be the operation that best balances the various interests at stake.

3. THE CASE OF THE RIGGED PUBLIC TENDERS

3.1. The Description of the Case

The article also point to a connection between this investigation and others opened for mafia association in other Italian regions, reiterating several times the distinctly mafia-like nature of the activities carried out by the suspects and their links, in various capacities, with companies and persons already convicted of mafia offences. In the investigation, which refers to events that took place around 2007, many local public administrators and municipalized companies are involved.

Some eight years after the publication of the articles, one of the persons involved – whom we shall refer to hereafter as *Titius* – verifies: *(i)* that, but carrying out a simple search by name on any of the various search engines, online articles mentioning the affair, dating back to 2010 and traceable to the same publisher, still appear; *(ii)* that such articles materialize as the first results of the search and are also referred to through the use (together the *Titius*' name and surname) of keywords with a strongly negative meaning, such as "mafia", "mafia association" and "mafia method".

Therefore, pursuant to article 17 of GDPR, he requests the publisher of the online articles for the immediate deletion of the links in which the news items can be found, also in view of the profound infringement of his right to personal identity and the serious damage to his image that this situation causes.

3.2. The Complaint's Reasons and the Legal Problem Underlyingthe Case

Titius elaborates his request on a well-defined scheme, expounding three problems.
The first: he argues that in the present case it cannot be argued, on the part of the publisher of the online articles, that it is a matter of data collection ant storage that responds to the right to report and the public interest in information. The case in point, in fact, involves another matter: the use in the articles of certain keywords with an absolutely negative meaning, such as "mafia", "mafia association", "mafia method". This determines that the articles in which *Titius* is mentioned may be referred to by the aforementioned keywords, associated with his name, with obvious harm to his imageand injury to his personal identity.

[4] The Italian Data Protection Authority - IDPA is an independent administrative authority established by the so-called privacylaw (Law no. 675 of 31 December 1996) and regulated subsequently by the Personal Data Protection Code (Legislative Decree no. 196 of 30 June 2003) as amended by Legislative Decree no. 101 of 10 August 2018, which also established that the Italian DPA is the supervisory authority responsible for monitoring application of the General Data Protection Regulation (pursuant to Article 51 of Regulation EU no. 2016/679).

Moreover, *Titius* adds that in this context – according to what can be drawn from the Italian and European legislation and jurisprudence (see, e.g., articles 7 and 8 of EU Charter of Fundamental Rights; articles 8 and 10 of European Convention of Human Rights; EU Court of Justice, 13.05.2014, C-131/12; European Court of Human Rights, 19.10.2017, application no. 17233/17; Plenary Session of the Italian Supreme Court, 22.07.2019, no. 19681) – the sacrifice of the aforementioned fundamental rights is permissible only if the person, whose date are stored and made public by means of the simplified computer search, holds a position that by reason of the office held entails media exposure, or when he holds a public office: all circumstances that have not occurred in the present case, since *Titius* is a simple business man who is entirely lacking in such notoriety.

The second: *Titius* points out that his request is based on a further fundamental right, the right to be forgotten provided for by article 17 GDPR. This right, which allows anyone not to be exposed, without any time limit, to facts concerning his or her past that re-emerge with a simple search engine consultation initiated by typing in one's name and surname. The right, in our national system, has recently received a very strong impulse with Law no. 134/2021 («Delegation to the Government for the efficienty of the criminal trial as well as in the matter of restorative justice and provisions for the speedy definition of judicial proceedings»), aimed at the reform of the criminal trial (called "Cartabia reform" by the name of the actual Italian Minister of Justice), which in article 1, paragraph 25, established the right to be forgotten automatically «in compliance with the European Union legislation on personal data» (today mergered into art. 64-*ter*, disp. att., of the Italian Code of Criminal Procedure). It is true that this reform is limited to the criminal trial and, specifically, to the archiving and final decision, but it is also true that it attests to the existence of a marked attention of the legal system to the issue of the right to be forgotten, which needs broad and solid protection.

The third: the lack of any up-to-date information on the part of the newspaper and such as to make the reader aware of the development over time of the affair involving *Titius*.

3.3. The Legal Problem

The reasons set out by *Titius*, with relevant references to Italian and European legal and case law, illustrate better than any further comment or analysis the complex legal issue underlying the case.

3.4. The Decision of the Newspaper's Publisher

The publisher of the online articles, considering the reasons put forward by *Titius***,** considered that it could carry out the de-indexing of the articles in order to avoid that facilitated and prolonged access to *Titius*' personal data, by means of the mere use of his first name and surname and of keywords, might prejudice his right not to be repeatedly attributed a telematics biography, different from the real one and constituting the subject of news that is now outdated.

4. THE CASE OF THE WEBSITE OF A POLITICAL PARTY

4.1. The Description of the Case

The website of a local branch of an Italian political party contains a file in PDF format, marked with a specific URL, which can be accessed by clicking on a relevant link, and consisting of a copy of a press release of a provincial command of the Carabinieri (a branch of Italian police). This document give an account of a judicial police operation in 2007, in which a restraining order was executed against a person, whose name and surname are given. The press release explains many details of the operation, which was the result of an investigation by the special departments of the Carabinieri and aimed at ascertaining the crime of public procurement fraud.

From this moment on, the name of the person subject to the pre-trial detention order, whom we shall call hereafter *Sempronius*, is inexorably matched, on the internet, to this document, consisting, we repeat, of a press release from a provincial headquarters of the Carabinieri. This means that every time the name and surname of *Sempronius* is typed into search engines, the aforementioned PDF document, uploaded to the website of the local branch of the political party, appears in the result grid as the opening link.

This situation continued until 2021 (i.e. almost 14 years after the date on which that document had been published), when *Sempronius* decided to turn to the person in charge of the site to request the deletion of the link containing the aforementioned document or, at the very least, the obscuring of his personal data. The owner of the website is a local branch of a political party.

4.2. The Complainant's Reasons and the Legal Problem Underlying the Case

Sempronius bases his arguments on five specific points:

- In the present case, the processing of data carried out for news or historical-archival purposes is not at issue. What is at issue is a different situation: the storage of a document in PDF format on the internet (represented by a press release of a provincial command of the Carabinieri), accessible *sine die* by surfers on the net.
- That document is linked, through the indexing carried out by search engines, to the name of *Sempronius*. This situation gives rise to the following fact: the said document reappears, as an opening link in the index of contents, at the outcome of a search conducted with the name and surname of *Sempronius*, with all its obvious damaging effect of the latter's dignity, honourand privacy.
- The large amount of time that has elapsed since the publication of the document and the facts depicted in it (approximately 14 years).
- That there is no current public interest in that past affair.
- The fact that *Sempronius* is not well known and he does not hold public office.

4.3. The Legal Problem

Through *Sempronius*' personal story emerges was is ultimately the constant thread that holds together the National and European jurisprudence also referred to in the case analysed above. All thesepronouncements are linked to the assertion that the passage of time alters the outcome of the balancing of opposing rights and leads the protagonist of an event to regain possession of his personal history.

The now distance sentence of the Italian Supreme Court, no. 5525/1958, coined, in relation to the dramatic affair of the Questore di Roma (Chief of Police of Rome), the somber but felicitous expression of the «right to the secret of dishonour». This expression represents in a plastic way the fact that the news of which the subject regains possession could also be - and this often happens, especially when the right of the press concerns judicial events, as in the present case - shameful or in any case such as to give rise to legitimate desire for silence.

On this line should be read:

- the Italian Supreme Court's judgement no. 5525/2012, which highlights the importance of the passage of time in relation to the positions of the persons concerned and the need for the news to be updated;
- as well as the Italian Supreme Court's judgement no. 16111/2013, which emphasized the circumstance, also decisive in the present case, that a piece of news that was of public

interest in a certain context does not necessarily long elapsed time has now rendered that interest non- existent;

- but also the well-known case concerning Vittorio Emanuele di Savoia (Supreme Court of Cassation – Criminal Section, no. 38747/2017), in which the public interest in the reenactmentof the news event was closely linked to the person's obvious public notoriety;
- and further confirmation, again from the point of view of the public nature of the person involved (which limits the exercise of the right to be forgotten), also comes from the aforementioned judgement of 19.10.2017 of the European Court of Human Rights, where the Strasbourg judges pointed out that the interest of those who wish to maintain the confidentiality of a certain affair may be overridden when there is a clear public notoriety of the subject: an element that makes the opposing interest of the community in the knowledge oftheir personal affairs prevail.

4.4. The First Decision Of The Newspaper Publisher

Let us recall that the owner of the website is a local branch of a political movement. The person in charge of the website responded to *Sempronius*' communication by objecting both to the deletion of the link containing the PDF document and to the obscuring of the latter's personal data ground that: *(i)* according to him, *Sempronius* should have approached the search engine directly and not the manager (webmaster) of the source site; *(ii)* also according to him, however, the request would not be in line with what the Italian Supreme Court of Cassation – Civil Section stated in its sentence no. 9147 of 19.05.2020. The site manager, in order to support this assertion, improperly uses an *obiter dictum*[5]of the judgement, which is decontextualized from the overall context of the decision.

4.5. The Complainant's Reply

Sempronius acknowledges the notice, contesting both grounds of opposition formulated by the webmaster, as wholly unfounded on the basis of the following considerations: *(i)* there is no obligationin our legal system to take action against the search engine instead of the webmaster of the source site. In this sense, the European Court of Human Rights expressed itself clearly, most recently, in its judgment of 25.11.2021, no. 77419/16 (also called "Biancardi case" by the name of the appellant); *(ii)* the meaning of the Italian Supreme Court no. 9147/20, improperly referred to by the webmaster, is entirely different from what the webmaster himself would like it to mean. In fact an *obiter dictum* of the decision is taken, disconnecting it from the overall context of reference, in order to attribute to it a meaning completely divorced from the sentence itself.

4.6. The Further Legal Issues

By critically reviewing the reasons set forth in *Sempronius*' reply it will be possible to understand, as amatter of law, the most relevant issues put forward.
The first point emphasized by *Sempronius*: the "Biancardi" ruling makes it clear that the obligation to de-index is not only imposed on search engines but also on digital publishers. It must also be said that this statement of the Strasbourg Court is based on several elements:

[5] The distinction between *ratio decidendi* and *obiter dictum* is well known. In an extremely synthetic manner, it can be said that the *ratio decidendi* means the legal rule linked to the relevant facts of the case. The expression *obiter dictum*, on the other hand, can be explained by a definition of a negative nature: that which does not form part of the *ratio* in the case and, therefore, includes the incidental comment made by the judge, which is not necessary for the definition of the dispute. In other words, the *obiter dictum* of a judgement constitutes the judge's statement unrelated to the facts of the case, arguments that, although related, are not absorbed into the final judgement, redundant motivations, a mere passage on issues that did not enter into the discussion

1) The Guidelines of the EU Data Protection Authorities published on 26.11.2014 (before, this group was called: Article 29 Working Party) on the interpretation and application of the judgment of the Court of Justice of EU, 13.05.2014, C-131/12, emphasise this point well: «B. Exercise of rights. […] There are two processing operations at stake, each based on a different basis of legitimacy and with a different impact on the rights and interests of individuals. A data subject may find it preferable, in the specific circumstances, to contact the webmaster of the source site in the first instance to request the deletion of a particular piece of information or the application of the "noindex" protocol to that information; however, this is not an obligation imposed by the judgment. 2. For the same reason, a data subject is free to choose how to exercise his rights with regard to the search engine by addressing one or more of them».
2) The EDPB Guidelines no. 5/2019 on the criteria for exercising the right to be forgotten against search engines, adopted on 07.07.2020, note: «50. The Court also distinguished between the lawfulness of the dissemination of information by the publisher of a website and the lawfulness of such dissemination by the search engine provider. The Court recognized that the activity of a web publisher may pursue exclusively journalistic purposes, in which case the web publisher would benefit from the exemptions that Member State may establish in such case on the basis of article 9 of the Directive (now article 85(2) of Regulation EU no. 2016/679). In this regard, in M.L. and W.W. v. Germany, of June 2018, the EDU Court indicates that the balance of interests at stake may produce different results depending on the specific request – distinguishing between *(i)* a request for deletion addressed to the original publisher, whose activity is the essential core of what is intended to protect freedom of expression, and *(ii)* a request against the search engine, whose first interest is not to publish the original information on the data subject, but to allow in particular the identification of the information available on that person and thus to establish his profile».

The second point highlighted by *Sempronius*: the Italian Supreme Court sentence no. 9147/2020 - wrongly used in support of his reasons by the webmaster – is, instead, to be counted among those that have recognized, under certain conditions, the prevalence of the right to be forgotten over the right to information, having affirmed the following principles of law:

1) The right to be forgotten is the right not to be exposed, without time limits, to an outdated representation of one's person, with prejudice to reputation and confidentiality, due to the re-publication – after an important time interval intended to integrate the right and to the passing of which is accompanied by a different identity of the person - or the maintenance without time limits of a piece of information relating to facts committed in the past, which in its dynamic version consists in the power, attributed to the holder of the right, to controlthe processing of personal data by responsible third parties.
2) On the subject of the right to be forgotten, where its holder complains of the presence on the web of information (for example a publication or a news) concerning him – belonging to the past and which he wishes to keep to himself in order to protect his identity and confidentiality – the protection of the aforementioned right must be balanced against the public interest in the knowledge of the fact, which is an expression of the right to express one's thoughts and therefore to report the news and to preserve it for historical-social and documentary purposes, and can find satisfaction, without prejudice to the lawful nature of the publication or the news, in the de-indexing of the article on general search engines, or on those set up by the publisher.

4.7. The Second Decision of the Newspaper Publisher

The person in charge of the site, having taken note of the further objections submitted by *Sempronius*, announces that he has proceeded to anonymise (in the form of obfuscation)

Sempronius' personal data contained in the PDF document uploaded on the website.

5. THE CASE OF THE "PANAMA PAPERS"

5.1. The Description of the Case

The case is well-known. The locution *Panama Papers* refers to a meaty dossier of over eleven million documents containing detailed information on over two hundred thousand offshore companies and their organizational charts. The name of this investigation is due to the law firm Mossack Fonseca, which is based in Panama to be exact.

The Panama Papers see mentioned, in various capacities and with various sums of money, world leaders, government officials, relatives and associates of the same; there is no shortage of well-known Italian figures.

The news has an international echo and is obviously picked up by Italian newspapers as well, which focus their attention, in particular, on the names of the Italian people involved, publishing the list. We are talking about articles that are published in early 2016.

One of the listed individuals, a person who is not known and who does not hold political or public office, asks the newspaper's publisher, after about five years from the publication of the article in which he is quoted, for the deletion of the link that marks the article itself, since the news reappears onthe Internet, at the same link, whenever his name and surname are typed in search engines.

5.2. The Complaint's Reasons and the Legal Problem Underlyngthe Case

The complainant, whom we shall henceforth refer to as *Ascanio*, makes the above claim by basing it on the fact that in the right to be forgotten, the relevant time factor is that of the sine die permanenceof the news in the virtual space of the Internet network.

And this situation occurs-and herein lies the legal problem highlighted by the case-despite a pluralityof factors clearly indicating that public interest in that news has now waned, given:

a) the large time span since the article was published;
b) the extensive media coverage the news has already received at the time, sparking intense andwide-ranging public debate;
c) *Ascanio*'s notoriety;
d) the fact that *Ascanio* holds no public role or social importance;
e) The absence of any investigation of *Ascanio*.

5.3. The Decision of the Newspaper Publisher

The publisher of the newspaper does not grant the request for deletion of the link, but provides for its de-indexing, so that the article is now accessible only to those who would search for it, in a timely manner, through the appropriate tools made available within the newspaper's historical archive. This isbecause the publisher considers it permissible for the print article to remain in the newspaper's computer archive, relating to facts dating back in time that still have a public interest of a historical or socio-economic nature, as long as the article is de-indexed from generalist sites and retrievable only through the newspaper's historical archive. By doing so, the publisher considers adequately balanced the right under Article 21 Const. of the community to be informed

and to preserve memory of the historical fact, with that of the owner of the archived personal data not to suffer undue compression of its social image (see, in this sense, Italian Supreme Court, 27.03.2020, no. 7559; 27.12.2023, no. 36021).

6. THE CASE OF THE WEBSITE OF AN ITALIAN REGION

6.1. The Description of the Case

In 2019, a professional, whom we will hereafter call *Mevio*, verifies that his own name, on the Internet, appears to be associated with an article in a regional newspaper, published in 1978 and with the headline «A scam sinks in the mud».

Specifically, whenever *Mevio* types his first and last name into a search engine, this article linked to a link uploaded to the website of an Italian Region appears among the first results in the table of contents.

The article refers to an investigation of fraud against the public administration dating back some forty- one years, and-as well as giving ample prominence to the affair-it specifically mentions *Mevio*'s first and last name and his professional activity.

As a result of the above, *Mevio* approached the Region's data controller to request, pursuant to Art. 17 Reg. (EU) no. 2016/679, the removal of the link that refers to the article.

6.2. The Complainant's Reasons and the Legal Problem Underlying the Case

Mevio bases his arguments on some considerations regarding the right to be forgotten.

It holds, in fact, that in the case at hand, the right to be forgotten - based on settled case law (see, for all, Italian Supreme Court, 20.03.2018, no. 6919) - should definitely be considered as prevailing over the right to information, as:

- almost half a century has passed since the publication of the article that is listed on the region's website;
- the news is of no current interest and does not contribute to a public interest debate;
- the person involved is not known and does not hold a public position;
- the news is not unconnected with other suitable information to record and disseminate the subsequent development of the story over time.

6.3. The Legal Problem

It seems, therefore, evident that in this case the really relevant factor, among the various arguments set forth by *Mevio*, is time. And, in fact, in the cases previously analyzed we have ascertained how the passage of time is capable of altering the outcome of the balancing of opposing rights and leads the protagonist of a fact, such as the one concerning *Mevio* - who, incidentally, no right to privacy could have been opposed at the time the fact occurred -, to regain possession of his personal history.

Moreover, with reference to the matter before us, it seems useful to dwell again on two pronouncements, which have already provided an occasion for reflection in the study of some of the cases discussed above:

The well-known ruling of the Supreme Court of Cassation 13.05.1958, no.1563 , in which the case of the then Questore of Rome, Pietro Caruso, was examined, to whom a newsreel had attributed: 1) the responsibility of having compiled the entire list of people who were shot at the Fosse Ardeatine, when in fact he had indicated "only" 50 out of more than 300; 2) of having commanded the firing squad that shot Galeazzo Ciano and other former Nazi hierarchs, while he was only responsible for public orderat that juncture.

Well, the Supreme Court ruled that «in an orderly society, a complete annihilation of the right of personality certainly cannot be admitted, and it must instead be recognized that, even the most immoral man, the most outspoken denial of what we call honor, has the right to demand that others notalter the extent of the crimes he has committed and not increase the grave burden of his faults by the addition of untrue facts». Since this time, the jurisprudence of the Supreme Court has consolidated, over the years, an orientation, authentically guaranteeing, aimed at the recognition, even if necessarily partial, of the right to honor and reputation in favor of all subjects, even in the presence of serious precedents in their past. In this sense, the news of which the subject regains possession (by virtue of the right to honor and reputation, to which today must be added the right to oblivion) could also be - and this often happens, especially when the right to chronicle has as its object judicial events, as in today's case - shameful or in any case such as to give rise to the legitimate desire for silence.

The ruling of the Italian Supreme Court 26.06.2013, no. 16111, which affirmed that «the dissemination of a news story with related photo of the person, with reference to a judicial chronicle episode linking it to events of many years ago, relating to a part of the person's existence considered now closed, with respect to which one just wants to be forgotten, constitutes a violation of the law on the right to confidentiality and must provide for compensation for damages in favor of the offended. What matters, for the purpose of the proper balancing of the right to privacy and the right to news, is the essentiality of the information and the public interest of the news disclosed. The subject's right to demand that one's own, past personal affairs be publicly forgotten (in this case cd. right to oblivion) is limited by the right of the press only when there is an actual and present interest in their disclosure». Therefore, the decisive circumstance for the full operation of the right to oblivion (and its prevalence over the antagonistic right of chronicle) is represented by the fact (subsisting also in the case concerning *Mevio*) that a piece of news that was of public interest in a certain context, does not necessarily continue to be able to be disclosed with all its personal references, when the long elapsed time has now made that interest non-existent.

6.4. The Decision of the Newspaper Publisher

The Region, at first, responded with a notice inviting the competent regional directorate to evaluate therequest in the manner and within the timeframe set forth in Article 12(3), Reg. (EU) no. 2016/679.

Subsequently, the Directorate General, deeming well-founded the grounds of objection formulated by Mevio, replied as follows, sending the same communication also to the publisher of the online newspaper that reported the article: «(...) with regard to the acts within its competence, havingassessed the reasons put forward by the interested party as the basis for the request to exercise the right to be forgotten in light of the principles enunciated by the Italian Supreme Court – Plenary Section, no. 19681 of 19.07.2019, and, in particular, in view of the considerable lapse of time since the occurrence of the event mentioned in the article and the no longer current relevance for the community of the mention of the aforementioned personal data, considered that it should grant the said request. For the reasons now stated, it is requested that

your editorial staff, while continuing to keep the article in the digital archive, to protect the choice of historical evocation of facts and events concerning events of the past that was intended to be implemented through the digitization of the newspaper (...), proceed as soon as possible and, in any case, no later than the terms referred to in Art. 12, paragraph 3 Reg. EU 679/2016, the deletion of the applicant's personal data mentioned in the aforementioned article visible in the institutional website of the Region (...), in order to eliminate any reference to the same, giving prompt notice of the cancellation to the undersigned Administration so that it can fulfill its obligations under the aforementioned Reg. EU 679/2016. It is requested, also, that the page relating to the article in question, as amended following the deletion of the data, be transmitted to the Presidency of the Region (...) - Institutional Communication Service - manager of the institutional platform of the (...) - so that the latter can proceed with the necessary timeliness to the modification in the website of the Region and the "de-indexing" of the number of (...) dated (...)».

7. CONCLUSIONS AND FUTURE PERSPECTIVES

As we have seen, the right to be forgotten is regulated by Article 17 of the GDPR, which provides the data subject's right to «obtain from the controller the erasure of personal data concerning him or her without undue delay». However, paragraph 3 of the article stipulates that the right to erasure cannot be granted to the data subject when the processing of personal data is necessary, among other things, for the performance of a legal obligation or the performance of a task carried out in the public interest or in connection with the exercise of official authority. That is, the rule stipulates that as a result of the necessary balancing of opposing interests, the right to erasure of personal data succumbs in the presence of overriding reasons, such as those indicated by the rule, including the regulatory provision dictated in the public interest or in the exercise of public powers. In such a case, the terms of the balancing are set upstream by the legislature, but then receive, for their practical effect, a very relevant and significant interpretative activity by the courts.

Therefore, at the normative level, the key to understanding the limits within which the right to be forgotten can be exercised is the balancing of competing interests. This is fully confirmed by the cases analyzed above: all resolved through the technique of balancing rights. And the cases examined allow us to enucleate a summary of the criteria for formulating a complex judgment that takes into account both the individual's interest in oblivion and the opposing interest of the community in keeping alive the memory of facts that were legitimately disclosed at the time: the notoriety of the person concerned, his involvement in public life, contribution to a debate of general interest, the subject matter of the news, its continence and relevance to the facts that occurred, the form of publication and the time elapsed since the facts actually occurred are all elements of decisive importance.

It has been said about the decisive relevance of the intervention of judges to ascertain, in concrete terms, how such balancing activity is put in place and what its factual repercussions may be.

The Italian jurisprudence follows this basic guideline, which considers the balancing mechanism as the interpretive tool deemed necessary for the resolution of the case (see, for all, most recently, Italian Supreme Court, 27.12.2023, no. 36021).

The European Courts (CJEU and ECHR) have also confirmed this approach to the right to be forgotten, focusing their attention on striking a fair balance between the legitimate interest of potentially affected Internet users in having access to the news and the fundamental rights of the data subject arising from articles 7, 8, 10 and 11 of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (artt. 8 and 10); specifying,

therefore, that the rights of the data subject protected by these articles prevail, in principle, over the interests of Internet users (and also over the administrators of newspapers and journalistic archives), although such balancing may depend, in particular cases, on the nature of the information in question and its sensitive nature for that person's private life, as well as on the interest of the public in having access to such information, which may vary, in particular, depending on the role that person plays in public life (EU Court of Justice, 13.05.2014, C-131/12; European Court of Human Right, 25.11.2021, applicationno. 77419-16). It has also been clarified that the search engine operator is obliged to comply with a de- indexing request when the link provides access to web pages where information related to judicial proceedings appears. In particular, if such pages refer to an earlier stage of the judicial proceedings in question and no longer correspond to the current situation, taking into account the course of those proceedings. In such case, the EU Court of Justice considers that – in the test of the grounds of overriding public interest set out in art. 8(4) of Directive 95/46/EC (now, as is well-known, repealed by Reg. EU 2016/679) and, having regard to all the relevant circumstances of the case - the fundamental rights of the data subject, guaranteed by articles 7 and 8 of the Charter of Fundamental Rights of the European Union prevail over the rights of internet users potentially affected, protected by article 11 of that Charter (EU Court of Justice, Grand Chambre, 25.09.2019, C-136/17).

In this complex context of reference, we can also see trend lines that mark the transition to a new level of interpretation, which sees Italian and European jurisprudence and even national Authorities focus on setting a series of conditions (even very selective ones) to prevent the right to report news and information from being recessive over the right to be forgotten and, more generally, the right to privacy (see, Italian Supreme Court,, 27.12.2023, no. 36021; EU Court of Justice, 08.12.2022, C- 460/20; European Court of Human Right, 25.11.2021, application no. 77419-16; Italian Data Protection Authority, 11.04.2024, no. 207 – web doc. no. 10018487). In other words, we witness - with respect to the well-known EU Court of Justice ruling of 13.05.2014, C-131/12 on *Google Spain and Google v. Agencia Española de Protección de Datos and Mario Costeja González*, characterized by the total openness to the right to be forgotten, seen almost as an absolute right with no limits - to the construction, again with a view to a balancing operation between fundamental rights, of a series of barriers that define the boundaries of the right to be forgotten and, in some way, limit its full operation.

In conclusion, in the light of the research conducted, the following key points can be highlighted:

1) The right to be forgotten must be read and interpreted as part of a balancing act of opposing interests.
2) The current articulation of the right to be forgotten in our legal system can be divided into four stages:

(i) the first, in which forgetting is the right to be forgotten (individual dimension);
(ii) the second, in which oblivion is the right to control the topicality of one's digital identity (social dimension: this aspect is well highlighted by the Data Protection Authority in its order published on 07.04.2022, no. 125, web doc. no. 9774819);
(iii) a third phase - the current one - of the right to be forgotten that concerns cases other than online archives. It can be defined as the phase of oblivion-deletion and/or oblivion-opposition developed in the algorithmic dimension of secondary use. It is, as mentioned. The current course of the right to be forgotten inaugurated by articles 17 and 21 of the GDPR, as well as endorsed by the EDPB Guidelines;
(iv) but a fourth stage is already in sight in which the right to be forgotten undergoes profound limitations in confrontation with the right to report news, the right to criticism and/or satire, and the right to information, considered as rights of a fundamental character for the development of a free and democratic society.

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AUTHOR

Giulio Ramaccioni has a PhD in Civil Law, at the University of Florence, Italy and now is an AssociateProfessor at the Faculty of Law, University e-Campus, Italy.