Chapter 15
The Right to be Forgotten in the Digital Age

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Introduction

The idea behind the right to be forgotten (RTBF) is to provide individuals with a correct and updated representation of their personal identity by obtaining the erasure (or at least the so-called de-referencing) of their past "digital traces" left online. In fact, the Internet is not designed to forget, but to store our "digital footprints" almost permanently, even in cases when they may harm our dignity and reputation. A key role to this respect is played by search engines, engaged in facilitating the retrieval of information that would not be so easily discoverable otherwise.

Starting from this premise, this chapter first tries to define the nature of the RTBF as part of the right of personality, related to concepts such as dignity, reputation, privacy, and protection of the person's moral and legal integrity. Indeed, the term "right to be forgotten" may be perceived as ambiguous and misleading, comprising various components, and referring to different situations that sometimes overlap and can be confused with one another. Moreover, it seems to be significantly determined by "external" elements, such as the passage of time, the public interest for the information, and the role played by the data subject in society.

The Court of Justice of the European Union's (CJEU) landmark decision *Google Spain* contributed to shaping the RTBF at EU level, thus "creating" a new right not enshrined in the Data Protection Directive 95/46/EC, namely the right to obtain from search engines the interruption of the links between personal name and information previously published online. The second part of this chapter is dedicated to analyzing the reasons for which the CJEU's ruling raised doubts, concerns, and criticisms, especially from American commentators in detail. Unfortunately, interpretative

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uncertainties have not been cleared out by the European Regulation in force since May 2018 (GDPR), where the RTBF seems to be conceived as a mere extension of the right to erasure (Article 17).

Since neither the CJEU nor the General Data Protection Regulation (GDPR) has defined precise criteria for the practical implementation of the RTBF, one may turn to the European Court of Human Rights (ECtHR) case law in an effort to shape the contours of the right in question. In the third part of this chapter, some relevant decisions of the ECtHR are examined, outlining that the positions of the two European courts are not easily reconcilable with each other, where the ECtHR is inclined to consider the seriousness of the harm caused to the individual by the information published online, while the CJEU is rather indifferent to the damage suffered by the data subject, revolving its reasoning around the legitimacy of the data processing.

The final part of this chapter briefly examines a recent decision of the Italian Court of Cassation, which has many features in common with the ECtHR's *M. L. and W. W. v. Germany*. However, the reasoning of the ECtHR does not seem to have influenced the Italian Court, which has come to opposite conclusions, marking a difference between the right to report and the right to carry out historical re-enactment of past events: in this last case the individual's right to anonymization was considered to prevail over the public interest in being informed.

Should Our "Digital Past" Be Forgotten?

In the digital age, data collection and automated memorization have become pervasive and can keep affecting one's life for a long time: "A past mistake, an involuntary negligence, a sudden emotional manifestation may unexpectedly surface long after someone and others have already forgotten about them, thus continuing to spoil a person's reputation" (Razmetaeva, 2020: 59). Indeed, the Internet is not designed to forget, but to store our "digital footprints" almost permanently: "Although a permanent, easy-to-access archive of nearly all information ever published has its virtues, it also has potential vices. When it comes to personal information, the Internet that never forgets may forever accentuate the worst or most embarrassing moments of a person's life" (Lee, 2016: 1021). Search engines play a particular role in this respect, as they help users retrieve online information about individuals, regardless of whether it is still relevant, correct, or not harmful for the person involved (Van Hoboken, 2013: 4). Due to search engines, nowadays remembering has become easy and inexpensive, whereas forgetting may turn out difficult and costly (Forde, 2015: 83), thus disrupting the natural cognitive capability of human beings to forget, which can act as a vehicle to maintain dignity and privacy (Criscione, 2020: 319).

Historical memory is antagonistic to the correct exercise of the RTBF, as it prevents updating or deleting facts and events that, even if true, the subject would like to conceal. Nevertheless, oblivion and memory share the same goals, namely the correct and truthful representation of facts and people and the protection of the personal identity and dignity (Bianca, 2019: 26–27). The struggle between oblivion

and memory, from which the RTBF emerges, "has also been influenced by changes in the concepts of "time" and "data" in the all-digital age. Information is now stored over an indefinite period but found and disseminated instantly. It is as if we perceived time in two forms at the same time – as an instant and as an eternity" (Razmetaeva, 2020: 65).

Therefore, new concerns are rapidly arising; new demands deriving from this long-lasting digital footprint issue require the implementation of new rights, among which is a "right to digital identity," understood as the right of the individual to obtain the rectification, contextualization, updating, and, in some cases, even de-indexing and cancellation of one's personal data from the Internet, in order to ensure a reliable representation of one's own identity. Therefore, the idea behind the RTBF is to provide a legal claim such that everybody is granted an actual representation of their personal identity by obtaining the erasure of their past "digital traces" left online (Pollicino & Bassini, 2014: 642).

The RTBF is related to concepts such as dignity, reputation, and privacy, being part of the right of personality, meant as the protection of the moral and legal integrity of a person (Weber, 2011: 121) in situations where certain information has lost most of its significance, while continuing to have a negative impact on the privacy of the person involved (Weber, 2015: 7). It is composed of various rights, such as to change one's mind regarding previously disclosed data, to have personal data deleted when no longer required to be kept, not to be permanently reminded of one's past and not to let it disproportionately harm the future, and to obtain de-referencing of data by tackling the power of Internet search engines (Forde, 2015: 101–102). Because of its multifarious features, the term "right to be forgotten" may be perceived as ambiguous and misleading, being normally used to address different situations that sometimes overlap and can be confused with one another, such as the fact "that a historical event should no longer be revitalized due to the length of time elapsed since its occurrence"—which should be more appropriately defined "right to forget"—or "the claim of an individual to have certain data deleted so that third persons can no longer trace them" (Weber, 2011: 120–121; Weber, 2015: 2). With reference to this latter meaning, a further distinction has to be drawn up between the claim for "dignitary privacy" (i.e., the right to be respected in one's own private and family life, home, and communications, envisaged in Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and in Article 7 of the *Charter of Fundamental Rights of the European Union*) and for "data privacy" (i.e., the right to maintain control over the circulation of one's personal data, envisaged in Article 8 of the *EU Charter of Fundamental Rights*) (Post, 2018: 990–995). Indeed, the right to data protection incorporates elements that are distinct from the components of the RTBF, such as "a right to withdraw previously given consent to process data; the right to object to data processing; the duty to delete or anonymize data once the purpose has been achieved and the right to erase data where its processing is noncompliant with protection requirements" (Forde, 2015: 102).

Over the years, the conflict between privacy and freedom of expression has been the source of countless legal battles, in which European courts have generally made

an effort to reach a fair and careful balance between these two competing rights. From a European point of view "the right to be forgotten is a response to the echo of totalitarian record keeping, an assertion against governments, and, as time has evolved, non-government entities" (Kampmark, 2015: 5). This approach is different from the American one, which protects freedom of expression to the extent that it almost constitutes a right to remember (Guadamuz, 2017: 61–62). In fact, there is no general data protection law in the USA and, furthermore, the *Communications Decency Act*, dating back to 1996, legally protects intermediaries from all liability for the postings of third parties (CDA, Section 230). "In Continental Europe the ideas of autonomy, self-determination and the right to be secure in one's own reputation from intrusion by others play a key constitutional role; in contrast, American law (mainly the First Amendment to the US Constitution) reflects the traditional distrust of centralized power" (Weber, 2015: 6). The result of this attitude is that American courts adopt an exceptionally strong presumption in favor of allowing the circulation of information, whereas the RTBF is considered a much-diminished tort, deserving protection only in extreme circumstances (Post, 2018: 1061). It is not surprising, then, that many US scholars consider the RTBF "a formidable global threat to freedom of expression" (Nunziato, 2018: 1012) and an example of data imperialism by which the EU is trying to assert its own ideologies on other nations (Criscione, 2020: 353–354). Nonetheless, these concerns probably ought to be debunked: while criticism has been raised at the "imperialist" attitude of EU data protection law, claims to digital sovereignty are emerging also in illiberal regimes around the world, endangering the protection of fundamental rights online; to counter-balance this attitude, the development of transnational legal frameworks among democratic regimes seems to be a necessary measure (Fabbrini & Celeste, 2020: 64).

Shaping the RTBF in the European Union: From *Google Spain* to Article 17 GDPR

For the first time in the landmark case *Google Spain SL v. Agencia Española de Protección de Datos*[1] the CJEU recognized the right to be forgotten, deriving it from Article 12(b) of the Directive 95/46/EC (the so-called *Data Protection Directive*, hereinafter DPD) that established the right of the data subject to obtain "the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data." Under this rather "creative" ruling, the CJEU granted individuals the right to request search engines to remove links to online content containing

[1] Court of Justice of the European Union, Case C-131/12, 13 May 2014. A summary of the case can be found here: https://globalfreedomofexpression.columbia.edu/cases/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos-aepd/

personal information that are "inadequate, irrelevant or excessive in relation to the purposes of the processing" or "not kept up to date" or "kept for longer than is necessary" (CJEU, *Google Spain*, 92–94). However, this decision is considered rather controversial for various reasons, as many commentators did not fail to point out.

First of all, the CJEU did not clarify for what precise reasons the data subject was entitled to removal of the links to the articles published by the Spanish newspaper *La Vanguardia*, concerning his past financial problems. Indeed, the Court did not explain whether the contested information was inaccurate, inadequate, irrelevant, excessive, not updated, or simply too old (Lee, 2016: 1022, 1033); it simply held that violations of the DPD did not require any showing of prejudice to the data subject (Post, 2018: 998). However, without a conception of harm it is very hard to reconcile the RTBF with the democratic function of public discourse (Post, 2018: 1009), given that the public has a fundamental interest in maintaining the integrity of the structure of communication that makes public discourse possible (Post, 2018: 1015).

Secondly, the CJEU has created a split decision, as the news articles containing the old information of the applicant's debt were not found to conflict the DPD, differently from the Google search results of Costeja's name that produced links to those articles (Lee, 2016: 1031). This difference was justified (CJEU, *Google Spain*, 85–86) by the fact that search engines and publishers may have different interests in deciding whether to accept a person's claim of a right of rectification and may fall under different derogations: in particular, only publishers may be granted the exemption "for the processing of personal data carried out solely for journalistic purposes," as stated by Article 9 DPD. The Court found that a search engine like Google, which stores, organizes, discloses, or makes personal data available, was not to be considered a neutral intermediary, but corresponded to the notion of "data controller" under Article 2(b) DPD, since it was in a position to determine the purposes and means of the data processing. However, Google's interest being solely economic (selling of advertising space), it could not rely upon the "journalistic exemption" under Article 9 DPD (CJEU, *Google Spain*, 56).

The position of the CJEU, however, was opposite to that expressed by the Advocate General Niilo Jääskinen (submission of June 25, 2013), who observed that search engines had a mere intermediary function—providing links to information previously published by third parties, without verifying whether it is legal and legitimate for the DPD purposes and without even distinguishing between personal and other data—and could not be equated to data controllers. Indeed, by providing increased access to the flow of information, search engines play an important role in promoting the transparency of information, which is essential in an open democracy. For this reason, allowing a data subject to obtain a restricted dissemination of personal data from search engines would have a distorting effect on the freedom of expression. Therefore, the Advocate General pleaded for the execution of an appropriate balancing test between conflicting rights—data protection and freedom of expression—concluding that the latter is to be considered generally prevailing (Weber, 2015: 6).

To this respect, the most important question raised by the CJEU in *Google Spain* is whether Google has become, like the modern newspaper, an essential component of the communicative infrastructure necessary to sustain the public sphere (Post, 2018: 1016). The approach of the Court, however, did not support this assumption: Google was considered only as a commercial company asserting its own economic interest, without serving journalist purposes. Indeed, the CJEU failed "to recognize that the circulation of texts of common interest among strangers makes possible the emergence of a "public" capable of forming the "public opinion" that is essential for democratic self-governance" (Post, 2018: 981).

Thirdly, the Court failed to clarify the cases and circumstances in which the preponderant public interest would require permanent access to information and when, instead, the information is no longer relevant (Forde, 2015: 107). The CJEU explained that the balancing between the RTBF and the public interested in the contested information requires case-by-case assessment—considering the type of information in question, its sensitivity for the individual's private life, and the interest of the public in having access to the relevant information—without, however, defining which criteria and procedures are to be followed to carry it out (Lee, 2016: 1034–1035).[2] Nevertheless, the Court seemed to lean toward the prevalence of individual privacy over the collective right to freedom of expression, although this presumption was mitigated by the possibility of some circumstances—particularly the public role of the data subject—that could make the disclosure of information relevant. In other words, this would mean that the extent of the RTBF can be determined by the public relevance of the data subject rather than the public interest in information (Stradella, 2016: 11).

Fourthly, considerable discretion and authority seem to have been delegated to search engines, which, in first instance, carry the primary responsibility to define the contours of the RTBF (Lee, 2016: 1035). Thus, private entities such as search engines have been made "judge, jury, and executioner" of the RTBF, thus taking the role of publishers in assessing the legitimacy of published information, which could lead to the possibility of censorship by a private party (Forde, 2015: 110–113). Moreover, transparency in how Google is currently dealing with delisting requests is problematic, and many have pointed out that the takedown process is operated on a quite arbitrary basis, remains obscure, and does not allow the data subject to have an effective cross-examination (Chenou & Radu, 2019: 89; Guadamuz, 2017: 66–68; Lee, 2016: 1035–1044; Leiser, 2020: 4–5; Post, 2018: 1069).[3]

[2] Actually, a list of 13 of 13 criteria European data protection authorities should take into consideration (on a case-by-case basis) when handling complaints is contained in the Guidelines on the Implementation of the Court of Justice's *Google Spain* judgment issued on November 26, 2014, by the EU's Article 29 Working Group (an advisory body composed of all the Data Protection Authorities in the European Union). Regarding the content of the guidelines, see Leiser, 2020: 5–7).

[3] Chenou and Radu (2019) highlight the emergence of transnational quasi-monopolistic private intermediaries in digital markets, due to a hybridization of governance entailing the transformation of both state and nonstate actors. Since Google exercises quasi-lawmaking, quasi-adjudicative, and quasi-enforcement powers in implementing the RTBF in the EU, it can be conceived as a private

Lastly, it has to be highlighted that even after de-indexing, the content remains on the original page and, although links are no longer displayed if the search is conducted by the name of the person, they can still be found using other relevant search terms (Forde, 2015: 117; Globocnik, 2020: 380). Moreover, even after the search engine has deleted the contested links from all its European domains, the information is still available and can be retrieved either through google.com or any other search engine (Forde, 2015: 112; Weber, 2015: 6), although the guidelines produced by the EU Article 29 Data Protection Working Party within a few months of the *Google Spain* decision determined that de-referencing decisions were to be implemented globally, and not just on search engines' EU domains.

This encouraged the French Data Protection Authority—*Commission Nationale de l'Informatique et des Libertés* (CNIL)—to make an attempt to require Google to implement the RTBF across all of Google's domains, including Google.com (Nunziato, 2018: 1033–1040; Reymond, 2019: 87–90). Nevertheless, in *Google v. CNIL* (24 September 2019, case C-507/17), the CJEU opted for EU-wide de-indexing, concluding that currently there is no legal obligation under EU law for search engines to carry out de-referencing on all their language versions, since the scope of the EU Regulation 2016/679 does not go beyond the territory of the Member States. However, the Court also noted that while EU law does not require de-referencing on a global scale, it also does not prevent national authorities from adopting such a practice. Therefore, after weighing the data subject's right to privacy and the collective right to freedom of information against each other, national authorities remain competent to order search engines, where appropriate, to carry out a worldwide de-referencing, although the court failed to offer a legal basis or guidelines for the execution of such practice, leaving its implementation to Member States (Criscione, 2020: 321–325, 332–334; Globocnik, 2020: 385–387).

The *Google Spain* ruling obviously had an influence on the drafting of the General Data Protection Regulation (EU) 2016/679, which entered into force in May 2018 (GDPR). The result was that the original title of Article 17, referring only to the right to erasure, was supplemented by a reference in brackets to the RTBF. Apart from being mentioned in the title of Article 17 and in the *Whereas* no. 65 and 66 (in both cases as a synonym of the right to erasure), the RTBF is not explicitly explained or regulated by the GDPR, whose Article 17 simply defines the pre-requisites for exercising the right to erasure, already provided by the DPD. The relationship between the right of erasure and the RTBF is not clear, the latter conceived as a mere extension of the first.

In fact, Article 17 GDPR does not establish any new rights but limits itself to specifying the conditions with greater detail and precision, under which data subjects can obtain the erasure of their personal data. The right to de-indexing, as "created"

administrative agency administering the RTBF, which raises serious concerns for democratic accountability and due process (Lee, 2016: 1066). The same opinion is expressed by Leiser (2020: 8–15), who underlines the need for a new public model for resolving international disputes about the implementation of the RTBF.

by the *Google Spain* ruling, is not explicitly envisaged, although it seems to be implicitly enshrined in par. 2, which requires the data controller to inform other controllers that are processing personal data of the fact that the data subject has requested the erasure of any links to, or copy or replication of, those personal data. However, it is not clear which data controller is meant to be the one primarily in charge of informing others: whether the search engine, which should inform publishers and/or other search engines of the data subject's requests for erasure or de-indexing, or the original publisher of the information to which the data subject has requested the erasure.[4] In any case, this provision does not seem to be strictly compulsory since it is explicitly meant to be dependent on the available technology and the cost of its implementation and does not indicate any sanctions in case of noncompliance.

Pursuant to Article 17(1), personal data shall be erased promptly by the data controller upon request by the data subject, when the latter withdraws his or her consent or objects to the processing, or when the personal data are no longer necessary or have been processed unlawfully, or their erasure is demanded for compliance with a legal obligation. This "classic" claim to the cancellation of personal data can be made against any data controller, namely the subject that determines the purposes and means of the data processing. This right is grounded on a proprietary conception of the right to privacy, as a property right exercised on personal data, which would allow the data owner to revoke the authorization for their dissemination issued to the data controller. The scope of the provision of Article 17 GDPR is considerably broader than the right to de-indexing outlined by the CJEU in the Google Spain CJEU case: it is not restricted to search engines, covers all personal information, not only the name and surname, and provides protection not only in cases of loss of interest in past, irrelevant information, but also in other situations, such as unlawful processing or withdrawal of consent (Ovčak Kos, 2019: 202).

The right to erasure can be limited in certain circumstances, the most relevant of which is the possible conflict with the exercise of the freedom of expression and information (Article 17, 1.a). More specifically, Article 85 explains that the right to protection of personal data must be reconciled with the right to freedom of expression and information; therefore, when personal data are processed for journalistic, academic, artistic, or literary purposes, exemptions or derogations from the general legal framework may be provided. However, some aspects of the Regulation—the requirement that the data controller take down personal data without undue delay, the "necessity" caveat on the freedom of expression defense,[5] the burden of proof

[4] The *Whereas* no. 54 simply explains that to "strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform third parties."

[5] Pursuant to Article 17, par. 1.a, the data controller can refuse the erasure (or de-indexing, in case of search engines) of personal data if these are still necessary in relation to the purposes for which they were collected or otherwise processed. However, Post (2018: 1047–1050) contends that purposes of search engines consist of providing the public the means of acquiring information, knowledge,

placed on the data controller that the data subject's requests are manifestly unfounded or excessive (Article 12), the exorbitant financial penalties for noncompliance, and the absence of an opportunity to be heard for publishers or speakers whose content has been erased or de-referenced—are likely to skew the balance in favor of the data subject's removal rights and against the data controller's right to freedom of expression (Nunziato, 2018: 1056–1057). On the contrary, it can be argued that the public should be somehow legally protected in case of erasure of information, as this interferes with the right to know and to access information (Ovčak Kos, 2019: 203).

The RTBF in the Case Law of the ECtHR and a Final Brief Comparison with a Recent Decision of the Italian Court of Cassation

Neither the *Google Spain* ruling nor the GDPR has defined specific and precise criteria for the practical implementation of the RTBF. Moreover, in shaping the scope of the RTBF, the CJEU in *Google Spain* did not clarify its relationship with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter Convention) and the ruling of the ECtHR, although all EU Member States are bound to the Convention as signatories (Ovčak Kos, 2019: 200). As the *Google Spain* decision is inconsistent with the principles enshrined in the case law of the ECtHR, it may lead to uncertainties regarding the interpretation of European legal systems and contribute to raising concerns about the scope of the RTBF (Szeghalmi, 2018: 268). Nevertheless, the CJEU's and ECtHR's decisions lie on different grounds: the theoretical framework of the ECtHR's reasoning focuses on guaranteeing a balance between the right to public debate and the damages caused by publication, where the seriousness of the harm caused to the individual concerned constitutes a relevant factor; on the contrary, in *Google Spain*, the CJEU assumed that the RTBF could be granted regardless of the damage suffered, revolving the reasoning around the legitimacy of the data processing (Szeghalmi, 2018: 260–261).

In *Węgrzynowski and Smolczewski v. Poland* (2013),[6] the ECtHR examined the request of two lawyers for the deletion of an allegedly defamatory article published on the website of a Polish newspaper. In fact, although the authors of the article and the newspaper's editor-in-chief had been found liable of defamation, the online version of the article had remained accessible, and the Warsaw Regional Court

education, experience, and entertainment, which are incompatible with the idea of the removal of information. Moreover, one may argue derogations provided in par. 3.d (when data processing is necessary for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes) may apply to search engines as well.

[6]ECtHR, Fourth Section, *Węgrzynowski and Smolczewski v. Poland*, Application no. 33846/07, July 16, 2013.

had refused its removal because this remedy would amount to censorship and rewriting history. In highlighting the need of a fair balancing between the right to respect for private life (Article 8 of the Convention) and the right to freedom of expression (Article 10 of the Convention), both of which require equal respect, the ECtHR stressed the substantial contribution made by Internet archives to preserving and making news and information available, and reiterated that news archives "constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free."[7] It also explained that, while the primary function of the press is to act as a "public watchdog," online archives had a valuable secondary role in maintaining and displaying previously reported news, which should prevent judicial authorities from engaging in rewriting history by ordering the removal of publications. Therefore, the Court concluded that there had been no violation of Article 8 of the Convention, although it would have been desirable—if only the applicants had requested such remedy—to add a comment to the online article informing the public of the outcome of the civil proceedings in the earlier libel case regarding the printed version of the article.

A few years later, the ECtHR dealt with the RTBF again in *Fuchsmann v. Germany* (2017).[8] The applicant complained that national courts had refused the erasure or at least the anonymization of an online newspaper article published in the past although there had not been sufficient public interest to justify mentioning him by name, and the article contained mere speculations but no proven facts. He also alleged that the reasoning of the CJEU regarding the RTBF and the right to de-indexing should be transferred to his case. However, although the ECtHR did not address this latter demand specifically, it substantially agreed with the conclusions of the German Court of Appeal, namely that (1) the article contributed to a debate of public interest, including the fact that the applicant was mentioned by name; (2) the article was based on sufficiently credible sources and was free from polemic statements and insinuations; (3) before the publication of the article, the journalist had contacted the applicant, who had not replied to the journalist's questions; (4) the applicant had provided no information in his submissions regarding any efforts made to have the link to the article removed from online search engines; and (5) finally, and most significantly, Internet archives constitute an important source for education and historical research and their function deserves protection. Therefore, the Court concluded that there had been no violation of Article 8 of the Convention.[9]

[7] Already in *Times Newspapers Ltd (Nos 1 and 2) v. The United Kingdom*, Application nos 3002/03 and 23,676/03, March 10, 2009, the ECtHR had noted that Internet archives, including those maintained by the press, are protected by the right to freedom of expression under Article 10 of the Convention.

[8] ECtHR, Fifth Section, *Fuchsmann v. Germany*, Application no. 71233/13, October 19, 2017.

[9] The Court also identified the following relevant criteria in the context of balancing competing rights: 1) the contribution to a debate of public interest; 2) the degree to which the person affected is well known; 3) the subject of the news report; 4) the prior conduct of the person concerned; 5) the

Lastly, in *M. L. and W. W. v. Germany* (2018)[10] the ECtHR examined the request of anonymization of personal data contained in newspaper articles published many years ago and still stored in the media outlets' digital archives. Notably, the applicants, convicted for murder, had not asked for the removal of the reports in question but only for their anonymization – a less restrictive measure in terms of press freedom than the deletion of published articles – claiming that their availability in online archives had the effect of permanently stigmatizing them, even though they had served their sentences and were prepared for their reintegration into society. However, the German Federal Court of Justice had refused the requested remedy, observing that (1) reports concerning criminal offenses were part of contemporary history, which the media had a responsibility to report on; (2) in the case of reports on topical events, the public's interest in being informed generally takes precedence over the right of the person concerned to protection of his or her personality; and (3) the public had a legitimate interest not only in being informed about current events, but also in being able to research past ones. The ECtHR shared the same opinion and concluded that there had been no violation of Article 8 of the Convention, as in that specific case the reports still available online continued to contribute to a debate of public interest which had not been diminished by the passage of time. In the Court's view, while the primary function of the press is that of disseminating information and ideas, playing a vital role of "public watchdog," its secondary but nonetheless valuable role consists of maintaining archives of reported news and making them available to the public. Although convicted persons have an interest in no longer being confronted with their past acts, with a view to their reintegration in society, and although rendering a report anonymous is certainly less detrimental to freedom of expression than its entire deletion, the Court maintained that journalists are free to decide what details ought to be published in order to ensure an article's credibility, provided that their choices are based on their profession's ethical rules and codes of conduct. Therefore, the Court found the applicants had only a limited legitimate expectation of obtaining anonymity in the reports. As for the possibility of being granted the RTBF (de-indexing of the reports by search engines), the ECtHR did not analyze this issue in detail, but limited itself to affirming that because of their amplifying effect on the dissemination of information and the nature of the activity underlying the publication of information on the person concerned, the obligations of search engines may differ from those of the entity which originally published the information. It can be concluded, therefore, that in the case of online media archives a significant limitation to the RTBF is represented by the passive aspect of the right to freedom of expression and information (protecting the public's interest in accessing information) and that this limitation is less relevant with respect to search engines.

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method of obtaining the information and its veracity; and 6) the content, form, and consequences of the publication.

[10] ECtHR, Fifth Section, *M. L. and W. W. v. Germany*, Applications nos. 60,798/10 and 65,599/10, September 28, 2018.

Quite surprisingly, the following year, in a very similar case the Italian Court of Cassation (Italy's highest court) came to an opposite conclusion.[11] The case, decided in July 2019, dealt with the legitimacy of the re-publication of a newspaper article already published in 1982, concerning a murder committed many years before: the applicant, who had already fully served his sentence, complained that re-publication, in addition to having caused him profound anguish and prostration, had exposed him to a new media pillory, when he had already managed to rebuild a new life. The premises of this case, however, were partly different from the ECtHR's judgment, as they did not concern the permanent availability of past publications in online archives, but the re-publication of an old press article in a paper journal.

After examining the relevant Italian and European case law on the balance between the right to report and the RTBF, the Court concluded that reproducing already published news after a long period of time did not fall under the right to report but merely constituted a historical re-enactment of past events. Given that a historiographical activity cannot enjoy the same constitutional guarantee provided for the press, it is necessary to verify the persistence of public interest case by case in knowing details (such as name and personal image) related to the protagonist of the story. In the Court's opinion, the general principle to be followed in case of purely historiographical activity is that the individual right to anonymity must prevail over other interests, especially when the person's dignity and honor are compromised, unless there is a renewed public interest in the story, or the protagonist has held or holds a public position. In other words, in historical re-enactment individual rights prevail over the journalistic right to disclose personal information, unless the public role played by the person justifies the publication of such information (in line with the CJEU's outcomes in *Google Spain*).

Conclusions

Despite any effort of analysis, the RTBF still appears a very elusive object. It is composed of different elements—control over personal data, claim for privacy and reputation, harm suffered by the data subject, passage of time, right to report, public interest in the dissemination of information, contextualization of news, and role played by online media archives and search engines—that national and European courts weigh, compare, and balance with divergent outcomes. Current European legislation does not contribute much to clarity: the RTBF is not explicitly explained or regulated by the GDPR in force since May 2018, being seemingly conceived as a mere extension of the right to obtain the erasure of personal data (Article 17) and hardly distinguishable from the latter.

[11] Corte di Cassazione, S. U. civ., July 22, 2019, no. 19681. Comments to this case: Colaruotolo, 2019, Peron, 2019, Sicuro, 2019.

In *Google Spain* (2014), the CJEU proved to be extremely creative, sanctioning an unprecedented right to request the search engine to interrupt the connection between the name of the data subject and the links to information published online and no longer of public interest due to the passage of time. However, this ruling has raised a lot of criticism for several reasons, such as the lack of an explanation about the precise reasons behind the granting of the RTBF in that particular case, the different treatment between search engines and publishers in terms of legitimacy of data processing and recognition of possible exemptions from the general discipline, the obscurity regarding cases and circumstances in which the public interest would require permanent access to information, the excessive discretion and authority delegated to search engines, and the absence of an opportunity to be heard for publishers whose content has been erased or de-referenced. All considered, the Court seemed to favor the prevalence of individual privacy over the right to freedom of expression, although this presumption was mitigated by the possibility of some circumstances—particularly the public role of the data subject—that could make the disclosure of information relevant.

On the contrary, the ECtHR, in the cases examined in this chapter, has constantly given greater relevance to freedom of information and right to report than individual expectations of privacy. The positions of the two European courts are not easily reconcilable with each other, where the ECtHR is inclined to consider the seriousness of the harm caused to the individual by the information published online, while the CJEU is rather indifferent to the damage suffered by the data subject, revolving its reasoning around the legitimacy of the data processing. Moreover, the ECtHR has considered the position of search engines only in passing and marginally, limiting itself to affirming that because of their amplifying effect on the dissemination of information, the obligations of search engines toward the person claiming for the RTBF may differ from those of the original publisher of the information.

These diverging opinions do not contribute to clarifying the nature of the RTBF and the conditions for its recognition. It is not surprising, therefore, that national courts may come to unusual outcomes, an example of which may be represented by the decision of the Italian Court of Cassation examined in the final part of this chapter, which drew a line between the right to report and the right to carry out historical re-enactment of past events: in this last case, the individual's right to anonymization was considered prevailing over the public interest in being informed.

The problem, unsolvable for the moment, is that the RTBF is recognized mainly at the jurisprudential level, in the absence of a suitable regulatory basis to define its contours.

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