

RIGHT OF REPLY

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1. Introduction.

The reason underlying the Right of Reply and the arrangements for its functioning necessitate analysing whether and in what manner this project is inserted, in the context of the Italian legal system (both at constitutional level and at the level of ordinary legislation), in a perspective of guaranteeing fundamental rights and freedoms.

To this end, it is primarily necessary to reconstruct the constitutional foundations of the rights involved – personal identity and the right of the individual to control the dissemination of data concerning them, on the one hand, freedom of expression, on the other hand –, the instruments provided by the legal system for their protection, as well as, the balances which become necessary in the reciprocal relationship – and often extinguishing – of these legal situations.

2. Personality rights and the conflict with freedom of speech. Defining the context.

The category of “personality rights” traditionally refers to those subjective legal situations inherent in essential attributes of the human person¹. They are rights in which the good that it is aimed at

¹ The personality rights were, in the past, the subject of numerous debates: there were those who considered that the protection of personality fell solely to the public right and those who sustained, instead, that it was not possible to talk of rights, but mere facts constituting obligations in the hands of those who brought into being behaviour contrary to the prerogatives of the person. Furthermore, a contrast is to be found between a monistic theory - which asserts the existence of single personality right of indefinite content - and a pluralistic theory, which envisages the existence of various personality rights. Cf *ex multis* A. DE CUPIS, *I diritti della personalità* (Personality Rights), Giuffrè publisher, Milan, 1959; D. MESSINETTI, *Personalità (diritti della)* (Personality (Rights)), in *Enciclopedia del diritto* (Encyclopaedia of Law), Vol. XXXIII, Milan, 1983, 355 or P. RESCIGNO, *Personalità (diritti della)* (Personality (Rights)), in *Enciclopedia Giuridica Treccani* (Treccani Legal Encyclopaedia), Vol. XIII, Rome, 1990, or even F. GAZZONI, *Manuale di diritto privato* (Private Law Manual), ESI, 1997; M. RICCA-BARBERIS, *Diritti della personalità e loro estensione* (Personality Rights and their Extent) Società Tipografica Modenese, Modena, 1956; E. CAPIZZANO, *I diritti tipici della personalità* (Typical Personality Rights) Camerino, Naples, 1972.

defending is not found outside the individual, but, on the contrary, concerns their very individuality and their experience of moral and social life².

The specific characteristics of these rights are to be found in the *necessity* - they are, in fact, due to all natural persons - in the *fact that they do not prescribe under a statute of limitations* - prolonged non-use does not lead to them being extinguished - in the *absoluteness* - entailing, on the one hand, a general duty of abstention of all known parties from bringing harmful behaviour into existence and, on the other hand, an *erga omnes* protectability - in the *non-property nature* – they defend values of the person not directly susceptible of economic evaluation - and, lastly, in the *non-disposability* – they are, therefore, capable of being waived³ - .

In Italy, prior to the entry into force of the Constitution, art. 2 of which represents the very foundation of new and additional rights originating from the needs of a society undergoing continuous transformation, these legal situations were taken into consideration and protected by the Civil Code in a rather small list. Indeed, it speaks only of protection of physical integrity (art. 5), protection of the name (arts. 6-9), of the image (art. 10) and of honour and reputation in the context of commercial activities (art. 2598). These particular cases are then backed up by others which find themselves recognised and governed in the Criminal Code or in some special laws. It is the case, for example, of the crimes against honour (art. 594 *et seq.* of the Criminal Code) or of the author's moral right (arts 20-24, 81 and 142, of Law no. 633 of 1941 containing provisions regarding the “Protection of copyrights and other rights connected to its exercise”).

The rights thus recognised and the arrangements for their protection constitute the fullest representation of a society in which the development of the person is realised by means of the construction of social relationships which must be defended.

It is with the technological revolution of the 20th century, with mass-media establishing itself⁴, with the dissemination of electronic computers capable of storing, developing and updating millions of individual items of data⁵, as well as, later, with the advent of the internet (an immense bank of databases, continuously enriched by millions of items of information issued on networks of a global nature⁶) that, however, the personality rights acquire a truly central relevance: on the one hand, indeed those rights already recognised start to be “restructured” within the private⁷ and more intimate sphere of the individual, protecting them from undue external interference; on the other hand, the new challenges that the technology brings lead to the rise of new subjective legal situations, classifiable as

² P. RESCIGNO, *Personalità (diritti della)* (Personality (Rights)), cit. 2.

³ A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato* (Private Law Manual), Giuffrè publisher, Milan, 2013, 123.

⁴ The first studies date back, in reality, to the 19th century in the United States. E. SHILS, *Privacy: its constitution and Vicissitudes*, Law & contemporary problems, 31, 1966, 289. The wise founder of privacy in the legal terrain is dated 1881 and is by S.D. WARREN, L.D., BRANDEIS *The right to privacy*, Harvard law Review, 4, 1890.

⁵ D. VALENTINO (edited by), *Manuale di diritto dell'informatica* (Information Technology Law Manual), Edizioni Scientifiche Italiane (Italian Scientific Editions), Naples, 2011. Central, in this sense, is the role of search engines: an ever growing number of people trust the internet to inform them and in the majority of cases they pass through the filter of search engines and direct themselves to these engines to be redirected to the information for which they are searching. From an investigation conducted by Agcom in 2013 (<http://www.jus.unitn.it/cardoza/Review/2005/Marini1.pdf>) it emerges that the internet, already 5 years ago, was among the means most used by people to inform themselves, placed in third position, at 42% of people who are actively interested in current affairs.

⁶ F. DI CIOMMO, *Quello che il diritto all'oblio non dice. Internet e oblio* (What the right to be forgotten does not say. The internet and being forgotten), in *Danno e responsabilità* (Harm and Liability), no. 12/2014, 1103.

⁷ <http://www.jus.unitn.it/cardoza/Review/2005/Marini1.pdf>

rights and meriting protection. In this perspective the recognition of the right to personal identity is placed (as “the right to be represented with the true identity⁸ and to see one's image respected⁹) understood ever more according to a global perspective involving various aspects of the personality.

Technology thus radically modifies the manner in which man perceives himself and the relations with other men and obliges greater attention to be paid to how, in this context, it changes the structuring of another apical value of our constitutional legal system: freedom of expression (especially in its variation of the freedom to inform and to be informed) which finds its foundation in art. 21 of the Constitution. This freedom, on the one hand, the diverse situations referable to the personality rights¹⁰, on the other hand, they are placed in a relationship which the instruments conceived up until this time have always construed in terms of a conflict now further complicated by the difficulty of operating an effective balance between society's “right to know” (which in our legal system finds, indeed, in art. 21 of the Constitution its highest point of reference) and the individual's right to make his truth known (this also having its constitutional foundation in the same article), in such a manner as to defend effectively the search for that “historic truth”, which is often disregarded in facts which have been publicised.

Starting from analyses of the current situation, the Right of Reply, as shall be seen, appears to represent a means in position to eliminate both that conflict between freedom of expression, personal identity and privacy, protecting them at the same time, and that conflict between everyone's right to information and the interested party's right to provide their version regarding the facts which concern them.

⁸ Civil Supreme Court of Cassation, 22 June 1985 no. 3769: “*the right to personal identity aims to guarantee the faithful and complete representation of the individual personality of the subject in the context of the community, general and particular, in which this individual personality has come into being, exists and solidifies itself. It is a matter of essential, fundamental and qualifying interest of the person and the aim of art 2 of the Constitution is indeed that of protecting the human person as a whole and in all its essential modes of being. This constitutional rule does not have a merely summarizing function of the rights expressly protected in the constitutional texts or even of those inherent in the human person specified in the Civil Code; it locates it at the centre of the entire constitutional legal system and assumes as a point of reference the human person in the complexity and unity of their values and needs, both material and spiritual. Precisely because the rule does not have a purely summarizing task; it constitutes an open and general clause of protection of the free and full progress of the human person and is consequently apt to embrace in its scope new emerging interests of the human person provided that they are essential to the same. Certainly, in our positive law it is not given to qualify the various personality rights as profiles or aspects of a single and all inclusive personality right, each one of them being recognised to protect the variety of man's fundamental interests, but, while these distinct and autonomous rights constitute subjective legal situations, all of them refer back to the integral and unitary value of the human person, as this is understood in art. 2 of the Constitution. This allows and absolutely does not exclude the possibility of identifying new needs of the human person which, if essential and fundamental, can immediately and automatically lead to the legal protection by private law by means of recourse to the analogy of the specifically recognised personality rights.*” (In the case in point: from the text of an interview conducted in a weekly newspaper by the director of the cancer institute of Milan, there was extrapolated, to then be reproduced in an advertorial insert, an affirmation regarding the less harmfulness of light cigarettes; on the basis of the principle just now reported, there was confirmed the generic condemnation to pay compensation for the harm at the responsibility of the company producing the cigarettes advertised, as well as of the advertising agency).

⁹ Court of Rome 27 March 1984 (The so called Pannella Case). The judges in Rome, in an article which appeared in the daily newspaper *La Repubblica* and tending to represent the radical leader as the author of a deal with terrorists, recognise the harm of the right to personal identity, describing it as the right of the individual “*to see their image protected to participate in social life with the acquisitions of ideas and experiences, with the ideological, moral, social, political and religious convictions which differentiate them and at the same time characterise them*”.

¹⁰ P. PERLINGIERI, *Informazione, libertà di stampa e dignità della persona* (Information, press freedom and dignity of the person), in *Rassegna di Diritto Civile* (Civil Law Collection), 1986, 624.

3.The right to personal identity. Its creation in the case law and its constitutional foundation.

The technological innovation connected with the advent of information technology, the introduction of the electronic processor, the dissemination of computers and the internet determines, as has been said, a true and proper Copernican revolution in such a manner as to create, organise and interrogate databases¹¹; all, with a profound impact on the manner of understanding the personality rights and on the claim of the individual to control the flow of information concerning them.

In this context is placed the recognition of the right to personal identity.

Already with the work of Nicola Stolfi on “*I segni di distinzione personali*” (Signs of personal distinction)¹² (while dedicated to distinctive elements such as surnames, forenames, nicknames, pseudonyms, noble titles, heraldic symbols), starts to profile the concept of identity of the person, in the sense of identifiability and uniqueness of the individual. And, then, with Adriano De Cupis and his study regarding “*Il diritto all'identità personale*” (The right to personal identity)¹³ dated 1949, where the need for protection, not only of individual distinctive signs, but rather of a wider right with its autonomous type of case directly connected to the protection of the person in their totality start to take shape¹⁴.

The entrance of the right to personal identity within the legal system, however, is due to the work of the courts judging the merits and lawfulness, first of all, and then of the Constitutional Court, which stimulate an effective legislative recognition on the part of the legislator; a recognition which, however, arrived only with law no. 675 of 31 December 1996 containing provisions regarding the “protection of persons and other subjects with respect to the processing of personal data”, which, in reality, is limited – with the more general governance regarding the processing of personal data – to mentioning the right to personal identity, but not to defining the object thereof.

The first ruling which seems to orientate itself in the sense of recognising a right of this type is that of the Municipal Court of Rome of 6 May 1974. This decision took place following the complaint of a man and a woman, who complained that, without any consent on their part, an image which represented them - created in the context of a photography competition - has been used in a propaganda manifesto of the National Committee for the Referendum on Divorce in order to support the vote in favour of the said referendum. If, pursuant to art. 10 of the Civil Code, the judge in Rome recognised a protection for the abusive use of the image, at the same time, however, he goes so far as to affirm the need to protect also the interests of the complainants harmed by the juxtaposition to their opinions, completely different, for the political purposes of the manifesto.

The Municipal Court of Rome again arrived at the same outcome on 7 May 1974, when called upon to pronounce itself in relation to an urgent appeal presented by the Communist Party which sustained that the Committee for the Referendum on Divorce had manipulated some phrases of Palmiro Togliatti in such a manner as to lead the electorate to believe that the said Party was contrary to this institution.

¹¹ S. RODOTA', *Privacy e costruzione della sfera privata* (Privacy and construction of the private sphere), in *Tecnologie e diritti* (Technologies and rights), Il Mulino, Bologna 1995, 106 *et seq.*

¹² N. STOLFI, *I segni di distinzione personali* (Signs of personal distinction), Officina tipografica salernitana (Salemitana typographical workshop), Salerno, 1905.

¹³ A. DE CUPIS, *Il diritto all'identità personale* (The right to personal identity), Giuffrè publisher, Milan, 1949.

¹⁴ E.C. RAFFIOTTA, *Appunti in materia di diritto all'identità personale* (Comments in terms of the right to personal identity), in www.forumcostituzionale.it.

With the aforementioned judgements, there was thus inaugurated a branch of case law which in the following years would move every more in the direction of consolidating itself, clarifying and specifying the object and the governance of the right to personal identity.

In this sense, of particular interest – especially for the contribution given to defining the legislative foundation of this right – are the judgements given at all levels in the court system which decide the so called “Veronesi case”¹⁵.

Limiting ourselves to what constitutes the subject matter to be discussed in this opinion, the most relevant ruling, in this case, is that of the Supreme Court of Cassation no. 3769 of 22 June 1985. This judgement, indeed, confirming the conclusions which were reached by the judges of the merits changed the orientation in force up to then (*ex multis* Supreme Court of Cassation no 2242 of 13 July 1971¹⁶) and characterised by the defence of the right of personal identity only in the event that it coincided with the protection of a particular case expressly provided for by law.

This decision, in contrast, establishes an autonomous legal foundation for this rights, for the first time attributed to art. 2 of the Constitution. The interest considered as generally meriting legal protection is that, specific to each subject, of being represented in life in relation with their true identity, just as this in the social reality, whether general or particular, is known or may be recognised in light of criteria of normal diligence and objective good faith; in this sense everyone has an interest not to see their intellectual, political, social, religious, ideological and professional heritage altered, misunderstood, obscured and challenged, as they have expressed themselves or seem destined to express themselves, on the basis of concrete and unequivocal circumstances, in the social environment. Therefore it is affirmed in a clear manner that: *“while distinctive signs (name, pseudonym, etc.) in the current system identify the subject on the level of material existence and civil and legal condition and the image evoked the physical semblance of the person, the identity represents, instead, an artificial formula to distinguish the subject from a global point of view in the multiplicity of their specific characteristics and manifestations (moral, social, political, intellectual, professional, etc.), namely to express the concrete and effective individual personality of the subject as they have come to be solidified or appeared destined, on the basis of unequivocal circumstances, to solidify themselves in the life of relationships. Therefore between the right to the name (and to the other distinctive signs) as it appears to be drawn from arts. 6 and 7 of the Civil*

¹⁵ The renowned oncologist, indeed, had explained in an interview – by means of statistical data and with precise aetiological indications – the relationship existing between smoking and some types of malign tumour and had proposed comparing the phenomenon with an educational action founded also on the prohibition of advertising cigarettes. Within this interview the professor had moreover affirmed, while concluding that the best choice continued to be abstaining from smoking, that some types of cigarettes (so called *less harmful cigarettes*) could lead to less harmful consequences than others. On the back of these affirmations, a tobacco producing company (Austria Tabakwerke) had, therefore, decided to publish in periodical press publications a series of manifests aimed at promoting the sale of a specific brand “light cigarette” and in which the following proposition was inserted “according to prof. Umberto Veronesi – director of the Cancer Institute of Milan – this type of cigarette reduces the risk of cancer by almost half”. The publicity failed to clarify that the professor would however have reiterated the generalized dangerous nature in every type of cigarette, urging people, in an absolute manner, not to smoke. In consequence of this, both Prof. Veronesi, and the Cancer Institute, complained to the Court of Milan, in order to request protection, not only for the professor's image and name, but also for his right to the so called personal identity. This latter protection, even if on the basis of different legal arguments, came to be recognised at all levels in the court system. Indeed, at the first (Court of Milan judgement of 19 June 1980) and at the second level (Court of Appeal of Milan judgement of 2 November 1982) the protection of the right to personal identity came to be recognised by means of an extensive interpretation of the right to the name under articles 6 and 7 of the Civil Code.

¹⁶ In this ruling the Supreme Court affirms that *“the protection of that which has defined the “historic truth” of a person would not have found itself guaranteed as a subjective right tout court, but only indirectly wherever legally relevant values were harmed in the event in which there was an express legislative provision”*.

Code and has come to be understood traditionally by the case law and the doctrine and the right to identity, as this has now come to be configured, there arises a certain correlation, but nothing more: there does not arise, therefore, either a relationship of identification or a relationship of understanding of one figure with respect to the other". In the same manner as for the name, the protection of the personality does not coincide with that of honour and reputation, which presupposes instead recourse to slandering offensive facts. The integrity of the social protection of one's personality may be harmed also by means of the attribution of opinions and ideas which are not offensive or unlawful in themselves, but are simply different from those really professed by the interested party.

As stated, the Court identifies the legislative foundation of the right to personal identity directly in art. 2 of the Constitution, which provides that "the Republic recognises and guarantees the inviolable human rights, both as an individual and in social formations, where their personality comes into play". If the aim of this article is that of fully protecting the human person, in all its essential ways of being, it is easy to understand how, among these, there is the identity of individuals as a faithful and complete representation of the individual personality of the subject in the context of the community in which it has come into play.

The Constitutional Court, with the judgement no. 13 of 3 February 1994 establishes the linking of this subjective legal situation to the Constitution. The Court of Florence, on the basis of voluntary jurisdiction, indeed, had raised a question of constitutions legality, in reference to art. 2 of the Constitution, of arts. 165 *et seq.* of the legal text dealing with civil status (Royal Decree 09 July 1939, no. 1238).

The judge in question, in the case in point, was called to pronounce his position in relation to a complaint presented in opposition to the request of the Public Prosecutor to rectify - after forty years - a birth certificate, declared false in part in a criminal context, by means of replacing the surname of the claimant's father with that of the mother who had acknowledged him. In particular, in this case, the Court was asked to resolve the doubt of constitutionality of the aforesaid legislation in the part in which it has not provided that, following the rectification of the deeds relative to civil status, for reasons independent of the will of the interested party, this latter could maintain the surname that they had used up until this time and which now signified their identity.

The Court revealed, accepting the question, how it was certainly true that among the rights that form the inalienable property of the human person art. 2 of the Constitution also recognises and guarantees the right to personal identity. This, indeed, is referable to an asset which is autonomous and independent from the personal and social condition of the individual, from their merits and defects: to everyone, indeed, is recognised the right for their individuality to be preserved, guaranteed and necessarily protected.

In line with judgement no. 13 of 1994 there was declared, with judgement no. 297 of 23 July 1996, also the unlawfulness, on the specific ground of violation of the fundamental right to personal identity¹⁷, of art. 262 of the Civil Code, in the part in which it did not provide for the right of the natural son, who

¹⁷ After several years, still the Constitutional Court, with judgement no. 120 of 11 May 2001 again used the parameter of the right to personal identity pursuant to art. 2 of the Constitution., in order to declare also the constitutional unlawfulness of the second paragraph of art. 299 of the Civil Code, in the part in which it provided that the adopted child who was the unrecognised natural son of his parents would assume only the surname of the adopting parent, losing, that originally imposed by the registrar of births, deaths and marriages. In this case the Court intends the right to personal identity as a guarantee of the right to the name as a principal distinctive sign of the personal identity.

had assumed the surname of the parent who first acknowledged him, to maintain the surname originally attributed to him where this was now to be considered a distinctive sign of his personal identity.

Thus, this concluded the course of the case law which leads to the affirmation of a right to personal identity, with a clear constitutional foundation and referable to the personality rights. In this sense this right is understood by the legislator in its first interventions on the subject: the legislation in terms of protecting personal data, in identifying the protection of confidentiality and personal identity as the *ratio* of the positive rules, indeed, it refers these rights to the horizon of fundamental freedoms (cf. art. 1 of the law no. 675/1996, and now art. 2, paragraph 1, of the Code in terms of protection of personal data, as well as the rules provided by the European Regulation in terms of protection of personal data no. 679/2016).

3.1. Right to personal identity and the internet.

Following the web becoming established, questions pertaining to personal identity acquired new and more complex forms.

Access to the Web, indeed, guarantees an apparently infinite quantity of news in all sectors, allows instantaneous communication with others, allows information to be disseminated with an enormous degree of efficiency and speed which almost always remain without any control and possibility for consent on the part of the owner of the news disseminated¹⁸. In the majority of cases it is sufficient to insert a name within the search engine in order to find the image or a series of data (profession, activity and interest) pertaining to a person. To this, then, are added the questions raised by the ever increasing dissemination of the so called social networks (Facebook and many others), which allow, via the internet and by means of the publication of texts and images, to expose one's own identity and that of others, as well as to establish and maintain personal and social relationships. In this context, not only are confidentiality and the manner of dissemination of the information in play, but also - wherever data is disclosed - its correspondence to the truth.

Therefore, there is affirmed in a framework that likewise involves questions linked to the processing of personal data (in a dynamic meaning of self-determination and sovereignty over oneself) a need to extend the protections provided for the personal identity to that of the so called digital personality, which often describes and represents the former.

Those who wish to complain of harm deriving from the presence online of news concerning them, must continue to ask to act to protect their right to personal identity, in order that the information relative to the interested party and disseminated by third parties shall be correct, current, up to date and complete.

The means by which this defence is expressed must obviously change.

4. Freedom of speech. The freedom to inform and to be informed.

¹⁸ D.J. SOLOVE, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet*, Yale University Press, 2007.

Once the right to personal identity has been restored to the set of inviolable rights recognised and guaranteed by art. 2 of the Constitution, the problem is posed to its relationship with another apical value of our constitutional legal system: freedom of speech. It is protected by art. 21 of the Constitution, according to which “everyone has the right to freely express their thoughts with spoken words, writing and every other means of dissemination”.

This measure is strictly connected to art. 19 of the UN's Universal Declaration of Human Rights which highlights the rights to “seek, receive and impart information and ideas through any media and regardless of frontiers”, as well as, art. 10 of the European Convention on Human Rights¹⁹ and art. 11 of the European Union's Charter of Fundamental Rights²⁰. Particularly important, with reference to the aforementioned international Charters and those of the European Union, is the fact that these explicitly differentiate, while placing them under same scope of protection, both the right to receive, and the right to communicate news, in a perspective of completeness of the information.

The relevance ascribed to this freedom is underlined, firstly, by the Constitutional Court which, from the time of its rulings causes it to re-enter “among the fundamental freedoms proclaimed and protected by our Constitution, one of those [...] which better characterise the current regime in the State, condition as well as the manner of being and of development of life in the Country in every cultural, political and social aspect of it” (judgement no. 9 of 1965). It is underlined, in this sense, that the right provided by art. 21 of the Constitution is “the highest, perhaps” of the “primary and fundamental rights” enshrined by the Constitution (judgement no. 168 of 1971), re-entering among the “inviolable human rights” mentioned at art. 2 of the Constitution (judgement no. 126 of 1985), “corner stone of the democratic order” (judgement no. 84 of 1969), “linchpin of democracy in the general legal system” (judgement no. 126 of 1985). The consequence of this recognition stands in the fact, on the one hand, that the Republic has the duty to guarantee the freedom of information also with regards to private parties - in the sense that “it is not lawful to doubt that this must dictate the respect of everyone, of public authorities as well as related parties, and that no one may make an attack on it” (judgement no. 122 of 1970) - and, on the other hand, that it is not suppressible. This freedom, according to the Court, does not constitute a consequence of democracy, but, *vice versa*, the very foundation of the democratic regime which is itself affirmed thanks to the circulation of ideas²¹ and the equal competition of all in the formation of the general will.

¹⁹ “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

²⁰ “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected”.

²¹ Cf. Constitutional Court, judgement no. 9 of 1965 in which the Court affirmed that: “freedom of speech is, among the fundamental freedoms and protected by our Constitution, one of those which better characterise the current regime of the State, condition as well as the manner of being and of development of life in the Country in every cultural, political and social aspect of it”. On the topic of freedom of speech in an individualistic or functional sense see A. VALASTRO, *Art. 21*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (edited by), *Commentario alla Costituzione* (Commentary on the Constitution), Utet, Turin, 2006, 454; P. BARILE, *Libertà di manifestazione del pensiero* (Freedom of speech), Giuffrè publisher, Milan, 1975, 79 *et seq.*; C. ESPOSITO, *La libertà di manifestazione del pensiero nell'ordinamento italiano* (Freedom of speech in the Italian legal system), Giuffrè publisher, Milan, 1958, 12 *et seq.*

From which derives the constitutional imperative that the “right to information” is qualified and characterised by: a) the pluralism of the sources which draw upon knowledge and news, in such a manner that the citizen can be placed in a condition of performing their own evaluations having different points of view and contrasting cultural orientations; b) the objectivity and impartiality of the data provided; c) the completeness, accuracy and continuity of the information activity performed; d) the respect for human dignity, public order, morality and the free psychological and moral development of minors²².

Up until the dissemination of the internet, the principal means of mass communication were the press, radio and television, the management of which, however, was (and is) reserved to a restricted number of individuals: one understands, therefore, because, over time, the attention of the Constitutional Court²³ has concentrated on the need to guarantee, with a certain degree of effectiveness, that everyone should have the possibility of accessing the media, with the methods and within the limits possibly made necessary by the peculiarities of individual means²⁴.

The context changed radically with the development of the Web²⁵: by means of the Web, indeed, each user may freely participate both as informer and as informed subject, without the need for any specific technical competence. In the same way, each person can choose whether to communicate directly with a person (for example by means of sending an e-mail) or with several determined or undetermined persons (by means of publication on a website, on a blog or on a social network)²⁶.

²² G. NICASTRO (edited by), *Libertà di manifestazione del pensiero e tutela della personalità nella giurisprudenza della Corte* (Freedom of speech and protection of personality in the case law of the Court), Atti di convegno (Conference documents), May 2015.

²³ Cf. Constitutional Court, judgement no. 105/1972; judgement no. 225/1974; judgement no. 94/1977. In a similar sense see also judgement no. 348/1990 in which the Court affirmed that “information, in its active and passive aspects (freedom to inform and the right to be informed) expresses, indeed, (...) a preliminary condition (or, if we wish, an unsuppressible prerequisite) for the implementation at every level, central or local, of the form of the democratic State”.

²⁴ See Constitutional Court, judgement no. 105/72 in which it is affirmed that: “*naturally, that everyone shall have the right to express their thoughts "with every means", cannot mean that everyone must have, in fact, the material availability of all possible means of dissemination, but means to say, more realistically, that the law must guarantee to everyone the legal possibility of using it or accessing it, with the methods and within the limits possibly made necessary by the peculiar characteristics of the individual means by the requirement to assure the harmonious co-existence of the equal right of each person or by the protection of other constitutionally significant interests, according to the criteria which this Court has applied on various occasions*”. On this topic see D. MULA, *Libertà di manifestazione del pensiero in rete* (Freedom of speech on the web), in G. CASSANO, G. SCORZA, G. VACIAGO (edited by) *Diritto dell'internet* (Law of the internet), Cedam, Padua, 2013, 4 *et seq.*

²⁵ Another question of apical importance lies in the right of access to the Web. See, in this sense, the declaration of rights on the internet developed by the Commission for rights and duties relative to the internet in 2015 which, at art. 2 defines this as a fundamental right. Stefano Rodotà, on this point affirms that a new and more intense need for rights is generated which can be satisfied thanks to the recognition and enhancement of the innovative capacity of the internet, all the more so if today access to networks has become an essential component of citizenship (S. RODOTÀ, *Il diritto di avere diritti* (The right to have rights), Laterza, Rome- Bari, 2003, 384 *et seq.*). *Ex multiis* S. RODOTÀ, *Il diritto di avere diritti* (The right to have rights), cit.; P. TANZARELLA, *Accesso ad Internet: verso un nuovo diritto sociale?* (Access to the internet, towards a new social law), Gruppo di Pisa (Pisa Group) (<http://www.gruppodipisa.it/wpcontent/uploads/2012/05/trapanitanzarella.pdf>), 2 *et seq.*; T. E. FROSINI, *Il diritto costituzionale di accesso ad Internet* (The constitutional right to access the internet), in *Libertè Egalitè Internet* (Liberty Equality Internet), Editoriale Scientifica (Scientific Editorial), Naples, 2015, 64; G. DE MINICO, *Internet regole e anarchia* (Internet rules and anarchy), Jovene Editore (Jovene Publisher), 2012, 127 *et seq.*

²⁶ This multitude of communication tools leads, in the first place, to a narrowing of the confines between the scope of application of art. 15 of the Constitution and that of art. 21 of the Constitution [On this topic see P. CARETTI, *Diritto dell'informazione e della comunicazione* (Law of information and communication), Il Mulino, Bologna, 2013, 210; A. PACE - M. MANETTI, *Art. 21*, in G. BRANCA (edited by) *Commentario alla Costituzione* (Commentary on the Constitution), Zanichelli, Bologna – Rome, 2006; P. COSTANZO, *Telecomunicazioni, Televisione, Internet, Nuovi*

A context of this nature makes the work of the interpreter called upon to identify the limits placed on the protection of freedom of expression extremely complex; the implementation of this fundamental principle in the relationships of life, indeed, leads to a series of relativizations and balances made still more complex, in the Italian legal system, by the fact that, distinct from art. 10 of the ECHR which defines a considerable number of goods (which range from national security and territorial integrity to the protection of health, morals, reputation or the rights of others) the protection of which legitimates the restriction of this freedom, art. 21 of the Constitution contains the sole explicit limit of morality. It is therefore left to the Constitutional Court, over the course of time, to perform the hermeneutical task of defining the cases in which freedom of expression can legitimately be subjected to limitations; in this sense, the personality rights, among which the right to personal identity, that find, as we have seen, their foundation in art. 2 constitute one of the most specific restraints: the goods which they protect, being essentially connected with the human person, are indeed signified by the character of inviolability (judgement no. 86 of 1974; judgement no. 13 of 1994).

5. The right to digital freedom. Considerations.

The interest and legal speculation around the specific problems of the Web lead, also in the Italian legal system and with effect from the time at which the internet started to spread to an appreciable extent²⁷ to a debate, especially at the level of the doctrine, regarding the appearance of the IT phenomenon which it is considered interesting to report for the general completeness of the opinion requested and for a fuller understanding of the context of reference.

The starting point for these reflections is to be identified in the Convention no. 108 of the Council of Europe regarding the “*protection of individuals with respect to the automatic processing of personal data*”, signed at Strasbourg on 28 January 1981²⁸, ratified by Italy with law no. 98 of 21 February 1989 and containing an articulated statement of principles aimed at ensuring that the right of individuals to privacy when confronted with any automated processing of data concerning identified or identifiable subjects is respected²⁹.

profili della convergenza multimediali(Telecommunications, Television, Internet, New profiles of multimedia convergence), in *Diritto delle radiodiffusioni e delle telecomunicazioni (DRT)* (Law of radio broadcasts and telecommunications), vol. 4, 1999, 141 *et seq.*] traditionally founded on the possibility of identifying or not the addressees of the information; indeed it proves difficult to distinguish with precision the cases in which digital communication is directed to one or more determined addressees, and therefore the user considers it possible to enjoy the secrecy and confidentiality guaranteed by art. 15 of the Constitution, from those cases in which, instead, the intention is that of dissemination of information, addressed to an undetermined public [Cf. A. PAPA, *Espressione e diffusione del pensiero in internet – Tutela dei diritti e progresso tecnologico* (Expression and dissemination of thought on the internet - Protection of rights and technological progress, Giappichelli, Turin, 2009)].

²⁷ See in this sense, P. COSTANZO, *Contributo ad una storia della libertà d'informazione: le origini di internet (1969-1999)* (Contribution to a history of freedom of information: the origins of the internet (1969-1999)), in *Studi in onore di Aldo Loiodice* (Studies in honour of Aldo Loiodice), Cacucci, Bari, 2012.

²⁸ In 1973 the Committee of Ministers of the Council of Europe adopted a resolution “on the protection of privacy of individuals *vis-à-vis* electronic data banks in the private sector” and in 1974 a similar resolution referred to data banks in the public sector. Both established minimum standards for the protection of confidentiality with respect to information contained in electronic data banks. They were mere non-binding recommendations for national governments.

²⁹ The Preamble mentions, among the human rights, the right to respect for private life and, among the fundamental freedoms, the free circulation of information among peoples, all susceptible of derogations only in so far as they represent a necessary measure in a democratic society. It entered into force on First October 1985. Italy ratified the

Among the outlets of the doctrinal reflection, also aimed at highlighting the theoretical gap with respect to some foreign experiences that had taken the opportunity to align their catalogue of fundamental rights to the needs posed by the advent of information technology, there is mentioned in particular the attempt at developing a so called *digital freedom*, referred, often, to situations which are non-homogeneous, but attributable, on the material level, to the constitutionalist concept of freedom³⁰.

In this sense, some reflections are connected to considerations which see in the technological means the tool to guarantee the freedom of information (in its turn susceptible of breaking down into a plurality of figures according to the active or passive attitudes of the agent³¹), others, instead, are linked to a rethinking of the rights to control the computerized processing of one's personal data.

With regard to the first aspect, the digital freedom can be defined as the right to freely express speech on the internet, to inform and be informed, to transmit and receive information, building relationships and creating more or less aggregations around one's thoughts or the information and news disseminated by means of interaction with other related parties³². Here we recall, in this sense, what has already been discussed in the previous paragraph.

With reference to the second, more innovative branch of development, the most appropriate constitutionalistic side is found, instead, in personal freedom, such as to place at the top the expression “*habeas data*”³³, coined on the basis of the more illustrious expression of “*habeas corpus*”³⁴. Digital freedom, therefore, became a right of the individual to self-determination in relation to disclosure, the claim of reappropriating to oneself one own personal history deciding in the first person regarding the disposal and use of the data concerning them. There is expressed, in this manner, the power to exercise a right of control over the data concerning one's own person.

There seems to be configured in this manner, in a manner very coherent with the *ratio* underlying the Right of Reply, a new concept of privacy no longer connected solely with confidentiality, but

Convention with law no. 98 of 1989, but the lack of adequate legislation on the subject has long impeded a full enforceability.

³⁰ P. COSTANZO, *Miti e realtà dell'accesso ad internet (una prospettiva costituzionalistica)* (Myths and reality of access to the internet (a constitutionalistic perspective), in <http://www.giurcost.org/studi/Costanzo15.pdf>, 4.

³¹ P. COSTANZO, *Informazione nel diritto costituzionale* (Informational in constitutions law), in *Digesto delle discipline pubblicistiche* (Digest of public law disciplines), Utet, Turin, 1993, VIII, 319.

³² S.RODOTÀ, *Il diritto di avere diritti* (The right to have rights), cit. 135.

³³ T.E. FROSINI, *Google e il diritto all'oblio preso sul serio* (Google and the right to be forgotten taken seriously), in G. RESTA E V. ZENO-ZENCOVICH (edited by), *Il diritto all'oblio su Internet dopo la sentenza Google Spain* (The right to be forgotten on the internet after the Google Spain judgement), RomaTrE-Press, Rome, 2015.

³⁴ For explicit or indirect references at constitutional level, it is appropriate, as is well-known, to bring the attention above all to certain Latin American experiences, but also to Spain itself and Portugal cf. T. E. FROSINI, *La libertà informatica: brevi note sull'attualità di una teoria giuridica* (Digital freedom: short notes on the topicality of a legal theory), in *Informatica e diritto* (IT and the law), 2008, 87. On this line, it seems opportune also to recall the reconstruction of a new constitutional right to confidentiality and integrity of IT systems by the German Constitutional Court, regarding which cf. A. WIEBKE ABEL E S. BURKHARD, *La decisione della Corte Costituzionale tedesca sul diritto alla riservatezza ed integrità dei sistemi tecnologici d'informazione – un rapporto sul caso BVerfGE, NJW 2008, 822* (The decision of the German Constitutional Court on the right to confidentiality and integrity of IT systems - a report on the case BVerfGE, NJW 2008, 822), in *Jei – Jus ed internet* (http://www.jei.it/approfondimentigiuridici/notizia.php?ID_articoli=601#_ftnref2), 15.11.2009. See also T. E. FROSINI., *Tecnologie e libertà costituzionali* (Technologies and constitutional freedoms), in *Diritto dell'informazione e dell'informatica* (Information and IT law), 2003, 3, 487; S. RUSSO, A. SCIUTO, *Habeas Data e informatica* (Habeas Data and IT), Giuffrè Publisher, Milan, 2011.

understood as a complex of rights pertaining to the management of personal data and aimed peculiarly to protect personal identity³⁵. It no longer concerns a mere protection of data (therefore of a negative right aimed at impeding the revelation of information on our account), but, in a wider meaning, of a right to express one's deepest aspirations and to realise them drawing freely on one's potentiality.

6. The forms of protection.

Right to personal identity, self-determination in the management of data by the individual, freedom of speech, to inform and to be informed. These are the interests which are in play, of clear constitutional relevance which, up until now, in their concrete expression, have always been found to be in conflict and the protection of which has required delicate balancing operations aimed at establishing which of them, in the individual concrete case, is destined to prevail.

In all this, the internet only serves to increase the complexity of the reference framework. Indeed, it is a tool which assumes a double nature: it is a means of communication, at the same time, on an individual and mass basis which allows, with regard to this last aspect, each individual to express themselves indiscriminately in a space that “does not have physical frontiers, territorial connections and, more generally, a space-time dimension”³⁶.

These enormous potentialities increase the awareness of having to create a safe digital environment which can combat violations which may be perpetrated by this means.

6.1 The procedural instruments guaranteeing the right to personal identity and the correct processing of personal data.

6.1.1. The procedures before the judicial authority.

In the event of violations of rights such as the right to personal identity and the correct processing of personal data, it is clearly evident that the protection by the courts³⁷ offered by the regime of civil liability (art. 2043 of the Civil Code) with its criteria of attribution and times required for the pronouncement of an ordinary judgement are altogether inadequate.

Lacking, indeed, in many of the instances of conduct perpetrated on the internet and harmful to the aforesaid rights, the specific characteristics of the acquillian tort: wilful misconduct and negligence of the agent, as well as, often the *ex se* unlawful character of the act itself. To this protection is combined, at least from a procedural point of view, a more specific, preventive, inhibitory and urgent defence. A direct protection, in so far as possible, to restore the situation to its original condition (almost

³⁵ On these problems, in an organic manner, cf. L. TRUCCO, *Introduzione allo studio dell'identità individuale nell'ordinamento costituzionale italiano* (Introduction to the study of individual identity in the Italian constitutional legal system), Giappichelli, Turin, 2004.

³⁶ C. CARUSO, *La libertà di espressione in azione* (The freedom of expression in action). *Contributo a una teoria costituzionale del discorso pubblico* (Contribution to a constitutional theory of public discourse), Bononia University Press, Rastignano (BO), 2013, 136.

³⁷ This is provided also by art. 79 of the new European regulation 2016/679 art. 79 of which provides that: “1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.”

impossible if one keeps to the web's methods of functioning) and to the immediate cessation of the harmful activity.

In these terms, a fundamental role, although in no way a resolution, is performed by the precautionary procedure, in particular the atypical mentioned at art. 700 of the Code of Civil Procedure, which was already central in the protection of personality rights prior to the dissemination of IT and digital services and based on the mere prerequisite of the commission of the harmful act without it being necessary to configure the subjective element of wilful misconduct or negligence in the hands of the agent. By means of adopting this procedure it is sought to reduce the reiteration of the effects of the harm to a minimum³⁸, avoiding the further damage which may derive to the individual who has requested the protection of the courts by the physiological times required by the ascertainment of rights in ordinary proceedings.

The temporal factor, in the event of harm to the personality rights, even more so if perpetrated by means of the internet, is, indeed, of fundamental importance standing also the nature of the legal asset protected: the time which runs up until the issuing of a definitive measure could, indeed, cause damage which may potentially become irreparable.

6.1.2. Protection before the Data Protection Authority.

A particular role, then, limited to the protection of the correct processing of the individual's personal data (in the perspective of the aforementioned dynamic concept of confidentiality) is ascribed to the Data Protection Authority.

In this sense, the data subject may present, firstly, *an application* to the data controller or processor, also by means of a person in charge of the processing, without particular formalities (for example, by means of recorded delivery letter, fax, e-mail, etc.).

In some cases, identified by the Personal Data Protection Code (article 9, paragraph 1 Personal Data Protection Code), the application may then also be formulated orally and, in this event, it is transcribed concisely by the person in charge of the processing or by the data processor.

The application may make reference, according to the needs of the data subject, to specific personal data, to categories of data or to a particular processing, or to all the personal data concerning them, however processed.

However, if, in the event of testing the procedure described above in order to exercise the rights provided by article 7 of the Personal Data Protection Code³⁹, a response is not received within the

³⁸ G CASSANO, *Diritto dell'internet. Il sistema di tutele della persona* (Law of the internet. The system of protections of the person), cit.

³⁹ Art. 7. Right to access personal data and other rights
"1. A data subject shall have the right to obtain confirmation as to whether or not personal data concerning them exist, regardless of their being already recorded, and communication of such data in intelligible form. 2. A data subject shall have the right to be informed: a) of the source of the personal data; b) of the purposes and methods of the processing; c) of the logic applied to the processing, if the latter is carried out with the help of electronic means; d) of the identification data concerning data controller, data processors and the representative designated as per article 5 paragraph 2; e) of the entities or categories of entity to whom or which the personal data may be communicated and who or which may get to know said data in their capacity as designated representative(s) in the State's territory, data processor(s) or person(s) in charge of the processing. 3. A data subject shall have the right to obtain: a) updating, rectification or, where interested therein, integration of the data; b) erasure, anonymization or blocking of data that

timescales indicated, this is not satisfactory or the running of the time periods specified in order to obtain a response risks exposing the individual to imminent and irreparable prejudice (article 146 of the Code), the data subject may request that their own prerogatives be protected or before the court authority (as is seen by means of an atypical precautionary appeal under art. 700 of the Code of Civil Procedure or by means of an ordinary court case) or by means of an *appeal* presented directly to the Data Protection Authority.

This *appeal*, governed by art. 147 of the Code, is a formal act, in respect that the decision which comes to be adopted has particular legal effects⁴⁰. The appeal will be presented only in order to assert the rights specified at article 7 of the Personal Data Protection Code (article 141, paragraph 1, lett. c) of the Code).

Additional tools of protection are, then, the *complaint* and the *reporting*. The *complaint* is a circumstantiated act with which a violation of the relevant personal data protection rules is represented (article 141, paragraph 1, lett. a). The complaint is followed by a preliminary investigation and a possible subsequent formal administrative procedure which may lead to the adoption of various types of measures (article 143 of the Personal Data Protection Code and Regulation of the Data Protection Authority no. 1/2007 article 8 *et seq.*)⁴¹.

When it is not possible or one does not want to present a circumstantiated complaint (in respect that, for example, one does not possess the necessary information), one can send a report to the Data Protection Authority (article 141, paragraph 1, letter b) of the Personal Data Protection Code and Regulation no. 1/2007 articles 13 and 14), providing useful elements for a possible intervention of the Authority aimed at controlling the application of the rules in terms of the protection of personal data more generically.

It is evident how the procedural tools outlined (reports, together with those which are more typically of a judicial nature, in order to reconstruct the overall framework of reference), albeit in their abstract utility and effectiveness, are reduced, if one regards both the addressees and the applications that they advances, to a total ineffectiveness in concrete protection of the interests in play.

6.2. The addressees of the measures. The civil liability of the provider.

One of the principal problems of the judicial protection against crimes committed by means of the internet, is encountered, in the first place, in the identification of the addressees of the interim

have been processed unlawfully, including data whose retention is unnecessary for the purposes for which they have been collected or subsequently processed; c) certification to the effect that the operations as per letters a) and b) have been notified, as also related to their contents, to the entities to whom or which the data were communicated or disseminated, unless this requirement proves impossible or involves a manifestly disproportionate effort compared with the right that is to be protected. 4. A data subject shall have the right to object, in whole or in part: a) on legitimate grounds, to the processing of personal data concerning him/her, even though they are relevant to the purpose of the collection; b) to the processing of personal data concerning them, where it is carried out for the purpose of sending advertising materials or direct selling or else for the performance of market or commercial communication surveys”.

⁴⁰ Any claims for compensation can only be asserted before the competent court (article 152 of the Personal Data Protection Code).

⁴¹ This tool is provided also by the new General Data Protection Regulation 2016/679 at art. 77 which affirms that: “1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation”.

injunction or the application for compensation of the harm. Indeed, there does not come into consideration only the figure of the party who has concretely brought the unlawful act into existence, as well as the data controller or data processor (with all the difficulties deriving from the identification of the same), but also the figure of the provider⁴², that is to say that natural person or legal entity who performs an economic activity online consisting in the provision of goods and services⁴³. It is a concept which is sufficiently broad to encompass all the most diverse operators of the web.

The civil liability of the provider is the object of a specific set of rules in our legal system, on the basis of articles 14-17 of legislative decree no. 70 of 2003, implementing articles 12-15 of directive 2000/31/EC (the so called E-commerce directive).

In the first place, in this sense, it is necessary to distinguish between the “active” provider⁴⁴, that is to say the provider who directly commits unlawful acts and which shall be called to answer for its own activity, and the “passive” provider which limits itself to performing an “activity of a purely technical, automatic nature”, while causally related to the occurrence of the unlawful act. In this second case, paragraph 1 of art. 17 of legislative decree no. 70 of 2003, establishes that “in the provision of the services mentioned at articles 14, 15 and 16, the provider is not subjected to a general obligation of surveillance in relation to the information that it transmits or stores, not to a general obligation of actively seeking facts or circumstance which indicate the presence of unlawful activity”. First the European legislator and then the national legislator, express, in this manner, a precise *favour* with regards to this figure and the development of e-commerce, notwithstanding the potential sacrifice of the opposed interests of the holders of rights harmed by means of the internet.

Of significance, then, are paragraphs 2 and 3 of art. 17, the first providing that, “*without prejudice to the provisions of articles 14, 15 and 16, the service provider is in any event bound: a) to inform without delay the judicial authority or the administrative authority having supervisory functions, wherever it shall be aware of presumed unlawful activities or information regarding one of the recipients of the information society; b) to provide without delay, at the request of the competent authorities, the information in its possession which allow the identification of the recipient of its services with which it has agreements for the storing of data, in order to identify and prevent unlawful activity*”; the second providing that “*the service provider is civilly liable for the content of these services in the event in which, having received a request from the judicial or administrative authority with supervisory functions, it has not acted promptly in order to impede access to said content, or, if, having been aware of the unlawful or prejudicial character for a third party of the content of a service to which it assures access, it has not arranged to inform the competent authority of this*”. From these rules derives the existence, in Italy, of a general clause of civil liability of the passive provider articulated in two diverse alternative hypotheses: the first, when the competent authority, not others, shall have requested the service provider to impede access to determined content and this latter shall not have

⁴² L. NIVARRA, V. RICCIUTO, *Internet e il diritto dei privati. Persona e proprietà intellettuale nelle reti telematiche* (The internet and the right of private parties. The person and intellectual property in digital networks), Giappichelli, Turin, 2000; M. DE CATA, *La responsabilità civile dell’Internet Service Provider* (The civil liability of the Internet Service Provider), Giuffrè publisher, Milan, 2010.

⁴³ Concerning the judgement no. 1928 of 7 April 2017 of the Court of Turin which decided, at first instance, the dispute which has opposed Delta TV against Google/YouTube, with alternating precautionary phases, with effect from 2014.

⁴⁴ The “active” provider, in its turn subject to art. 2043 of the Civil Code or where applicable to special provisions not explicitly referred to the provider, is then also the so called content provider, which means to say those who exercise an authority or control over the unlawful activity brought into existence by a recipient of the service. With regard to this latter figure, indeed, paragraph 2 of art. 16 of legislative decree no. 70 of 2003 excludes the possibility of even the causes of exemption from liability provided for the “passive” provider subject to the more serious regime, that exercising the hosting activity, finding application.

acted promptly in this sense; the second, instead, occurs when the said service provider shall have been aware of the unlawful character of the content of a service and shall not have informed the competent authority.

To the general rules in favour, however, are added some special clauses of exemption from liability, differentiated according to whether the activity performed by the provider proves, in concrete, to be classifiable as a *mere conduit*, activity in which the provider transmits information provided by a recipient of the service on one of its communication networks or provides access to the communication network itself -, as *caching* - storage of information, activity in which the provider transmits the information provided by a recipient of the service with automatic, intermediate and temporary storing of the same at the same time - or as *hosting* - long term storage, activity in which the provider stores, at the request of a recipient of the service in a manner which is neither transitory or temporary, information provided by this latter - , according to a growing order of intensity of the activity performed and in parallel also to the seriousness of the relative liability.

For the *mere conduit* activity, pursuant to paragraph 1 of art. 14 of legislative decree no. 70 of 2003, “*the provider is not liable for the information transmitted on condition that: a) it does not give rise to the transmission; b) it does not select the recipient of the transmission; c) it neither selects nor modifies the information transmitted*”. It is, evidently, a case of cumulative causes of exemption from liability (that is to say that they must coexist in order to exclude the provider's liability), all supplemented by conduct of an omissive nature.

For the *caching* activity, pursuant to paragraph 1 of art. 15 of legislative decree no. 70 of 2003, instead provides that, “*the provider is not liable [...] on condition that: a) it does not modify the information; b) it complies with the conditions of access to the information; c) it complies with the rules of updating of the information, indicated in a manner broadly recognised and used by businesses of the sector; d) it does not interfere with the lawful use of technology broadly recognised and used in the sector in order to obtain data regarding the use of the information; e) it acts promptly in order to remove the information that it has stored, or to disable access to it, as soon as it effectively becomes aware of the fact that the information has been removed from the place where it was initially to be found on the net or that the access to the information has been disabled or that a court body or an administrative authority has provided for it to be removed or disabled*”. It concerns causes for exemption from liability, which once again, are cumulative.

Finally, for the *hosting* activity, pursuant to paragraph 1 of art. 16, the liability of the service provider is excluded, on condition that this latter: “*a) is not effectively aware of the fact that the activity or information is unlawful and, in so far as pertains to actions for compensation, it does not have knowledge of the facts or circumstances which make manifest the unlawfulness of the activity or the information; b) as soon as it becomes aware of such facts, upon communication from the competent authorities, it acts immediately in order to remove the information or to disable the access thereto*”. This is a case of two causes of exemption from liability which, in distinction from those previously mentioned, are alternative and not cumulative.

6.3 The right to be forgotten as an instrument of protection of the personality rights.

The recognition of the right to be forgotten⁴⁵ is placed in a perspective of protection of the personality rights (especially of the right to confidentiality and of the right to personal identity).

⁴⁵ In doctrine, on the right to be forgotten see: E. GABRIELLI (edited by)., *Il diritto all'oblio* (the right to be forgotten). Atti del Convegno di Studi del 17 maggio 1997 (Conference Studies Documents of 17 May 1997), Jovene, Naples, 1999; T.A.AULETTA, *Diritto alla riservatezza e "droit à l'oubli"* (Right to confidentiality and the "right to

However, its development and its governance, on the one hand, do not do other than place the conflict with freedom of speech on another level, and on the other hand, they manifest a total ineffectiveness.

The right to be forgotten is the right that information concerning a determined individual and subject of a previous dissemination shall be “forgotten” and no longer accessible to everyone. In this manner, it is desired to protect the individual sphere of the individual and their personal identity with respect to informative activities which could compromise the human course completed by them over time.

It is a right which is placed, as stated, as an expression both of the right to privacy, understood in a new dynamic perspective of control over the dissemination of the data which concerns the individual, and the right to personal identity, conceived, as has been seen, as a claim, specific to each individual, to be represented in the reality of life of relation with the true identity and not to see their intellectual, ethical, ideological and professional heritage modified⁴⁶.

6.3.1. The right to be forgotten. The origin.

The progress of technology, the evolution of the means of mass communication and the birth of the internet give rise to the need to recognise and protect the right to be forgotten first on the part of the case law and doctrine, and then by the legislator: any data, on the Web, becomes spread with extreme ease and risks never being able to be deleted, remaining always abstractly available. In this context, the very concept of the temporal factor changes (with the consequent ineffectiveness of the classic instruments of protection): indeed the changes which take place between the publication of the information and its republication are no longer evaluated, but those occurring with effect from the first dissemination of a determined item of data which, potentially, never exit from the sphere of public attention.

The problem therefore becomes that of attributing a weight to the information, of contextualizing it⁴⁷, of guaranteeing that the identity of a data subject is not misrepresented – and flattened - on the Web.

Also the right to be forgotten owes its conceptual development to the work of the doctrine and, above all, of the case law which, for a long time, denied its existence⁴⁸.

be forgotten”) , in G. ALPA, M. BESSONE, L. BONESCHI, G. CAIAZZA (edited by), *L'informazione e i diritti della persona* (Information and the rights of the person), Jovene, Naples, 1983, 127 *et seq.*; G. FERRI, *Diritto all'informazione e diritto all'oblio* (Right to information and the right to be forgotten), in *Rivista di diritto civile* (Civil law review), 1990, 801 *et seq.*; M. R. MORELLI, *voce Oblio (diritto all')* (entry *Forgotten (right to be)*), in *Enciclopedia del diritto*, Agg. (Encyclopaedia of law, updated), VI, Milan, 2002; MEZZANOTTE, *Il diritto all'oblio. Contributo allo studio della privacy storica* (The right to be forgotten. Contribution to the historic study of privacy), Jovene, Naples, 2009; in the case law among the rulings which have more specifically concerned with the right to be forgotten the following are highlighted: Civil Supreme Court of Cassation, 18 October 1984, no. 5259, in *Giur. it.*, 1985, coll. 762; Civil Supreme Court of Cassation, 9 April 1998, no. 3679, in *Foro it.*, 1998, coll. 123 and on the merits Court of Rome, 15 May 1995, in this Review, 1996, p. 427; Court of Rome, 27 November 1996, in *Giust. civ.* 1997, p. 1979; Court of Rome, ord. 20.21.27 November 1996, in *Dir. aut.*, 1997, p. 372 *et seq.*

⁴⁶ Civil Supreme Court of Cassation 22 June 1985, no. 3769.

⁴⁷ Civil Supreme Court of Cassation 05 April 2012, no. 5525. See V. ZENO-ZENCOVICH, *Onore e reputazione nel sistema del diritto civile* (Honour and reputation in the system of civil law), Jovene, Naples, 1985, 120: the decontextualisation consists in the separation of an individual's image from the context in which it was originally to be found and placing it in a different state, with the effect of creating an externally perceivable negative contrast

⁴⁸ To this end the judgement no.4487/1956, relative to the case of the tenor Caruso, is clear which explains how “those who did not know wanted to keep hidden the facts of their life cannot claim that the secret be maintained by

The subject in question would be confronted, if only transversely, in the ruling no. 1563/1958 relative to the Questore Caruso, executed by firing squad following the fall of Fascism in respect that he participated, together with others, in the Fosse Ardeatine massacre: there is encountered, in this case, for the first time, a concept of a “right to the secret of dishonour”, based on the idea by which “*even the most immoral man has the right to claim that others do not alter the entity of the crimes committed by him and do not increase the serious burden of his guilt with the addition of untrue facts*”.

With the exception of this judgement, however, the debate regarding the existence and protectability of a right to be forgotten remains substantially silent up until the nineties, with the exception of some doctrinal interventions on the subject. Among these, we can mention Auletta⁴⁹, who, in 1983, affirms the need to investigate fully for the first time whether the person or events lawfully publicized in the past may still constitute the subject of a new dissemination or whether, instead this becomes illegitimate in consequence of the change of situations which has occurred over time.

With regard to the Courts, around the middle of the 90's, it was the Court of Rome which laid the foundation for the subsequent recognition of the right to be forgotten, pronouncing itself in the context of proceedings for interim injunctions⁵⁰ brought by the protagonists of past legal cases, who maintained that, in the event of screening, by RAI, of television series which concerned them, unjustified harm would derive to them from their personal identity being painstakingly reconstructed.

In these terms, the court of Rome, with a ruling of 8 November 1996, established that the story of a lecturer, sentenced at the end of the 60's for having deceived a young person of little more than twenty years old, could be represented, provided that it was in a fictional form, in such a manner as to be reported on the news a case subject of broad debate, but that, at the same time, it was necessary to respect, in so far as possible, the anonymity of the boy whose name and sensitive data (health and gender), not strictly pertaining to the social utility of disclosing the story, must be omitted.

Again, the same Court, with a ruling dated 20 November 1996, affirmed that a man, who in 1964 had killed his pregnant partner in consequence of an uncontrolled taking of drugs to combat insomnia which had caused him narcotic effects, could not complain regarding the transmission of a television series relative to the case in question, but that, equally, the representation of the minor children and of the female prison director with whom the protagonist had begun a romantic relationship during his detention, could not be considered essential to the economy of the story.

The breakthrough point of this journey towards the definitive recognition of a right "to be forgotten" occurred, however, with the judgement no. 3679/1998 of the Supreme Court of Cassation⁵¹: the

the discretion of others; curiosity and even innocuous gossip, while constituting an unelevated manifestation of the soul, do not of themselves give rise to an unlawful act recognised by the law. Even less can we speak of the right to confidentiality when, as is assumed to have happened in this case, the facts narrated do not pertain to the true life of the personality but have arisen from author's fantasy of the subject of the cinematographic work in order to make the narration more lively and interesting and mainly expressive and signified a work of the genius of a creative character". If one could not speak, then, of a right to confidentiality, even less could one make reference to any claim to be forgotten subsequently to the lawful dissemination of news.

⁴⁹ T.A. AULETTA *Diritto alla riservatezza e diritto à l'oubli* (The right to confidentiality and the right to be forgotten), cit.

⁵⁰ Ruling of the Court of Rome 8 November 1996. Ruling of the Court of Rome 20-21 November 1996. Ruling of the Court of Rome 27 November 1996.

⁵¹ Civil Supreme Court of Cassation 09 April 1998, no. 3679.

judges of the points of law, on this occasion, outlined, for the first time, the appearance of an autonomous right to be forgotten and its relationship with the freedom of expression.

According to the Court, indeed, *“the disclosure of news which causes prejudice to honour and reputation must, on the basis of the right to information/press freedom, be considered lawful when three conditions are met: “the objective truth of the news published; the public interest in knowing the fact (so called relevance); the formal accuracy of the facts presented (so called continence) (Judgement 6041-97, cit.)”* – the so called journalist's catalogue -; to these three conditions, the Supreme Court of Cassation adds a fourth, that *“of the topicality of the news, in the sense that it is not lawful to disclose afresh, after a significant lapse of time, information which in the past had been legitimately published. It is not only a matter of a self-evident application of the principle of topicality of the public interest in knowing, given that this interest is not strictly linked to the topicality of the published fact, but whether its public relevance remains or when it again becomes topical. There instead comes into consideration a new profile of the right to confidentiality recently defined also as the right to be forgotten understood as the reasonable interest of each person not remain exposed for an undetermined period to further damage which harms their honour and their reputation by the repeated publication of news which was legitimately disclosed in the past”*.

Other judgements then followed this one⁵² which, by means of hermeneutical activity of the legislation in force, found in the Privacy Code – legislative decree 196/2003 – and, specifically, in articles 7 and 11 a foundation of the positive right to protection of the right to be forgotten. The data subject, indeed, may claim that the information subject of processing responds to the criteria of proportionality, necessity, relevance to the purpose, accuracy and coherence with their actual and effective personal or moral identity (art. 11). Furthermore, they may know at any time who possesses their personal data and what use is made of it, they may object to the processing of the said data, even if it is relevant to the purpose for which it is collected, or they may request the deletion, transformation, blocking, rectification, updating or supplementing thereof.

On the basis of these two articles, the Supreme Court of Cassation, with the judgement no. 5525/2012, in a case relative to politician of a Municipality in Lombardy, arrested in 1993 for corruption who complained of the fact that by means of normal search on the Web, in the Web archive of the "Corriere della Sera" newspaper, only news of the arrest was to be found, without any reference to the subsequent favourable outcome of the court case, affirmed that *“if the public interest supporting the right to information (art. 21 of the Constitution) constitutes a limit to the fundamental right to confidentiality, the subject to whom the data pertains is attributed with the relative right to be forgotten and that is to say that news will not be further disclosed that by the passage of time proves to be now forgotten or unknown to the general mass of fellow citizens”*.

⁵² Also interesting, in this sense, are the decisions of the Data Protection Authority. Among these, can be included that of 7 July 2005 [web doc no. 1148642] in which is taken in examination the case of broadcasting of a television episode dedicated the proceedings in a criminal case, on the occasion of which the broadcaster had unlawfully disseminated images taken during the course a criminal debate which included, in addition to the parties to the process, also other persons present in the courtroom, among whom was a woman, at the time of the process romantically linked to one of the accused. The Data Protection Authority, observing that personal data may be processed for journalistic purposes, even without the consent of data subjects, but only while respecting the limits of the right to information/press freedom and while respecting the dignity of the person, has provided the prohibition on further dissemination of the images relative to the reporting party, of which the emotional reactions to the verdict of conviction were covered, since, in contempt of the canon of essentiality of the information, it proved to be damaging to “her right not to be recalled publicly at a distance of years” and the right “to see her renewed social and emotional dimension respected is it came to be defined subsequently.”

The first point, therefore, is to check whether or not a reported fact assumes relevance as a historical fact characterized by a public interest to the knowledge of the news. In this case, however, especially in current society and with the dissemination of the internet, the attention must shift to the accuracy and constant updating of the news, the burden of which is placed upon the owner of the source site. If, the Court affirmed, in the case in point, the politician's legal case had registered a subsequent evolution, this could not be omitted, under penalty of disclosing substantially untrue and, therefore unlawful news. Indeed the generic possibility of finding further data within the “sea of the internet” is not sufficient, but it is necessary to provide an appropriate system to report that this episode has had a different outcome.

Finally, the role of the Constitutional Court is interesting, which in various rulings (see judgement no. 287/2010 and 278/2013), referring to the right to be forgotten at art. 2 of the Fundamental Charter, makes it a parameter of the constitutionality of laws, equipping it with an inviolable character.

6.3.2. The right to be forgotten in European and Italian legislation. The European data protection regulation.

After almost 4 years from the proposal made by the European Commission, on 25 January 2012, regarding the need to adopt a new Regulation concerning the protection of personal data, it arrived, on 15 December 2015, at a definitive agreement, on the occasion of negotiations among the Commission, Parliament and Council – the so called trilogue - ⁵³, on the text of the new legislation which by May 2018 will replace the national legislation of the 28 Member States. On 8 April 2016 the Council adopted its position, the European Parliament did the same on 14 April 2016.

With reference, in particular, to the topic of the right to be forgotten, this has already been the subject of regulation in the European Directive 95/46/EC “*on the protection of individuals with regard to the processing of personal data and on the free movement of such data*”, which protected this subjective legal position as a right to obtain the deletion, blocking, freezing of data or to object to the processing of the same. As will be seen, art. 12, analysed by the Court of Justice of the European Union in the Google Spain case, set out that “*Member States shall guarantee every data subject the right to obtain from the controller: a) without constraint at reasonable intervals and without excessive delay or expense (...) b) as appropriate 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*”. Art. 14 of the said directive, instead, governed the right of the interested person to object and provides that “*Member States shall grant the data subject the right: (a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data*”.

These measures, then, receive implementation in our legal system with Legislative Decree no. 196 of 30 June 2003 “Personal Data Protection Code” and in particular with art. 7, paragraph 3, lett. b) which provides that the “*erasure, anonymization or blocking of data that have been processed unlawfully, including data whose retention is unnecessary for the purposes for which they have been collected or subsequently processed*” and with art. 7, paragraph 4 which provides that: “*a data subject shall have the right to object, in whole or in part: a) on legitimate grounds, to the processing of personal data concerning them, even though they are relevant to the purpose of the collection*”.

⁵³ <http://www.federprivacy.it/attivita/ufficio-stampa/comunicati-stampa/1569-arriva-il-nuovo-regolamento-privacy-ue-due-anni-di-tempo-per-adequarsi.html>

This framework appears not to change in the new European Regulation “*on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (general data protection regulation)*” of 25 January 2012⁵⁴ where at art. 17, the right to be forgotten and the right to the erasure of data are governed.

The prerequisites to request the erasure of data, according to the first paragraph of art. 17 of the proposed regulation are the following: “*a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or the authorised period of conservation of the data has expired and where there is no other legal ground for the processing; c) the data subject objects to the processing pursuant to Article 19; d) the processing of data is not conform to this regulation*”.

The principal innovation appears to be encountered only in the configuration of a new responsibility of the data controller; this latter, indeed, is bound to inform third parties who are processing the data of the data subject's request to erase any link, copy or reproduction of the information which concern them and that, if the data controller has authorised a third party to publish personal data, it is considered responsible for such dissemination⁵⁵⁵⁶.

6.3.3. The right to be forgotten and the internet: a right which is not guaranteed.

The right to be forgotten changes with the use of the internet and of digital networks. On the Web, as has been said, republication is no longer necessary: information is not erased, but remains available or at least abstractly available forever. Indeed, it determines a radical change in the manner of understanding the temporal factor.

This latter, indeed, is no longer to be considered with reference to the interval which passes between the publication of the information and its republication, but only in relation to the initial moment of the publication which persists.

Therefore there are not two isolated events, but a temporal *continuum* that inserts information which potentially never leaves the public attention and which, even if lawfully disseminated in the past, continues to be located in the present, with all its harmful potential⁵⁷.

The right to be forgotten, on the basis of the characteristics of the virtual reality assumes, therefore, the new appearance of the individual's right to have their data at their disposal, to request that it be removed such that it is no longer part of their personal identity, with all the technical difficulties

⁵⁴ COM 2011 (12) final, http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_it.pdf

⁵⁵ On the feature of the article, “right to be forgotten and to erasure”, not so much unfortunate, but rather politically orientated in the Europe - United States debate, see the reflections of F. PIZZETTI, *Il prisma del diritto all'oblio* (The prism of the right to be forgotten), in F. PIZZETTI (edited by), *Il caso del diritto all'oblio* (The case of the right to be forgotten) Giappichelli, Turin, 2013, 21 *et seq.*

⁵⁶ R. FLOR, *Dalla data retention al diritto all'oblio. Dalle paure orwelliane alla recente giurisprudenza della Corte di Giustizia. Quali effetti per il sistema di giustizia penale e quali prospettive de jure condendo?* (From data retention to the right to be forgotten. From Orwellian fears to the recent case law of the Court of Justice. What effects for the criminal justice system and what de jure condendo prospects?) In *Il diritto dell'informazione e dell'informatica* (The right to information and digital rights), fasc. 4-5, 2014, 775 *et seq.*

⁵⁷ This is the problem confronted by MAYER-SCHÖNBERGER, *Delete: the virtue of forgetting in the digital age*, Princeton University Press, Princeton, 2009.

connected to that⁵⁸. The Web allows an almost infinite amount of data to be archived and makes it possible to access any item of news at any time, with the risk of making the concept of topicality everlasting; the present and the past converge, leading to a phenomenon of decontextualization⁵⁹ of the information which remains available, but freed from its original source and from any subsequent evolution of the information context.

The objective becomes that of guaranteeing “that the technique is allied with the rights instead of opposing them. And that the Web, escaping to the opposed temptations of censure and anonymity, promotes the freedoms and rights of each individual⁶⁰”.

One of the factors which has an effect on this subject in most problematic way is the digitalisation of the historical archives of newspapers which allows articles to be located even at a distance of years, often concerning court proceedings, which date back and are not updated with the subsequent developments of the case. The pervasiveness of this dissemination is, then, further amplified by the presence of generalised search engines which, as mere digital intermediaries, not responsible for the content of the source sites, offer an automatic and permanent system of locating information by means of key words and simple names.

It is evident how all this leads to enormous tensions with respect to the right to information/press freedom and the prerequisites which legitimate the exercise thereof. Over time, the case law has indeed outlined some conditions the existence of which legitimate the exercise thereof— and the consequent compression of the individual's personality right —; it is the so called journalist's catalogue, defined by the Supreme Court of Cassation with judgement no. 5259/1984 and which identified three requirements: 1) truth of the facts disclosed (objective or even only putative provided that, in this latter case, it is the fruit of serious and diligent research work); 2) civil form of presentation (based on serene objectivity and without derogatory/defamatory and offensive intent, so called continence); 3) public interest in the dissemination of the news (so called relevance).

In this event there then enters into play the so called “fourth requirement”, that of topicality, requirement defined, as has been seen, by the Supreme Court itself with judgement no. 3679/1998.

If, however, the element by virtue of which the right to be forgotten may legitimately prevail over freedom of expression is that temporal factor the running of which causes the interest of a person to reappropriate information concerning them and to return to anonymity to arise, it is indisputable that this constitutes a requirement which may never find effective application in the world of the Web, in which, more than an initial dissemination and then a subsequent one, as has been said, one has to deal with the news constantly remaining on the Web.

In this regard, the Courts have proposed different remedies to protect the right to be forgotten, all, as shall be seen and, as had been said, highly ineffective with respect to the desired effects and all destined to clash with the freedom of expressing information and with press freedom.

6.3.4. The Google Spain judgement and de-indexation.

⁵⁸ G.SCIULLI, *Il diritto all'oblio e l'identità digitale* (The right to be forgotten and digital identity), 2014.

⁵⁹ Civil Supreme Court of Cassation no. 5525 of 05.04.2012

⁶⁰ Speech of Antonello Soro, 16 October 2014, Data Protection Authority [Http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3458830](http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3458830).

In first place, among the instruments envisaged by the case law, is placed that of so called de-indexation, remedy clearly explained in 2014, by the Court of Justice of the European Union⁶¹; in this manner, documents which are no longer current and responding to a public interest, in so far as consultable by accessing the publisher's website, are no longer “reachable” by means of search engines.

Reference is made, in this case, to the judgement of the Court of Justice of the European Union of 13 May 2014 (case C-131/12), with which the European judges expressed themselves regarding the interpretation of articles 12 lett b)⁶² and 14 first paragraph lett. a)⁶³ of directive 95/46/EC, having as their object, respectively, the right of access to personal data and the objection to the processing of the same.

This ruling possesses a fundamental importance in dealing with the right to be forgotten on the internet, in defining the specific role of search engines and in the awareness of how these, for the reality of the Web, are not protectable as such.

The decision under examination originates from the case of a Spanish citizen who, in 2010, had presented to the Agencia Española de Protección de Datos a complaint against the publisher of a national daily newspaper, as well as against Google Spain and Google Inc. The complainant sustained that, carrying out a Google search for his name, he was referred to two links to the web page of the cited daily newspaper in which the news of the sale by auction of some of his seized properties; what came to be challenged, in the case in point, was that, having regard to the fact that settlement of the enforcement procedure now dated back a particularly long period in time, the information was now deprived of any public relevance.

The Agency, accepting the complaint, provided that the two Google companies should arrange for the data to be removed from their indexes in such a manner as to make it impossible to access the same in the future.

Google Spain and Google Inc., however, challenged the measure and, in the context of the proceedings which arose from it, the competent Spanish court, in 2012, referred the matter the Court of Justice of the European Union.

This latter, in the first place and for the first time, with its ruling, clarified the applicability to parties owning search engines of the directive 95/46/EC, with all the consequences which derive from that in terms of protection of the individual with respect to the processing of personal data.

⁶¹ Court of Justice of the EU, case C-131/12, published on 13.05.2014. For comments see *ex multiis*, F. PIZZETTI, *La decisione della Corte di Giustizia sul caso Google Spain: più problemi che soluzioni* (The decision of the Court of Justice on the Google Spain case: more problems than solutions), in www.federalismi.it; O. POLLICINO, M. BASSINI, *Reconciling right to be forgotten and freedom of information in the digital age. Past and future of personal data protection in the EU*, in *Diritto pubblico comparato ed europeo* (European and comparative public law, 2, 2014, 614 *et seq.*

⁶² “Member States shall guarantee every data subject the right to obtain from the controller: (...) as appropriate, 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”.

⁶³ “Member States shall grant the data subject the right: (...) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation”.

These subjects, indeed, come into consideration as data processors⁶⁴, in respect that they collect, extract, register and organise information in the context of various indexing programmes, conserve it on servers and communicate in the form of lists⁶⁵.

The operator of the search engine indeed, therefore, became classifiable as a data processor pursuant to art. 2 lett. d) of the directive. From which, the obligation, placed at the responsibility of Google itself, to erase (art. 12 lett. b of the directive), at the request of the data subjects, links which referred to news that was no longer associated with a character of topicality. The European judges, relative to this latter aspect, indeed, sustain that “*as regards Article 12(b) of Directive 95/46, the application of which is subject to the condition that the processing of personal data be incompatible with the directive, it should be recalled that [...] such incompatibility may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes*”; they add, furthermore, that “*even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive*” and conclude affirming that “*the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine. Therefore, this data, can be erased. The particular nature of the information, having a sensitive nature for the private life of the person to whom it refers, may justify the removal of the link that spreads the information (with the consequence that the news will continue to be findable on the source site), at least where there is not a public interest in receiving such information*”.

It is evident how, in this judgement, more than the right to be forgotten we should dwell on a more technical and neutral “right not to be found easily⁶⁶”, to rethink the digital visibility of an individual⁶⁷. The personal data subject of de-indexation does not come to be removed from the vast sea of data stored on the Web, but simply subtracted from a simple and easy means of finding it.

It is a right, the Court further specifies, which must be evaluated on a case by case basis, on account of the characteristics of the same and taking account of the specific aim of the search engine, that is to say that of facilitating access to information for internet users, improving the effectiveness of disseminating information and providing various information services to society. Only in this manner is it possible to make a fair balance between the legitimate interest of “internet users” to find information on the Web and the right of the private citizen to be forgotten, which receives, here, as has been said, a protection in a certain sense attenuated by the fact that, more than a true and proper right to be forgotten, it creates a substantial interest of the individual not to be found online except

⁶⁴ See S. SICA, V. D'ANTONIO, *La procedura di de-indicizzazione* (The de-indexation procedure), in G. RESTA E V. ZENO-ZENCOVICH, *Il diritto all'oblio su Internet dopo la sentenza Google Spain* (The right to be forgotten on the internet following the Google Spain judgement), RomaTrE-Press, Roma, 2015, 147.

⁶⁵ In the body of the decision, the activity of the search engines came to be defined as “consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference”. Cf. paragraphs 21 and 41.

⁶⁶ A. PALMIERI, R. PARDOLESI, *Dal diritto all'oblio all'occultamento in rete* (From the right to be forgotten to being concealed on the Web), 14

⁶⁷ S. SICA, V. D'ANTONIO, *La procedura di de-indicizzazione* (The de-indexation procedure), in G. RESTA E V. ZENO-ZENCOVICH, *Il diritto all'oblio su Internet dopo la sentenza Google Spain* (The right to be forgotten on the internet following the Google Spain judgement), 154.

directly from the source site⁶⁸. The search engine, indeed, may not eliminate the personal data which is to be found with the data controller who has published the information, but only the link with this. And it is clear, in these terms, that the mere de-indexation, accompanied by the possibility of finding on the web news that is no longer current, incomplete and often decontextualised, does not allow any of the rights in play to be protected fully.

In consequence of this judgement, the Italian Data Protection Authority, on 22 January 2015 approved the protocol of checking of the measures that Google was called to adopt for the protection of the privacy of Italian users [no.30; web doc. no. 3738244] and this latter made available a web form by means of which data subjects could request the removal of results from the search engine.

It is an extremely complicated arrangement with huge time and economic costs, which require evaluations on a case by case basis, measures in this sense, to then arrive at protections that effectively never full, as said, while deindexing an item of news, it remains on the Web without any possibility for the data subject to claim that the actual truth be reconstructed.

In addition, then, there is considered the risk that de-indexation leads to an exponential increase of false requests or requests that are not adequately justified by the data subjects, amplifying the censoring effect and limiting the free apprehension of information on the Web favoured by the use of search engines.

6.3.5. The obligation to contextualise news.

A further remedy, developed by the case law of the Courts, is that to be found in the judgement no. 5525 of 2012⁶⁹ with which the Supreme Court of Cassation⁷⁰ enshrined the obligation of the party owning the source site to update and contextualize news.

With this judgement, the Supreme Court, in a case which saw a politician from Lombardy request the removal of an article from 1993 which could be found in the online archive of the *Corriere della Sera* and attesting his arrest for corruption without, moreover, the - subsequent - news being reported that the judicial investigation was concluded with an acquittal, performed a balance between the right to be forgotten and to personal identity, on the one hand, and the right to information/press freedom, on the other hand, arrived at a position establishing that the Web archives must be updated to reflect the evolution of the facts; this, was all the more important, when it concerned court cases⁷¹.

⁶⁸ Guidelines of the European Community of 26/11/2014 The independent consultative body (Working Party) established in conformity with article 29 of Directive 95/46/EC on the protection of personal data has published guidelines for the implementation of the aforementioned ruling of the Court of Justice, which contain a series of criteria to guide the activity of the national authorities in the management of the complaints of data subjects following the failure on the part of search engines to accept requests for de-indexation, clarifying that no criterion is determining by itself. Among these, appears in first place that of the nature of the applicant: in particular, the circumstance by which the applicant possesses a role in public life should tend to orientate towards denying the request for de-indexation (political personalities, other officials, businessmen, persons enrolled in professional registers).

⁶⁹ See also G. FINOCCHIARO, *Identità personale su Internet: il diritto alla contestualizzazione dell'informazione* (Personal identity on the internet: the right to the contextualisation of information), in *Il diritto dell'informazione e dell'informatica* (The right to information and digital rights), 2012, 3, pages 383 - 394

⁷⁰ See, in this sense, also the Civil Supreme Court of Cassation no. 3679 of 1998.

⁷¹ As has been written by V. ZENO-ZENCOVICH, *Onore e reputazione nel sistema del diritto civile* (Honour and reputation in the system of civil law), Jovene, Naples, 1985, 120: the decontextualisation consists in the separation of an

In this case, the Court proposed a dynamic reconstruction of the protection of privacy (coherent with the general context described in the preceding paragraphs), aiming to raise the dimension of control by data subjects regarding the use and fate of their data.”.

According to the Court, it is necessary to pay due attention to the differences existing between the archive and memory of the internet network: *“while the archive is characterised by being ordered according to determined criteria, with interconnected information aimed at assisting the access thereto and allowing the consultation thereof, in reality the internet network constitutes a body where the information is not archived but only stored. This is equipped with an unlimited and timeless memory, in this regard the common reference to the “sea of the internet” and the “ocean of memory” in which internet users “navigate” is emblematic. The memory of the internet network is not an archive, but a deposit of archives. In the internet network information is in reality not organised and structured, but transpires to be isolated, all placed on the same level (“flattened”), without an evaluation of the relative weight, and deprived of contextualisation, deprived of connection with other published information (as pointed out also in the doctrine, the said page rank indicates when a page is connected by a link, not to which information it must be related, nor does it provide any data regarding the quality of the information).*

If there exists a citizen's right to *“receive complete and correct information, the mere generic possibility of finding additional news within the sea of the internet not being sufficient”* it is the responsibility of the owner of the source site to require to guarantee, with all the costs which flow from this, the contextualisation and updating of the news, especially when *“the relative settlement of court proceedings has occurred”*, arranging a system of notes or annotations which, while giving an account of the subsequent events, are apt to safeguard the historical and original content of the episode in question⁷².

This judgement enshrines three legal principles: firstly, it is affirmed that the system introduced with Legislative Decree no. 196 of 2003, shaped as a priority respect of the fundamental rights and freedoms and the dignity of the person (and in particular of confidentiality and of the right to protection of personal data as well as of the personal or moral identity of the data subject to whom the same pertain), is characterised by the necessary correspondence of the processing personal data to the criteria of proportionality, necessity, pertinence and not exceeding the purpose (this latter constituting a true and proper intrinsic limit of the lawful processing of personal data), which is met in the joint participation of the data subject in the use of their own personal data (this latter having the right to know at any time who possesses their personal data and how it is used, as well as to object to the processing of the same, even though pertinent to the purpose for which it was collected, or to intervene in this regard, requesting the erasure, transformation, blocking, or rectification, updating, supplementing thereof (Legislative Decree no. 196 of 2003, art. 7), to protect the dynamic projection of their personal data and the respecting of their actual personal or moral identity).

Secondly it enshrines that, even in the event of storing on the internet network, the mere deposit of archives of individual users who access the Web and that is to say of owners of sites constituting the source of the information (so called source sites), the right to be forgotten must be recognised to the

individual's image from the context in which it was originally to be found and placing it in a different state, with the effect of creating an externally perceivable negative contrast.

⁷² Of particular relevance, appears then the judgement no. 5107 of 2014 with which the Supreme Court of Cassation, III criminal section, in the case “Google/Vivi Down” which establishes that, in the case of uploading, by users (so called uploaders) on a website which offer the Hosting service, of textual, audio, video or multimedia content, given the lack of a general obligation of surveillance for service providers, it is the users who are the data controllers of the personal data of third parties. Furthermore, it affirms that the crimes mentioned at art. 167 of the Privacy Code must be understood as proper crimes, dealing with conduct which takes concrete form in violations of obligation of which only the data controller is an addressee in a specific manner.

subject to whom the personal data object of processing there pertains, and that is to say to the relative control to protect their social image, which even when it pertains to true news, and *a fortiori* if a matter for the press, it can be translated into the claim for the contextualizing and updating of the same, and if applicable, having regard to the purposes for which it is kept in the archive and to the interest that underlies it, even to the relative erasure. Finally, then, it is affirmed that, as in the case in point, of transfer Legislative Decree no. 196 of 2003, under art. 11, paragraph 1, lett. b), of news that is already reported (in this case, relative to a court case involving a political personality) in its historical archive, the owner of the information body (in this case, the company Rcs Quotidiani s.p.a.) which availing itself of a search engine (in this case, Google) stores the same also on the internet network is bound to observe the proportionality, necessity, pertinence and non-excess of the information, having regard to the purposes which allow the lawful processing thereof, as well as contextualizing and updating news which is already reported as the object of information and processing, by way of protection of the right of the subject to whom the data pertains to their personal or moral identity in its social projection, as well as the safeguarding of the right of the citizen user to receive complete and correct information, the mere generic possibility of finding further news concerning the case in point within the "sea of the internet" not being sufficient in this regard, but requiring, given the recognised persistent public interest in knowing the news in question, the provision of a suitable system to report (in the body of the text or in the margin) the existence of a follow-up or a development of the news (in the case, of the terms of the occurrence of the relative definitive settlement of the court proceedings), allowing rapid and easy access by users for the purposes of the relative adequate detailed study, with fair operating methods established by the judge of the merits in the absence of agreement between the parties.

The Data Protection Authority appears to have adopted this orientation in two rulings⁷³ in which, accepting the appeals of two citizens it ordered a publishing company to update some articles present in the historic online archive of its daily newspaper.

Similarly to the ruling of the Supreme Court is placed, then, a judgement of the European Court of Human Rights of 16.7.2013 (appeal no.33846/07, case *Węgrzybowski and Smolczewski v. Poland*) in which the right of the data subject to obtain the removal of the information material published online was rejected in consideration of the fact that, according to the Court, the point of balance between conserving the news – albeit incorrect – in the informational heritage of the newspapers on the Web and the claim of the person involved to conserve their personal identity can be identified in the possible obligation, placed at the responsibility of the editor, to publish an addition or a note to a source available in an internet archive⁷⁴ that specifies the circumstance that the same has been deemed to be defamatory by the Court Authority⁷⁵. The removal of the article, indeed, according to the Court, would not fall among the judicial prerogatives⁷⁶ and would equate, in a disproportionate manner with respect to the protection of confidentiality and personal identity, to “rewriting history”, with radical violation of freedom of expression and knowledge.

⁷³ Of 20 December 2012 [no. 434; doc. web no. 2286432] and of 24 January 2013 [no. 31; doc. web no. 2286820].

⁷⁴ F. DI CIOMMO, *Quello che il diritto all'oblio non dice. Internet e oblio* (What the right to be forgotten does not say. The internet and oblivion), cit. 1108.

⁷⁵ The principle appears conform to that affirmed also by the American case law with effect from the case of *Georg Firth v. State of New York*, Court of Appeals of the State of New York.

⁷⁶ The judgement reads: “*it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found by final judicial decisions, to amount to unjustified attacks on individual reputations*”.

The principle, according to the judges in Strasbourg, proves to be corroborated by the protection offered by art. 10 of the European Convention on Human Rights against the public interest in access to the press' internet archives. The remedy of full removal, aimed at protecting individuals under art. 8 of the Convention indeed proves to be excessive according to the Strasbourg Court.

From the rulings reported above it is clearly deduced that the instruments thus developed protect, more than the right to be forgotten, a just as relevant right to complete and correct information, placing at the responsibility of the owner of the source site the obligation to continually update news published over time. However, if this is placed abstractly as an element of protection both of the personal identity and of freedom of information, it is evident that, in the facts, it proves not to be feasible: the procedure for updating/rectifying hypothesised obsolete content, placed directly at the responsibility of the source sites in consequence solely of the complaints made by individuals, is surrounded by enormous uncertainties regarding the arrangements, timescales for implementation and the costs necessary in order to give a response to users' applications.

6.3.6. The deletion of news.

The last option, essentially supported by the case law on the merits, but extremely controversial and opposed by the European Court of Human Right, is that of the radical deletion of the news from the newspaper's online archive. In this sense the Court of Chieti⁷⁷, sub-section of Ortona, with judgement no.8/2011 of 20.1.2011 ordered, pursuant to art. 11 and 99 of legislative decree 196/2003, the deletion of an article published, in 2006, on an online daily newspaper from Abruzzo reporting the news of two spouses accused of attempted extortion continued in competition, updated however up until it acknowledged the occurrence of the archiving. The Court arrived, indeed, at a position of affirming that, from the moment that the privacy legislation imposed that the processing of personal data could not take place for a time that was greater than that which was necessary for the purposes for which the same had been collected, and that, in the case under examination, there was no longer any public interest in knowing the news, that article must be completely deleted, making exception for the conservation of a paper copy.

In the balancing between the personality rights and the right to completeness of information, this latter thus comes to be radically sacrificed.

7. Right of Reply. Conclusions.

Hence, a plurality of elements are placed in evidence, all co-essential to the structuring of our constitutional legal system and the protection of which is imposed by the said Fundamental Charter: firstly, on the one hand, the right to individual identity, a personality right which finds its foundation and its protection in art. 2 of the Constitution, as well as the individual's right to self-determination in the processing of their personal data and, on the other hand, the freedom of speech in its various forms, an ever more direct emanation of the dignity of the human person, as well as the central element of the entire legal system. They are rights which, in recent years, especially with the dissemination of means of mass communication and of the internet, have found themselves in a state of perennial tension and continuous reciprocal limitations.

⁷⁷ In the same manner the Court of Milan with judgement no. 5820/2013, published on 26.4.2013: the court considered that the most appropriate remedy was that of intimating the deletion of the news from newspaper's digital archive, only allowing a paper copy to remain, since the public interest in permanent knowledge of the case was lacking and the data subject concerned did not have a role of public significance.

The processes available to individuals in the event of violation of the aforesaid rights are then identified.

Lastly, then, the right to be forgotten is analysed, manifestation of a form of protection of the personal identity, its persistent conflict with freedom of speech, understood in its most specific form of the right to information/press freedom, as well as the total ineffectiveness, in concrete, of the instrument conceived up until now.

With regard to all that has been set out above, it operates, as has been seen, in a context in which both the generalised right of access to the internet and the effectiveness of the principle of net neutrality assume ever more relevance as an essential element of a system that appears to be ever more widespread and fearful of regulation. With regard to the first aspect, in the conclusions of a report presented in 2011 to the General Assembly of the UN it is affirmed that “the internet having become an indispensable element to make a large number of fundamental rights effective, in order to combat inequality and to accelerate development and civil progress, the guarantee of a universal access to it must represent a priority for all States”. Furthermore, this incoming freedom must be supported by an access that goes beyond the mere technical connection and that allows the concrete availability of free knowledge on the Web. Only thus can the creative contribution of a range of subjects be made real. Therefore, the right of access concerns both the outgoing knowledge, that which each individual can draw from the Web, and incoming knowledge, produced by all those who expand it with their intervention.

With regard to web neutrality, in contrast, it finds its foundation in the principle of equality (mentioned at art. 3 of the Constitution) and consists in the prohibition of any discrimination concerning data and traffic on the internet; it constitutes a precondition aimed at impeding that only certain subjects can contribute to the construction of the global knowledge asset and aimed at allowing, on the contrary, everyone to be both a provider and a user of information.

All this being highlighted, it appears evident how the Right of Reply constitutes an instrument that, in the full affirmation and guarantee of the two preconditions mentioned above, protects at the same time the right to personal identity, the control that each individual may have over their data and the freedom of speech, eliminates the need, in concrete, for forms of balance between the same and, adapting itself to the technical characteristics specific to the internet, guarantees a fully effective protection thereof. In the perspective of the fullest guarantee of the accuracy, completeness and pluralism of the information it indeed provides the instrument to protect all the interests in play at the same time.

By means of the Right of Reply, indeed, the right of the person who disseminates information is not placed in dispute, nor much less does it limit it, but it allows the subject whom the said data concerns, on the one hand, to exercise themselves that said freedom of speech mentioned at article 21 of the Constitution and, on the other hand, to protect their personal identity, representing a complete version of the historical fact and concurrent with what has been disclosed. With a single means, therefore, it causes the perennial clash between these fundamental freedoms to diminish, guaranteeing both of them. The content and its reply, thanks to the Right of Reply, indeed, will have the same formal dignity and the same ranking within a specific search engine, because clicking on a link and therefore on a given content (whether it be an article, photo, video, blog or forum) the Right of Reply banner will also appear at the same time. If the content is opened at a specific moment in time, the reply can also be opened at the same time, permitting them to be read contemporaneously.

This system, as well as placing itself as being coherent with the constitutional data (and actually essentially necessary for its full implementation) and, as well as reducing to the minimum the risk of disputes (with all the costs and timescales that flow therefrom), furthermore allows the problems of a technical nature on the basis of the ineffectiveness of the right to be forgotten to be avoided: on the one hand the search engine, as has been seen, is not responsible for the content of the information which can be found on the Web, which remain fully accessible despite often being incomplete and inaccurate, but, at the most, it can be bound to eliminate the link with source sites on the basis of the outcome of evaluations to be made on a case by case basis, in relation to the concrete circumstances of the case, which is scarcely protective for individuals and extremely costly in economic terms. In the same manner on the other hand, the imposition on the party responsible for the site to provide a suitable system to report any development regarding news which has already been disseminated, in order to allow a complete and concurrent indication of all the elements which, over the course of time, have contributed to composing the historical fact, cannot produce the desired effects.

All these elements find a practical concordance with the Right of Reply; by means of this instrument, even without a dispute, within the limit of not bringing unlawful conduct into being, [concurrently with] the right of the party who disseminates news to maintain it on the Web (and therefore guaranteeing their freedom of expression in full) there is placed in the hands of the individual concerned the ability to monitor that the news concerning them, present online, shall always be constantly updated and capable of being updated, in such a manner that their identity is faithfully represented in its dynamic becoming. There is a convergence between the aims of the data subject and that of the user who aspires to the completeness and accuracy of data found on the Web

Freedom of speech, the right to personal identity and the right of the public that it is possible to find complete and current information regarding each individual subject on the Web therefore, in this way, become protectable at the same time in an effective manner.

At Turin, on 05.02.2018

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