

## Chapter 2

# Legal Memories and the Right to Be Forgotten

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**Abstract** The paper examines the current debate on the right to be forgotten in connection with three different issues that revolve around: (i) the construction of individual identities; (ii) how individual and collective memories are intertwined; and, (iii) different forms of oblivion vis-à-vis the idea of forgiveness. The aim is to offer a normative stance in terms of “fair memory” and “difficult forgiveness.” From a philosophical viewpoint, attention is drawn to the dual status of the past, i.e., that which is not any longer and what Paul Ricoeur used to call the “existent state.” From a legal perspective, focus is on how to strike a balance between the subjective claim to be forgotten and further rights of the legal system. From a political outlook, what is at stake concerns the mediation between the relational structure of the law and the inter-subjective nature of forgiveness. Today’s debate has to match up with all these aspects of the right to be forgotten.

### 2.1 Introduction

The “right to be forgotten” should not be considered as a new right in the legal domain and still, the information revolution has forced both legislators and courts to rethink the ways in which such right must be understood. On the one hand, the right to be forgotten can properly be traced back to the traditional right to respect for private life, e.g., Article 8 of the European Convention on Human Rights (“ECHR”), much as the protection of personal data. Consider, for instance, Article 6 (e) of the European directive on data protection, i.e., D-95/46/EC and the provisions on data that should be kept for no longer than is necessary for the purposes for which such data was collected. On the other hand, the information revolution has profoundly impacted on this framework because of the persistence, replicability, scalability and searchability of information on the internet, along with the de-contextuability and

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re-combinability of content of individual messages. Accordingly, on 25 January 2012, the European Commission has presented the proposal for a new regulation on data protection (2012/0011 (COD)), whose Article 17 on the “right to be forgotten and to erasure” has sparked much controversy. Pursuant to Article 17(1) of the proposal, “the data subject shall have the right to obtain from the controller the erasure of personal data,” in all the cases in which the data are no longer necessary, the data subjects withdraw consent, or object to the processing, and so forth. In addition, the proposal aims to introduce new obligations for data controllers: whereas the latter shall carry out the erasure without delay, and restrict processing of personal data where their accuracy is contested by the data subject, the data controllers “shall take all reasonable steps, including technical measures, ... to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data” (Art. 17.2 of the Proposal).

Meanwhile, courts and tribunals have been very active: suffice it to recall the decisions of both the Tribunal de grande instance de Paris and the Italian Corte di Cassazione, vis-à-vis the doubts of the Audiencia Nacional in Madrid. First, on 15 February 2012, an *ordonnance de référé* of the Tribunal de grande instance de Paris ordered the search engines Google.com and Google.fr to remove from their services all of the links that could trace the plaintiff Diana Z. back to her previous life (and artistic work) of porno actress. Although this decision looks highly problematic in light of the clauses of immunity for internet service providers (“ISPs”), such as Article 15 of D-2000/31/EC, namely the European directive on e-commerce, this trend was confirmed two months later in Italy. On 5 April 2012, the third section of the Court of Cassation in Rome established in case n. 5525, that online news archives, such as those of the Italian newspaper *Il Corriere della Sera*, should be kept updated, in order to enforce the individual right to be forgotten: recall Article 6 (d) D-46/95/EC and the provision that personal data should be “accurate and, where necessary, kept up to date.” On 9 March 2012, similar problems were already discussed before the Audiencia Nacional in Madrid (C-131/12): the issue concerned once again the obligations of search engines as providers of content in relation to Directive 95/46/EC on data protection. Significantly, the approach of the Court was more problematic and, as a result, a Reference for a preliminary ruling from the Audiencia Nacional was lodged before the EU Court of Justice in Luxembourg. The doubts of the Spanish Court can be summarized with two main points: according to no. 2.3 of the reference, can the Spanish Data Protection Agency “impose on the search engine of the Google undertaking a requirement that it withdraw from its indexes an item of information published by third parties, without addressing itself in advance or simultaneously to the owner of the web page on which that information is located?” Moreover, in the phrasing of no. 3.1 of the reference, do “the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by Article 14(a), of Directive 95/46/EC, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally”?

Leaving aside old and new obligations of internet service providers (Pagallo 2011; Reed 2012; etc.), focus is here on the philosophical reasons of today's legal debate, namely the role of oblivion in social interaction and the increasing amount of data and information, available on the internet, that shape individual identity. By reversing Jonathan K. Foster's thesis that "we are what we remember" (Foster 2008), it seems fair to affirm that oblivion plays a crucial role in people's lives, since it allows bearing the weight of the past and reprogramming the future. Whereas memory allows "to speak, read, recognize objects, orient ourselves in our environment or maintain contact" (Foster 2008), the right to be forgotten may be understood as a way to protect individual autonomy and permit people to remove their data, that is, "the traces of the past" that regard or affect the individuals. As it occurs with other provisions of the data protection framework, such as the transparency and fairness of data processing, whether data may be used and processed, etc., no violation of personal identity is thus necessary to grant the power to remove, or see removed, the data. Rather, such right to remove, or see removed, the data would be an expression of the autonomy with which every individual should be able to present and describe herself.

On this basis, we may say that both memory and oblivion cooperate to the construction of the personal identity as two sides of the same coin. In legal terms, this means that the protection of the right to speech, much as freedom of information and access, of press, etc., should go hand in hand with the protection of the right to be forgotten. But, how far should this latter power go? How about possible limitations of the right to be forgotten in the name of "legal memories"? How could a balance between memory and oblivion be properly struck?

In order to offer a hopefully comprehensive view on these issues, the paper is presented in four parts. Next, focus is on the philosophical status of the past: although it seems obvious that both memory and the right to be forgotten have to do with the dimension of the past, the meaning of such past is not evident. The confusion that often affects the current debate undermines the opinion that legal systems shall recognize and protect an individual right to be forgotten. This latter argument is deepened in connection with three different topics: the construction of personal identity in Sect. 3, the relation between individual and collective memories in Sect. 4, and the different forms of oblivion vis-à-vis the politics of forgiveness in Sect. 5. In each section, we examine what advocates and critics of the right to be forgotten argue, so as to offer a normative standpoint in the conclusions of the paper. Of course, our analysis does not aim to consider all of today's scholarly research but rather, we pay particular attention to the work of Paul Ricoeur. The French philosopher brilliantly wrote on memory and oblivion throughout his work, showing particular attention to the convergence between theory and practice with specific reference to the field of the law. In light of Ricoeur's meditation, the purpose is to grasp why everything in life is memory, apart from the thin line of the present and eventually, some aspects of the right to be forgotten.

## 2.2 The Status of the Past

In *La marque du passé* (1998), Ricoeur examines the nature of the past and its philosophical status, in order to prevent a usual mistake, namely to conceive the past as an entity, or as a place in which the experiences are deposited once they go by. Contemplate the Greek metaphor of the impression that a seal leaves on the wax: the metaphor refers to the recording and preservation of the traces of the past, which are necessary for the work of memory. Starting from such traces, the past could be reconstructed in the evocation of what is gone. However, memories do not remain unchanged over time: on the contrary, the act of recalling should properly be grasped as an active force (Foster 2008). After all, traces are not signs (Durante 2011): the thought of the past requires that the remembering subject makes sense of such traces via an active reconstruction. This latter stance warns against the risk of reifying the language—and this also may be the case of the legal language—that quite reductively assumes the concepts of memory and oblivion in terms of inscription, retention and deletion of data, as the traces of the past. By giving prominence to the materiality and availability of the data, rather than the more complex process of giving them meaning, this approach fails to grasp what is philosophically at stake with the nature of the past, i.e., what Ricoeur used to describe as “the enigma of the past,” a puzzle between “what is no longer” and “the existent state” (Ricoeur 1998).

The nature of the past is indeed twofold, because it should be grasped in both a negative and positive ways. Whereas the negative conception of the past refers to that, which is lost forever, irretrievably deleted by the action of time, the positive concept sheds light on the past as something that remains, since we cannot pretend that nothing happened. This tension, according to Ricoeur, has been adequately examined by Martin Heidegger’s meditation on time and the “analytic of existence,” namely the analysis of what constitutes or defines our identity. By distinguishing between the past as *Gewesenheit*, that which was, and *Vergangenheit*, that which is not and hence, is not *Zuhanden*, “at hand,” Heidegger emphasises the dynamic dimension, both verbal and adverbial, of the passing of the past. For the sake of clarity and conciseness, let us sum up the reasons why Ricoeur dwells on Heidegger’s work in accordance with three points. First, the past is no longer conceivable as an entity that is immutable and can be tracked as such, in “its full availability.” Second, the distinction between the past as that which is no longer and the existent state highlights the active relationship with the past, because individuals can delete or keep tracks of such past. Third, Ricoeur interprets Heidegger’s analytic of existence as a theory of powers and non-powers, which is particularly fruitful for our analysis on legal memories and the right to be forgotten. In fact, the distinction between what is and what is not at hand (*Zuhanden*), has to do with that which remains available and thus can be erased, e.g. the deletion of memory traces. Therefore, from the stance of the remembering subject, the latter has to strike a balance between the poles of the full deletion and the total preservation of the memory traces. We return to this below.

In the opinion of Ricoeur, however, we should widen the perspective and insert the memories of the recalling subject “in the movement of exchange with the expectation of the future and the presence of the present”: in other words, we should wonder about how memory and the past are connected with the present and the future (Ricoeur 1998). On the one hand, the present cannot be conceived as a mere result of the past, to which it would always be anchored. Rather, the present should be grasped in Kantian terms as the basis of the individual autonomy, namely as the ability to start something anew, to take the initiative to act on things in a non-predetermined way, that is, “to be free.” From the legal point of view, this autonomy is what justifies the act of granting rights and duties to the individuals.

On the other hand, the role of memory involves the opening of the present to an unwritten future and therefore, according to Ricoeur, it also concerns the notions of fault and debt, much as the act of forgiveness, because “the orientation towards the future of the past is the counterpart of the opposite movement, for which the representation of the past affects the future.” Think about the notion of fault, which is the burden that the past transmits to the future: whilst such burden weights on the future, the notion of forgiveness has to both clarify and release it. “If there is a duty to remember, it is because of guilt, which, by transferring the memory into the future, literally marks the future: you will remember! Do not forget!” (Ricoeur 1998). The representation of the past impacts on how we perceive the future and this is why Ricoeur suggests that a right memory is crucial, because the latter must account for the debt that the present has contracted with the past and, at times, dissolve the weight that nails the present down to a fixed and unchangeable past.

The twentieth century has imposed a duty to recall (Margalit 2002): more specifically, a duty to recall represents a form of justice, in order to not reiterate the crime by removing the memory of the victims. Still, today’s advocates of the right to oblivion suggest an increasing need to be forgotten in this era of overwhelming memory, so as to be set free from the faults of the past and, so to speak, to be forgiven, for this would be the condition for a new beginning, a re-birth, and a new admission in the community. In light of Ricoeur’s distinctions between “what is no longer” and “the existent state,” between future, present, and the past, the connection between memory and oblivion that the idea of a right to be forgotten postulates should thus be deepened. Advocates and critics of the right to be forgotten usually discuss three points: (i) the construction of the personal identity; (ii) the relation between individual and collective memories; and, (iii) the different forms of oblivion vis-à-vis the idea of forgiveness. Our analysis proceeds with the first of such points, namely the structure of personal identities.

## 2.3 The Structure of Personal Identities

Advocates of the right to be forgotten often claim that a full control over data, which includes data removal (Mayer-Schönberger 2009), would guarantee the ability of the individuals to build their personal identity in a better way. After all, who could

be in a better condition than the individual, so as to tell her own story, and give the latter a new beginning, a different articulation or, in more philosophical terms, a renewed understanding of the self?

Admittedly, this idea and its corollary seem legitimate and furthermore, we should admit that the information revolution makes the construction of personal identities through the control of data a critical issue today. Still, the structure of this argument has not to be taken for granted: what is at stake does not only concern a matter of personal identity, which depends on the link between past and future. Rather, we are dealing with issues of power and authority that have to do with the relationships that each of us has with other individuals. Therefore, the question correspondingly changes: how can the individual relate to her past and the others, without precluding the opening of the present to the future?

Again, Ricoeur's work and his interpretation of Heidegger's analytic of existence look particularly fruitful in order to tackle the issue. The indelible relation of the individuals with their past does not pre-determine or affect their lives but rather, represents the condition that allows the individuals to build an "inclusive" present and future. What constitutes both the essence and possibility of the future, according to Ricoeur, is our ability to understand and include the past in the dimension of the future and not the other way around, i.e., the dimension of the past that would always determine the future. The way in which we understand and include the past in light of the future ensures the maintenance of the self, namely of the individual that is incessantly transformed by the existence. This "inclusion" has been stressed by Heidegger in *Being and Time*: "it is truly be-coming only the Dasein that has authentically been" (Heidegger 2010). Although with hermetic language, the German philosopher means something simple: only that which comes from the past can aspire to have a future. Liberating the present from the tie that brings it back to the past may help people enjoying new beginnings, novel stories, or alternative lives, as advocates of the right to be forgotten often claim. Yet, the rupture with the past, e.g., the erasure of memory traces in the name of the right to oblivion, may deprive the individuals of their future in a subtle way. As Friedrich Nietzsche warns in his *Untimely Meditations*, namely in "On the Use and Abuse of History for Life" from 1874, it appears difficult to build our own future on a series of erasures, or removals. Indeed, the past irremediably affects that "maintenance of self" which allows the construction of every personal identity, notwithstanding the transformations of the subject. As seen in the previous section, such past should not be understood as something fixed and immutable, to be simply deleted or removed, but as something which is still incomplete and whose meaning is open to revisions or re-elaborations. This is an alternative way to build a story that frees the individual from the burden of the past: instead of erasing the memory traces, the aim should be to give them a new meaning.

However, the construction of such meaning, which is implicit in the reworking of the past, is not a simple individual or private activity. This construction needs several points of reference, e.g., the need that others have to access and know that past, so that every new meaning has to be shared with (and within) the community. This brings us back to the reasons why Ricoeur interprets Heidegger's analytic of

existence as a theory of powers and non-powers: the power of reconstructing one's past deals with the power that others have to access and knowledge such past, which hinges as well on the sharing of knowledge that is essential for the formation and comprehension of a meaningful world. The power of the individual when relating to others must take into account these limitations that turn the previous condition into a non-power: our story—the story of ourselves on which we build our personal identity—never is a pure soliloquy but continuously draws on a common knowledge and a set of shared meanings. A personal story always depends on “the story of the others” (Ricoeur 1998): individual memories, as the attribution of meaning to the past, are not a private game but presuppose the social nature of language.

On this basis, the idea apparently suggested by supporters of the right to be forgotten, that memory is a purely private affair, based on the full availability of resources that feed the narrative construction of personal identities, is challenged. Whereas it is hard to sell the idea that a number of erasures, deletions, or disruptions of memory may set up the identity of the individuals, it also is difficult to conceive the reworking of the traces of the past and their meaning, on which the narrative of the self depends, as something that can be achieved regardless of the relationship with other individuals. As Ricoeur sums up, “the first fact, and the most important, is that you do not remember of your own, but with the help of other people's memories. In addition, our alleged memories often borrow stories heard from others. Finally, and this is the crucial point, our memories are framed by collective memories” (op. cit.).

The social nature of meaning makes problematic the widespread idea of the “ownership” of the past, according to which, once grasped the past as an entity, a trace, or a set of data, the past would fully be at the disposal of the individuals as the owners of their own memories. Since people's knowledge, memories, and meaning of the past are “irremediably social and public” (Ricoeur 1998), the right to be forgotten concerns how we should grasp the connection between individual and collective memories. This topic is examined separately in the next section.

## 2.4 Individual and Collective Memories

Advocates of the right to be forgotten often claim that the right to delete or remove the traces of the past, e.g., by subtracting them from the public dominion, allows the individuals to present themselves in a better light, consistent with the current and renewed image that such individuals aim to provide of themselves. Although this argument takes into account the connection between individual and collective memories, it may lead to a new paradox: by dissolving the tie which brings the present back to the past, the risk is to losing out on our own future. Whereas, in the previous section, attention was drawn to the meaning of the past, as such open to reinterpretations or revisions, here, following Ricoeur's reference to the work of Maurice Halbwachs (1992), focus is on how individual and collective memories are intertwined.



The individual memory cannot be understood as a purely private affair: such memory is not only supported by the memory of the subject but concerns social frameworks and external prostheses, such as speech, writing, signals, rituals, monuments, and shared organizations of space and time. Moreover, by describing the present from the selective reconstruction of the past, individuals define and negotiate their membership to the community, so as to make their present coherent with the group of which they are part. Contrary to the abstract representation of the individual as a self isolated from the rest of the community, every reformulation of the past has to do with a social task. The new meaning of the past shall be comprehensible in light of the conceptual framework with which every community builds its own collective memories. But, more concretely, how should we grasp the connection between individual and collective memories?

Ricoeur suggests paying attention to the work of Reinhart Koselleck (2004), and the distinction between the “space of experience” (*Erfahrungsraum*) and the “horizon of expectation” (*Erwartungshorizont*). Whilst the space of experience refers to the legacy of the past and its settled traces, the horizon of expectation is made up of all kinds of anticipations, such as desires, fears, or plans, that project us into the future. The idea is that of a “living present.” Rather than the midpoint of a chronological chain, between a before and an after, the living present of the culture and the community of which we are part should be understood in light of this tension between the legacy of the past and the set of expectations that makes sense of “the dynamics of historical consciousness” (Ricoeur 1998). More particularly, in light of this tension, every reformulation of the past shows the power that the future exerts on the past. The individuals that intend to reinvent themselves through the deletion of the data ensured by the right to be forgotten, aim to make their story consistent with the set of expectations, desires, and fears, that form the living present of the community, or of the group to which they belong. The threat, often underestimated by the advocates of the right to oblivion, is that such alleged novelty, which the deletion of data and the rewriting of the past make possible, may paradoxically be flattened on the set of beliefs, desires, fears, and profiles that constitute the horizon of expectations in a given society.

On the one hand, by erasing the traces of the past, individuals may relocate themselves in the social fabric of the (new) group. Yet, on the other hand, there is the risk of maximum conformity to such group. The alleged autonomy of the individual, which the right to be forgotten intends to protect, can lead to the heteronomous clutch of the desire to conform to the horizon of expectation of a particular social group. Hence, the right to oblivion shows a hidden face, which is difficult to reconcile with the ideas of rupture, discontinuity, novelty, or rebirth, that the law should protect through the control over personal data. The reformulation of personal memories may go hand in hand with the consolidation of values, anticipations, and norms that ground the experience of which the horizon of expectation is made up. This consolidation is even more effective when presented under the banner of people’s autonomy and the reaffirmation of the rights of individuals to freely reconstruct their own personality.



However, by insisting on how the articulation between individual and collective memories does not occur in a sort of social vacuum, it does not follow that a degree of oblivion is unnecessary for the elaboration of the past. Going back to Nietzsche's remarks in the *Untimely Meditations*, we may say that "it is possible to live almost without remembering, indeed, to live happily, as the beast demonstrates; however, it is generally completely impossible to live without forgetting." Yet, rather than a simple deletion of data, such oblivion should be grasped as a "plastic force ... of growing in a different way out of oneself, of reshaping and incorporating the past and the foreign, of healing wounds, compensating for what has been lost, rebuilding shattered forms out of one's self" (Nietzsche 1874).

It is thus necessary to pay attention to the forms of oblivion and, hence, to a new argument that is commonly presented to support the right to be forgotten: the need to see the sins of the past forgiven, that is, to integrate the "wounds, lost parts, and shattered forms" into the fabric of the individual memory. Since forgiveness is the philosophical notion that refers to the human capacity to free the present from the weight of the past and open it to the future, next section deepens this figure, in order to determine its compatibility with the legal forms of oblivion and the right to be forgotten.

## 2.5 Political Oblivion and Forgiveness

According to Ricoeur, we should preliminarily distinguish between two forms of oblivion, namely between deep and manifest oblivion. The former concerns "memory as inscription, retention, preservation," the latter has to do with "memory as the function of recalling, of remembering" (Ricoeur 1998). Moreover, the notion of deep oblivion should be further distinguished between the forms of inexorable and immemorial oblivion. Inexorable oblivion "not only prevents the recall of memory ... but works to erase the track of that which one has learned and experienced: it erodes the registration of memory as such" (op. cit.). The erasing of memory brought on by this form of forgetting deprives the holder of memories, much as any other person, of the possibility to access and know the past. This is the form of oblivion that conceives the past as *Vergangenheit*, namely that which is not, and that will not reoccur under any form in the present of memories.

Still, in the phrasing of Ricoeur, "there is the other pole of the deep oblivion, which would be better to define as the immemorial oblivion; it is the forgetting of the fundamentals—of their original occurrence—that are not even 'events' of that which is possible to recall; we never really have learned them, but they make us what we are: the forces of life, the creative forces of history, 'origin', *Ursprung*" (op. cit.). The immemorial oblivion, in other words, is a condition of memory that deals with the past as *Gewesenheit*, rather than *Vergangenheit*, namely that which was and cannot be at hand any longer: the "being-state [that] makes oblivion the immemorial resource offered to the work of memory" (Ricoeur 1998). From this latter perspective, oblivion plays a positive role, because it makes manifest, rather

than deep, oblivion possible: manifest oblivion does not concern the recognition, preservation, or deletion of the traces of the past, but the remembering through the evocation of memories. More particularly, Ricoeur distinguishes two different forms of manifest oblivion: passive and active oblivion. The former is the oblivion of removal or escape, through which individuals want to remove the painful memories of the past, or run away from them in advance. Passive oblivion, as a form of manifest oblivion, avoids inquiring and investigating, in order to break free from the weight of both individual and collective history, and its evil. As a sort of “I don’t want to know,” which does not entail a conscious activity but, more often, an ill-concealed form of negligence and omission, passive oblivion has characterized the collective memory of Europe in the past century (Darhendorf 1967; Friedlander 1992; etc.).

The other form of manifest oblivion, that is active oblivion, is selective and hinges on the strategic collection of memories. This latter choice is necessary, according to Ricoeur, at two different levels: the level of “life” and that of “narrative coherence.” In the former case, it would be intolerable for any consciousness to recalling everything, or bearing the full weight of “the heavy load of the past.” Likewise, in the case of narrative coherence, nobody can tell a story without omitting some events, episodes, or incidents, from the point of view of the plot chosen by the storyteller. From an evolutionary and pragmatic perspective, manifest oblivion, much as memory, have thus a crucial function, in that individuals and societies need to select what is deemed as significant, important, or useful, for the present. This evolutionary and pragmatic function shows why a politics of memory that reconciles remembrances and oblivion is necessary, since only their balance can have a “salutary effect” on human beings. As Nietzsche stresses in *On the Use and Abuse of History for Life*, “there is a line which divides the observable brightness from the unilluminated darkness, that we know how to forget at the right time just as well as we remember at the right time, that we feel with powerful instinct the time when we must perceive historically and when unhistorically. This is the specific principle which the reader is invited to consider: that for the health of a single individual, a people, and a culture the unhistorical and the historical are equally essential” (op. cit.).

In light of the fair balance that has to be struck between memory and oblivion, however, the focus of the analysis should be widened, so as to take into account forms of individual and institutional forgiveness, much as the ways in which the latter relates to the forms of manifest oblivion examined in this section. Whereas the notion of forgiveness can properly be conceived as opposed to any form of passive oblivion, forgiveness entails a sort of active forgetfulness, although, in the wording of Ricoeur, it “does not address the events in themselves, the trace of which must be carefully protected, but the guilt, whose weight paralyzes memory and, hence, the ability to creatively project ourselves into the future. The object of oblivion is not the past event, the criminal act, but its meaning and its place in the whole dialectic of historical consciousness” (Ricoeur 1998). As a result, forgiveness, as a form of active oblivion, does not intend to lose the tracks of the past but rather, aims to free

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