ISSN 2704-8012

European Journal of Privacy Law & Technologies



Special issue (2020)

G. Giappichelli Editore

European Journal of Privacy Law & Technologies

Directed by Lucilla Gatt

Special issue (2020)

Edited by Massimo Foglia

G. Giappichelli Editore

European Journal of Privacy Law & Technologies
On line journal
Italian R.O.C. n. 25223

G. GIAPPICHELLI EDITORE - TORINO
VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100
http://www.giappichelli.it



The Journal is one of the results of the European project TAtoDPR (Training Activities to Implement the Data Protection Reform) that has received funding from the European Union's within the REC (Rights, Equality and Citizenship) Programme, under Grant Agreement No. 769191.

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Published Online by G. Giappichelli in September 2020
www.ejplt.tatodpr.eu

GDPR AND THE RIGHT TO BE FORGOTTEN

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Abstract:

The paper deals with the EU case-law about the right to be forgotten, enshrined also in article 17 of the GDPR, and compares its developments with some trends at domestic level.

Keywords: Oblivion, Balancing, Information.

Summary: 1. Historical Remarks. – 2. EU Law Impact on Domestic (Italian) Law. – 3. Recent Judicial Developments.

1. Historical Remarks

Forgetting, or in more learned words oblivion, has always been something of great anthropological importance. The wish to forget traumatic events has always been a powerful driver of human behaviour at both the individual and the societal level, since the most remote antiquity [1]. In the Greek mythology Oblivion was even a goddess, the famous *Λήθη* [2].

[1] We know about ceremonies performed in primitive societies in order to establish a collective forgetting: see D. BATTAGLIA, *At Play in the Fields (and Borders) of the Imaginary: Melanesian Transformations of Forgetting* (1993) *Cultural Anthropology*, 430-442. With regard to the philosophical and anthropological aspects of memory and forgetting see A. ASSMANN, *Formen des Vergessens* (Göttingen 2016) and F. CIMATTI, *La fabbrica del ricordo* (Bologna 2020).

[2] According to T. HESIOD, *Theogony*, (Harmondsworth 1973) 225-226, Lethe was one of the dreadful daughters of Eris (the personification of Strife), and so a granddaughter of Night and Chaos. Lethe was also the name of one of the underworld rivers, and the shades of the dead drank its waters in order to forget their earthly life and so to be ready for reincarnation (PLATO, *Politeia* (Leiden 1989), 621; VIRGIL, *Aeneid* VI (London 1906), 713-715), or, in the later Christian versions, to be ready for Paradise (D. ALIGHIERI, *Purgatory*, XXVIII, 126-130). See also H. WEINRICH, *Lethe: Kunst und Kritik des Vergessens* (München 1997).

More specifically, humans have always tried to govern through legal instruments the unpleasant consequences of new technologies that seemed to render possible a perpetual survival of some information that could be unwelcome to those in power, or anyway destabilizing for the society. Therefore, ancient legislators ordered the systematic destruction of monuments, when the new potentially dangerous techniques were sculpture and engraved inscriptions [3], and then ordered the burning of books, when press played such a role in its turn [4].

In other interesting cases through the centuries, provisions that forbade to remember recent events were enacted in order to extinguish past hates at the end of civil wars [5], or in the attempt to avoid new conflicts [6], and with the aim to grant a peaceful transition from dictatorship to democracy [7].

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[3] Many relevant cases are reported by J. ASSMANN, *Das kulturelle Gedächtnis: Schrift, Erinnerung und politische Identität in frühen Hochkulturen* (München 1992) and N.N. MAY (ed.), *Iconoclasm and Text Destruction in the Ancient Near East and Beyond* (Chicago 2012), including the Egyptian attempts to destroy any memory of Hatshepsut, the woman who dared to proclaim herself Pharaoh, and then of Akhenaton, the heretic monotheist Pharaoh. E. VARNER, *Mutilation and Transformation: Damnatio Memoriae and Roman Imperial Portraiture* (Boston 2004), shows that also in Rome the destruction of imperial monuments was usually ordered after the deposition of an emperor or of a dynasty, but sometimes the same monuments were also restored after new changes of circumstances. Similar practices went on during the Middle Ages against the monuments of antipopes and of excommunicated sovereigns; see L. SANFILIPPO-A. RIGON (eds.), *Condannare all'oblio: pratiche della Damnatio Memoriae nel Medioevo* (Ascoli Piceno 2010).

[4] The historical examples are innumerable, from the Savonarola's *Falò delle vanità* to the Inquisition's *Index librorum prohibitorum* or the Nazi *Bücherverbrennungen*, and so on: see, also for other references, R. KNUTH, *Burning Books and Leveling Libraries: Extremist Violence and Cultural Destruction* (Westport 2006); L.X. POLASTRON, *Livres en feu. Histoire de la destruction sans fin des bibliothèques* (Paris 2004); P. BATTISTA, *Libri al rogo. La cultura e la guerra all'intolleranza* (Milan 2019).

[5] In 403 BC, after the civil war between the followers of the democratic leader Thrasybulus and those of the oligarchy of the Thirty Tyrants, an agreement was reached in Athens and death penalty was imposed on people who dared to "*μνησικακεῖν*" the strife of the recent past (ARISTOTELES, *De Republica Atheniensium*, 39.6 and 40.2). After a couple of millennia, in 1598 AD, the French Wars of Religion were ended by King Henry IV of Bourbon with the Edict of Nantes that contained a specific prohibition to "*renouveler la mèmoire*" of what had happened. Both cases are discussed by S. RODOTÀ, *Il diritto di avere diritti* (Bari 2012).

[6] In 44 BC a few days after the death of Caesar in Rome, his followers leaded by Marc Anthony and the conspirers defended by Cicero reached a compromise: the acts of the assassinated dictator would have remained valid, but his murderers would have been protected by a "*αμνηστία*", whose Greek literal meaning is precisely the denial of memory (see S. MAZZARINO, *L'impero romano* (Bari 1998), I, 40-41). But the agreement did not last, and the final outcome was inspired by a totally different approach to memory: Octavianus chased for years the killers of his divinized adoptive father all over the ecumene, and then dedicated the temple built in his new Forum to *Mars Ultor*, the Avenger God.

[7] In Spain all political parties accepted the so called *Pacto del Olvido* (meaning: "agreement of oblivion") after the end of the Francoist dictatorship in 1975. Only after the approval of the *Ley de Memoria Històrica* of 26 December 2007, the situation has changed.

Today internet and search engines are the new technologies that promise a (seemingly) permanent preservation of information [8], while each and every single individual is now considered as a sovereign on his/her own personal data.

Therefore, people ask for, and often judges do order, the cancellation of information that are not defamatory nor false [9], neither reserved [10], but true and originally published in a fully legal manner, because such data are now considered as not consistent with the current personal identity of the concerned individual. This is, indeed, the exact legal rationale of the right to be forgotten, as a right pertaining to the fundamental value of free self-identification [11].

At the European level the existence of such a right has been recognized by the Court of Justice in the well-known decision on the Google Spain case [12], has then been elaborated in specific Guidelines [13], and is now enshrined in article 17 of the General Data Protection Regulation [14].

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[8] Indeed, it could be just an illusion, given that the obsolescence of electronic supports is much faster than that of the more traditional ones: see L. RUSSO, *La rivoluzione dimenticata* (Milan 2001), 433. In fact, today we are still able to read ancient manuscripts in the libraries and engraved inscriptions in the monuments of our historical cities, but everyone has experienced that it is practically impossible to accede the information stored in floppy disks and CD-ROMs of a few years ago, or saved with a software version that is not compatible with the last updated one.

[9] Legal protection of the rights to honour and reputation against defamatory information dates back, at least, to Roman times, and defamation is considered as a crime in modern legal systems. But today private law remedies, such as civil liability, are provided also to protect the right to personal identity against the circulation of merely false information, given that "*The false light need not necessarily be a defamatory one*" (W.L. PROSSER, *Privacy* (1960) *California Law Review*, 383-423 and in particular 398).

[10] The protection of privacy as the "*right to be let alone*" dates back to S. WARREN - L. BRANDEIS, *The Right to Privacy* (1890) *Harvard Law Review*, 193-220. In the European framework it found a legal basis in article 8 of the Convention on Human Rights of 1950: e.g., its first recognition in the Italian Supreme Court case-law was grounded by Cass. 27.5.1975, 2129, the famous Soraya case, precisely on a direct application of article 8 to the domestic legal system. Today, the protection of personal data has been strongly enhanced by recent, European as well as internal, statutory acts, including, last but not least, our GDPR.

[11] See, for further references from different countries, F. WERRO (ed.), *The Right To Be Forgotten. A Comparative Study of the Emergent Right's Evolution and Application in Europe, the Americas, and Asia* (Cham 2020).

[12] We refer to the Case C-131/12, Google Spain v Google, ECJ, 13.5.2014. See, also for other references, S. PIETROPAOLI, *La rete non dimentica. Una riflessione sul diritto all'oblio*, in *Ars interpretandi*, 2017, 1, 67-80.

[13] The Guidelines were elaborated by the Article 29 Data Protection Working Party, composed by the Data Protection Authorities of all EU Member States, and were adopted on 26 November 2014.

[14] We refer to EU Regulation 2016/679 of 27 April 2016, in force since 25 May 2018. Its article 17 states that: "*1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the*

2. EU Law Impact on Domestic (Italian) Law

If we look at such developments from an Italian Law point of view [15], we have to notice that, quite interestingly, the most relevant European impact on the internal legal system has concerned not the recognition of the right to be forgotten, already admitted by domestic case-law, but the recognition of its limits, with particular regard to the respect for the competing rights to free information and to free historical research. Indeed, in a first moment internal judges had almost neglected such issues, but the European interventions sensitized them to consider the need for a balance with these other fundamental rights.

In fact, in the recent past, some famous Italian judicial decisions had recognized right to oblivion in a wide sense to a known politician under investigation

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obligation to erase personal data without undue delay where one of the following grounds applies: (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 point (a) of Article 9(2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1). 2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data. 3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information; (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3); (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or (e) for the establishment, exercise or defence of legal claims".

[15] About the Italian perspective on article 17 of GDPR see, also for other references: D. BARBIERATO, *Osservazioni sul diritto all'oblio e la (mancata) novità del regolamento UE 2016/679 sulla protezione dei dati personali*, in *Responsabilità civile e previdenza*, 2017, 6, 2100; A. THIENE, *Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio*, in *Nuove leggi civili commentate*, 2017, 2, 410; R. SENIGAGLIA, *Reg. UE 2016/679 e diritto all'oblio nella comunicazione telematica. identità, informazione e trasparenza nell'ordine della dignità personale*, in *Nuove leggi civili commentate*, 2017, 5, 1023; F. DI CIOMMO, *Diritto alla cancellazione, diritto di limitazione del trattamento e diritto all'oblìo*, in V. CUFFARO - R. D'ORAZIO - V. RICCIUTO (eds.), *I dati personali nel diritto europeo* (Turin 2019), 353-396.

for corruption [16] and to a former terrorist [17]. But soon after Google Spain in quite similar cases a right to be forgotten has been denied, because of the public function exercised by the applicant [18] or because of the historical relevance of the concerned events [19]. Indeed, we could say that, thanks to the European influence, these later judgements have rediscovered some important limits on the right to be forgotten [20], that are indeed granted also by the fundamental principles of the internal legal system, both at the constitutional level [21] and in important developments of ordinary legislation [22].

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[16] Cass. 5.4.2012, 5525, in *Guida al diritto*, 5, 44: a former socialist politician, who had been under investigation for corruption during the famous "*Tangentopoli*" (meaning something like "Bribesville") scandal and had been acquitted, was trying to restart a new political career but the news concerning the investigations were still online in the informatic archive of "*Corriere della Sera*", a prominent Italian newspaper; therefore, he obtained a judicial injunction ordering the newspaper to modify the archive, with a link to the updated news concerning the successive acquittal.

[17] Cass. 26.6.2013, 16111, in *Foro italiano*, 2013, 9, I, 2442: a former far left extremist, who had been a member of the terroristic organization "*Prima Linea*" and had already served his sentence in jail, obtained compensation against a local newspaper that had republished news concerning his troubled past.

[18] First Instance Tribunal of Rome, 3.12.2015, in *Il Quotidiano giuridico*: the applicant asked de-indexation with regard to his involvement in a criminal law proceeding, where he had never been sentenced, but the judge rejected the application also because the applicant, being a practicing lawyer enrolled in a public register, has no right to be forgotten in accordance with criterion n. 2 of the above-mentioned Guidelines of the Article 29 Data Protection Working Party, which excludes all persons who "*play a role in public life*". The difference with the case of 2012 is evident: the role in public life played by a politician involved in a corruption scandal is indeed much more relevant!

[19] Italian Authority for Data Protection, 31.3.1998, 152: a former far right extremist who had committed crimes of terrorism and had already served his sentence in jail, asked for de-indexation with regard to his troubled past, but the Authority rejected his application because, also in the light of criterion n. 13 of the Guidelines of the Article 29 Data Protection Working Party, the public interest to access information about his serious crimes, connected to a very relevant page of Italian recent history, has to prevail. Of course, we cannot accept to ground the distinction between this case and that of 2013 on a different evaluation of far right and far left terrorism, and so we have to recognize again a relevant impact of the European limits on the exercise of the right to be forgotten. See M. RIZZUTI, *Il diritto e l'oblio*, in *Corriere giuridico*, 2016, 8/9, 1077-1082, also for further references to Italian legal literature at these regards.

[20] The mentioned decisions still made reference to the Guidelines of the Article 29 Data Protection Working Party, but also the new article 17 of GDPR expressly confirms that right to be forgotten is limited by both freedom of information (paragraph 3, letter a) and historical research (paragraph 3, letter d). In fact, more recent Italian decisions, such as Cass. 27.3.2020, 7559, and Cass. 19.5.2020, 9147, have directly grounded on article 17 of GDPR the need to balance the right to oblivion with the competing rights to memory and to free press.

[21] In the Italian Republican Constitution of 1948 free press and freedom of information are protected by article 21, while the freedom of scientific research is protected by article 33.

[22] In the last years many legislative interventions have been enacted in Italy aiming at protecting against oblivion the historical memory of relevant tragic events, such as: the *Shoah* (with the Act of

We need to distinguish different legal aspects: if a politician has been acquitted from charges of corruption, he/she must be free to restart a political career but the public must be free to know about his/her past involvement in scandals; if a person involved in tragic historical events has already served his/her sentence, he/she must be free from any other sanction but historians must be free to do research and the descendants of the victims must be free to preserve their memory [23].

In a quite similar way, a need for distinction and for a reasonable balance is emerging with regard to parental anonymity (that is something analogous to oblivion): if, in order to disincentivize abortion, the biological mother is allowed to obtain anonymity after childbirth, this means that the child has no right to establish a legal parental relationship nor to claim for maintenance and inheritance, but it must not imply also the denial of any possibility to access to information about genetic ancestry for health-related reasons or for other relevant reasons [24].

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20 July 2000, 211), the Istrian-Dalmatian Exodus (with the Act of 30 March 2004, 92), and precisely Terrorism (with the Act of 4 May 2007, 56). The trend is going on with the legislation against the crime of negationism (Act of 16 June 2016, 115), and with other interventions to protect the memory of the victims of migration (Act of 21 March 2016, 45) and of mafia (Act of 8 March 2017, 20). Moreover such a trend is not isolated and similar initiatives can be reported also in other legal systems, with regard to the memory of: the *Holodomor* (with the EU Parliament Resolution of 23 October 2008) and other crimes of Communism (with the EU Parliament Resolution of 19 September 2019), the Slave Trade (with the French Act of 21 May 2001, 434), the *Medz Yeghern* (with the French Act of 29 January, 2001, 70, and the German *Bundestag* Resolution of 2 June 2016), the Native American Genocide (with, e.g., the Venezuelan Decree of 10 October 2002, 2028), the *Seyfo* and the *Katastrophè* (with the Swedish *Riksdag* Motion of 11 March 2010, that considered them together with *Medz Yeghern*), the *Sürgünlik* (with the Ukrainian *Rada* Resolution of 12 November 2015), the Ethnic Cleansing of Circassians (with the Georgian Parliament Resolution of 21 May 2011). In many cases the concerned events are still quite controversial and provoke harsh debates, the so called "memory wars", with international tensions (e.g. between Turkey and France about *Medz Yeghern*) or internal contradictions (e.g. France also approved the Act of 23 February 2005, 158, to recognize the positive role of French colonialism). At these regards see, from different perspectives, D. RIEFF, *In Praise of Forgetting: Historical Memory and Its Ironies* (New Haven 2016); E. SJÖBERG, *The Making of the Greek Genocide: Contested Memories of the Ottoman Greek Catastrophe* (New York 2017); M. BIANCA (ed.), *Memoria versus oblio* (Turin 2019); V. PISANTY, *I guardiani della memoria e il ritorno delle destre xenofobe* (Florence-Milan 2020); M. FLORES, *Cattiva memoria. Perché è difficile fare i conti con la storia* (Bologna 2020).

[23] In some interesting cases, the national appeasement after regime changes has been pursued through an exchange between a criminal law immunity for the perpetrators of serious delicts linked to the past regime, on the one hand, and the preservation of truth and memory for the victims, on the other hand. The most renown example is represented by the Truth and Reconciliation Commission instituted in South Africa after the end of Apartheid by N. Mandela, but other relevant examples can be found in other countries of Africa, Oceania and the Americas: see, also for other references, P.B. HAYNER, *Unspeakable Truths: Facing Challenge of Truth Commissions* (New York 2010). On the other hand, in the Italian historical experience such a moment is missed, because the post-war amnesty implied also a general amnesia: see, also for other references, P. CAROLI, *Il potere di non punire. Uno studio sull'amnistia Togliatti* (Naples 2020).

[24] Case C-33783/09, Godelli, European Court of Human Rights, 25.9.2012, deemed the Italian

3. Recent Judicial Developments

The above-mentioned European trend towards a careful limitation of the right to be forgotten is confirmed also by the most recent case-law of the European Court of Justice. First of all, with reference precisely to an Italian case, the CJEU has specified that there is no room for the right to oblivion when public registers are concerned [25].

Moreover, according to recent CJEU decisions "*the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights*", so that "*there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject… to carry out such a de-referencing on all the versions of its search engine*" [26]. Interestingly, in the same days a totally different approach has been adopted by the Court with regard to the illegal publication of defamatory content, with the recognition of a judicial power to block access to that information worldwide [27]. It is therefore quite evident that, according to EU justices, the right to be forgotten has a lower rank in comparison with the protection against defamation.

On the other hand, recent domestic case-law sometimes turns out to be less convincing. In a recent case decided by the Italian Supreme Court, with regard to a journalistic reconstruction of a murder dating back to twenty-seven years ago, the justices opined that this kind of historical research is not protected by art. 21 of the

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legislation on maternal anonymity not acceptable, because it was totally unbalanced against the child's right to information. In *obiter dictum* the Italian Constitutional Court of 10.6.2014, 162, declared that the same legal reasoning has to apply also to the anonymity of gametes' donors with regard to assisted reproductive technologies. On the other hand, Cass. 17.2.2020, 3877, has recognized an unlimited right to be forgotten with regard to the freedom of a transsexual person to choose a new name, precisely because in this case there no competing rights to be balanced.

[25] Case C-398/15, Camera di Commercio Industria Artigianato e Agricoltura di Lecce v Salvatore Manni, ECJ 9.3.2017, issued such a decision with specific regard to data archived in the Public Register of Enterprises run by the Chamber of Commerce of Lecce (Italy). See the comment to the judgement by A. VERDESCA, I. STELLATO, *Diritto all'oblio e pubblicità commerciale: un bilanciamento invertito*, in *Corriere giuridico*, 2018, 8-9, 1125, also for other references to Italian legal literature at these regards.

[26] The twin judgments with regard to the controversies between Google and the French Authority for Data Protection are: Case C-507/17, Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL), ECJ, 24.9.2019, and Case C-136/17, GC e a. v Commission nationale de l'informatique et des libertés (CNIL), ECJ, 24.9.2019. For a critical perspective see M. ASTONE, *Il diritto all'oblio on line alla prova dei limiti territoriali*, in *Europa e Diritto Privato*, 2020, 1, 223 et seq.

[27] We refer to the Case C-18/18, Eva Glawischnig-Piesczek v Facebook Ireland Limited, ECJ, 3.10.2019, regarding the controversy between the Austrian politician E. Glawischnig-Piesczek and Facebook.

Constitution, recognizing the freedom of the press, and, as a consequence, that the right to be forgotten should prevail: therefore, the decision imposed the anonymization of the data of the involved persons [28].

Indeed, the recourse to anonymization can even be approved as a sort of judicious compromise solution, but we have to critically discuss the quite surprising motivations used by the justices: in fact, in the Italian legal system, historical research, and scientific research in more general terms, enjoys of the protection of art. 33 of the Constitution, that is stronger than that of the said art. 21 [29].

Therefore, coming back to our starting point, we would like to conclude that the right to *ἀλήθεια* has to prevail against *Λήθη* [30].

[28] Cass. 22.7.2019, 19681, in *Foro it*., 2019, 10, I, 3071. See the comment to the judgement by V. CUFFARO, *Una decisione assennata sul diritto all'oblio*, in *Corriere giuridico*, 2019, 10, 1189, also for other references to Italian legal literature at these regards.

[29] More specifically, according to article 21 of the Italian Constitution press is free but with the limit of common decency, whilst according to article 33 research is *tout court* free without such a limit nor other comparable limits at all.

[30] The ancient Greek word for truth was *ἀλήθεια* and interestingly its literal meaning is "denial of oblivion" (privative alpha + *Λήθη*), and so disclosure of information. Moreover, we should remember that the opposite of Lethe, as personification of oblivion, was Mnemosyne, as personification of memory (*Μνήμη* in Greek), and that the latter was also the mother of the Muses (*Μοῦσαι* derives from *Μόνσαι* and contains the same root μεν-μαν of their mother's name, and of Latin words such as *mens* = mind or *meminisse* = remember), including precisely Clio, the Muse of historical research (HESIOD, *Theogony*, 53-79). About the "rights to truth" today see F. D'AGOSTINI-M. FERRERA, *La verità al potere. Sei diritti aletici* (Turin 2019).