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## **Freedom of the Press and Data Protection: The Italian Case**

### **A Difficult Balance**

Freedom of the press and privacy protection are poised in a continuous confrontation, a state of tension that may sometimes give rise to veritable conflicts.

On the one hand, you have the fundamental right to information, consisting in citizens' interest in being informed even more (or more importantly) than in the journalist's right to inform. On the other hand, you have the personal rights safeguarding privacy, identity, and dignity – rights and values that the media as such can jeopardise.

The right to know, freedom of communication, transparency requirements – all of them basic features of a democratic society – should not do away with the need for privacy, the right to unrestrained development of one's personality, to freely build up one's private sphere and have one's dignity respected in all cases.

This is shown by the fact that the Treaty establishing a European Constitution has given personal data protection the standing of an autonomous fundamental right – just like freedom of the press.

These different rights must be reconciled by unrelentingly striving to strike a balance.

### **“Media Privilege” and the Italian Anomaly**

As for the relationship between freedom of expression and personal rights, in particular the right to privacy, the European directive on data protection of 1995 left

Member States much room (in its Article 9) for setting out derogations and exemptions from most of the basic data protection principles. This is why one often refers to a “media privilege”.

When most countries enacted the respective data protection laws, this produced no or minor effects on the regulatory framework applying to freedom of the press; however, this was not the case in Italy. From this standpoint, Italy is an anomaly in the European context. Basically, data protection principles also apply to journalistic activities in our country. This approach was followed in the data protection Act initially passed in 1996 – albeit to an excessive extent, so that several amendments were subsequently introduced. The same pattern can be recognised in the legislation currently in force as laid down in the “Personal Data Protection Code” of 2003 – even though significant derogations from the standard requirements have been provided for in respect of journalistic activities, in particular as to the processing of sensitive data.

I am not going to dwell on the details of our legislation, however what I have said so far will probably enable you to understand why the Garante – i.e. the Italian data protection Authority – plays a “leading role” in Italy in the complex confrontation between freedom of the press and personal rights. It may be helpful to briefly outline how this subject matter has been addressed over the past few years in Italy’s legal system.

### **The Basic Tools Available to the Garante**

The Garante usually avails itself of two main tools to reconcile the interests at stake, that is to say:

1) Data protection legislation as related to its general principles and, in particular, the requirement concerning “materiality of the information with regard to facts of public interest” (I will try and explain shortly what this means and what importance should be attached to this principle);

2) A more flexible tool, i.e the Code of conduct applying to journalistic activities. This is an example of the co-regulation policy set out in our data protection legislation. It was adopted in 1998 by the Board of Journalists – which is the official

body representing Italian journalists – in co-operation with the Garante. The Code allowed applying general data protection principles to journalism by taking account of the multifarious gamut of cases in which a difficult balance must be struck between personal rights and freedom of the press.

### **13 Articles To Be a “Good Journalist”**

The Code of Conduct – consisting of 13 short articles – is also the end-point of an analysis that has been carried out over several years by the most enlightened representatives of the journalistic profession. It is a valuable answer to the increased awareness of the public opinion, which is nowadays much more sensitive and responsive to the contents handled by media.

The Code applies to all journalists, photographers, and camera operators as well as to any person publishing articles, essays or other intellectual works whether on a regular basis or not. This is actually a fundamental difference compared with conventional codes of practice; indeed, this Code also applies to non-professional journalists.

(The text of the Code is available at [www.garanteprivacy.it](http://www.garanteprivacy.it); it is on p. 116 of the English version of the Italian data protection Code).

### **Contents of the Code of Conduct**

#### ***a) Limitations in General***

Let me now refer to the contents of the Code. A basic concept is the “materiality of the information”. Journalists are required to evaluate whether dissemination of a personal data contained in news is material, i.e. pertinent, by having regard to the public interest. At times, quoting a person’s name, publishing a photograph or reporting a highly personal item of information are immaterial, therefore one must refrain from doing so.

*For instance, in a title such as “Biker Run over by Bus outside a Gay Haunt”, the latter item is not pertinent to the news and unnecessarily violates the data subject’s personality rights.*

Another general limitation applying to journalistic activities consists in a person’s right not to be discriminated against on account of his/her race, religion, political opinions, sex, and personal, bodily or mental conditions.

*For instance, “Cancer Patient Robs Bank” is unacceptable as a title.*

### ***b) Specific Safeguards***

There are several safeguards applying to specific individuals, values and situations. Let me briefly list them with some examples.

- Sensitive Data: The concept of “materiality of the information” is especially important in this case; any reference to relatives and/or other individuals that are not involved in a story will have to be avoided. *“Muslim Kills Wife”* is unacceptable as a title.

- Protection of Private Domicile: A journalist may not enter someone’s house or film the inmates of a hospital or prison without the data subjects’ consent.

- Public Figures: They are entitled to less stringent privacy safeguards if news concerning their private lives are directly related to their public role.

- Persons Involved in a News Story: A practice that is all too common in Italy leads to publishing photographs of individuals under arrest or criminal “mug shots” without the persons’ consent for no “proven judicial and/or police purposes”. The fight waged by the Garante to eradicate this practice, though officially supported by senior police officials, is bound to be a failure. The police and judges/prosecutors are actually too keen to self-promote their activities in the media, indeed news and photographs are regarded as items to be bartered.

- Diseased Persons: The Garante applied its harshest sanction, i.e. blocking the processing of information, in connection with publication by a number of media of several data concerning a person affected by Creutzfeldt-Jakob disease. Following a highly hypocritical approach, no daily had actually disclosed the name of the young girl concerned, however the information made available did allow identifying her – and she was unaware of her disease. More recently, it was maintained – with regard to the publication of news on the disease affecting a Minister that was running for the European Parliament elections – that electors were entitled to know whether a candidate would be in a position to fulfil his mandate, however there was no need to probe into the details of the relevant disease.

- Sex Life: The Garante has had to repeatedly highlight that individuals have the right to keep confidential their own sex preferences and orientation.

- Children: Many decisions by the Garante have addressed the enhanced safeguards to be afforded to children. Media seize every opportunity to claim that it is necessary to protect our children, but then mercilessly pounce on any case involving a child either as the main character or as a victim. An infanticide story has drawn and still draws the exaggerated attention of Italian media.

### **Fighting Gossip and Beyond**

As these very summary examples perhaps show, the protection of privacy in connection with journalistic activities goes well beyond the mere fight against gossip. Although “paparazzi”, i.e. photographers on the lookout for snatches of love stories between cinema stars, were a by-product of the Italian cinema world in the post-war period, the Garante chose to play its game in earnest to protect individuals and their dignity – acting much more in the interest of the public at large than as the watchdog of VIPs.

## **A Difficult Start**

You should not be misled into believing that building up this original Italian approach was as easy as one, two, three.

When the 1996 data protection Act came into force and it was announced that a Code of conduct would be drawn up, a violent reaction was sparked in some areas of the journalistic profession. Threatened freedoms, censorship, a crackdown on freedom of the press were some of the terms wielded by the media. It was a white-hot debate. However, the authoritativeness and reliability of the Italian Garante played a key role. On the one hand, our Authority managed to obtain some amendments to the legislation for the benefit of journalism; on the other hand, we could finalise the Code of conduct – which does afford enhanced safeguards to citizens and raises journalists' awareness of and sensitivity to these issues. The autonomous role played by the Italian Garante – which is also strengthened by the mechanism for appointing its 4 members, of whom two are elected by the Chamber of Deputies and the other two by the Senate – has given rise to a set of specific “case law” in this sector; indeed, the balanced approach followed in the Garante's decisions over the years has been finally recognised both by journalists and by citizens, who can apply to our Authority whenever they believe a news report to have violated their dignity. The main decisions issued by the Garante were actually collected in a book called “Privacy and Journalism. Freedom of the Press and Citizens' Rights”, which was presented in almost all training schools and university departments for journalism studies.

## **Technological Innovations**

Technological development, in particular the Internet, allows journalists to access an increased amount of information and disseminate, in turn, many more items of information – which carries additional problems for data subjects. Let me make an example. Internet does away with all space and time boundaries as regards dissemination of news. If posted on a web site or re-published on the site managed by a newspaper, radio or TV station, an article can be read anywhere for an unlimited

amount of time. That is to say, it is no longer filed in some dusty folder. This entails the elimination of the so-called “right to oblivion”, meaning the right to rest assured that a news concerning ourselves will be forgotten. What I am saying applies to both true and false statements, which may cause terrible havoc. A search engine will be enough to retrieve an old news item you would like to have forgotten. If you are a job applicant, it will not be easy to pass off as a qualification that you were charged – perhaps when very young – with participating in a students’ demonstration or kicking up a row in a bar. In a recent decision by the Garante, we requested and obtained erasure of a news item also from the web sites of the relevant newspapers.

In this regard, one cannot but acknowledge that denials and rectifications are poor remedies. What remedy can actually be afforded to an individual by rectifying an item of information that has meanwhile travelled all over the Web?

There are plenty of problems to be addressed here, indeed new problems keep heaping up. I only hope that the Italian experience as outlined in my presentation will be helpful for the exchange of our views.