The Protection of Privacy in Italian Law: Case Law in a Codified Legal System

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I. TERMINOLOGY

The use, in the Italian legal vocabulary, of words which have their origin in legal developments in other countries, is becoming more and more widespread. Such words are used in the creation of legal doctrine, in the reasoning of judgments, on occasion in judicial decisions, and even in the wording of legislation. This may flow from the traditional "xenophilia" that is the hallmark of the Italian culture and national character; or it may be the result of the impossibility of rendering concisely in Italian a particular phenomenon, institution, or concept. Other explanations could be found but it would serve no purpose to list them here. For the fact remains that imported words such as "leasing," "factoring," "franchising" and "project financing" are now in common use in Italy. There has been no sign of any negative or resentful attitude to these words that would have ensured their immediate conversion into Italian, on the lines of what has happened in France. There is no

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prohibition in Italian law of the use of foreign words; indeed any such prohibition would be unthinkable.

This was what happened with the word "privacy," which has always been used in Italy in its English version. To be sure, there has been no shortage of Italian translations of the term, such as *diritto alla riservatezza* (the right to privacy), *diritto al riserbo* (the right to be treated with discretion or, to privacy), *diritto al segreto della vita privata* (the right keep one's private life secret) and *diritto ad essere lasciati soli* (the right to be left alone). Yet it does not take much to realise that some of these terms are literal translations: *riservatezza* and *riserbo* are translations of "privacy"; and *diritto ad essere lasciati soli* is equivalent to "the right to be left alone." In any event, none of these literal translations has undermined the widespread and uncontested use of the word "privacy." This phenomenon is of interest not only for students of Italian linguistic usage and the Italian language, but also for lawyers. Terminology in the law is never a matter of chance. It is manifestly the result of tradition, or of practice (especially commercial or contractual practice), or of its own foreign origins. In the development of Italian law, the right to "privacy," in the modern sense of the word, is the result of an importation from the world of common law. The legal meaning has been imported together with the linguistic usage. What we are looking at, therefore, is a real transplant—a phenomenon attentively studied by comparative lawyers—with all the modifications required by the peculiarities of the legal system into which the transplant has been made.

II. THE TRANSPLANT AND ITS FORMATIVE ELEMENTS

It is interesting to enquire how this transplant has come about: in other words, what formative elements have enabled its insertion into Italian law and its subsequent development. Two such elements have played a major part in this operation: legal doctrine; and (academic) commentary on case law. Legal doctrine has assisted, accompanied, and consolidated the creation of the right to privacy. Italian legal scholars, always curious to know what is happening abroad, and especially about the most important legal developments, have attempted to describe the right as having originated in the United States at the end of the last century, in the writings of Warren and Brandeis[1]; they have tried to find a

1. Rodotà, *Tecnologie e diritti* [Technology and rights], Bologna, 1996, in which the fundamental themes of the right to privacy are dealt with. The history of Italian legal doctrine and, first of all, German legal doctrine is offered by Ferrara-Santamaria. "The right to undamaged personal intimacy," in *Riv. dir. priv.* [Review of Private Law], 1937, 171. After the war, among the first unfavorable contributions see Pugliese, "Il preteso diritto alla riservatezza e le indiscrezioni cinematografiche" [The so-called right to privacy and indiscretions on film], in

basis for the right in the scanty provisions of international, constitutional, and ordinary law, in order formally to place it in our legal system[2]; and they have traced the course of various developments abroad. They have examined these first, where the right to privacy has been the subject of case law, as in the common law systems; secondly, where it has received the recognition of general legislation, as in France, where the French Civil Code has been "renewed" by the introduction of Article 9; and thirdly, where legal provisions have been enacted relating to single specific branches of the law, as in the numerous statutes on the collection of personal data on computer.[3] Academic commentary on decided cases has been the deciding factor, as a formative element, because the right to privacy in the Italian experience has been, and still is, specifically derived from such legal activity. Actual legislation has so far had little influence, with the exception of a few provisions contained in the Workers' Statute designed to protect the privacy of employees, and of some provisions contained in the legislation on criminal records and on the treatment of members of the armed forces. In Italy, until a few weeks ago, there was thus still no general legislation on data-banks. The draft law, dating back to the beginning of the eighties, had had a long and tormented legislative life. I, myself, was a member of the Commission, whose chairman was the President of the Court of Cassation, Professor Giuseppe Mirabelli, which was given the task of producing the first draft. The absence of any general legislation on personal databases had been preventing Italy from signing the Schengen Agreement. Despite difficulties the law was finally passed by Parliament a few weeks ago.

Article 1 of the law mentions the right to privacy (*riservatezza*) and the right to *identità personale*: the right to have one's personality protected from false representations in the public eye. It goes on to explain that the new law is to "ensure that in the handling of personal data, the rights, the fundamental liberties and the dignity of natural persons are respected, with particular reference to the rights to privacy and the right to have one's personality protected from false

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Foro It. [Italian Forum], 1954, I, 115 and Ondei, "Esiste un diritto alla riservatezza?" [Is there a right to privacy?] in *Rass. dir. cinematografico* [Collection of film law] 1955, 66; among the favorable contributions see Musatti "Appunti sul diritto alla riservatezza" [Notes on the right to privacy], in *Foro It.* [Italian Forum], 1954, IV, 184; De Cupis, *I diritti della personalità* [The rights of the personality], Milan, 1959, p. 47 ff.

2. E.g., see Giacobbe, "Il diritto alla riservatezza in Italia" [The right to privacy in Italy] in *Dir. e società,* [Law and Society], 1974, 687; Frosini, "L'informazione pubblica e la riservatezza privata," [Public information and personal privacy], in *Riv. trib.* [Law Courts Review] 1973, 5.

3. On this point see Alpa, Bessone, Zeno-Zencovich, *I fatti illeciti* [Illicit facts], vol 14 of the *Trattato di dir. priv.* [Treatise on private law] directed by P. Rescigno, Turin, 1996.

representations in the public eye." Obviously, the text of this law was not the place to offer a complete regulation of the right to privacy as a whole; arguably that is unnecessary, since the right is already regulated by "case law." Nevertheless, it is important that the right has been mentioned in the wording of an enactment, because this can be seen as a definitive recognition of the right, giving it the legislative seal of approval.

A fundamental characteristic of the right to privacy in the Italian legal system may now be stated. It is a right which, apart from the creations of legal theory (which, though necessary, are not conclusive), has been able to come into being and to develop as a result of judicial activism. Of course, there remain differences of style. The formalistic method, which generally prevails in Italy, may tempt observers to focus on differences with the Common law. Yet, notwithstanding this, it is arguable that our present experience in this particular branch of the law, though a continental one in character and flavor, has come close to that of common law, especially in so far as it shows that this right has its origins in decisional law. It can also be seen as an example of the phenomenon which Professor Markesinis has described as "The Gradual Convergence" of the European legal systems.

Still on an introductory note, it may be useful to point out that, in terms of the references found for it in existing legislation, the right to privacy in Italy has gone through several phases as far as its legal basis is concerned. During the first phase, its basis was found in Article 8 of the European Convention on Human Rights. In the second phase, the right was based on Article 10 of the Civil Code, which governs one's rights over one's image (that is, the right to prevent the use of visual images of oneself and one's family being used in such a way as to damage one's own, or one's family's, dignity or reputation). In the third phase, the basis was seen to lie in Article 2 of the Constitution, which protects the individual, both as a single person and in the social groupings in which his personality is active; and in the last and present phase, the right is justified by reference to the general principle of protection of the person, as acknowledged and guaranteed by the Constitution as well as the European Union.

III. THE CONCEPTUAL FORMS OF THE RIGHT TO PRIVACY AND ITS APPLICATIONS

The legal transplant to which I have alluded, has not been merely mechanical. For one thing, it has needed the modifications dictated by the existing legal system and by the new needs occasioned by the

computer society in which we now live. For another, it has grown and divided itself into categories.

The contemporary situation is more complex than will appear from these short notes; and there are several reasons for this complexity.

The first reason is that—even in the context of a general right of personality—several forms of right can be discerned which resemble, or assist, or are actually intertwined with the right to privacy. I refer to the following:

(i) The rights of a human being over his image, which relate to the use made by third parties of the visual representation of a person, whether for the purpose of information or publication or for financial purposes in the narrowest sense (in the latter case, we refer, using English words, to the "right of publicity").

(ii) The rights of a person to his identity, that is, to the identity he knows in himself, which consists of the wealth of ethical values and political, economic, social, and sexual persuasions that belong to an individual and that must not be misrepresented or distorted in their presentation to the public.

(iii) The rights of a person to his name, perceived not merely as the means of identifying him but also as an expression of the individual's personal history, his way of being and presenting himself.

(iv) The right to a person's genetic identity.

(v) The rights of a sick person when his illness is related to his behaviour (his pleasures, his sex life, and so on).

(vi) The ways that these rights or, more specifically, these forms of the single, all-embracing right of the personality, conflict with the right of reporting, which belongs to journalists working in the press, radio, and television networks, and with the right of artistic expression.

The right to privacy also affects activities which, because of developments in technology, make the person more vulnerable, such as the creation of personal databases on computer, phone tapping, and the transmission of information and images via the Internet.

Following the earliest recognitions of the right to privacy by judges in decided cases, awareness of this new right spread not only to legal scholars but also to the rest of society; and the (rather imaginatively so-called) "social conscience" has assimilated the concept of the right to privacy, taking it to mean that the freedom of the individual must be protected within the social structure. Privacy is regarded as a "civil right" and ranks as one of the so-called third generation rights (after political rights and social rights). Proceedings relating to the right to privacy have been quite a growth industry; and the records of decided cases for the last fifteen years offer a very rich selection of applications of the right: in the

collections of judgments from 1980 until today, there are more than five hundred recorded decisions of courts of all instances; and this does not include decisions which have not been published in journals. Given the huge and growing volume of civil litigation, this may not be an enormous figure; but it may indicate that the number of suits brought and settled is even higher.

The application of the right to privacy first lapped the edges of and then invaded distinct branches of the law which are quite remote from each other. Merely to obtain a faint and approximate idea of the phenomenon, one should think of questions such as: the right to privacy and the voting powers of an administrative committee[4]; the sanction of suspending a driving licence[5]; the dismissal of a local government employee during his probationary period[6]; the use in the course of a criminal trial, of recordings made illicitly[7]; the theft of company documents by an employee[8]; the negative effect upon communal living of the cessation of the legal extension of the lease[9]; the question whether balconies and roof terraces may be built[10]; whether it is lawful for an employee to present a false medical certificate to his employer because he does not want to reveal that he is, or has been, in custody[11]; the publication of information relating to the payment of taxes[12]; the entrusting of the children to the other, separated spouse if the spouse to whom they had been entrusted has abandoned all discretion by publicly revealing his relationship with another person[13]; searches of the property

4. *Cons. Stato* [Consiglio di Stato: the highest administrative court], VI, 2.5.1983 no. [of judgment] 300, in *Cons. Stato* 1983, I, 556.

5. *T.A.R.* [Tribunale Amministrativo Regionale] Abruzzi, sez. L'Aquila [Regional Administrative Court of Abruzzi, L'Aquila section] 24.3.1982, no. 150, in *Rivista della Circolazione dei Trasporti* [Review of traffic cases] 1982, 156, 346.

6. *T.A.R.* [Tribunale Amministrativo Regionale] Lombardia, sez. Milano [Regional Administrative Court of Lombardy, Milan section], 26.10.1982, in *T.A.R.,* 1982, I, 3384.

7. *Cass. pen.* [Criminal Court of Cassation: the highest court of criminal appeal], 1983, 684.

8. *Trib. Lodi* [Court of Lodi, 16.3.1982, in *Orient. giur. lav.* [Directions in labour law], 1982, 1280.

9. *Cass. civ.* [Civil Court of Cassation: the highest court of civil appeal], 16.9.1983, no. 5604.

10. *Cass. civ.* 8.11.1983, no. 6594.

11. *Cass. civ. sez. civ.* [Civil Court of Cassation, labour law section], 29.11.1982, no. 6494.

12. *T.A.R.* Liguria, 26.6.1980, no. 371, in *Foro amm.* [Administrative Forum], 1980, I, 2171.

13. *App. L'Aquila* Corte d'appello: [Court of Appeal of L'Aquila], 31.12.1976 in *Giurisprudenza di merito* [a journal of jurisprudence derived from judgments on facts, i.e. any judgments including those on appeal, other than those given in the Court of Cassation, where only matters of law are considered], 1979, 625.

of persons in custody[14]; a divorced woman's use of her ex-husband's surname[15]; the installation, by the joint owners, of a security camera in the hall and staircases of a block of flats[16]; and so on.

The majority of cases relate to the protection of the privacy of employees (which is outside the scope of this Article) and the protection of privacy as it affects the publication of news, caricatures, and physical and conceptual images of persons in the mass media.

This branch of the law has been beset from the beginning by the problem of the protection of "famous" people, that is those people who because of their family, their profession, their role in politics, or the events of their lives, are already known to the public, so that there is a public interest of some kind in publication.

In this area of the law, the use of comparative case law—a practice inaugurated in Italy by that great master, Gino Gorla[17] and particularly developed in the United Kingdom by Basil Markesinis[18]—is an interesting subject for analysts. It has hitherto been very unusual for Italian judges to refer to foreign judgments as precedents; they have preferred to refer to domestic *precedenti* but in order to lighten the difficult task of balancing the interests involved and strengthening the right to privacy, it is probable that in future this method of comparing commentary on decided cases will find favor even with our judges. There are some interesting signs that this may already be happening in your own system; but that is not for me to comment upon.

IV. THE METHOD AND THE LOGICAL REASONING

The steps in the formal reasoning, of both academic and practising lawyers, are as follows. If an interest is to be protected it must be raised to the level of a subjective right (in this case, an absolute subjective right) that is protected *erga omnes*; that subjective right must be founded upon a reference to it in legislation. Such reference is "found" (using the practice of *Rechtsfindung*, or "finding the law") in legal provisions already in existence; once the right has been so established, it must be coordinated with any other rights that are in conflict with it; and any conflict is resolved by comparing the respective rights' legal validity and the relative

14. *Corte assise Torino* [Turin Court of Assizes], 12.11.1987, in *Giur. cost.* [journal of constitutional jurisprudence], 1988, 221.

15. *App. Roma* [Court of Appeal of Rome], 18.5.1987, in *Foro It.* [Italian Forum], 1987, I, 3143.

16. *Trib. Milano* [Court [Tribunale] of Milan], 6.4.1992, in *Arch. locazioni* [Archive of landlord and tenant cases] 1992, 823.

17. Gorla, *Il contratto* [The Contract], Vol. II, Milan, 1955.

18. Markesinis, *The German Law of Torts*, 3d ed., Oxford, (1994).

interests in their protection, having regard to the current state of the legislation.

In a case of breach of privacy, the reasoning is therefore as follows. The facts fall within the ambit of civil liability, which requires the application of Article 2043 of the Civil Code, the general provision on liability. The case is about "unjust" (or, unlawful) damage, caused by the infringement of an absolute subjective right, the general right of personality. At present, this right is "found" by directly applying Article 2 of the Constitution. According to this reasoning, the right to privacy is placed in a defined category: the type of damage is categorised as a tort; and the type of interest infringed is categorised as one of the rights of the personality; some aspects of it are covered by constitutional law and some also by the criminal law, when the infringement is accompanied by damage to assets that are protected by the criminal law.

Clearly, there are techniques, or fictions, at the heart of this reasoning. The fiction lies in the "discovery" of the legal provision and thus in the notion that the judge cannot create, but can only find, a rule that applies to the case, in the existing legal system. Another fiction lies in the comparison (or weighing) of interests, which is made as if the text of the provision or provisions referred to were so clear as to dictate to the judge what the outcome of the case should be.

In reality, an analysis of the facts and the "living law" reveals the truth to be the opposite of these fictions. Where there is no specific provision covering the facts under consideration (as there would be, by contrast in France, under Article 9 of its Civil Code) the "finding" is the result of interpretation, extending the application of the necessary rule, to cases it was not intended to cover, or applying it by analogy, or retrieving fragments of rules and putting them together in a sort of mosaic, from which the form of the right can be descried. Moreover, the construction of the right is driven by the additions the interpreter of the law makes to it from the values in which he believes and which he is interpreting, probably also praying "social conscience" in aid. These techniques of judicial procedure are an interesting aspect of the study of the right to privacy.

The majority of the judgments on the matter pertain to the interlocutory stage of proceedings: whether because of the urgency with which an order is needed, to terminate the abuse complained of and limit the damage, or whether because of the long time required in the Italian legal system to reach a judgment on the merits. In addition, since the damage is nonmaterial, even though sometimes the damages are significant in economic terms, compensation may be required to take a

specific form (e.g., rectification) or to take a different form (e.g., the payment of appropriate pecuniary damages).

V. THE FOUNDING CASES RELATING TO FAMOUS PEOPLE'S RIGHTS TO PRIVACY AND THE REASONING IN THEIR JUDGMENTS

Since, as has been underlined above, the right to privacy has its origins in legal doctrine and in commentary on decided cases, it has taken shape as a result of the process carried out by theoreticians and judges, often in opposition to each other, of refining the models of judgments. The theoreticians sketch the ideal models of judgments. The judges set out the actual models. The history of the protection of privacy in Italy is an instructive example of the following: the way in which model judgments evolve; the extension of private law by commentary on decided cases; and the growing sensibility of public opinion, of academic lawyers, and of judges, about the protection of the rights of the person. The most difficult problems are posed by the protection of the privacy of famous people; rather, the first cases relating to breaches of privacy relate to famous people or members of famous families. It is even possible to say—though I have never found the distinction very convincing—that the right to privacy in Italy has been formed from "hard cases." Certainly it has had a difficult evolution.

The earliest judgments deny the existence of any right to privacy *(riservatezza)* in our legal system and consequently either they refuse to award compensation to the plaintiff, or they award it by protecting related rights, such as the right to one's name (and not to have it falsely used), to one's dignity and reputation, and one's rights over one's image. In the first twenty or thirty years, a straight contradiction grew up between the lower courts (where matters are decided on the merits of their evidence) and the Court of Cassation. The former were more inclined to admit the existence of new rights, partly because they were and are more sensitive to the facts of a case. The latter was more inclined to apply the provisions of law strictly, since its duty was and is to supervise the correctness of judicial reasoning.

The earliest cases, both favourable and unfavorable, began to appear in the Fifties. It is difficult to determine whether the timing is merely fortuitous (as it often is in other tort cases), since these are dependent on the accidental occurrence of a damage-causing event; or whether the importance accorded by the law to these matters at that time was increased by the socio-political circumstances prevailing after the War. The fascist regime had ended; the press was more free to publish news, and to criticise the behaviour of individuals and especially of famous

people; people were reading more books, and the improvement in living standards favoured their circulation; the radio, though it was owned by the state, was no longer gagged as it had been before; and television, likewise publicly owned, was taking its first steps at free reporting, and gaining popularity among viewers (especially those who belonged to the less fortunate social classes) who had to congregate in bars and cinemas to watch the most engaging programs.

It was in this new climate that the earliest judgments were handed down, in the *Caruso* case and in the case of *Petacci.*

A. The Caruso *Case*

The judgments given in the case of *Caruso* differed at first, second, and third instance. The case was about the making of the film "Legend of a Voice." The film was about the great tenor, Enrico Caruso; and events from his private life were portrayed in it in a romanticised way, some of them with no foundation in fact. The singer's heirs claimed that this was damaging to his memory, his dignity, and his right to privacy. They sued the film company accordingly. There were, for example, episodes in the film which depicted the humble environment in which the tenor had lived in his youth, and showed his disputes with tax inspectors, his tendency to get drunk, his quarrels with colleagues, and even his attempted suicide. The judges at first instance affirmed the existence of the right to privacy and found for the plaintiffs. Even in their argued judgment[19] all the questions are addressed that were to be discussed in the years that followed and that even today constitute the main elements of the problem of privacy. The judgment is also exemplary in its logical structure which takes the form of a series of syllogisms—because it proceeds, after describing the applicable legislation, to describe the facts, and returns to the facts again in its statement of the law.

As for the foundation for its findings in existing legislation, the judgment states that[20]

> our legal system, although there is no explicit provision on the point, does recognise the existence of a right to privacy *(riservatezza or privatezza).* This is expressed in the prohibition against any interference by strangers in a person's private life and against any disclosure, by third parties, of facts or personal behavior which, not being by nature public, are not intended by the persons to whom they relate, to be made public. This right represents a fundamental need of the personality and the construction of the right and

19. Trib.Roma [Court [Tribunale] of Rome], 14.9.1953, in *Foro It.* [Italian Forum], 1954, I, 115.

20. *Id.* c.128.

> the rules relating to it must be sought, in the absence of specific legislation on the point, in the legislation relating to a person's rights over his image. The fact that these are protected by the law is a sign that the privacy of the person is also protected.

As for the fact that it was a famous person whose rights to privacy were being infringed, the judges at first instance affirmed that in such a case there were derogations from the rule:

> The public interest in knowing about the facts of these people's lives and about their behavior, has the same weight and is as worthy of protection, as is the [public] interest in being acquainted with their visual images. Nevertheless, the invasion of the private life of another person, even when it is lawful, must be seen to be justified . . . in other words it must be proportionate to the said public interest. It is in the public interest that everything should be known that may have contributed to the famous person's development or that is necessary for the public to evaluate him. It cannot be said, however, that it is in the public interest that disclosures should be made about the private life of the person, which are not justified by these purposes but merely satisfy the public's reprehensible inquisitiveness or taste for gossip. The limitation that fame imposes on the famous person's enjoyment of his right to privacy demands that the public interest be fairly balanced against the individual interest, so that the former does not cause the total, and unjustified, sacrifice of the latter.

We do not know whether the words "*riservatezza" and* "*privatezza"* were used in the advocates' written pleadings, or whether the judges of the court of Rome used them on their own initiative; but the fact remains that since that decision the term and the concept have come into use. Since, however, it was necessary, for formal reasons, to discover a provision of legislation on which to base the protection of the interest under discussion, the judges made use, by analogy, of an interpretation of Article 10 of the Civil Code. They did not consider the rules of the Constitution, because at that time the provisions of the Constitution were not regarded as applicable to relationships between private individuals but were seen as being relevant only to the relations between state and private persons. We should also take account of the fact that one of the most distinguished scholars of Roman law and Comparative law, the late Professor Giovanni Pugliese, severely criticised the judgment. In his view, the right to privacy *(riservatezza)* had no legal foundation in our system.[21] He held this opinion in spite of being fully aware of the efforts made in that direction by the creators of Italian doctrine, the Italian comparative law scholars, and by German and Anglo-American legal

21. "The so-called right to privacy and the indiscretions of film," in *Foro It.* [Italian Forum], 1954, I, c. 117.

commentary. Indeed, he cited some of them with his customary precision, referring to Ferrara-Santamaria, Kohler, and Ravà (all writing before the Second World War). He referred also to the writers of treatises and text books such as De Cupis and Santoro-Passarelli. He disposed of their efforts without mercy. He thus stated that

> the sweeping statements in these writings and pronouncements are not balanced by any persuasive demonstration, using the inductive arguments of positive law; instead, moral and social axioms are repeated, which would serve at best for an argument *de lege ferenda*.[22]

The model of the reasoning of the judgment, itself, was maintained on appeal but the judges' opinion differed as to legal doctrine. They questioned whether a right to privacy existed in our legal system. The model of the judgment came to grief in the judgment of legitimacy (i.e., at the Court of Cassation).[23]

The Highest Court—the Court of Cassation—asked itself the question whether there should be protection for a general right to *riservatezza* or *privatezza* as defined in Anglo-American case law as the "right of privacy." Its reply was in the negative:

> No provision of law authorises us to hold, as a general principle, that absolute respect for the privacy (*intimità*) of a person's private life has been sanctioned by legislation; still less, has it been so sanctioned as a restriction upon artistic licence; the mere desire for privacy (*riserbo*) has not been considered by the legislature to be a protectable interest. No one who has failed, or who has not wished, to keep the facts of his own life a secret, is allowed by the law to claim that the secret should be kept by other people's discretion. Curiosity and harmless gossip, though they are not one of the highest manifestations of the human spirit, do not, of themselves, give rise to a legal wrong. Still less, is it possible to speak of a right to privacy *(riservatezza)* when, as in the present case, the facts narrated do not belong to the real life of the character but have been drawn from the film director's imagination about the subject of the film, in order to make the narrative more lively and interesting and more expressive and significant as a creative work of the imagination.

In defence of this judgment, it would be possible to admire the unusual citation from foreign case law; but this is actually quite generic, since no reference is made either to a decided case or to the court making the decision; and one suspects that the judges of the Court of Cassation had mistaken for English law, a development that had taken place in the law of the United States! Moreover, there is a certain narrowness of

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22. *Id.*

23. *App. Roma* [Court of appeal of Rome] 14.9.1955, in *Foro It.* [Italian Forum], 1956, I c.796.

vision as to the possibility of applying the rules of existing legislation—if rules were needed; and there is a very noticeably moralising tone in the judgment, particularly where it is claimed that the individual, if he does not wish to be assailed by the curiosity of the public, should live as if he were subject to the rules of a *monastero*, or actually become agoraphobic (as did the mysterious Greta Garbo).

It is interesting to follow the course, not only of the debate carried on by the creators of legal doctrine, which accompanies the developments in commentary on decided cases, but also of the invective exchanged between the courts of appeal (especially the Court of Appeal of Milan and the Court of Appeal of Naples) and the Court of Cassation, which is a strange and altogether unusual occurrence, when seen in the context and climate of the time. At the end of the Fifties, and then at the beginning of the Sixties, the cultural climate of study and practice in the law was changing. The formal method was still *de rigeur* and *Rechtsfindung* still regarded as essential, as was the notion, dating from the Napoleonic era, that the judge is the *bouche de la Loi* (mouthpiece of the law). The attitude of the judges on the merits in all courts below the Court of Cassation was loyal in following the direction of the Highest Court, as if in observance of an unwritten law (since the judgments of the Court of Cassation do not constitute binding precedents). These judges adopted this attitude perhaps because they had a certain fondness for rules, or because of the prestige of the judges of the Court of Cassation. Less noble reasons may also have played a part since the reversal by the Court of Cassation of judgments given in the courts below is commonly taken as a negative evaluation of the professional abilities of the relevant judges when it comes to their promotion. But the picture was beginning to change: the provisions of the Constitution were coming to the fore in the reasoning given in judgments; the diversity of reference values regarded as available was being extended; and the protection of the person (even if famous) was becoming an important point of reference.

B. The Petacci *Case*

The model judgment, which reaffirmed the existence in our legislation of the right to privacy, is still that of the Court of Appeal of Milan in the *Petacci* case.[24] By this time the trend was quite clear (the first instance judgment is not recorded).

The case related to the publication of a book in which the author reconstructed the personality of Mussolini's mistress, Claretta Petacci,

24. *Cass*. [Court of Cassation: the highest court of appeal] 22.12.1956, n. 4487, in *Foro It.* [Italian Forum], 1957, I, 877.

who was executed with him at the end of the War. The book made assertions about her, and made them in a way that Claretta's family considered offensive and damaging to the privacy not only to herself, but also of members of her family. The reasoning in the judgment is at once simple, concise, and conclusive:

> The right to privacy *(riservatezza)* has, in this case, been breached. It is one of the fundamental rights of the personality, taking its place in that varied field of rights, alongside the right to one's name, over visual images of oneself, the author's moral rights, and so on. The right to privacy *(riserbo)* is the legal liberty to exclude any invasion made by strangers into the realm of one's personal and family privacy *(intimità).* This right requires that the person must be respected; and it must be applied fully, in its own right and absolutely, and must not be limited save by the restrictions which appear to be imposed on it for reasons of the public interest or because of the higher interests of society.

In this judgment, in contrast to earlier ones, the right to privacy *(riservatezza)* was presented as a right of the personality that is so wide in its scope as to embrace the other aspects of it that are expressly protected by the law, such as the right to one's name, one's rights over visual images of himself, and the confidentiality of documents etc.

Rechtsfindung is saved by the reference—which the Milanese judges copied from the written pleadings of the parties—to the European Convention on Human Rights. This states in Article 8 that: "*toute personne a droit au respect de sa vie privée et familiare, de son domicile et de sa correspondance*." As for the question whether a person's fame makes any difference, no derogation is admitted: this is because the right of reporting cannot be justified in the absence of the presupposition of public interest. The judges determinedly underline this clearly when they say: "even when it is a question of people belonging to the public life of a country, the secret of their private (intimate) life must be respected: there is no place, even in such a case, for the disclosures and interferences of public curiosity."[25]

The dispute finally reached the Court of Cassation.[26] This time the Highest Court had difficulty. It did not wish to alter its own case law, so it persisted in excluding the possibility of the existence in our legal system of a right to privacy *(riservatezza);* but its embarrassment is evident, for it also held that there had been a breach of the absolute right of the personality. In other words, the judicial form of the question was changed; but this time the underlying interest was recognised and

25. *App. Milano* [Court of Appeal of Milan], 26.8.1960, in *Foro It.* [Italian Forum].
26. Judgment given on 20.4.1963, n. 990, in *Foro It.* [Italian forum], 1963, I, 877.

protected. The Court held that the specific and piecemeal protection of individual rights of the personality, as provided in the Civil Code or in ordinary special laws, did indicate that there was a general right of the personality in our legal system.

The duty of *Rechtsfindung* is, likewise, discharged, though this time the judges did not rely on Article 8 of the European Convention on Human Rights. The Court held that Article as superfluous, since it expresses a principle that is already present and protected in our legal system. It relied, instead, on Article 2 of the Constitution, which provides: "The Republic recognises and guarantees the inviolable rights of man both as an individual and in the social formations where his personality is active, and requires the fulfilment of the binding duties of political, economic and social solidarity." This is an admission of the right to free self determination in the development of the personality within the limitations we have discussed above, which are imposed by life in the community.

This recognition by such a high authority, sounding as it does more like a *"non obstat"* than a *"placet,"* paved the way for the fuller protection of privacy in our legal system. Legal doctrine almost unanimously continued the trend, and the judges of fact, who courageously preempted the decision of the Court of Cassation, were duly rewarded. Indeed if we were called upon now, to identify the "leading precedent" we should be embarrassed: the decision of the Court of Cassation precedes in time, and culturally takes precedence over, the decisions of the judges on the merits; they are "precedents," in every sense of the word; they are not however "leading" because they appeared as courageous acts of anticipation rather than as models to be followed.

VI. THE CASE OF SORAYA ESFANDIARI AS "LEADING PRECEDENT"

Rather than adopting the reasoning used by the courts below the Court of Cassation prefers to construct its own model. At the beginning of the Sixties the model judgments of the courts of fact could be regarded as isolated decisions, in which the reasoning depends more on the particular circumstances of each case than on any consciousness of introducing a new right into the list of fundamental rights. That is why legal doctrine[27] has preferred to treat one of the later decisions of the Court of cassation as the leading precedent. It is the judgment in the case of the Princess Soraya Esfandiari.[28] The "precedent" in Italian legal

27. Visintini, *Trattato breve sulla responsabilità civile* [A short essay on civil liabilities], Padua, 1996, p. 82.

28. Cass. [see (24)] 27.5.1975, n. 2129, in *Foro It.* [Italian Forum], 1976, I, 2895.

practice and development does not have the same significance or role as in the common law jurisdictions. This makes it possible to say that the Italian right to privacy has quite a long history and that its origin can be found at the beginning of the Fifties. If, however, we wish to point to the first decision in which the highest court unhesitatingly recognised the right to privacy, we find it in the middle of the Sixties.

The case of Soraya is extremely simple. A news weekly devoted specifically to events in the lives of royal families, and consequently circulating among a wide public, had photographs—taken with a telephoto lens—prepared for publication (but had not yet been published). They showed the Princess Soraya behaving affectionately with an actor, inside her Roman villa. At that time the princess, who had formerly been the Czarina of Persia, was living in exile, having been abandoned by her husband because of her inability to conceive children. It was also known that she had been granted an annuity, subject to the condition that she led a chaste and exemplary life. This was what gave rise to the princess's claim, both for breach of her rights over her visual image and for breach of her right to privacy and for trespass in her home.

At first instance, the *Tribunale* of Milan allowed her claim. In the judgment given on appeal, the Court of Cassation—though until that time it had maintained an unfavourable attitude to the right to privacy—changed its opinion (we do not know whether this was to comply with the previous trend set by the Court of Cassation, or whether it was because of a change in the committee of judges) and partly reversed the judgment given at first instance. It did, however, stress that the public interest in information about a famous person is not to be confused with the public's morbid curiosity about facts relating to that person's private life.

There are several reasons why this case is interesting. First of all, the case involved the combined protection of a person's visual image and reputation with the protection of her privacy. Secondly, it showed that it is necessary to adjust the right of reporting (and of the public to information) to the rights of the person. Finally, the case related to a famous person and can be connected with recent events concerning members of reigning families.

The logical steps in the reasoned judgment of the Court of Cassation are also interesting. The Court ran through the history of judgments on the matter, from the earliest cases in which the right to privacy was affirmed, to the cases which revealed conflicts between judicial opinions (already alluded to above), to a consideration of the opinions formulated in legal doctrine.

With regard to rights over one's visual image, the Court stated that the commercial purposes inherent in the publication of visual images of

other people must be considered in the light of Article 41, clause 2 of the Constitution. This Article grants individual liberty to engage in commercial initiatives provided they do not damage human dignity. This means that the liberty commercially to exploit the visual image of another person is conditional upon obtaining the interested party's consent which, in the circumstances of this case, had certainly not been given.

With regard to the liberty to express one's thoughts from which the freedom of information derives (under Article 21 of the Constitution), the Court specified that these liberties must be exercised within the limitations construed from "case law." These are, that the facts that are made public must not only be true, but must also be consonant with an appreciable public interest; and that respect must be maintained for the privacy *(riservatezza)* and dignity *(onorabilità)* of the person, to which even well-known people have the right.

The outcome of the case followed from this. It was that sequestration of the weekly would not be granted, because neither the ordinary nor the constitutional legislation relating to the press enabled such an injunctive measure to be taken for breach of the rights of the person. Instead, the court ordered the payment of damages.

As a matter of method, the Court specified that "the time has not yet come when it would be right to hold that the traditional conception has been superseded, of subjective rights as the defining category of those subjective legal situations that are particularly important in our legal system, inasmuch as the court grants them the protection of immediate remedy [in their own right, and not by analogy with other rights]."

The judges proposed therefore to carry out a *Rechtsfindung,* that is, to identify the provisions of law in force that, without listing privacy *(riservatezza)* among the rights so immediately protected, can nevertheless can be used in order to afford it some protection. First of all, however, the Court of Cassation noted the need to define the meaning of the right which has by then come to be called in Italian: "riservatezza." They identified three different meanings which are as follows (starting from the narrowest meaning): (1) domestic privacy (*intimità*), which is linked to the protection of the home, to which the court says that perhaps the Anglo-American "right to be let alone" is equivalent; (2) the realm of individual and family life, and certain forms of illicit, inter-personal intimacy in relationships, including outside the home and in correspondence; (3) *riserbo,* or the right to require other people's discretion about one's private life, or privacy. Applying the "general principles of the legal system" the Court held that the first definition was too restrictive, the second more "reasonable," and the third too wide and general.

The list of the provisions referred to in order to found the right to privacy as described above in section (ii) is by now far wider than it was in the past; even though specific provisions relate to specific situations, the Court recalled the passage in Celsus: "*Scire leges non est verba carum tenere, sed vim ac potestatem*."[29] In addition, many provisions in the Constitution are used as means of affirming that the preservation of privacy is not implicit but explicit in the legislation (Articles 2, 3, 14, 15, 27, 29 and 41 of the Constitution); and use is also made of international provisions, from the United Nations Declaration on Human Rights to the United Nations Resolution of 16 December 1966 n. 2200, to the European Convention of Human Rights, to the Resolution n. 428 of 1970 of the Assembly of the Council of Europe.

The Court also specified that a rigid definition of privacy *(riservatezza)* is not appropriate, since it needs "flexibility as to its precise content" in order for it to be adapted "to the needs of [different] environments, places and times." A definition is, however, proposed in the following terms:

> . . . this right is a right of protection for those situations and events that are strictly personal and relating to the family and which, even if they take place outside the domestic residence, do not have an appreciable public or social interest for third parties. It is a right to be protected from such interference, even if it is effected by lawful means, for purposes that are not exclusively speculative and that involve no offence against dignity, reputation, or propriety, as is not justified by an overriding public interest.

As for famous people, the Court reaffirmed that there need only be an exception to the rule in respect of them, if there is "a real social interest or an overriding public interest."

The judgment has been greeted by the creators of legal doctrine with favorable commentary. In it, the conception of privacy *(riservatezza)* as having to do with ownership, is superseded; restrictions are imposed on the right of reporting; and it is admitted that even well-known people have a right to protection.

VII. THE DEBATE NOW GOING ON AS TO THE LIMITS OF THE RIGHT TO PRIVACY

Notwithstanding its recognition by the Court of Cassation and the favor it has found in legal doctrine, the right to privacy is still under discussion. There is no longer any doubt as to its naturalisation into our

29. L 17 Dig. de leg. ("Knowing the law is not a matter of knowing the letter of the law but its force and its power").

legal system, but in defining its limitations, its scope remains uncertain. These limitations can be summarised as follows:

(i) The Status of the Interested Party

There remains a grey area relating to famous people insofar as they carry on a political or institutional activity. Does the public interest justify the invasion of their private lives? Legal doctrine is divided on this point. A person proposing himself to the public for election to parliament is not bound to lead a blameless life in the behavior prompted by his affections; we Italians have always considered the reactions of American public opinion to the "escapades" of presidents or presidential candidates to be excessive, moralistic, and puritan at the same time; American smear campaigns have appeared to us more like the methods of political competition at its lowest level than the means of alerting the public to unbecoming and therefore unpromising traits of character or behavior. It is as if the contenders had only those arguments available to them to beat their opponents. On the other hand, it has been thought that breaches of privacy were permissible, where the facts of a person's private life, his friends and those he is intimate with, might affect not only his sexual but also his political morals.

The question remains open; and judgments are recorded, even from the criminal section of the Court of Cassation, specifying that "the right of reporting is limited by the right to privacy because facts relating to the intimate relationships and private life of a citizen are not matters of interest to society even if he is in public office."[30] Contrariwise, other judgments are recorded, which take a different line and specify that "the right to privacy may be sacrificed to the right of reporting, provided that a balance has been struck between the two rights: not an absolute, but a relative [balance], on the basis of a consideration of the subjective characteristics of the interested party."[31]

(ii) The Subordination of Privacy to Other Rights

Commentary on decided cases draws a distinction of degree between the rights (or between the forms) of the personality. The right to dignity and reputation has in many cases been considered more important than the right to privacy, so that the right to dignity and reputation appears to prevail—even when the right to privacy would have to yield to the right of reporting. The Praetor [Magistrate] of Rome, for example, says that "the right to privacy *[riservatezza]* and the rights over one's visual

30. *Cass. pen.* [see (7)], 9.2.1979, in *Riv. pen.* [Journal of Crìminal Law], 1979, 1041; *Pret. Roma* [Pretura: Magistrates' Court of Rome], 15.7.1986, in *Dir. informatica* [Journal of computer/information law] 1986, 926; *Pret. Roma* 13.7.1987, in *Dir. informatica* 1987, 1005.

31. *Pret. Roma* [see (29)], 7.11.1986, in *Giur. merito* [see (13)], 1987, 1190.

image may be reduced if the person belongs to current events, to history or to the news; but in such a case the prohibition against causing damage to that person's reputation and dignity still stands."[32]

(iii) Conflict with, and Adjustment to, Other Rights: Artistic Expression

Commentary on decided cases also draws distinctions between the different ways in which privacy is breached. Artistic, photographic, romantic and satirical creations are protected even in the Constitution, as well as being manifestations of thought and words. The case of Claretta Petacci again comes to the fore. Her love affair became the subject of a television screenplay "The Duce and I." This time, however, the court found against her (plaintiff) family because the judge considered that there was no obligation to respect historical truth in imaginative works of narrative literature or cinema, provided that the person was not presented in a pejorative way and the author did not evince a denigratory intent.[33] However, if the publication of photographs in a magazine results in a negative and insulting image of the person portrayed in them, the publisher and the editor of the paper are ordered to pay damages.[34] It is added also that what must be preserved in this case is privacy, dignity and reputation, but not the image the individual has of himself.[35] Satire is looked upon with favor because it acts as a social monitor of the behavior of famous people. Indeed, one reads in a judgment of the *Tribunale* of Rome[36] that satire has the standing of a subjective right and has constitutional importance; the boundaries within which it is permitted cannot be modeled on those of the right of reporting; and, indeed, satire does not answer a need for information, it does not have any necessary or obvious connection with factual truth, and it need not comply with canons of balanced expression, so that its only limitations consist in:

> an internal limitation, inasmuch as its legitimate exercise is dependent upon the fame of the person against whom it is aimed; the person, precisely because he has chosen fame as a dimension of his life and actions, is presumed to have renounced that part of his right to privacy that directly relates to his public dimension; and various external limitations, pertaining to each of the media by which the satire is published, and to the content of the satirical message, such as [a restriction against] the attribution of

32. Judgment of 6.5.1983, in giur. merito [see (13)], 1984, 550.

33. *Pret. Roma* [see (29)], 25.5.1985, in Dir. autore [journal of copyright law] 1986, 181.

34. *Trib. Milano* [Tribunale: Court, of Milan], 16.4.1984, in *Rass. dir. civ*. [collection of civil law], 1985, 1107.

35. *App. Roma* [Court of Appeal of Rome], 11.2.1991, in *Giust. civ*. [Civil justice], 1992, I, 223 and 2859.

36. Of 13.2.1992, in *Dir. famglia* [journal of family law], 1993, 1119.

> offensive facts, the disclosure of confidential information or the ironic representation of a person's private life.
>
> In any case, satire [should], according to the Roman judges, fulfil the function of "restraining the powerful, debunking and humanising the famous, and humbling the proud," thus limiting the excesses of power, reducing social tensions and upholding the virtue of tolerance.

(iv) The Right of Reporting

The most important moral values that are in conflict with the right to privacy are still the liberty to make one's thoughts known, the freedom of opinion and the freedom of the press. These are protected in the Constitution among the fundamental moral values in Article 21. In Italy this is a moral value which, since being trampled upon for the entire period of the fascist regime, has kept an aura of sanctity, so that every restriction placed upon it is rigorously examined, and often breaches of those rights that are in opposition to it are looked upon with indulgence. This makes it difficult to draw a line between the area in which the journalist's right of reporting can expand and the area which must be kept intact because it relates to the person; and even more difficult when the question concerns famous people, those in public office and those who belong, by birth or acquisition, to the most visible classes of society.

The distinction to be drawn is between the use of information, data, and images for an informative purpose and the use made of them for commercial gain; in the latter case the interests of a person who has not given his consent to their use certainly prevail.[37] In the former case, the relationship between the right of reporting and the right to privacy has had alternating fortunes: at the beginning, the right of reporting prevailed; in the latter part of the Eighties the right to privacy prevailed; and now it seems that the right of reporting is again in the ascendant. It is difficult to say whether this pendulum effect is due to changes in the mentality of the judges, or to changes in social consciousness, or to external factors, which mean that sometimes more attention is paid to the right to know than to the right to be left alone; the secrets and the underground relationships that have been a distinguishing feature of the last few years and have led to a real political and institutional revolution in Italy, have reasserted the public's right to know, and especially to know about famous (or notorious) people.

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37. *See Cass.* [see (24)] 16.4.1991, n. 4031 in *Nuova giur. civ. comm*. [commentary on new civil jurisprudence], 1992, I, 45.

One case that has caused a good deal of controversy was decided by the Court of Cassation on 18 October 1984, n. 5259.[38] It is the case which has gone down in history as "the journalists' ten commandments," because in it the judges "codified" the conditions upon which the press can be said to have freedom to publish news and comment (the case was about a financial transaction which was criticised in a specialist journal). The conditions relate to the usefulness of the information to society, the objective truth of the facts disclosed and whether the facts are reported in a civilised manner. The controversy sparked by the judgment extended not only to journalists' organisations, who were seeing rules for the conduct of their activities imposed on them by the judges, but also to legal commentators. What many people disliked was not the inclusion of the first two conditions, which in any case had been repeated in many other judgements, but the inclusion in the list of the third, which relates properly to the way in which an article is written: the means, even the literary means, of its expression. The judges (justly, in my opinion) censured the use of knowing implications, suggestive juxtapositions, scandalised tones, innuendos, and so on.

As for privacy (or confidentiality) of information the new law (mentioned at the beginning of this Article) introduces restrictions on the use of data made by journalists: Article 13 really introduces a privilege for journalists, because the consent of the interested party is not required when the information is gathered in the exercise of the journalist's profession, provided that the data are gathered for professional purposes; but the privilege ends there, inasmuch as personal data may only be disclosed and published, pursuant to Article 20 Clause 1 letter d): "within the restrictions that have been placed upon the right of reporting for the purpose of protecting privacy." These limits are posed by the question whether the information is necessary as a matter of public interest and the question whether the journalists' code of ethics is being respected. In any case, pursuant to Article 22, sensitive data may neither be collected nor published. These are data on person's racial and ethnic origin, his religious, philosophical or other convictions, his political opinions, his membership of parties, trade unions, associations or organisations of a religious, philosophical, political or trade-union nature, or personal details apt to reveal a person's state of health and sex life.

38. In *Nuova giur. civ. comm*. [commentary on new civil jurisprudence], 1985, I, 84, with a favourable comment from myself, at page 214 and a critical comment from V. Roppo, on page 326.

(v) The Type of Damage

The ethical value (or right) of the person is treated as having not only a moral value but also a value in pecuniary terms. These matters have been briefly dealt with. It is also worth mentioning another judgment in which a further kind of damage was highlighted, to add to those already mentioned: biological damage. It can happen, indeed, that the breach of privacy involves damage not only to a moral right, in that information which should have been kept private has been made public, but that it also involves physical and psychological damage to the victim. That is why damages have been awarded under this heading also.[39]

It is interesting to note, on the question of civil liability for breach of privacy (*riservatezza*) in respect of personal details collected in data banks, that the new law provides, at Article 18, that Article 2050 of the Civil Code shall apply. This relates to liability for carrying on dangerous activities. Legal doctrine and commentary on decided cases have interpreted this provision as heralding the presumption of not merely subjective, but objective liability. In any event, the reference to Article 2050 reverses the burden of proof, so that it falls upon the author of the wrongful act.

VIII. CONCLUSION

The history of the right to privacy in the Italian legal system is symbolic. It demonstrates that the differences between codified and noncodified legal systems are really only stereotypes, which may be useful for teaching purposes but do not always accurately represent the reality of living law. It also demonstrates that when it is necessary to fill gaps in the legislation, our judges do intervene (even if they are not directly empowered to act as legislators) and prepare the way for the intervention of the legislators, provided that they consider it necessary. Really, the right to privacy needs to have a chapter devoted to it in an entire book dealing solely with those elements of Italian private law that have actually been constructed and developed from case law.[40]

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39. *App. Trieste* [Court of Appeal of Trieste], 13.1.1993, in *Giur. It*. [Italian Law Review commenting on decided cases] 1994, I, 2358.

40. I am grateful to Ann Thompson for producing the first (and crucial) version of the translation of my Italian text.