
28. ANONYMITY AND THE LAW IN ITALY

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I. INTRODUCTION

In a technological society where everyone leaves traces in both the digital world and the material world—often without being aware of it—there is an increased interest in the problem of anonymity from a legal viewpoint. One only has to think about traces left by mobile phones, video surveillance cameras, and Internet connections to realize that anonymity seems impossible nowadays.

This *de facto* statement, however, has legal consequences. This chapter examines the legal understanding of anonymity in Italy. In it, I argue that data that is not anonymous is defined as personal data under Italian and European law; therefore, personal data protection law applies. I also suggest that the definition of anonymity is a relative one that depends on the legal context in which anonymity is sought.

II. ANONYMITY UNDER ITALIAN LAW

A. Anonymity Defined

Defining anonymity is not a simple task. The Oxford English Dictionary's definition of "anonymous" as "of unknown name"¹ evokes an absolute concept. By definition, anonymity excludes the identity of the subject to which it refers—it is faceless and without identity. Anonymity is a concept that evokes an absolute lack of connection between a piece of information or an action and a person.

1. "Anonymous," OED online, <http://www.oed.com>.

Upon closer examination, however, anonymity is often relative to specific facts, subjects, and purposes. A written composition, for instance, may be anonymous to some, but not necessarily to others, depending upon whether or not a person is able to recognize its author. Anonymity, therefore, can be defined in many different ways, something that affects the legal definition and experience of the right to anonymity.

In the Italian context, the concept of anonymity does not belong to public or private law but is more of a general concept. The definition of anonymity is found in the Italian Personal Data Protection Code (in force since January 1, 2004) and applies to both private and public entities.² The Code explicitly defines “anonymous data” as data that, in origin or after being processed, “cannot be associated with an identified or identifiable data subject.”³ There is no distinction made between electronic and non-electronic data in the definition.

Data can be anonymous as soon as it is collected or can be processed to make it anonymous. The key question is whether or not the data can be associated with the data subject. In which cases can it be deemed that data cannot be associated with a subject? Must this be a physical or a technological impossibility? The latter question has been clarified by the Council of Europe Recommendation on medical data protection, which states that information cannot be considered identifiable if identification requires an unreasonable amount of time and manpower.⁴ In cases in which the individual is not identifiable, the data is referred to as anonymous.

In contrast, the Code defines “personal data” as “any information relating to natural or legal persons, bodies or associations that are or can be identified, even indirectly, by reference to any other information including a personal identification number.”⁵ In like vein, the European directive defines “personal data” as follows:

[A]ny information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.⁶

Both definitions include not only data that refers to a data subject but also data that may possibly be connected to a data subject. However, the likelihood of making this connection is measured in relation to the time, cost, and technical means necessary to do so. The value and sensitivity of the information is also

2. Italian Personal Data Protection Code Legislative Decree no. 196 of June 30, 2003.

3. *Ibid.*

4. Council Recommendation (EC) R97/5 of February 13, 1997, on the protection of medical data.

5. Italian Personal Data Protection Code (n. 2).

6. EU Directive (EC) 95/46, The Data Protection Directive.

taken into account. The technical threshold at which medical data, for example, will be considered identifiable is lower, because the data is sensitive and therefore warrants a high level of protection. The question of whether or not data is personal or anonymous is a relative one that depends on the type of data and the uses to which it is put. Personal data can legally be processed only for specified purposes by authorized persons, and data can be anonymous to certain people under pre-defined conditions. In other words, data can be anonymous in some contexts, but not in others. Therefore, anonymity in the processing of personal data is not an absolute concept but rather a relative concept, tied to the use to which the data is put and protected by the reasonableness of the technical efforts that would be required to identify it.

This latter point is illustrated by Recital 26 of the Directive on the Protection of Personal Data. The recital explicitly refers to reasonableness when it states that “to determine whether a person is identifiable[,] account should be taken of all the means likely [to be reasonably] used either by the controller or by any other person to identify the said person.”⁷ As pointed out by the recent Opinion 4/2007 on the concept of personal data, adopted on June 20, 2007, by the Article 29 Data Protection Working Party⁸ the determination of the reasonableness of the means likely to be used should, in particular, take into account factors such as the cost of identification, the intended purpose, the way the processing is structured, the advantage expected by the controller, the interests at stake for the individuals, and the risk of organizational dysfunctions and technical failures.

Interestingly, reasonableness is not a civil law principle, but a common law principle. Therefore, anonymity is not a black-or-white concept—one cannot simply state that anonymity exists or does not exist. Rather, there are degrees of anonymity as well as degrees of identifiability, and the determination of whether each piece of data is anonymous must be made in context. This is particularly true in a digital world.

For example, the Article 29 Data Protection Working Party directive states that the test of identifiability is a dynamic one that should consider state-of-the-art technology at the time of processing.⁹ Although it may be possible to quantify anonymity in the future, given computer science research on *k*-anonymity,¹⁰

7. EU Directive (EC) 95/46, The Data Protection Directive R 26.

8. Article 29 Working Party Opinion on the Definition of Personal Data, Opinion 4 of June 20, 2007.

9. *Ibid.*

10. On the technological side, see Pierangela Samarati and Latanya Sweeney, “Protecting Privacy When Disclosing Information: *k*-Anonymity and Its Enforcement through Generalization and Suppression,” *Proceedings of the Symposium on Research in Security and Privacy* (1998): 384–393; Latanya Sweeney, “Achieving *K*-Anonymity Privacy Protection Using Generalization and Suppression,” *International Journal of Uncertainty, Fuzziness and Knowledge Based Systems* (2002): 571–588; Latanya Sweeney, “*K*-anonymity: a model for protecting privacy,” *International Journal on Uncertainty, Fuzziness and*

at this point, anonymity is a relative concept that depends upon context, and that must therefore be evaluated on a case-by-case basis.

B. Does a Right to Anonymity Exist under Italian Law?

Italian law does not provide for an explicit right to anonymity.¹¹ There is no general legal right, in the digital world or in the real world, for a subject to be anonymous, to not be identified, to refuse to disclose information, or to refuse to reveal himself or herself.

If the right to anonymity under Italian law cannot be affirmed in general terms—that is, as the right to forbid the connection among facts, acts, and data and a subject, in relation to any information and to any circumstance—it does not mean that a right to anonymity is not contemplated by the Italian legal system. Anonymity has been protected in the context of particular needs. Therefore, the picture for the Italian jurist is inevitably fragmentary.

There are three ways to ground the right to anonymity in Italian law. First, the right to anonymity is recognized under Italian law for certain subjects, in predefined circumstances, and for specific occasions, as specified by the law. We will return to this in the sections of this chapter dedicated to private law, public law, and criminal law.

The second way of grounding the right to anonymity in Italian law is by using the principle of minimization. As a general principle, applying to private and public law, as well as to criminal law, Art. 3 of the Personal Data Protection Code provides for the principle of minimization in data processing.¹² It states that information systems and software shall be configured to minimize the use of personal data and identification data in such a way as to rule out their processing if the purposes sought in the individual cases can be achieved either by using anonymous data or by making arrangements suitable to allow for the identification of data subjects only in cases of necessity, respectively.¹³ Therefore, according to this principle, when possible, personal data should be processed as anonymous data.

Knowledge-based Systems (2002): 557–560; Fosca Gianotti and Dino Pedreschi, eds., *Mobility, Data Mining and Privacy* (Berlin-Heidelberg: Springer, 2008); Jaideep Vaidya, Chris Clifton, Michael Zhu, *Privacy Preserving Data Mining* (Berlin-Heidelberg: Springer, 2006).

11. The right to anonymity has not been much explored by Italian doctrine. Among the rare works exploring the concept of anonymous in legal terms, it is worth mentioning the following: CANDIAN, *Anonimato (diritto all')*, in *Enciclopedia del diritto* (Milan, 1958): 499–502; CORSO, *Notizie anonime e processo penale* (Padova, 1977): Chapter VI, §§ 2 and 3, 148–155; PIOLETTI, *Il concetto di "scritto anonimo" è diverso e più vasto di quello di "non sottoscritto,"* in *Rivista penale* (1935): 1214–1219, G. FINOCCHIARO, ed., *Diritto all'anonimato* (Padova, Italy: Cedam, 2008).

12. Italian Personal Data Protection Code, Art. 3 (n. 2).

13. *Ibid.*

Third, the right to anonymity can be seen as instrumental to the effective exercise of the personal data protection right or to the effective exercise of the right to privacy. The personal data protection right and the right to privacy have a general constitutional basis in Art. 2 of the Italian Constitution.

I examine each of these avenues in turn.

C. Anonymity in Constitutional Law

The Italian Constitution does not provide for a right to anonymity. In certain cases, however, anonymity can be seen as instrumental to the effective exercise of the right of personal data protection or the right to privacy.

The Right to Privacy There is no explicit right to privacy in the Italian constitution. However, a privacy right was created by Italian jurisprudence in the first half of the last century.¹⁴ There is no single unifying notion of this right. To date, Italian courts have used it to protect the original historical meaning of privacy as the right to exclude others and to prevent the disclosure of information concerning the private personal and familial life of a person. The most recent meaning ascribed by the courts has been privacy as informational self-determination. The right to privacy has therefore been considered by Italian doctrine as a unique right and also as a plurality of rights.

The Right to Personal Data Protection The right to personal data protection is the right of a subject to exercise control over information regarding himself or herself. This general right includes, for example, the right to obtain information as to whether or not personal data concerning oneself exists, the right to be informed about the source of such data (as well as the purposes for and methods of their processing), and the right to know the entities to whom the personal data may be communicated. The data subject is also entitled to require that the data be updated or corrected, and that data processed unlawfully be deleted. Moreover, the data holder must certify that the required corrections have been made and that the data holder has notified the entities to whom the data was communicated.

14. Among the first Italian authors who have studied the right to privacy are Adolfo Ravà, *Istituzioni di diritto privato* (Padova, Italy: Cedam, 1938); Francesco Carnelutti, "Il diritto alla vita privata," *Rivista trimestrale di diritto pubblico* (1955): 3–18; Giorgio Giampiccolo, "La tutela giuridica della persona umana e il c.d. diritto alla riservatezza," *Rivista trimestrale di diritto e procedura civile* (1958): 460; Adriano De Cupis, *Teoria generale, diritto alla vita e all'integrità fisica, diritto sulle parti staccate del corpo e sul cadavere, diritto alla libertà, diritto all'onore e alla riservatezza* (Milano, Italy: Giuffrè, 1959); Adriano De Cupis, *I diritti della personalità* (Milano, Italy: Giuffrè, 1959–1973); Giovanni Pugliese, "Il diritto alla riservatezza nel quadro del diritto della personalità," *Rivista di diritto civile* (1963): 605–627; Pietro Rescigno, "Il diritto all'intimità nella vita privata," in *Studi in onore di F. Santoro Passarelli* 4 (Napoli, Italy: Jovene, 1972); Michele Giorgianni, "La tutela della riservatezza," *Rivista trimestrale di diritto e procedura civile* (1970); Stefano Rodotà, *Elaboratori elettronici e controllo sociale* (Bologna, Italy: Il Mulino, 1973).

The right to personal data protection is regulated by the Personal Data Protection Code. Because, as previously discussed, the definition of personal data is very broad, the right to personal data protection is also construed broadly. According to the code, everyone is entitled to the protection of his or her own personal data. This right is to be distinguished from the right to privacy or confidentiality. The former—the right to the protection of personal data—concerns information about natural or legal persons and is not necessarily relevant to the private or family life of an individual. The latter concerns the protection of an individual’s private life. Both rights are provided for in the Italian system in general and by the code in particular. The right to the protection of personal data is also different from the right to personal identity, which includes, for example, the right not to have one’s social image misrepresented.

The right to personal data protection was recognized in 2000 as an autonomous right by the Charter of Fundamental Rights of the European Union.¹⁵ It is mentioned in Art. 8 and is considered a right of freedom.

Anonymity Anonymity can be seen as a method to advance either the right to personal data protection or the right to privacy. The first is a “positive liberty” that allows the exercise of control on the part of the individual, whereas the second is a “negative liberty” that ensures that the individual has the power to exclude others from a personal and private sphere. The personal data protection right is a “freedom to.” The right to privacy is a “freedom from.” Because both rights are connected to liberty—one positively, the other negatively—anonymity can be seen as part of “diritti della personalità,”¹⁶ or the right of personality. Anonymity may therefore gain more prominence in the digital world than in the “material” world, because anonymity as a way of exercising liberty in the digital world in order to guarantee a sphere of freedom is instrumental to the expression of personality.

The constitutional foundation of the right to privacy and of the right to personal data protection is in Art. 2 of the Italian constitution, which states that

[T]he republic recognizes and protects all human beings’ fundamental rights, for individuals by themselves as well as in the social contexts where their personality is developed, and also requires them to carry out their duties of solidarity in the political, social and economic fields.¹⁷

15. The Charter of Fundamental Rights of the European Union (EC), December 7, 2000.

16. The category of “*diritti della personalità*” is a category elaborated by the Italian doctrine. It partially matches with the category of “personal rights” defined by Francesco De Franchis, *Dizionario giuridico-Law Dictionary* 2 (Milano, Italy: Giuffrè, 1996), as non-patrimonial rights, as the right to reputation, and as the right to physical integrity. It also partially matches with the category of “fundamental rights” defined by the Black’s Law Dictionary, 6th ed. (St. Paul, MN: West Publishing Co., 1990) as “those rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution.”

Because of the incomplete correspondence with other categories such as “fundamental rights” and “personal rights,” the definition in Italian will be maintained.

17. Italian Constitution, Art. 2.

The expression used by Art. 2 of the Italian constitution—fundamental rights—constitutes the basis for other rights that can be implied or explicitly stated in another constitutional provision, such as the liberty of expression.¹⁸

New rights would be “implied” and included in the content of more extensive rights explicitly recognized in the constitution. There are also “instrumental rights” that can be invoked because, in case of their absence, other rights would be deprived of their effective meaning or not sufficiently guaranteed.¹⁹

D. Criminal Law

Introduction The first argument against a possible right to anonymity is the need for security; nowadays, anonymity is usually considered only as a danger.

In criminal law, the opposition between anonymity and security is more evident.

As previously stated, anonymity in and of itself is not a right under Italian law—this is especially true in the criminal law.

In some cases, anonymity is denied. Identification seems to be the necessary basis for fighting and preventing certain crimes. Anonymity thus seems to be a source of social insecurity, particularly as regards antiterrorism legislation, money laundering legislation, and tax evasion.

On the other hand, in some cases Italian penal law protects anonymity, either as instrumental for the protection of other rights or as part of a data protection right.

Cases in Which Identification Is Required Starting from the cases in which identification is required, it is worth remembering that part of Italian criminal legislation is characterized as “emergency legislation.” It dates back to the 1970s and was enacted to counteract internal terrorism. An example is the duty of real estate owners to identify and promptly report to the police their tenants’ names and other data useful for personal identification.²⁰ More recently, emergency legislation has been passed to combat tax evasion, money laundering, and recent forms of terrorism.²¹ Some laws have been enacted to allow tax officers access to people’s bank accounts.²² A strict duty to inform public authorities about clients who are suspected of money laundering has also been enacted.²³

18. See Antonio Baldassarre, *Diritti della persona e valori costituzionali* (Torino, Italy: Giappichelli, 1997), 60; Augusto Barbera, “Commento all’art. 2,” in *Commentario della Costituzione*, Giuseppe Branca and Antonio Scialoja, eds. (Bologna-Roma, Italy: Zanichelli, 1975), 80.

19. See Antonio Baldassarre, *Diritti della persona*, 59 (n. 7).

20. D. l. 21.3.1978, n. 59, Art. 12.

21. D.l. 27.7.2005, n. 144 enforced with law 31.7.2005, n. 155.

22. Among others, d.l. 30.12.1991, n. 413, and d.p.r. 29.9.1973, n. 600.

23. See d. lgs. 20.2.2004, n. 56, modified by Art. 21 l. 25.1.2006, n. 29, and d.m. 10.4.2007, n. 601.

The police have powers to identify people. False declaration is punished by articles 495, 496, and 651 of the Italian Penal Code.²⁴ Moreover Art. 349, § 2 *bis* of the Italian Procedural Criminal Code states that the police, if authorized by the public prosecutor (*pubblico ministero*), can coercively take hair or saliva from a person under investigation or from a person who has refused to declare his or her identity or from anyone who seems to have declared a false identity.²⁵

However, it must be emphasized that legislation concerning a DNA database to assist in criminal investigations has yet to be passed, although it is now under discussion. Any new law must ostensibly comply with data protection standards.

Owners of public Internet access nodes have a duty to identify persons who access the Internet over their systems and register their names according to anti-terrorism laws.²⁶ Moreover, the same laws suspend Personal Data Protection Code rules concerning data retention, providing cancellation of traffic data, until December 12, 2008.²⁷

Anonymity as an Aggravating Circumstance In some cases, anonymity is seen as an aggravating circumstance. Examples include cases of menace, violence, or resistance towards a public officer.²⁸ In other cases, anonymity is an essential element of the criminal case—in the case of slander and false self-incrimination, for instance.²⁹ Anonymity is also considered instrumental in legislation for the protection of witnesses, which allows a witness at risk to be admitted to a special protection program in order to obtain a new formal identity (name, surname, date and place of birth, etc.).³⁰

Anonymity as a Form of Protection of Privacy and of Personal Data In other cases, anonymity is seen as a form of protection of privacy and of personal data. Article 734 *bis* of the Italian Penal Code protects the victims of sexual crimes by prohibiting the publication of their name or picture without their consent. Article 167 of the Personal Data Protection Code criminally punishes the illegal processing of personal data in certain cases when the offense causes effective damage to the victim.³¹ A special kind of malice is also necessary: the perpetrator of the offense has to have acted maliciously, with the purpose of causing such damage or of gaining profit from his or her conduct.

E. Private Law

Contractual Regulation In a contract, there are no obstacles to anonymity or pseudonymity, which are a mere fact, unless the contract is a formal contract

24.

25.

26. L. 31.7.2005, n. 155.

27. Term recently postponed by l. 28.2.2008, n. 31.

28. Italian Criminal Code, Art. 339, 610, 611, 612.

29. Italian Criminal Code, Art. 368–370.

30. L. 29.3.1993, n. 119.

31. Italian Personal Data Protection Code, Art. 167 (n. 2).

(deed) or the identity of the party is essential to the contract. The name in this case is functional to other interests—ensuring payment, for instance. From a theoretical point of view, the contract can be anonymously concluded and performed.

There are, however, some provisions that require an identification of the contractual parties. Among these are certain provisions contained in the “*Codice del consumo*.”³² Specifically, in contracts concluded at a distance, Art. 52, par.1, lett. a of the Code states that the supplier has to be identified and has the duty to give the consumers information about his or her identity. In the case of deceptive advertising, Art. 26 of the Code provides that the Antitrust Authority can require the advertising operator to give information about the client in order to identify him or her.³³ Another provision requiring identification is found in Art. 55 of the Electronic Communications Code,³⁴ which states that companies have to provide the Ministry of the Interior with a list of subscribers and a list of the buyers of prepaid cards that are identified at the time of the activation of the service.

Copyright law Italian law recognizes the right of the author to be anonymous and to use a pseudonym as well as the right to reveal his or her identity. Originally this right was not explicitly stated but recognized as implied;³⁵ in latter years, the right has been explicitly recognized.³⁶ Current copyright laws provide an author with the right to publish a work anonymously or with a pseudonym, if included in the contract with the publisher. The author has the right to reveal himself at anytime in any circumstance.³⁷ It is a moral right—a “*diritto della personalità*”—a right of personality that can be exercised towards anybody.

It should also be noted that the pseudonym has the same protection in Italian law as a name if it is well known, according to Art. 8 of copyright law, or if it has the same importance as the name.³⁸

Electronic Signature The legislation in force, known as the Digital Administration Code or CDA (“*Codice dell’amministrazione digitale*”),³⁹ was recently amended.⁴⁰ The Digital Administration Code has replaced previous legislation concerning electronic signatures. In essence, it introduces two types of signatures—the “*elettronica*,” or electronic (Art. 1, § 1, lett. q), and the “*qualificata*,” or qualified (Art. 1, § 1, lett. r). The former corresponds to the electronic signature of the directive, and the latter to the advanced signature with a qualified certificate created by a secure signature–creation device. The Digital Administration Code also

32. Consumers’ code, d. lgs. 6.9.2005, n. 206.

33. Consumers’ code, Art. 26 (n. 32).

34. Electronic Communications Code, d.lgs.1.8.2003, n. 259.

35. L. 25.6.1865, n. 2337.

36. R.d.l. 7. 11.1925, n. 1950.

37. This is provided by Art. 21 of the l. 633/1941.

38. According to Civil Code, Art. 9.

39. D. lgs. 82/05.

40. D. lgs. 159/2006; the technical rules in force are contained mainly in d.p.c.m. of January 13, 2004.

sets forth norms concerning the so-called “*firma digitale*,”—digital signature (Art. 1, § 1, lett. s)—which is a type (the only one at present) of qualified signature and which is based on PKI, its private key embedded in a smart card issued by selected certification service—providers who have to comply with strict rules regarding their economic robustness and trust requirements.

Although Italian law allows for the use of pseudonyms,⁴¹ an electronic certificate may not be anonymous.

Duty of the Internet Service Provider Internet service providers (ISPs) do not have a general obligation to monitor the information that they transmit or store; neither do they have a general obligation to actively seek facts or circumstances that indicate illegal activity.⁴² Art. 156 *bis* of Italian copyright law compels the defendant to disclose the identity of people supposedly engaged in intellectual property violations whenever the plaintiff’s complaints appear reasonably grounded.⁴³

On August 19, 2006, and September 22, 2006, the Tribunal of Rome upheld two orders on a complaint filed under this provision by the German music label Peppermint Jam Records GmbH, ordering an Italian ISP to disclose the identification data of 3,636 Internet users. The said users were allegedly involved in copyright infringement, performed through the BitTorrent and eMule applications. This was the beginning of the largest legal case ever in Italy in this field.

Peppermint had received the IP and GUID codes of these users from a Swiss company, Logistep, which was engaged in a massive scan of Internet traffic and subsequently built a collection of personal data on behalf of the plaintiff. For that purpose, Logistep used a specific software application simulating P2P file-sharing activities. Circumstances suggested that the 3,636 infringement cases constituted only a fraction of the actual users’ data collection. This led many experts to define it as an impressive profiling operation.

On February 9, 2006, the same Tribunal of Rome issued another order of disclosure regarding a complaint filed by the abovementioned German music label. On May 18, the Italian Data Protection Authority communicated that it would enter as a party in the trial,⁴⁴ for all necessary assessments with respect to the correct application of legislation on data protection.

On July 16 and 17, the Tribunal of Rome issued two new decisions overruling its previous ones. This time, the complaints of Peppermint-Logistep and Techland (a Polish company) were dismissed on the basis that they were not compliant with data protection legislation. The Tribunal found that Art. 156 *bis* was not applicable to the case at hand, for several reasons, the most relevant one

41. If clearly indicated as such in the certificate as provided in Art. 28, § 1, lett. d.

42. According to the legislative decree 70/2003, implementing the directive 2000/31 on electronic commerce.

43. Art. 156 *bis* of Italian copyright law implements the directive 2004/48/EC.

44. According to Italian Personal Data Protection Code, Art. 152, § 7 (n. 2).

being the incorrect balance of rights. Data protection and freedom of communication are recognized by the Italian Constitution in Articles 2 and 15 and, as such, can be overcome only for superior public interests or in case of protection against attacks to ICT systems.⁴⁵

Although these decisions do not technically affect the previous ones, it is believed that they will set the trend in Italy for future court cases.

Minors According to the Code of self-regulation “Internet and minors, which was approved on November 19, 2003, anonymity of users is allowed, but the identification of the users from the information society service providers is required. Therefore, the user may be anonymous to other users, but the provider has to know his or her identity. The provider has also to inform the user that it is possible that unauthorized third parties may identify the user through abusive data processing.⁴⁶

A specific protection concerning minors in cases of data processing by journalists was provided in 2006 by the updating of “*Carta di Treviso*”—the code of conduct concerning the right to information and minors.⁴⁷

Health Data There are a number of explicit provisions regarding health data that require the anonymity of data.⁴⁸ Health data cannot be published or disseminated⁴⁹ and must also be encrypted and kept separate from other data.⁵⁰ More generally, sensitive or judicial data has to be given a form of relative anonymity so that the data is temporarily unintelligible to the entities authorized to access them, but that also allows the data subject to be identified, although only in case of necessity.

The protection of the identity of the patients affected by HIV is provided for by Art. 5 of the Italian Personal Data Protection Code, and the protection of the identity of the women who have practiced abortion is provided for by Art. 11⁵¹

Debtors In the past, the need to guarantee the privacy of a debtor was raised in order to respect his or her particular situation of poverty;⁵² nowadays, however, a debtor’s anonymity is not generally guaranteed. However, the Personal Data Protection Code and the Code of Conduct and Professional Practice Applying

45. For more information on this case, and for the text of the decisions, see *Diritto dell’Internet*, (2007): 461.

46. See, among other things, the following decisions issued by the Italian Data Protection Authority: <http://www.garanteprivacy.it>, decision 11.10.2006, doc. web. n. 1357845; decision 6.4.2004, doc. web. n. 1091956; decision 10.3.2004, doc. web. n. 1090071.

47. The “*Carta di Treviso*” has also been published at <http://www.garanteprivacy.it>, doc. web. n. 1357821.

48. For example, Art. 87 of the Italian Data Protection Code, concerning prescriptions, and Art. 93, concerning the right of anonymity of the mother at the time of childbirth.

49. Italian Personal Data Protection Code, Art. 23, § 8 (n. 2).

50. *Ibid.*, Art. 22, § 6 and 7.

51. L. 5.6.1990, n. 135; l. 22.5.1978, n. 194.

52. For example, by l. 10. 5. 1938, n. 745.

to Information Systems Managed by Private Entities with Regard to Consumer Credit, Reliability, and Timeliness of Payments, which became effective on January 1, 2005, provide limits to accessing information regarding the debtor's financial position. In particular, as far as this research is concerned, the right to oblivion of the debtor has been specifically guaranteed. Many decisions of the Italian Data Protection Authority have been issued in this field.⁵³

Publication of Decisions Data that is somehow related to a trial, may be anonymized. This is provided by Art. 734 *bis* of the Italian criminal code, which forbids the publication of the name or picture of a victim of sexual crime without his or her consent. Art. 50 of the Personal Data Protection Code forbids the publication of data concerning minors involved in any kind of trial. In accordance with Art. 13, § 5 of the law 23.2.1999, n. 44, the public prosecutor has to adopt any possible protection in order to protect the identity of the victims of crimes of extortion and usury.

Art. 52 of the Personal Data Protection Code provides that a party may require the court to omit his or her identification data from the decision when it is published in legal reviews or data banks.⁵⁴ It also provides that the publisher has the duty, when the decision is published, to omit data that identifies minors and the parties, if the decision concerns family relations and status.⁵⁵ This provision could also be applied to journalists, but examining this problem would require a separate paper.⁵⁶

It must be noted that the parties are not de-identified in the trial and that the official decision has the names of the parties. The above-mentioned provisions merely apply when the decision is published in legal reviews.

Other Special Provisions of Private Law Anonymity is recognized as a right by some special legislation. For instance, it is recognized in the case of a drug addict when he or she enters detox.⁵⁷ In this instance, the patient can ask to remain anonymous while at the hospital, with doctors and with personnel. Patients also have the right to ask that their medical file contain no identifying data.

Mothers may ask not to be named in the birth file should they not want to reveal their identity at the time of childbirth.⁵⁸ This right can conflict with the child's right to know the identity of his or her birth mother. If the child has been adopted, he or

53. See, among other things, the following decisions issued by the Italian Data Protection Authority: <http://www.garantepriacy.it>, decision 31.7.2002, doc. web. n. 621342; decision 9.1.2003, doc. web. n. 1067798.

54. Italian Personal Data Protection Code, Art. 52.

55. *Ibid.*

56. See, among other things, the following decisions issued by the Italian Data Protection Authority: <http://www.garantepriacy.it>, decision 30.10.2001, doc. web. n. 42188; decision 21.10.1998.

57. In this case, the right to ask for anonymity is provided by Art. 120 of the d.p.r. 9.10.1990, n. 309.

58. Art. 30 of d.p.r. 30.11.2000, n. 396.

she does not have the right to know the name of his or her mother because of the mother's right to anonymity.⁵⁹ According to the court, this guarantees the mother the right to access hospital care and to avoid having an abortion. Therefore, according to the court, in this case, anonymity is a way to protect maternity.

The right to anonymity of the mother is denied in cases of assisted procreation.⁶⁰ In other cases, the legal system imposes a duty of anonymity. When organs or bone marrow are donated, for example, administrative and medical personnel have to guarantee the anonymity of the donor as well as the anonymity of the recipient.⁶¹

F. Anonymity in Public Spaces

Anonymity in public spaces is not a right, but rather a fact. It is not explicitly guaranteed, but it was taken for granted in the past. In recent years, with video surveillance systems, anonymity has become more and more difficult to achieve.

On April 29, 2004, the Italian Data Protection Authority issued an act regarding video surveillance in public space.⁶² This provision has been applied on many occasions by the Italian Data Protection Authority.⁶³ The basic principles stated in the act are that the processing of personal data has to respect principles of legality, minimization, proportionality, and purpose. The reasons for adopting a video surveillance system, and the criteria for processing and retaining such data, should be indicated in a specific act. The potential data subjects should be informed.

Art. 137 of the Italian Data Protection Code, which regulates data processed by journalists, provides for the processing of data concerning circumstances or events that have been made known either directly by the data subject or on account of the latter's public conduct. However, it is doubtful that "private" (as opposed to "public") is a concept related to the location and the place instead of the particular fact photographed.⁶⁴

G. Anonymity in Public Law

In many cases, the state or the public administration interacts with citizens electronically; in these cases, anonymity is not guaranteed. On the other hand, there is a specific need for the identification of citizens.

59. This has been recently confirmed by the Italian Constitutional Court in decision 25.11.2005, n. 425; also published in www.cortecostituzionale.it.

60. See l.19.2.2004, n. 40.

61. See l. 1.4.1999, n. 91.

62. <http://www.garanteprivacy.it>, doc. web. n. 1003482.

63. See, among other things, the following decisions issued by the Italian Data Protection Authority: <http://www.garanteprivacy.it>, decision 23.2.2006, doc. web. n. 1251535; decision 27.10.2005, doc. web. n. 1246675; decision 23.11.2005, doc. web. n. 1202254; decision 21.7.2005, doc. web. n. 1150679; 19.12.2001, doc. web. n. 40085; 28.9.2001, doc. web. n. 39704; decision 7.3.2001, doc. web. n. 30947; decision 28.2.2001, doc. web. n. 40181.

64. This thesis was already presented by Giorgio Giampiccolo, *La tutela giuridica*, 460 (n. 5).

The Electronic Identity Card (EIC) and the National Services Card (NSC) are instruments provided by Public Administrations to citizens as a means of identification in online communication. They are therefore essential tools for the development of higher value-added e-government services, which require certainty and security (e.g., for access to customized databases or transactions). The EIC card is issued by local authorities.⁶⁵

The National Services Card (NSC) is a card issued by Public Administrations that contains an embedded microprocessor having the same features as the EIC and an identical running software.⁶⁶ It differs from the latter only in that it lacks the additional security elements of the EIC, such as laser bands, holograms, and such like. Therefore, the NSC does not work as an ID document accepted on sight. The NSC does not bear a photo of the owner and is not subject to special security constraints regarding its plastic material. However, although the NSC is not accepted on sight, it does work in ICT-based services as an instrument of entity authentication.

It should also be noted that the NSC can be used to sign electronic documents with a qualified signature. In fact, it contains not only an entity authentication certificate but also a qualified signature certificate.⁶⁷

Tax Law A recent law⁶⁸ guarantees citizens and companies the right to be anonymous vis-à-vis the tax administration when they return capital that was illegally sent abroad. This provision and the guarantee that data will be not communicated to the tax administration have constituted an incentive to bring back capital that was illegally sent abroad. This right to remain anonymous can only be exercised in accordance with specific circumstances and conditions (for instance, capital must be maintained by an authorized intermediary who will tax them) and is not a general freedom from questioning by the tax administration.

III. CONCLUSIONS

Italian law does not have a uniform approach toward anonymity. Legal provisions cover the gambit, sometimes negating any right to anonymity and other times protecting it. Sometimes anonymity is instrumental to the actual and concrete

65. The EIC was introduced by the l. 15.5.1997, n. 127. Technical rules for the issuing of the card have been first supplied by d.p.c.m. 22.10.1999, n. 437 and by d.m. 19.7.2000. Other relevant norms can be found in the law of June 16, 1998, and in d.m. 2.8. 2005, n. 191 (decree of the Ministry of Internals).

66. The most relevant legal sources for the NSC are the D.p.r. March 2, 2004, No. 117, and the CDA.

67. According to Art. 64, § 3 of CDA, beginning on December 31, 2007, access to e-government services provided by Public Administrations using tools other than EIC and NSC will no longer be allowed.

68. L. 23.II.2001, n. 409.

exercise of another right; in others, it is considered irrelevant in law; in still others, it is protected as a right.

I suggest that anonymity should be considered not only instrumentally, but also as a form of exercising the right to privacy and the right to data protection. It is a form of control of personal data and is also a form of excluding others from the private sphere of an individual. It may be a form of exercising both a positive and a negative liberty.

Anonymity constitutes a space of liberty for the individual, something becoming more and more essential in a digital world. Nowadays, we leave traces everywhere—it is virtually impossible not to. The difference between privacy and data protection now compared with privacy and data protection twenty years ago is that now, we always leave traces and information records.⁶⁹ In fact—which is very important—the right to data protection has been defined as a freedom in the Charter of Fundamental Rights of the European Union. As control becomes more and more diffuse and easily realized, anonymity becomes a way to guarantee privacy and data protection. Thus, in this way, anonymity is essential. It should be guaranteed in order to allow individuals a space of liberty. Anonymity should be seen as a purpose.

However, as a form of exercising the right to privacy and the right to data protection, the right to anonymity has to be continuously balanced with other fundamental rights. Because anonymity cannot be absolute, space should also be left to forms of “sustainable,” “protected,” or “reasonable” anonymity.

It could be useful to express this solution clearly in a specific legal provision, for instance by making more general the provisions on data minimization contained in Art. 3 of the Italian Data Protection Code.

After the law has established an appropriate balance between anonymity and other rights, technology should implement the rules. The effectiveness of a right to anonymity must be guaranteed using technology,⁷⁰ and technology should provide for the protection of different degrees of anonymity.

69. Bruce Scheneier, paper presented at the Conference *Terra Incognita*, held in Montreal on September 25–28, 2007.

70. Joel R. Reidenberg, paper presented at the Conference *Terra Incognita*, held in Montreal on September 25–28, 2007, and at the Conference *Reinventing Data Protection?*, held in Brussels on October 12–13, 2007.

