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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE LEGISLATION ON DEFAMATION**

**OF ITALY**

**on the basis of comments by:**

**Mr Richard CLAYTON (Member, United Kingdom)**  
**Mr Christoph GRABENWARTER (Member, Austria)**  
**Ms Herdís THORGEIRSDÓTTIR (Member, Iceland)**

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## I. Introduction

1. In its Resolution 1920 (2013) on the state of media freedom in Europe, the Parliamentary Assembly of the Council of Europe requested an opinion from the Venice Commission on “whether the Italian laws on defamation are in line with Article 10 of the European Convention on Human Rights” (hereinafter ECHR).

2. Ms Herdís Thorgeirsdóttir, Mr Richard Clayton and Mr Christoph Grabenwarter were appointed as Rapporteurs.

3. On 21-22 October 2013, the Rapporteurs travelled to Italy and met with representatives of the authorities as well as of journalists and editors associations and of the civil society. The Venice Commission is grateful to the Italian authorities for the excellent organisation of the visit and to all participants in the meetings held for their co-operation.

4. *The present opinion was adopted by the Commission at its ... Plenary Session (Venice, ...).*

## II. Scope

5. The scope of the present opinion is to assess whether the Italian legal framework on defamation<sup>1</sup> (see CDL-REF(2013)035), including the defamation Bill<sup>2</sup> (CDL-REF(2013)051) adopted by the Chamber of Deputies, meet the European standards.

6. The present opinion is based on the English translation of the above-mentioned provisions. Since the translation may not accurately reflect the original version, certain comments and omissions might be affected by problems of the translation.

## III. Background

7. Defamation is a criminal offence in Italy and, under articles 595-597 of the Criminal Code and article 13 on the Law of the Press no. 47/1948 (hereinafter the Press Law), penalties for defamation by means of the press may amount to imprisonment between six months and six years. While these provisions have been considered dormant in Italy, their application in a number of cases in recent years has raised concern in Italy and Europe.

8. In particular, the *Sallusti* case – where a 14-month prison sentence was imposed on a newspaper editor for publishing a defamatory article written by an anonymous columnist on a judge’s decision relating to the abortion of a 13-year old girl –, sparked protests in Italy and abroad. The Italian President subsequently commuted the prison sentence into a fine. In 2011 and 2012, three journalists and three newspaper editors were sentenced to imprisonment for defamation. In May 2013, three further journalists were sentenced to prison on defamation charges.

9. It is in this context that the Italian Parliament introduced a Bill in September 2012 proposing, *inter alia*, amendments of the criminal defamation provisions. The Bill was eventually rejected by the Italian Senate. A new Bill (hereinafter the Bill) was introduced before the new Italian

<sup>1</sup>Law on the Press No. 47 of 8 February 1948, articles 57-58bis, 278, 290, 290bis, 291, 594-599 of the Criminal Code

<sup>2</sup>Bill No. 925, tabled by Deputy Costa, Amendments to Amendments to Law No. 47 of 8 February 1948, to the Criminal Code and to the Code of Criminal Procedure in matters of defamation, libel committed via the press or other media, insults and the sentencing of defendants, approved by the Chamber of Deputies on 17 October 2013

Parliament in May 2013 and adopted by the Chamber of Deputies on 17 October 2013. The Bill is currently tabled for examination by the Senate.

10. Two judgments<sup>3</sup> condemning Italy for violation of Article 10 of the ECHR in relation to defamation have been recently adopted by the European Court of Human Rights (hereinafter “the Court”).

11. In *Belpietro v. Italy*, the Court held that, in principle, imposing criminal liability on a newspaper editor for publishing a defamatory article against a prosecutor written by an Italian senator raised no issue under Article 10. The Court made reference in this connection to article 57 of the Italian Criminal Code, imposing on a newspaper editor the obligation to control what is published, in order to prevent breaches of the law, which it did not find to be in breach with the ECHR; it furthermore stressed that a newspaper editor is responsible for how an article is presented and the importance given to it in the publication. As to the article in question, the Court found that, although it concerned an issue of importance for society, some of the allegations against the prosecutors were very serious, without sufficient objective basis. In *Ricci v. Italy*, concerning the conviction and sentencing of the presenter/producer of a satirical television programme for disclosing confidential images that had been recorded for the internal use of a public television station, the Court held that, taking into account in particular the applicant’s failure to observe the ethics of journalism, his conviction did not itself entail a violation of his right to freedom of expression.

12. In both cases, however, the Court found that the nature and severity of the penalty imposed, that is the prison sentence, even suspended, had a significant chilling effect and, in the absence of any exceptional circumstance justifying such a severe sanction, constituted a disproportionate interference with the legitimate aims pursued.

#### **IV. European Standards**

13. The prohibition of defamation raises the issue of the appropriate balance to be struck between freedom of expression, as protected by Article 10 ECHR, and the right to respect for private and family life, as protected by Article 8 ECHR. Freedom of expression carries with it duties and responsibilities which are of particular significance when the reputation of a named individual and the “rights of others” are at risk.

#### ***The right to freedom of expression as an essential foundation of democratic society***

14. The main standards for the protection of the right to freedom of expression and opinion, as well as of the right to freely receive and impart information are provided for in Article 10 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Freedom of opinion and expression is also guaranteed by the Universal Declaration of Human Rights in its Article 19, as well as, more recently, by Article 11 of the Charter of Fundamental Rights of the European Union.

15. As emphasised by the Court, freedom of expression constitutes one of the key foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.<sup>4</sup> According to Article 10 (2) and the well-established case law of the Court,<sup>5</sup>

<sup>3</sup>*Belpietro v. Italy*, Application No. 43612/10, judgment of 24 September 2013 (not final); *Ricci v. Italy*, Application no. 30210/06, Judgment of 8 October 2013 (not final)

<sup>4</sup>*Axel Springer AG v. Germany*, Application No 39954/08, Judgment of 7 February 2012, § 78

<sup>5</sup> See, e.g., *Sunday Times v United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, § 49; *Belpietro v.*

interference by authorities must be “prescribed by law”, correspond to a “pressing social need”, be proportionate to one of the legitimate aims pursued within the meaning of Article 10 (2), and be justified by judicial decisions that give relevant and sufficient reasoning. Expression incompatible with a society based on tolerance, pluralism and broadmindedness, such as hate speech,<sup>6</sup> is not protected.

### ***The right to protection of one’s reputation***

16. The right to protection of one’s reputation comes under Article 8 ECHR as part of the right to respect for private life. Unlike Article 17 ICCPR, Article 8 ECHR does not explicitly mention the right to reputation. The Court has nonetheless confirmed that the right to reputation is protected by Article 8 ECHR as part of the right to respect for private life<sup>7</sup> and has stressed that under Article 8, in addition to the primarily negative obligation on the State to abstain from arbitrary interference in the exercise of the right to private and family life, there are also positive obligations to ensure effective respect for the private life, in particular the right to protection of one’s reputation<sup>8</sup>. The Court has on the other hand ruled that, in order for Article 8 to come into play, “*an attack on a person’s reputation must attain a certain level of seriousness in a manner causing prejudice to personal enjoyment of the right to respect for private life*”.<sup>9</sup>

17. The Grand Chamber of the Court in the *Axel Springer*<sup>10</sup> judgment set forth the criteria relevant for the balancing exercise between private life protection and freedom of expression, in particular when the media is concerned : (a) contribution to a debate of general interest; (b) how well known is the person concerned and what is the subject of the report (the extent to which the information relates to his/her official/public activities); (c) prior conduct of the person concerned; (d) method of obtaining the information and its veracity (must be acting in good faith and on accurate, factual basis and provide “reliable and precise” information in accordance with ethics of journalism); (e) content, form and consequences of publication; (f) severity of the sanction imposed; whether they are capable of having a chilling effect in light of the above factors.

### ***Foreseeability of the norms restricting freedom of expression in order to protect reputation and the rights of others***

18. The Court accepts, with regard to the calculation of damages for injury to reputation, that national laws must make allowance for an unlimited variety of situations and that a considerable degree of flexibility may be needed to enable an assessment of damages tailored to the circumstances of the particular case. However, national laws on defamation must be formulated with sufficient precision to enable citizens to regulate their conduct: they must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the given circumstances, the consequences which a particular action may entail.<sup>11</sup>

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*Italy*, § 44

<sup>6</sup> *Gündüz v. Turkey*, no. 35071/97, Judgment of 4 December 2003 § 41

<sup>7</sup> *Radio France v. France*, Application No. 53984/00, Judgment of 30 March 2004, §31; see also: *Chauvy and Others v. France*, No. 64915/01, § 70; *Polano Torres and Movilla Polanco v. Spain*, no. 34147/06, 21 September 2010, § 40. See also *Pfeifer v. Austria*, No. 12556/03, § 35, where the conflict was addressed under Article 8

<sup>8</sup> *Somesan and Butiuc v. Romania*, Application No. 45543/04, Judgment of 19 November 2013, §§ 22-23

<sup>9</sup> *A. v. Norway*, Application No. 28070/06, Judgment of 12 November 2009, § 64

<sup>10</sup> *Axel Springer AG v. Germany*, Application No. 39954/08, 7 February 2012

<sup>11</sup> *Sunday Times (No. 1) v United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, § 49

### ***The press as public watchdog and the public's right to receive information***

19. According to Article 10 case-law,<sup>12</sup> the press plays a vital role as a “public watchdog” which is essential in a democratic society. As recently reiterated by the Court in *Belpietro v. Italy* (§ 47), although the press must not overstep certain bounds, regarding in particular the protection of the reputation and rights of others, it is its duty to impart - in a manner consistent with its “duties and responsibilities” - information and ideas on all matters of public interest, including those relating to justice.<sup>13</sup> The press does not only have the task of imparting such information and ideas: the public also has a right to receive them. The Court has confirmed that Internet and the information stored on-line fall within the ambit of the protection afforded by Article 10.<sup>14</sup> In a recent judgment<sup>15</sup>, the Court, for the first time, interpreted Article 10 ECHR as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet.

### ***Subject***

20. In its case law, the Court has consistently applied the notion of a high tolerance threshold for criticism directed to politicians, government members and heads of state, judges and even big corporations.<sup>16</sup> As emphasised in *Lingens v. Austria*,<sup>17</sup> the limits of acceptable criticism are wider as regards public or political figures than as regards a private individual. In a democratic society, the government's action must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, “*the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.*”<sup>18</sup>

21. With regard to the media criticism targeting judges, the Court, while stressing the need for an adequate balance between the public interest in the fair administration of justice and freedom of expression (*Sunday Times*, § 65), has underlined that, as all other public institutions, courts are not immune to criticism and scrutiny, “*be it in specialised journals, in the general press or amongst the public at large*”.<sup>19</sup> The Court however recalled that, in view of its special role in the society, the judiciary must enjoy public confidence to be successful and, from this perspective, it may prove necessary “*to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying*”.<sup>20</sup>

<sup>12</sup>*Goodwin v. United Kingdom*, Application No. 17488/90 Judgment of 27 March 1996, § 39; *Tammer v. Estonia*, Application no. 41205/98, Judgment of 26 February 2001, § 62; *Cumpănă and Mazăre v. Romania*, Application no. 33348/96, Judgment of 17 December 2004, § 93; *Times Newspapers v. United Kingdom*, Applications No. 3002/03 and 23676/03, Judgment of 10 March 2009, § 45

<sup>13</sup>*De Haes and Gijssels v Belgium*, Application No. 19983/92, Judgment of 24 February 1997, § 37; *Sunday Times v. the United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, § 65; *Perna v Italy*, No. 48898/99, Judgment of 6 May 2003, § 39;

<sup>14</sup>*Times Newspapers Ltd. v. the United Kingdom* (nos. 1 and 2, nos. 3002/03 and 23676/03, Judgment of 10 March 2009, §27 See also Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted on 21 December 2005

<sup>15</sup>*Editorial Board of PravoyeDelo and Shtekel v. Ukraine*, Application no. 33014/05, Judgment of 5 May 2011, §66

<sup>16</sup>*Steel and Morris v. the United Kingdom*, Application no. 68416/01, Judgment of 15 February 2005, § 94

<sup>17</sup>*Lingens v Austria*, Application No. 9815/82, Judgment of 8 July 1986, § 42

<sup>18</sup>*Castells v. Spain*, Application No. 11798/85, Judgment of 23 April 1992, § 46

<sup>19</sup>*Worm v. Austria*, Application No. 22714/93, Judgment of 29 August 1997, § 50

<sup>20</sup>*Prager and Oberlischlick v. Austria*, Application No.15974/90, Judgment of 26 April 1995, § 34; *Skalka v. Poland*, ApplicationNo. 43425/98, 27 May 2003, § 34

22. Therefore, a distinction needs to be made between the legitimate criticism related to the professional activities of judges, i.e. the reasoning in a judgment, with its wider limits, and defamatory accusations against individual judges or insult.<sup>21</sup> Where criticism involves accusations of unlawful and abusive conduct by members of the judiciary, these should be supported by relevant evidence.<sup>22</sup> Finally, in balancing the interests in place, the Court has paid particular attention to the media as a space for voicing criticism; it stressed that, in view of the larger audience, unfounded criticism of judges/other members of the judiciary in the media or leakage of non-public “court information” to the media are likely to lead to more serious injury to the reputation of judges or other members of the judicial authority.<sup>23</sup>

### ***Public interest debate and the concept of responsible journalism***

23. When considering whether an interference with freedom of speech is necessary in a democratic society, the Court gives the strongest protection to political debate on matters of public interest, which it has defined very widely, to cover speech on all matters of general public concern. Furthermore, as established in *Handyside v. United Kingdom*,<sup>24</sup> the protection of Article 10 applies not only to information or ideas that are favourable and inoffensive but also to those that offend, shock or disturb. Consequently, in the sphere of public interest debate, “*exceptions to freedom of expression must be interpreted narrowly*”.<sup>25</sup>

24. The Court has also developed and defined the “duties and responsibilities” of a journalist.<sup>26</sup> The “public interest” safeguard afforded by Article 10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. Furthermore, the media must not become a vehicle for the dissemination of hate speech and the promotion of violence.<sup>27</sup>

### ***Differentiation between statements of fact and value judgments / Truthfulness***

25. In its case law, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The Court has held that the requirement to prove the truth of a value judgment is impossible to fulfil and “*infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10*”.<sup>28</sup> Where a statement amounts to a value judgment, proportionality of the interference may depend on “*whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive*”.<sup>29</sup>

<sup>21</sup> *Barfod v. Denmark*, Application No.11508/85, judgment of 22 February 1989, § 35; *Shalka v. Poland*, Application No.43425/98, 27 May 2003, § 34

<sup>22</sup> *Lesnik v. Slovakia*, Application No. 35640/97, Judgment of 11 March 2003, § 57

<sup>23</sup> *Schöpfer v. Switzerland*, Application No. 25405/94, Judgment of 20 May 1998, § 34

<sup>24</sup> *Handyside v. United Kingdom*, Application No. 5493/72, Judgment of 7 December 1976, § 49; see also *Perna v. Italy*, Application No. 48898/99, Judgment of 6 May 2003, § 39

<sup>25</sup> *Lopes Gomes da Silva v. Portugal*, Application No. 37698/97, Judgment of 28 September 2000, § 30

<sup>26</sup> *Times Newspapers Ltd v. United Kingdom* (Nos. 1 and 2), Application Nos. 3002/03 and 23676/03, 10 March 2009, § 42; *Fressoz and Roire v. France [GC]*, Application No. 29183/95, 21 January 1999, § 54

<sup>27</sup> *Erdogdu a. Ince v Turkey*, Applications No. 25067/94 and 25068/94, Judgment of 8/7/1999 § 54

<sup>28</sup> See *Lingens v. Austria*, § 46; *Mahmudov and Agazade v. Azerbaijan*, § 41; *Belpietro v. Italy*, § 51

<sup>29</sup> See, for example, *Feldek v. Slovakia*, Application No. 29032/95, Judgment of 12 July 2001, §§ 75-76; see also *Steel and Morris v UK*, Application No. 68416/01, Judgment of 15/2/2005, 87

26. In principle, the burden of proof lies with the author. Yet, the proof of the truth should not be imposed on the author of the offence as an obligation in cases where it is impossible for him/her to prove the truth or unreasonable efforts would be needed on his/her part, while the plaintiff has access to relevant facts.<sup>30</sup> As concerns the media, in *McVicar v. UK*, the Court recalled that “special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements that were defamatory of private individuals.”<sup>31</sup>

27. Likewise, the Court’s case law has firmly established, as part of the “public interest” defence, the right of the public to receive information and ideas of all kinds, even if sometimes not entirely confirmed. In addition, the Court held that, in the context of public interest debate, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.<sup>32</sup>

### **Nature and severity of sanctions / “Chilling effect” of sanctions**

28. The Court has consistently held that the nature and severity of a sanction imposed are factors to be carefully considered when assessing the proportionality of the interference.<sup>33</sup> The “chilling effect” that sanctions may have on the future exercise of the freedom of expression plays a decisive role in the balancing of interests.<sup>34</sup>

29. The Court has not proscribed criminal provisions on defamation. In its view, it remains open to the competent state authorities to adopt, where appropriate, even measures of a criminal law nature.<sup>35</sup> The Court has however stressed the chilling effect of the mere fact that a sanction is of criminal nature and criticised the excessive use of criminal provisions.<sup>36</sup>

30. The Court exercises the utmost scrutiny of the proportionality requirement with regard to measures that might deter the media from fulfilling their key role of reporting on matters of public interest.<sup>37</sup> In particular, the Court has found imprisonment to be a too severe sanction (even when not executed) having a significant chilling effect.<sup>38</sup> In its view, “[a]lthough sentencing is in principle a matter for the national courts, [...] the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression [...] only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence”.<sup>39</sup> Also, to punish a journalist for

<sup>30</sup> See Venice Commission, *Interim Opinion on the Draft Law on Amending the Civil Code of the Republic of Armenia adopted by the Venice Commission at its 79<sup>th</sup> Plenary Session*, (Venice, 12-13 June 2009), CDL-AD(2009)037, § 15

<sup>31</sup> *McVicar v United Kingdom*, No. 46311/99, Judgment of 7/05/2002, §§ 84; see also *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, Application No. 17550/03, Judgment of 22 May 2008, § 49, 70

<sup>32</sup> *ThorgeirThorgeirson v. Iceland*, Application No. 13778/88, Judgment of 25 June 1992, § 65; *Pedersen and Baadsgaard*, Application No. 49017/99, Judgment of 17 December 2004, §71; *Prager and Oberschlick v. Austria*, Application no.15974/90, Judgment of 26 April 1995, § 38; *Perna v. Italy*, § 39

<sup>33</sup> *Ceylan v. Turkey*, Application No. 23556/94, Judgment of 8 July 1999 § 37; *Skalka v. Poland*, Application No. 43425/98, Judgment of 27 May 2003, § 41; *Tammer v. Estonia*, Application No. 41205/98, Judgment of 6 February 2001, § 69; *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, Judgment of 17 December 2004, § 111.

<sup>34</sup> *Goodwin v United Kingdom*, Application No. 17488/90, Judgment of 27 March 1996, § 39

<sup>35</sup> *Incal v Turkey*, Application No. 22678/93, Judgment of 9 June 1998 § 54; *Castells v Spain*, § 46

<sup>36</sup> *Azevedo v. Portugal*, Application No. 20620/04 Judgment of 27 March 2008, § 33; see also *Altug Taner Akcam v. Turkey*, Application No. 27520/07, Judgment of 25 October 2001, §§ 75 and 82;

<sup>37</sup> *Bergens Tidende v. Norway*, Application No 26132/95, Judgment of 2.08.2000, § 52; *Cumpănă and Mazăre v. Romania*, § 113; See also UN Human Rights Committee, General Comment No. 34 on Article 19 ICCPR

<sup>38</sup> *Belpietro v. Italy*, § 61; *Ricci v. Italy*, § 59

<sup>39</sup> *Cumpănă and Mazăre v. Romania*, §§ 112 and 115; see also *Mahmudov and Agazade v. Azerbaijan*, Application No. 35877/04, Judgment of 18 December 2008, § 50; for further references see *Feridun Yazar v. Turkey*, Application No. 42713/98, Judgment of 23 September 2004, § 27, and *Sürek and Özdemir v. Turkey* [GC], Application Nos. 23927/94 and 24277/94, Judgment of 8 July 1999, § 63

assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of public matters.<sup>40</sup>

31. As regards sanctions prohibiting journalists from exercising the profession, the Court held that by such measures, albeit subject to a time-limit, “the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.”<sup>41</sup> In its view, “*prior restraints on the activities of journalists call for the most careful scrutiny [...] and are justified only in exceptional circumstances*”.<sup>42</sup>

32. Damage awards applied in civil proceedings must take into account the specific circumstances of the case and bear a reasonable relationship of proportionality to the injury to reputation suffered.<sup>43</sup> It is well established case law of the Court that excessive financial compensations may have a “chilling effect” on freedom of expression and lead to self-censorship. This chilling effect is highly problematic when it affects, in particular, those trying to shed light on corruption and abuse in high places. When disproportionate, penalties for defamation will result in a violation of Article 10 ECHR.<sup>44</sup> It is, on the other hand, permissible to provide for specific obligations for the media, such as to correct a false statement, to give the complainant a right of reply or to publish a court judgment which finds a statement to be false.

#### The Council of Europe approach to sanctions for defamation

33. In its 2004 *Declaration on freedom of political debate in the media*, the Committee of Ministers stressed that “*defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech*”. In its *Recommendation CM/Rec(2011)7 to member states on a new notion of media*, the Committee of Ministers emphasised that any action sought against media in respect of content should respect strictly applicable laws and, above all, international human rights law, in particular the ECHR, and comply with procedural safeguards, and that there should be “*a presumption in favour of freedom of expression and information and in favour of media freedom*”.

34. In its *Recommendations 1506(2001) and 1589 (2003)* and, more recently, *Recommendation 1814 (2007) and Resolution 1577 (2007) Towards decriminalisation of defamation*, as well as the *Resolution 1920 (2013) on the state of media freedom in Europe*, the Parliamentary Assembly invited states to repeal or amend criminal defamation provisions and abolish prison sentences. The Assembly condemned “*abusive recourse to unreasonably large awards for damages and interest in defamation cases*” and underlined that journalists prosecuted for defamation must be allowed to protect their sources.

<sup>40</sup> *Jersild v. Denmark*, Application No. 15890/89, Judgment of 23 September 1994, § 35

<sup>41</sup> *Cumpănă and Mazăre v. Romania*, § 119

<sup>42</sup> *Cumpănă and Mazăre v. Romania*, § 118

<sup>43</sup> *Tolstoy Miloslavsky v. United Kingdom*, Application No. 18139/91, Judgment of 13 July 1995, § 49; 15/2/2005, *Steel and Morris v United Kingdom*, § 96

<sup>44</sup> *Tolstoy Miloslavsky v. United Kingdom*, § 49, §51; in *Steel and Morris*, § 96, the Court held that a defendant’s limited means could be a factor in determining the proportionality of a damages award. The high awards against the defendants were considered excessive “when compared to [their] modest incomes and resources”.

## V. Analysis of the legal framework relating to defamation in Italy

### A. Legislative provisions in force in relation to defamation.

35. Freedom of expression and freedom of the press are protected by the Italian Constitution of 1948 in its Article 21, which reads: “*Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The press may not be subjected to any authorisation or censorship [...]*”.

#### **Definition and scope of “insult” and “defamation”**

36. The 1930 Italian Criminal Code defines insult as an attack on the honour and dignity of a person, in his or her presence (Article 594). The justification for retaining insult as a criminal offence is open to question as Article 10 ECHR protects not only information and ideas that are favourable or well received but also those that offend, shock or disturb and that civil law provides effective remedies in this respect.

37. Defamation is defined in Article 595 as damage to the reputation of a person through communication with several persons. There are three forms of aggravated defamation: through the allegation of a specific act (Article 595 § 2); through the press or any other means of publicity, or through a public deed (§ 3); and if it is directed to a political, administrative or judicial body (§ 4).

38. The Venice Commission stresses that, differently from the interpretation of the notion of “defamation” which prevails in the case-law of the Court (see Chapter IV above), Article 595 does not require that the information be false or inaccurate for the offence of defamation to occur. Article 596 even excludes the defence of justification (proving the truth of the allegation, *exceptio veritatis*), except, for the cases of defamation through the allegation of a given act, in three cases: 1) when the defamed person is a public official and the alleged act relates to the exercise of his functions; 2) if criminal proceedings are still pending on the alleged act on the part of the defamed person, or if proceedings are brought against him or her; 3) if the complainant formally requests that the judgment should extend to ascertaining the truth or falsity of the alleged act. It should be noted in this respect that referring to the impossibility *de iure* to plead the defence of the truth, the Court has expressly stated such interference with the applicant’s freedom of expression was not necessary in a democratic society.<sup>45</sup>

39. However, both the Italian legal literature and the case-law have constantly affirmed that the exercise of the right to news reporting (*diritto di cronaca*) and of the freedom of the press guaranteed in Article 21 of the Constitution represents a cause of justification within the meaning of Article 51 of the Criminal Code, thus making the acts (the communication of information damaging the honour, the dignity or the reputation of another person) non punishable. A landmark judgment of the Court of Cassation (Cassazione civile, sez. I, October 18, 1984), constantly applied by civil and criminal courts, has set out the three criteria for the operation of Article 51: the social utility or social relevance of the information; the truthfulness of the information (which may be presumed (*verità putativa*) if the journalist has seriously verified his or her sources of information); restraint (“*continenza*”), referring to the civilised form of expression, which must not “violate the minimum dignity to which any human being is entitled”. The case-law has further clarified that these three criteria cannot fully operate in relation to the right to criticize

<sup>45</sup> *Castells v. Spain*, § 48; *Colombani and others v. France*, Application No. 51279/99, Judgment of 25 June 2002 § 66

and to satire.

40. Also the Italian Constitutional Court (see decision no. 175, 5 July 1971, in *Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale*, vol. XXXIV, 1971, p. 550) has stated that the exclusions and the limitations of the *exceptio veritatis* provided for in Article 596 of the Criminal Code are not applicable when the defendant exercises the cause of justification related to the freedom of expression recognized by Article 21 of the Constitution, asserting the truthfulness of the information.

41. The Venice Commission observes that while the wording of Articles 595 and 596 of the Italian criminal code raises issues under the European Convention on Human Rights, the interpretation and application of these two provisions appear to have been corrected and brought more in line with European standards. Importantly, in most cases the truthfulness of the communicated information excludes criminal defamation. However, it still appears possible that the communication of true information which has interfered with the private life of an individual may amount to criminal defamation (even though, in practice, compensation for damage to one's reputation is more likely to be pursued in civil proceedings rather than in criminal one, notably for the sake of avoiding publicity).

42. The Venice Commission is of the view that it would be appropriate to introduce in Article 595 the defence of truth recognised in the 1984 judgment of the Court of Cassation and in the 1971 judgment of the Constitutional Court, as well as, in line with the ECHR law, the defences of public interest<sup>46</sup> and responsible journalism. As mentioned in § 39 above, the domestic case law takes into account the criteria of social utility or social relevance of the information and the journalists' "continenza". Article 596 should also be reconsidered.

### ***Public institutions and public figures as subject of defamation***

43. According to Article 595 § 4 of the Criminal Code, when defamation targets "*a political, administrative or judicial agency, a representative of the latter or a collegial authority*", increased sanctions will be applied. Under Article 290 of the Criminal Code, defamation of the Republic, the constitutional institutions and the armed forces are punished with higher fines (up to 5000 EUR) compared to those applicable to defamation against other persons, up to 2065 EUR in the case of the allegation of a given fact under Article 595 § 2.

44. The Venice Commission recalls that public criticism of the authorities is highly protected under the ECHR case law and exceptions to freedom of expression must, in this context, be interpreted narrowly (see § 20 before). Article 594 §4 is clearly not in line with this case law. The Venice Commission welcomes the fact that the new draft amendments no longer provide for the application of increased sanctions in such cases.

45. Similarly, the honour and prestige of the President of the Republic enjoy a particularly strong protection under Article 278 and 290bis of the Criminal Code, as any affront is punishable by a heavy imprisonment sanction of one to five years.

46. These provisions are problematic from the standpoint of Article 10 ECHR case law, according to which the protection of the reputation of the Head of State cannot serve as justification for affording him/her special protection vis-à-vis the right to convey information and express opinions concerning him/her.<sup>47</sup> The Venice Commission is of the view that these

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<sup>46</sup> *Somesan and Butiuc v. Romania*, Application No. 45543/04, Judgment of 19 November 2013, §§ 25-26

<sup>47</sup> *Artun and Güvener v. Turkey*, Application No. 75510/01, Judgment of 26 September 2007, § 31; *Mondragon v.*

provisions should be reconsidered.

### ***Respondents for defamation***

47. Articles 57 and 57bis of the Criminal Code provide for liability of the editors/deputy editor and publisher or the printer (for non-periodical press), in case the offence of defamation is committed, for failure to conduct supervision of the content of the publication. The penalty applicable to the offence will be in their respect (except in case of complicity) reduced by a maximum of one-third. Article 58 extends the scope of these provisions to the clandestine press. Article 596bis extends to the editor, deputy editor, publisher and printer the application of the provisions of article 596 dealing with the defence of the truth (see § 38 above).

48. The Venice Commission is of the view that, as stated by the Court in *Belpietro v. Italy* (see §§ 58-59 of the judgment), the obligation of the newspaper/publisher/printer editor to supervise, in order to prevent breaches of the law, the content of the publication, including its presentation, as well as the related liability, are in compliance with the ECHR standards (see § 11 above). This was further confirmed by the Court in its recent *Delfi AS v. Estonia* where it held that making an internet news portal liable for offensive online comments of its readers was justified.<sup>48</sup>

49. Similarly, under Article 11 of the Press Law, offences committed by means of the press, the owner of the publication and the editor are civilly liable, both mutually and jointly with the offenders.

50. The Venice Commission is of the view that, as an incentive to ensure high journalistic standards in the media outlets<sup>49</sup>, defamation laws should place the primary legal liability in damages on the owner/publisher who employs the journalist/editor, who should bear all or most of the financial liability. This is of particular importance for journalists employed by less prominent media, for whom the threat of heavy fines and financial compensations has a greater deterrent. According to information provided to the Commission, in Italy, in the case of the biggest media, most of the financial responsibility for defamation if not its entirety is assumed by the media themselves/the owner. Self-employed journalists, those employed by less powerful media and/or the so-called “contributors” remain however particularly vulnerable.

### ***Exemptions from defamation - privileged statements***

51. The provisions of Article 598 of the Criminal Code protecting, as privileged statements, defamatory expression in proceedings before a judicial and administrative authority, would benefit from increased clarity. In particular, the limitation of the privileged statements to those touching upon “*the subject of the case or administrative appeal*” may be the source of diverging and even potentially restrictive interpretations. It is also recommended that an absolute privilege defence be introduced in the context of other instances, such as the debates in parliaments (see also article 68 §1 of the Italian Constitution on parliamentary immunity<sup>50</sup>).

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*Spain*, Application No. 2034/07, Judgment of 15 March 2011, § 55; see also *Colombani v. France*, Application No. 51279/99, Judgment of 25 June 2002, § 56; *Castell v. Spain*, Application No. 11798/85, Judgment of 23 April 1992, § 46; *Eon v. France*, Application No. 26118/10, Judgment of 14 March 2013, § 55. See also, with regard to excessive protection of the status of the President of the Republic in civil cases, *Pakdemirli v. Turkey*, Application No. 35839/97, Judgment of 22 February 2005, § 52

<sup>48</sup> *Delfi AS v. Estonia*, Application No. 64569/09, Judgment of 10 October 2013, §§ 91 and 94

<sup>49</sup> Venice Commission, *Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan*, CDL-AD(2013)024, § 90

<sup>50</sup> “*Members of Parliament cannot be held accountable for the opinions expressed or votes cast in the performance of their function*”.

52. Under Article 599 § 2 of the Criminal Code, dealing with “retaliation and provocation”, persons having committed insult or defamation “in a state of anger which has been caused by an unjust act by a third party and is suffered after this act [...]” are exempted from sanctions.

53. It is basically in line with the Court’s case law to take account of the conduct and former expression of a person targeted by defamation and the particular context in which the statement at issue was made. However, the discretion in the law (not to punish at all) may go too far with regard to Article 8 ECHR if the competent court is not balancing the interests involved. Moreover, the conditions referred to in Article 599 § 2 are rather vague. It is recommended that the decision on the matter be left, based on the specific circumstances of the case, to the judge.

### **Sanctions**

54. As they stand at present, the severity of the sanctions provided for by the Italian provisions dealing with defamation, against the background of the ECHR standards and in the light of the recent judgments of the Court against Italy, is a source of particular concern. It seems doubtful whether maximum prison sentences of up to one, two or six years and minimum sentences of six months under certain circumstances, are – except for the exceptional situations indicated by the Court – in line with the principle of proportionality as established by Article 10 case law. Although their application in practice remains very rare, the recent convictions of Italian journalists to imprisonment for defamation confirm that this situation needs to be addressed as a matter of priority. Thus, the commitment of the Italian authorities to abolish imprisonment in the framework of the pending Bill is a very positive development (see § 60 below).

55. The absence of upper limit for the financial penalties applicable for defamation published in the media should be reconsidered (Criminal Code, article 595 § 3 and § 4 and Press Law, Article 13). This raises problems not only in terms of foreseeability of the punishment, but also and especially because it may lead to the imposition of heavy fines and disproportionate awards, which might jeopardise the very survival of certain media. According to different sources, this, coupled with the precariousness of the journalist profession in a country facing a difficult financial crisis is an important concern for many journalists, particularly those working independently or not being employed by powerful media.

56. It should be pointed out that proportionality between the offence and the sanction is a general principle of the Italian legal order, enshrined insofar as criminal sanctions are concerned in Article 27 § 3 of the Constitution (“*Punishments may not be inhuman and shall aim at re-educating the convicted*”). Furthermore, according to the general principles set forth in the Criminal Code for the application of sanctions, in determining the amount of the fines, the judge, within the limits of discretion set by law (Article 132), must take into account *inter alia* the gravity of the offence (Article 133) as well as the economic situation of the offender and the effect of the pecuniary sanction (133bis). Making explicit reference to the proportionality requirement in the provisions specifically dealing with defamation would nevertheless contribute to more adequately implementing the above guarantees.

57. In its current form, the Press Law provides (Article 12) for the proportionality principle in relation to the amount of the pecuniary redress (“*The sum shall be determined in proportion to the seriousness of the injury and circulation of the printed matter*”). However, no explicit reference is made to the economic situation of the journalist<sup>51</sup>, which must be taken into account in any case as required by Article 133bis of the Criminal Code.

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<sup>51</sup>See *Steel and Morris v United Kingdom*, Application No. 68416/01, Judgment of 15 February 2005, § 96

## **B. The Bill amending the current legal framework**

58. The amendments proposed to the current legislation are aimed, in line with the recent rulings of the Strasbourg Court against Italy, at limiting the use of criminal sanctions for defamation, and introduce, as a notable positive step, the abolishment of imprisonment as a sanction for defamation. The overall purpose of the Bill is also to more clearly delineate defamation, related procedures and remedies, including by extending the scope of the relevant provisions to the audio-visual media and the internet.

59. The Venice Commission positively notes that, while reflecting the choice made by the Italian authorities for a dual system of regulation of defamation – by both civil and criminal law – , the changes introduced by the Bill demonstrate a clear commitment of the Italian legislator to achieving, in line with the ECHR standards and their interpretation by the Court, a more appropriate balance between the safeguards required by the protection of reputation and the unhindered exercise of freedom of expression, including freedom of the press. The simultaneous amendment of the provisions of civil and criminal law is also welcome, as it reflects the concern for a comprehensive and consistent approach in this field.

### *a. Amendments to criminal law provisions*

60. According to the new Article 595 proposed by the Bill, defamation shall incur a fine of 3 000 to 10000 EUR (15 000 EUR when it consists in attributing a specific fact), increased by half when committed via the media. Under the above provisions, already adopted by the Chamber of Deputies, defamatory acts will therefore no longer be punishable by imprisonment in Italy. This is a remarkable improvement, in accordance with the Council of Europe calls for lighter sanctions for defamation, and at the same time a clear response to the two recent Court rulings having condemned Italy for the use of prison sentences. The Venice Commission welcomes this amendment and strongly recommends the final adoption, by the Italian Parliament, of the abolishment of such sanctions.

61. The abolishment of imprisonment is coupled with increased maximum amounts for fines. The Venice Commission recalls that excessively high fines pose a threat with almost as much chilling effect as imprisonment, albeit more insidious. Ensuring proportionality between the defamation act and the relevant pecuniary sanctions is of crucial importance. The Commission positively notes, in this connection, that the proposed amendments provide for an upper limit of the proposed fines (lacking in current Article 595 § 3).

62. Defamation directed to public institutions and agencies is, under the Bill, no longer punishable with higher levels of penalties. This is a very positive development which deserves to be commended. For the sake of consistency, Article 290 of the Criminal Code should also be amended accordingly.

63. Increased fines will however still be applied for defamation through the media. The amounts are not excessive compared to other countries. The proportionality principle remains essential in the context of their application.

64. In this context, it is pointed out that, during the visit to Rome, the Venice Commission was informed about a separate issue of “defamatory” statements, i.e. true statements in the press violating the private sphere especially in the context of criminal proceedings of high public interest. It seems that this issue is not entirely solved in the practice of Italian criminal courts. It is doubtful whether more severe sanctions on newspapers and journalists will solve the problem,

bearing in mind that a lot of information of this kind is circulated in the internet, very often by non-professional journalists; so they become public without a journalist being responsible, and once they are public the press cannot easily ignore a debate already taking place.

65. The provisions of the proposed new Article 57 of the Criminal Code, dealing with the editors' liability for defamation, raise several issues. First, the chilling effect in terms of Article 10 ECHR of the criminal offence contained in Article 57, entailing an incentive on editors to interfere with controversial expressions of political opinion, cannot be underestimated. Second, since the amendment enables delegation by editors of their supervision duty, it would be important, to avoid the risk of editors abusing the delegation power, to clarify what a "professional journalist suited to this role" means and to what extent to editor's liability will be transferred to this person. The delegation of liability from editor to journalist may also have a chilling effect in the sense that journalists facing high fines will hesitate to practice investigative journalism which often evokes harsh reaction from those in power. The editor/newspaper should be liable for the act of a journalist doing his job in accordance with the ethics of journalism. The absence of any rationale for reducing the penalty for breach of Article 57 by one third "in all cases" may be seen as arbitrary.

*b. Amendments to the Press Law*

66. According to the proposed new Article 13 of the Press Law, the fines applicable to the media for defamation will also be increased (between 5 000 and 10 000 EUR for defamation via the press with attribution of a specific act). It is understood that the general principle of the application of proportionate sanctions, in accordance with the individual circumstances of the particular case, remains a key requirement.

67. The same applies to the proposal in Article 13.1 introducing considerably higher fines (between 20 000 and 60 000 EUR) for untrue allegations disseminated while known to be untrue. In addition, the proposal to increase the fine automatically where untrue allegations concern a specific fact appear to be disproportionate since the fine increases, regardless of the significance of the particular fact which is said to be untrue. Care should be given to avoiding rendering unlawful untrue statements that have been published in error but without malice.

68. Efforts have been made to propose improved criteria for assessing damages resulting from defamation, and a two year time-limit for civil actions for damages is proposed. It is recommended that, in the new Article 11bis, the requirement of proportionality of damages also covers explicitly, among the criteria to be taken into account, the economic condition of the journalist.

69. The introduction, as ancillary penalty, of a prohibition from exercising the profession of journalist for one to six months (*proposed new Article 13*) is problematic from the standpoint of the principle that the press must be able to perform the role of a public watchdog in a democratic society,<sup>52</sup> and should be re-examined. As an alternative, the issue may be referred to the disciplinary bodies of the profession.

70. The proposal to bring on-line newspapers within the scope of the legislative provisions dealing with the press is a positive development, in line with the on-going growth of internet media and the increased the possibilities they offer for everyone to freely receive and impart information. It seems that this amendment does not apply to bloggers. It would be important to clarify whether and under which circumstances there will be liability for defamation for third party

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<sup>52</sup>*Cumpănă and Mazăre v. Romania*, Application No. 33348/96, Judgment of 17 December 2004, §§ 118-119

comments posted on such sites.

71. The introduction of a clause limiting the on-line communication covered by these provisions - and the concerned editors' liability - to "*the content produced, published, transmitted or made available on the network by the same editors*" - seems to be proposed as a defence for on-line media editors with regard to defamatory statements made on line by third parties. It would be also important to encourage on-line media professionals and Internet providers, as a way to encourage responsible journalism, to develop specific codes of conduct, including for the protection of dignity and reputation, as well as of effective notice and takedown procedures.

72. The effort to strengthen the "right to reply and rectifications" in new Article 8 of the Press Law is a commendable step and certainly a remedy for those in the public limelight who consider that they have been dealt with unfairly by the press. It is positive that the reparatory effect of the timely publication of a correction is added to the criteria for the assessment, by courts, of the damage resulting from defamation by the media (*new Article 11bis*). Similarly, the proposal to eliminate the criminal offence following the publication of rectification is an important step in the direction of limiting the use of criminal provisions in relation to defamation (*new Article 13*). These amendments deserve to be commended.

73. The new paragraph in Article 8 absolving the authors of liability for defamation when the editor/newspaper has failed to publish a denial or correction is also a welcome development in terms of protection of journalists.

74. The law would benefit from increased clarity with regard to the content of the „statements or rectifications“, i.e. whether these should only cover rectification of erroneous information or may also include expression of the opinion/personal view of the victim of defamation on the way he/she has been portrayed. This seems important in the light of the additional requirement that the rectification should be published "without comments" and "without reply".

*c. Amendments to criminal procedural law provisions*

75. A commendable amendment is proposed in Article 200 of the Code of Criminal Procedure, whereby independent journalists and "contributors" will now be able to enjoy the guarantees provided for the protection of journalistic sources. However, the provision enabling judges to require journalists to disclose/identify a source - where the information at stake is "essential to provide proof of the offence in question and its truth can be ascertained solely by identifying the source" - may be seen as a disproportionate interference under Article 10 ECHR.

76. The amendment of article 427 of the Code of Criminal Procedure, allowing courts to discourage, in the case of repeat offence, the abuse of lawsuits for defamation, is a positive step. Yet, the maximum amount of the fines proposed (10 000 EUR) does not seem to be a sufficient deterrent to effectively fulfil this function.

## **VI. Conclusions**

77. It is legitimate to restrict freedom of expression through defamation laws aiming to protect the right of reputation. Yet, restrictive measures may not be overbroad and must conform to the principle of proportionality, and serve a pressing social need.

78. Civil defamation laws have less chilling effect on freedom of expression than criminal laws, provided that the law is formulated in a way that excludes abuse by authorities. Providing guarantees that those sued will be able to mount a proper defence are essential.

79. Prison sentences for defamation should be abolished, except in limited, extreme cases such as in the case of hate speech or incitement to violence, and high fines applied with care to avoid deterring journalists or other commentators from contributing to public interest discussions.

80. The fundamental right to freedom of expression requires a strong scheme of legal defences which can be used against defamation claims. The legal defences in defamation cases concern the truth of statements, the right to express an opinion, the public interest in an open, free, political debate, as modern democracies depend on open and transparent discussions about potential abuse of power and corruption. Political speech is almost inviolable under ECHR case law.

81. Public authorities must respect the right of journalists to disseminate information on questions of general interest, including through recourse to a degree of exaggeration or provocation, provided that they act in accordance with responsible journalism.

82. Criminal defamation provisions currently in force in the Italian legislation do not fully meet the European standards on freedom of expression.

83. The Bill which is presently under discussion in the Italian Parliament undoubtedly represents a welcome effort to improve, modernize and bring the Italian legal framework pertaining to defamation in conformity with the ECHR requirements. Substantial improvements are introduced concerning the system of sanctions. In particular, the abolishment of the prison sanction for defamation is a significant step forward, demonstrating a clear commitment to giving a constructive response to the recent judgments of the Strasbourg Court against Italy. The limitation of the use of criminal provisions by strengthening the right to reply and rectification should also be commended. The speedy adoption of the above proposals by the Italian Parliament is strongly recommended.

84. The defences of truth, public interest and responsible journalism already largely recognised by the case law, should be explicitly introduced in Article 595 of the Criminal Code, and Article 596 should be reconsidered, in the light of the consolidated Constitutional case law.

85. Making more explicit, in the defamation provisions, the requirement of proportionality of sanctions and the economic condition of the journalist as a criteria for damage assessment, would help, alongside the general proportionality principle in the Italian legal system, avoid application of excessive fines and ensure proportionality of damage awards. Also, the introduction, for repeated defamation, of a temporary ban on the exercise of the journalistic profession should be reconsidered as it may lead to self-censorship within the media and have a chilling effect on investigative journalism.

86. Political debate should enjoy the highest protection, as well as fair and responsible criticism against public figures, in the framework of the debate on issues of public interest. The abolition of paragraph 3 of Article 595 is welcome. Articles 278 and 290bis of the Criminal Code should be reconsidered.

87. The Venice Commission encourages the Italian authorities to finalize the legislative process which is underway as regards the legislation on defamation. In addition to abolishing the imprisonment sanctions, it recommends careful consideration, prior to the final adoption of the amending Bill, of the recommendations contained in the present opinion both with regard to the amendments proposed and to the relevant provisions of the legislation in force.

88. The Venice Commission remains at the disposal of the Italian authorities should they need any assistance.