



**Organization for Security and Co-operation in Europe  
Office of the Representative on Freedom of the Media**

**LEGAL ANALYSIS OF LAW NO. 925 OF 17 OCTOBER 2013  
CONCERNING THE DEFAMATION LEGISLATION IN ITALY**

*Commissioned by the Office of the OSCE Representative on Freedom of the Media from  
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## **Executive Summary**

This Comment analyses the Law No. 925 (Defamation Law) of Italy currently tabled for review by the Senate for its compliance with international freedom of expression standards. The law was adopted by the Chamber of Deputies on 17 October 2013 introduces amendments to the Criminal Code and the Law No. 47 of 8 February 1948 (Press Act) as well as to the Civil Code of Procedure. The changes relate to online newspapers and radio and television news and current affairs programmes, the criminal liability for defamation, the media liability for defamation and the right of protection of journalistic sources.

The Defamation Law can be lauded for a number of changes which will have a positive impact on freedom of expression and media freedom in Italy. These include:

- the abolishment of prison sanctions for insult and defamation;
- the abolishment of the higher level of responsibility for defamation of public figures; and

At the same time some aspects of the Defamation Law are not favourable to freedom of expression; these include:

- the retention of criminal liability for insult and defamation,
- the excessive fines, the prohibition from exercising the profession of journalist,
- the long limitation period for filing a civil action for damages, and
- the criteria for determination of compensation awards for defamation.

The Defamation Law fails to deal with other problematic provisions of the Criminal Code such the criminal liability for insult of the President, for defamation of the Republic, the constitutional institutions, armed forces, and the Italian nation.

## **Summary of recommendations**

1. The Senate should consider carefully the calls and arguments of international bodies for decriminalization of defamation and abolish criminal defamation in its entirety. If criminal defamation is retained the fines for defamation should be reduced and the set minimum should be removed.
2. The prohibition of journalists from exercising their profession should be abolished as it is incompatible with international standards.
3. The period for filing a defamation suit should be no more than one year from the date of publication.
4. The Defamation Law should set out that the overriding goal of providing a remedy for defamatory statements is to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement.
5. A ceiling of the compensation awards should be fixed.
6. The criminal liability for insult of the President, and defamation of the Republic, the constitutional institutions, armed forces and the Italian nation should be repealed.

7. The defences of truth, expression of opinion, reasonable publication in public interest and reporting official sources should be explicitly recognised by law.
8. A timeframe for civil defamation proceedings must be set out.
9. A procedural mechanism should be set up to strike out claims for defamation early on in the civil proceedings unless the plaintiff can show some probability of success.

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## **Introduction**

The present comment was prepared by Boyko Boev, Senior Legal Officer at *ARTICLE 19*,<sup>1</sup> at the request of the Office of the OSCE Representative on Freedom of the Media.

The comment analyses the Law No. 925 (Defamation Law) of Italy currently tabled for review by the Senate for its compliance with international freedom of expression standards. The law was adopted by the Chamber of Deputies on 17 October 2013 and introduces amendments to the Criminal Code and the Law No. 47 of 8 February 1948 (hereinafter Press Law) as well as to the Civil Code of Procedure. The changes relate to online newspapers and radio and television news and current affairs programmes, the criminal liability for defamation, the media liability for defamation and the right of protection of journalistic sources. In accordance with the legislative process in Italy, the Defamation Law awaits a final reading and vote by the Senate.

The reform of the defamation legislation in Italy has been prompted by recommendations of international bodies. The Recommendation 1814 (2007) of the Parliamentary Assembly called on the Council of Ministers “to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case-law of the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions.”<sup>2</sup>

Furthermore, several international bodies called specifically on the Italian Government to bring its defamation legislation in compliance with international standards. In 2006, the UN Human Rights Committee recommended to the Government to abolish imprisonment for defamation.<sup>3</sup> In 2013 the OSCE Representative on Freedom of the Media called for decriminalization of defamation in Italy.<sup>4</sup> Similar calls were made by *ARTICLE 19*<sup>5</sup> and the International Press Institute.<sup>6</sup>

The review of the defamation legislation was prompted by several recent defamation cases in which journalists and editors received prison sentences:

- In 2010, journalist Gianluigi Guarino served 43 days in prison for criminal defamation before his prison sentence was reduced and he was subsequently released.<sup>7</sup>
- In May 2011, the Court of Chieti sentenced the journalists, Walter Nerone and Claudio Lattanzio to one-year imprisonment for defamation. At the same trial Luigi Vicinanza, a

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<sup>1</sup> Established in 1988, *ARTICLE 19* advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. It has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. *ARTICLE 19*'s *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (London: *ARTICLE 19*, 2000) have attained significant international endorsement, including that of the three official mandates on freedom of expression, 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 (see their Joint Declaration of 30 November 2000)

<sup>2</sup> Recommendation 1814 (2007) Towards decriminalisation of defamation, adopted on 4 October 2007 (34th Sitting).

<sup>3</sup> Concluding Observations of the Human Rights Committee: Italy, adopted on 24 April 2006, CCPR/C/ITA/CO/5, para. 19

<sup>4</sup> OSCE media freedom representative deplors Italian criminal defamation ruling, urges law reform, 27 September 2012; available at <http://www.osce.org/fom/94351>.

<sup>5</sup> *ARTICLE 19*, Italy: Criminal defamation legislation must be repealed, 7 September 2011; available at <http://www.article19.org/resources.php/resource/2721/en/italy:-criminal-defamation-legislation-must-be-repealed>.

<sup>6</sup> Steven Ellis, Italian journalist imprisoned for libel, IPI condemns detention, urges lawmakers to decriminalise defamation, October 2013.

<sup>7</sup> Steven Ellis, Media Freedom in Italy: The Criminal Defamation Case, 1 May 2013 <http://www.faiobserver.com/article/media-freedom-italy-criminal-defamation-case>

former director of the newspaper *il Centro di Pescara* was convicted to 8-month imprisonment.<sup>8</sup> I

- In September 2012 the Supreme Court of Cassation upheld the 14-month prison sentence for criminal libel against Alessandro Sallusti, editor of the newspaper *Il Giornale*.<sup>9</sup>
- In May 2013 a prison sentences for defamation were given to the journalists Giorgio Mule, Andrew Marcenaro and Riccardo Arena.<sup>10</sup> I
- In October 2013 an order was issued for the execution of the two-year prison sentence of Francesco Gangemi, a 79-year-old editor of monthly magazine *The Debate*.<sup>11</sup>

In several recent defamation cases the European Court of Human Rights (the European Court) found Italy in violation of Article 10 of the European Convention of Human Rights (the ECHR). Namely:

- In the case of *Ormanni v. Italy*, the European Court found that the criminal fine of 1,032 Euro and the award of 12,911 Euro which the applicant, a journalist and director of the weekly magazine *Oggi* was sentenced to pay, were disproportionate and violated Article 10.<sup>12</sup>
- In the case of *Belpietro v. Italy*,<sup>13</sup> concerning the complaint of an editor of the national daily newspaper *Il Giornale* against his suspended four-month prison term for defamation, the European Court held that the sanction of imprisonment and the high award of damages (in total 110,000 Euro) were disproportionate.
- In the case of *Riolo v Italy*,<sup>14</sup> the European Court concluded that the compensation award (approximately EUR 36,151 in respect of non-pecuniary damage plus legal fees) which an author of a newspaper article was ordered to pay, amounted to disproportionate interference with his right to freedom of expression and was not necessary in a democratic society.

The structure of the comment is guided by tasks formulated by the Office of the OSCE Representative on Freedom of the Media. These include to comment on the current version of the Defamation Law by comparing provisions against international media standards and OSCE commitments; to indicate provisions which are incompatible with the principles of freedom of expression and media; and to provide recommendation on how to bring the legislation in line with above mentioned standards.

The Comment first outlines the international standards with respect to the right to freedom of expression and defamation. These standards are defined in international human right treaties and in other international instruments authored by the United Nations, the OSCE, and the Council of Europe. Part III contains an analysis of the Defamation Law's compliance with these standards, specifically the right of reply and rectification, the changes to criminal defamation and the media liability for defamation and the protection of journalistic sources.

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<sup>8</sup> ARTICLE 19 Italy: Criminal defamation legislation must be repealed, 7 September 2011 <http://www.article19.org/resources.php/resource/2721/en/italy:-criminal-defamation-legislation-must-be-repealed#sthash.0tgjDCOF.dpuf>

<sup>9</sup> OSCE media freedom representative deplors Italian criminal defamation ruling, urges law reform, 27 September 2012, <http://www.osce.org/fom/94351>

<sup>10</sup> ARTICLE 19, Italy: Urgent need to reform defamation laws, 25 June 2013; available at <http://www.article19.org/resources.php/resource/37122/en/italy:-urgent-need-to-reform-defamation-laws>.

<sup>11</sup> The sentence stems from a string of eight libel convictions that Gangemi, a journalist since 1983, accumulated in Calabria and Sicily in the last seven years. See Steven Ellis, Italian journalist imprisoned for libel, IPI condemns detention, urges lawmakers to decriminalise defamation, *op.cit.*

<sup>12</sup> *Ormanni v. Italy*, Application no. 30278/04, Judgement of 17 June 2007.

<sup>13</sup> *Belpietro v. Italy*, Application No. 43612/10, Judgement of 24 September 2013.

<sup>14</sup> *Riolo v Italy*, Application No. 42211/07, Judgment of 17 July 2008

The Comment lists the positive aspects of the Defamation Law and elaborates on the negative ones, with a view of formulating recommendations for the review.

## **International standards relating to freedom of expression and defamation**

### **A. The right to freedom of expression**

Article 10 of the ECHR provides: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated: Freedom of expression . . . is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.<sup>15</sup>

In the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE<sup>16</sup> the OSCE participating states reaffirmed that:[E]veryone will have the right to freedom of expression.... This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.<sup>17</sup>

### **B. Restrictions on the right to freedom of expression**

The right to freedom of expression is not absolute. Both international law and most national constitutions recognize that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 10(2) of the ECHR lays down the benchmark, stating: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This article envisages restrictions on freedom of expression but only where they meet a strict three-part test.<sup>18</sup> The jurisprudence of the European Court makes it clear that this test presents a high standard which any interference must overcome, because of the fundamental importance of freedom of expression in a democratic society. The European Court has repeatedly stated: Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>19</sup>

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<sup>15</sup> *Handyside v. United Kingdom*, Application No. 5493/72, Judgment of 7 December 1976, para. 49.

<sup>16</sup> Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990.

<sup>17</sup> *Ibid.*, para. 9.1

<sup>18</sup> *The Sunday Times v. UK*, Application No. 6538/7426 Judgment of April 1979, para. 49.

<sup>19</sup> See, e.g., *Thorgeirson v. Iceland*, Application No. 13778/88, Judgment of 25 June 1992, para. 63.



Hence, any restriction on the right to freedom of expression must meet “the three part test”:

- First, the interference must be provided for by law. The European Court has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”
- Second, the interference must pursue a legitimate aim. The lists of aims at Article 10(2) of the ECHR and Article 19(3) of the ICCPR are exclusive in the sense that no other aims are considered to be legitimate grounds for restricting freedom of expression. The listed aims include the protection of national security, prevention of disorder and the rights of others.
- Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>20</sup>

### C. Freedom of expression, media and public interest debate

The guarantees of freedom of expression apply particularly to the media. The European Court has consistently emphasised “the pre-eminent role of the press in a State governed by the rule of law.”<sup>21</sup> Hence they receive particularly strong protection under Article 10 of the ECHR. The Court has further stated: Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>22</sup>

Along with the right of the media to impart information, Article 10 of the ECHR protects the right to hold opinions and to receive information.<sup>23</sup> Therefore when considering restrictions on freedom of expression the legislators and courts must take into account the right of both the speakers and the audience.

In the Charter for European Security (1999),<sup>24</sup> the OSCE participating states stated: We reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded trans-boarder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.<sup>25</sup>

The European Court gives the strongest protection to political debates on all matters of general public interest. States have a limited margin of appreciation regarding in this context and all exceptions to freedom of expression should be interpreted narrowly.<sup>26</sup>

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<sup>20</sup> *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, paras. 39-40

<sup>21</sup> *Thorgeirson v. Iceland*, *op.cit.*, para. 63.

<sup>22</sup> *Castells v. Spain*, Application No. 11798/85, Judgment of 23 April 1992, para. 43.

<sup>23</sup> *Sunday Times v. the United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, para. 65

<sup>24</sup> Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999.

<sup>25</sup> *Ibid.*, para. 26.

<sup>26</sup> *Lopes Gomes da Silva v. Portugal*, Application No. 37698/97, Judgment of 28 September 2000, para. 30

#### **D. Criminal defamation under international law**

There is an international consensus that criminal defamation is unnecessary for protection of reputation and must be abolished in view of its chilling effect on free expression. In General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee stated: States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.<sup>27</sup>

The three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they issue a joint Declaration addressing various freedom of expression issues. In their Joint Declarations of November 1999, and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read: Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.<sup>28</sup>

The Parliamentary Assembly of the OSCE has repeatedly called on participating states to “repeal laws which provide criminal penalties for the defamation of public figures, or which penalise the defamation of the State, State organs or public officials as such”.<sup>29</sup>

In 2007 the Parliamentary Assembly of Council of Europe invited states to repeal or amend criminal defamation provisions.<sup>30</sup> The Council of Europe Commissioner for Human Rights also stated that defamation should be decriminalized and that unreasonably high awards should be avoided in civil cases relating to the media.<sup>31</sup>

A 2012 study on defamation legislation the Council of Europe member states established that while there are still countries where defamation continues to be a criminal offence, there is “a clear trend towards abolition of sentences restricting freedom of expression and a lightening of the sentences in general”.<sup>32</sup> 14 OSCE participating States have partially or fully decriminalized defamation: Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Romania, Tajikistan, Ukraine, the United Kingdom and the United States.

The European Court, however, has never ruled out criminal defamation, and there are a small number of cases in which it has allowed criminal defamation convictions, but it clearly recognizes that there are serious problems with criminal defamation. It has frequently reiterated the following statement, including in defamation cases: [T]he 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

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<sup>27</sup> General Comment No. 34, adopted on 29 June 2011, CCPR/C/GC/34

<sup>28</sup> Joint Declaration of 10 December 2002.

<sup>29</sup> Warsaw Declaration, 1997; Bucharest Declaration, 2000; Paris Declaration, 2001.

<sup>30</sup> Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly “Towards decriminalisation of defamation”. See also Recommendations 1506(2001) and 1589 (2003) of the Parliamentary Assembly.

<sup>31</sup> T Hammarberg, Human Rights and a changing media landscape, Council of Europe, 2011.

<sup>32</sup> Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, Council of Europe, Information Society Department, CDMSI(2012)Misc 11Rev.

and criticisms of its adversaries or the media.<sup>33</sup>

There is a univocal consensus that imprisonment is disproportionate sanction for defamation and violates the right to freedom of expression. The UN Human Rights Committee has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of custodial sanctions for defamation.<sup>34</sup> The UN Special Rapporteurs on the Right to Freedom of Opinion and Expression repeatedly stated in their annual reports that “penal sanctions, in particular imprisonment, should never be applied.”<sup>35</sup> The Parliamentary Assembly of Council of Europe also invited states to ensure that in the future defamatory acts will no longer be punishable by imprisonment.<sup>36</sup>

The European Court has repeatedly criticised the imposition of criminal sanctions for defamation holding that a sanction of criminal nature has in itself a chilling effect<sup>37</sup> In *Cumpănă and Mazăre v. Romania*, it found a violation of Article 10 because it concluded that the imposition of prison sentences and/or a prohibition on exercising the profession may inhibit journalists from reporting on matters of general interest.<sup>38</sup> The Court stated: Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention 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>

### E. The European Court’s approach to defamation cases

When examining defamation cases the European Court follows a particular a particular method developed by it. It takes in account the following elements:

- **Impact on the measures on the author:** The European Court gives a higher level of freedom of expression to the mass media due to their vital role as a “public watchdog” in a democratic society. It also limits the margin of appreciation given to the national authorities when the freedom of expression is being exercised by NGOs,<sup>40</sup> authors of history books,<sup>41</sup> and researchers.<sup>42</sup> If the defamation cases are launched against these authors the European Court carefully scrutinizes the impact of the measures in defamation cases by referring to the “chilling effect” that would result from them on the exercise of freedom of expression.<sup>43</sup>

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<sup>33</sup> *Castells v. Spain, op.cit.*, para 46.

<sup>34</sup> For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999), Italy (2006) and Former Yugoslav Republic of Macedonia (2008)

<sup>35</sup> Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

<sup>36</sup> Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly “Towards decriminalisation of defamation”. See also Recommendations 1506(2001) and 1589 (2003) of the Parliamentary Assembly.

<sup>37</sup> *Cumpănă and Mazăre v. Romania*, Application No. 33348/96 Judgment of 17 December 2004, para. 114; *Belpietro v. Italy*, *ibid.* 13, para. 61

<sup>38</sup> *Ibid.* para. 96. See also *Mahmudov v Azerbaijan*, Application No 35877/04, Judgment of 18 December 2008, paras 37, 49.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Vides Aizsardz las Klub v Latvia*, Application No. 57829/00, Judgment of 27 May 2004, para. 42

<sup>41</sup> *Chauvy v France*, Application 64915/01, Judgment of 29 June 2004

<sup>42</sup> *Riolo v Italy, op.cit.*, para. 63

<sup>43</sup> *Nikula v Finland*, Application No. 31611/96, 21 March 2002

- **Persons targeted by the statements:** In defamation cases, the European Court weighs the protection of one's reputation against the wider public interest in securing a robust public interest debates. For this purpose it distinguishes between several categories of plaintiffs and establishes the limits of acceptable criticism against them. Politicians, public figures, and heads of states are required to demonstrate a greater degree of tolerance to criticism than ordinary citizens.<sup>44</sup>
- **Content, tone and form of the statement:** The European Court considers the content, tone and form of the statement. In view of the protection provided even to insulting speech under Article 10, it has allowed the use of terms such as "idiot," "Nazi" and "fascist" in the context of a public debate as a response to statements of others.<sup>45</sup> It also recognizes the specific nature of satirical and other forms of expression and the need to protect them.<sup>46</sup>
- **Good faith and responsibility:** The European Court examines whether persons and in particular journalists have not acted in good faith and exercised due diligence in order to provide accurate and reliable information. It has held that journalists must act in accordance with the ethics of journalism.<sup>47</sup> It has found a failure to exhibit good faith when an applicant either had not attempted to verify the reliability of her sources or was not able to substantiate her defamatory statements of providing proof or at least a sufficient factual basis.<sup>48</sup>
- **Type and severity of the sanctions for defamation:** The European Court takes into consideration the nature and severity of the penalties imposed for defamation are factors as factors when assessing the proportionality of an interference with the freedom of expression.<sup>49</sup> *Disproportionately large awards* can lead to a violation of Article 10.<sup>50</sup> It has underlined that people and in particular journalists should not be dissuaded from expressing their opinion on matters of public interest for fear of criminal and other sanctions and has held that disproportionate damage awards have a "chilling effect" on freedom of expression and amount to a violation of Article 10.<sup>51</sup>

The European Court has recognized the following defences for persons liable for defamation:

- **Truth:** The European Court has held that journalists should be "able to rely on a defence of justification – that is to say proving the truth of the allegation – to escape criminal liability."<sup>52</sup>
- **Expression of opinion:** The European Court distinguishes between statements of facts and value judgments (opinions). The first require proof of veracity by the applicant, while the truth of the second is not susceptible of proof. Nevertheless, value judgments should be founded on sufficient factual basis.<sup>53</sup>
- **Reasonable publication in public interest:** the European Court recognizes that journalists who have acted reasonably and had dealt with matters of public interest

<sup>44</sup> *Lingens v Austria*, Application No. 9815/82, Judgment of 8 July 1986, paras. 41-42.

<sup>45</sup> *Schorsch v Austria*, 39394/98 Judgment of 13 November 2003, *Gavrilovici v Moldova*, Application No. 25464/05, para. 58, Judgment of 15 December 2009.

<sup>46</sup> *Eon v France*, Application no. 26118/10, Judgment of 14 March 2013

<sup>47</sup> *Pedersen V Denmark*, Application No. 49017/99, para. 78, 17 December 2004, para. 78

<sup>48</sup> *Europapress Houlding D.O.O. v Croatia*, Application No 25333/06, Judgment of 22 October 2009, paras. 66-68, *Mahmudov v. Azerbaijan, op.cit.*, para. 44

<sup>49</sup> *Tammer v. Estonia*, Application No. 41205/98, Judgment of 6 February 2001, para. 69.

<sup>50</sup> *Tolstoy Miloslavsky v. United Kingdom*, Application No. 18139/91, Judgment of 13 July 1995.

<sup>51</sup> *Mirro Group Newspapers Limited v. the United Kingdom*, Application No. 39401/04, Judgment of 18 January 2011, para. 201

<sup>52</sup> *Colombani and others v. France* (2002), para. 66

<sup>53</sup> *Feldek v. Slovakia*, Application No. 29032/95, Judgment of 12 July 2001, paras. 75-76; *Flux v Moldova (no.1)*, Application no. 28702/03 Judgment of 20 November 2007.

should not be punished even if the truth of the factual statements cannot be proved in court.<sup>54</sup> Conversely, when the expression has no bearing on debate of public interest but only serves to attack individuals on a personal level, the protection of the expression decreases.

- **Reporting official sources:** The European Court has held that “the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research”.<sup>55</sup>

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<sup>54</sup> *Alithia v Cyprus*, Application No. 17550/03, Judgment of 22 May 2008, paras. 49 - 51

<sup>55</sup> *Colombani and others v. France*, Application No. 51279/99, Judgment of 25 June 2002, para. 65

## Analysis of the Defamation Law

### A. Positive aspects

The Defamation Law can be lauded for the following changes which will have a positive impact on freedom of expression and media freedom in Italy:

- **It abolishes prison sanctions for insult and defamation:** The Defamation Law introduces changes to Articles 594 and 595 of Criminal Code, replacing the prison sanctions for insult and defamation with fines. The Law also removes the prison sanction from Article 13 of the Press Law which applies to defamation committed the press. The abolishment of the prison sentence is in line with international standards and will end the nefarious practice of sentencing journalists to prison for defamation.
- **It includes measures against malicious complainants:** The Defamation Law amends Article 427 of the Code of Criminal Procedure by giving powers to the court to fine plaintiffs in defamation cases to pay a sum of 1,000 to 10,000 Euros if they have abused the criminal process by launching unsubstantiated complaints for defamation. This change is positive as it aims at preventing the abusive recourse to court proceedings to stifle media criticism.
- **It allows for media who have published a reply or rectification, in accordance with the legal requirement thereof, to be absolved from criminal sanctions.** The new Article 13, paragraph 3 of the Press Law states that the perpetrator of defamation or the person in charge of the newspaper shall not be liable to a penalty if they arrange for the publication of statements or rectifications. According to Article 13, paragraph 4 when deciding on the liability of penalty the court must consider only if the reply or rectification comply with the legal requirements. This change is positive because it protects the media against criminal sanctions.
- **Journalists are absolved from responsibility if the director of the newspaper has failed to publish a denial or correction:** The Defamation Law introduces a new paragraph in Article 8 of the Press Law absolving authors of responsibility for defamation when the newspaper has refused to publish a denial or correction. This provision is fair and reasonable as journalists should not be responsible for the editorial decisions.
- **Limitation of liability of directors for defamation:** The Defamation Law replaces Article 57 of the Criminal Code. The new provision limits the liability of directors or deputy directors for defamation. Directors are responsible only if the defamation is a result of a breach of their supervision. In such cases, the penalty is decreased by one-third. Moreover directors can no longer be prohibited from exercising the profession of journalist.
- **Higher level of responsibility for defamation of political, administrative or judicial agency, a representative of the latter or a collegial authority is abolished:** The Defamation Law repeals Article 595 paragraph 4 of the Criminal Code which grants higher protection to the officials and bodies against insult and defamation. The abolishment of the special protection of public officials is in line with Resolution 1636 of the Parliamentary Assembly of the Council of Europe<sup>56</sup> and the European Court's

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<sup>56</sup> Resolution 1636 of the Parliamentary Assembly of the Council of Europe, Indicators for media in a democracy, Adopted on 3 October 2008 (36<sup>th</sup> Sitting). Item 8.2 states: "state officials shall not be protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty."

case law according to which the officials must tolerate more criticism than ordinary citizens.<sup>57</sup>

- **It ensures clarity on the owners and editor-in-chief of online newspapers:** The Defamation Law expands the scope the Press Law and obliges online newspapers to declare their owners, editor-in-chief and deputy editors. Although from a freedom of expression perspective, self-regulation is the best model of online media regulation, the statutory obligation for registration of online newspaper is not problematic as it does not affect their establishment and operation and therefore it does not amount to licensing. Moreover the purpose of the requirement for registration – to provide clarity of ownership and editorial staff – is legitimate.

## **B. Negative aspects**

The following provisions of the Defamation Law are incompatible with international freedom of expression standards:

1. **Criminal liability for insult and defamation is retained:** It is regrettable that the Chamber of Deputies decided to retain criminal liability for insult and defamation. Italy misses a chance to modernise its defamation legislation in accordance with international freedom of expression law and the best practices. Italy also failed to follow the trend of decriminalisation of defamation and the example of other Council of Europe member states like Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Moldova, Montenegro, Ukraine, and the UK who have abolished criminal defamation. The retention of criminal defamation and insult implies that the state has an interest in controlling expression and imparting negative social stigma to it. In modern democracies the protection of one's reputation is treated primarily or exclusively as a private interest. Moreover, the retention of criminal liability for defamation and insult has a chilling effect on journalists and individuals due to the criminal nature of the sanction and the criminal record they would have in case of conviction.<sup>58</sup> It is recommended that the Senate consider carefully the calls and arguments of international bodies for decriminalisation of defamation and abolish criminal defamation entirely.
2. **Directors, deputy directors, and printers are criminally liable for defamation:** According to Article 596 *bis* of the Criminal Code, printers can be criminally liable for defamation. Similarly Article 57 of the Criminal Code provides that directors and deputy directors can be sued for criminal defamation. These provisions are highly problematic as these persons do not exert editorial responsibility and it is unfair and unnecessary to hold them criminally responsible. Under international standards, no one should be liable under defamation law for a statement of which he or she is not the author, or someone else who had no reason to believe, that what he or she did intentionally contributed to the dissemination of a defamatory statement. It is recommended again that the criminal defamation is abolished. In any case, directors, deputy directors, , printers and those who did not deliberately contributed to the dissemination of the defamatory statement should not be criminally liable.

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<sup>57</sup> See above, section on international standards.

<sup>58</sup>The European Court places strong emphasis on the adverse effect of criminal sanctions themselves, and particularly the potential impact of a criminal record on an individual's future. See *Scharsach and News Verlagsgesellschaft v. Austria*, Application No.39394/98, Judgment of 13 November 2003, para. 32

3. **Excessive fines are established and increases the pre-existing ones:** The Defamation Law increases the fines set out in Articles 594 and 595 of the Criminal Code. The fine for defamation increases from 3,000 to 10,000 Euros, whereas the fine for insult up can reach 7,500 Euros. The Defamation Law also increases the fines for defamation via the media. According to the amended Article 13 of the Press Law, the new fines for the media from 5,000 to 10,000 Euros if the defamation is a result of negligence. The fines for deliberate defamation (when it has been known that the specific fact is untrue) are increased from 20,000 to 60,000 Euros.
4. **Penalty of prohibition from exercising the profession of journalist is retained:** The Defamation Law retains the criminal penalty of prohibition from exercising the profession of journalist for a period of one to six months. According to Article 13 para 2 of the Press Law, this penalty is ancillary and is imposed along with convictions of journalist of defamation. The prohibition to practice journalism even if temporary is unnecessary interference with the right to freedom of expression and prohibited under international law.<sup>59</sup> For example, in the case of *Cumpănă and Mazăre v. Romania*, the European Court found that the penalty of prohibition from practicing journalism is a disproportionate restriction on the right to freedom of expression.<sup>60</sup> It is recommended that the prohibition of journalists from exercising their profession be abolished.
5. **Statute of limitation period for filing a civil action for damages is unnecessarily long:** The new paragraph 2 of Article 11 *bis* of Press Law decreases the statute of limitations for launching of a civil action for damages from 10 to 2 years after publication. Although the 5-time decrease of the limitation period is welcome, the 2-year statute of limitation is still long. It is recommended that the period for filing a defamation suit be no more than one year from the date of publication.
6. **Criteria for determination of compensation award for defamation are problematic:** The Defamation Law amends Article 11 para 1 of the Press Law. According to the new provision, in assessing the damage resulting from defamation committed via the press or a radio or television broadcast, the court takes account of the circulation and national or local relevance of the means of communication used to commit the offence, the seriousness of the offence and the reparatory effect of publication or dissemination of a rectification. This provision does not fully comply with the standard established by European Court which requires that the awards be proportionate to the harm and have no “chilling effect” on the media.<sup>61</sup>

Moreover, it is noted that the European Court takes into account more criteria than the ones listed in Article 11. In the case of *Romanenko and others v. Russia*,<sup>62</sup> concerning the conviction of journalists for defamation and pecuniary compensation they were ordered to pay, the European Court noted that the domestic courts did not analyse the journalists’ income and whether the compensation has an excessive burden on them. It found a violation of the journalists’ right of freedom of expression noting that the award

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<sup>59</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion of Inter-American Court of Human Rights, OC-5/85 of 13 November 1985, Series A. No. 5. See also Joint Declaration of 18 December 2003 of three special mandates for protecting freedom of expression, *op.cit.*

<sup>60</sup> *Cumpănă and Mazăre v. Romania*, *op.cit.*

<sup>61</sup> *Ibid.*, paras. 94-95. The European Court held that although state parties are permitted or even required by their positive obligations under Article 8 to ensure adequate protection of an individual’s reputation, they must not do so in a manner that has a “chilling effect” on the media.

<sup>62</sup> *Romanenko and others v. Russia*, Application No.111751/03, Judgement of 8 October 2009, para. 48.



which amounted to the equivalent to their income for four months was a “severe penalty”. It is recommended that the Press Law require that in assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression be taken, among other things, into account.

Pecuniary awards should never be disproportionate to the harm done, and should take into account the income of the convicted journalists and editors. It is also recommended that the Press Law set out that the overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement. The Press Law should fix a ceiling on compensation awards and provide that this maximum can be applied only in the most serious cases.

7. **Criminal liability for insult of the President, the Republic, and for defamation of constitutional institutions and armed forces, the Italian nation are retained:** The Defamation Law does not envisage abolishment or changes in other defamation provisions. Article 287 envisages prison sentence from one to five years for those who affront the honour or prestige of the President of the Republic. Article 290 provides for a fine from 1,000 to 5,000 Euro for everyone who publicly defames the Republic, Parliament, the Government, the Constitutional Court, the judicial system, the State armed forces or the liberation armies. Article 291 provides for the same fine for anyone who publicly defames the Italian nation shall be punished with a fine of between € 1 000 and € 5 000. These provisions are in conflict with international free expression standards. For example, in Recommendation 1897 (2010) on respect for media freedom, the Parliamentary Assembly of the Council of Europe reaffirmed the reputation of a nation, the military, historic figures or a religion cannot and must not be protected by defamation or insult laws. It recommended that governments and parliaments “clearly and openly reject false notions of national interest evoked against the work of journalists. Nationalism must never again become the misguided reason for killing journalists, or depriving them of their rights or liberty”. Likewise the Human Rights Committee has called for the abolition of the offence of "defamation of the State"<sup>63</sup> It is recommended that Articles 287, 290 and 291 be abolished.

In addition, it is noted with concern that the Defamation Law fails to include important guarantees for the right to freedom of expression in the defamation regime. In particular:

1. **The Defamation Law does not provide for defences for defendants in defamation cases:** Although the Italian courts may have already recognised specific defences in defamation cases, it is recommended that the Defamation Law explicitly provide for such defences. The Press Law should guarantee the defences of truth, expression of opinion, reasonable publication in public interest and reporting official sources, which have been recognised by the European Court.<sup>64</sup>
2. **The Defamation Law does not set up a timeframe for civil defamation proceedings:** Delays of defamation proceedings have a chilling effect on freedom of the media. Therefore courts should be obliged to ensure that each stage of civil defamation proceedings is conducted with reasonable dispatch, in order to limit the negative impact of delay on freedom of expression.

<sup>63</sup> Concluding Observations of the Human Rights Committee: Serbia and Montenegro. 12/08/2004. CCPR/CO/81/SEMO

<sup>64</sup> See above, section on international law.

