

Steering Committee on Media and Information Society

COUNCIL OF EUROPE



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Draft list of questions for CDMSI members on the implementation of Council of Europe standards related to safety of journalists and other media actors

Reply by San Marino

1) Which are the existing mechanisms to ensure investigation and prosecution of attacks against journalists and other media actors?

With regard to prosecution and punishment of criminal offences against journalists and/or other media actors, the general rules governing prosecution and application of the penalty imposed by a judgement of the court should be considered.

Art. 1 of the Code of Criminal Procedure lays down the principle of mandatory criminal prosecution in the event of an offence. After receipt of a *notitia criminis*, the investigating judge shall initiate the investigation, which is aimed at identifying the offender and at obtaining all relevant information to establish the existence of the infringement and the offender. After the investigation, the judge shall assess the evidence collected in order to decide whether to dismiss the case or to proceed to indictment. The latter measure is adopted if the investigating judge, following the investigation, considers that there is evidence of guilt. The proceedings is made public through notification of the indictment order and of the writ of summons.

The enforcement of the criminal judgement, and therefore the enforcement of the sentence imposed for the offence, is based on the *res judicata* of the judgement. In particular any enforcement proceeding is based on a final and irrevocable judgement, resulting in a enforceable and mandatory sentence. Therefore, the sentence inflicted by the judicial authority is enforced on the basis of the final and irrevocable judgement.

2) Are there any non-judicial mechanisms, such as parliamentary or other public inquiries, ombudspersons, independent commissions, as useful complementary procedures to the domestic judicial remedies guaranteed under the ECHR, specifically dealing with threats and crimes targeting journalists and other media actors?

No. For the sake of completeness, it should be stated that under Art. 6 of Law no. 211 of 5 December 2014, the Supervisory Authority for Information, among its duties, serves as the body responsible for supervising the proper performance of the activities of the sector, determining and applying penalties in case of non-compliance with the rules, "*assesses the information in its possession and that disclosed by interested parties, it carries out verification and investigation in order to prevent and combat restrictions and distortions of information pluralism (...)*".

3) Is the confidentiality of journalists' sources of information protected in both law and practice?

Article 3, paragraph 4 of Law No. 211 of 5 December 2014 establishes that "*publishers and media actors can oppose professional secrecy on the sources of information*".

4) Does the domestic legislation in your country regarding defamation/libel include criminal law provisions?

Art. 183 of Penal Code entitled "**Defamation**", provides that "*Anyone attributing to someone else, either present or absent, a fact that offends his/her reputation in public meeting or while communicating with people, upon a complaint lodged by the offended person, shall be punished by terms of second degree arrest or daily fine*".

Article 185, "**Public libel**", provides that "*If the offence referred to in Article 183 is committed through social communication, even abroad, legal action shall be taken upon a complaint lodged by the offended person and the offence shall be punished by first degree imprisonment or fine [in lira] or second degree arrest or third degree daily fine*".

The offence of slander or self-slander in San Marino legal system is governed as follows: Art. 357 states that "*Anyone who, having lodged a complaint or having brought proceedings before the judge or a public official having an obligation to report back to the judge, accuses of a misdemeanor someone while being aware that he/she is innocent, or fabricates evidence of an offence against him/her, shall be punished with imprisonment from the second to the third degree*".

A second degree imprisonment shall be applied if the offender accuses himself of a misdemeanor or of a felony not committed by him/her.

These penalties are reduced by one degree if the accuse concerns a infraction".

Pursuant to Art. 357 of the Criminal Code, in order for the offence of slander to be committed, blaming someone for committing an offence is not enough; indeed, a complaint must be lodged or the proceedings have to be brought before the judge or a public official.

Moreover, Art. 184 of the Criminal Code regulates the offence of "Insult", stating that "*Anyone offending the reputation of a person, either present or absent, in a public meeting or communicating with people, shall be punished, upon a complaint lodged by the offended person, by terms of second-degree arrest or daily fine or by reprimand*".

*[If the insult is committed in the sole presence of the injured person, first-degree arrest or daily fine or reprimand shall be applied(**)].*

Epistolary, telegraph, telephone communication and the like shall be considered equivalent to presence".

*(**) The fact provided for in the second paragraph of Art. 184 constitutes an "administrative infringement" to be considered by the Law Commissioner, in accordance with Art. 1 of the annual Regency decrees and related annex 'A'.*

5) What are the procedural guarantees (the right to defence, the periods of limitation applicable to defamation suits, exceptio veritatis (defence of truth) and the burden of proof, presumption of good faith etc.) included in the civil and/or criminal legislation related to defamation?

Article 15 of the "Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order"¹ (hereinafter referred to as "Declaration on the Citizens' Rights") establishes that "*Everyone is entitled to jurisdictional protection of subjective rights and legitimate interests before the competent ordinary and administrative courts and before the Panel responsible for guaranteeing the constitutionality of rules*".

Everyone is entitled to defend him/herself at any stage of the judicial proceedings".

¹ Decree no. 79 of 8 July 2002 and subsequent amendments.

Pursuant to Art. 52 of the Criminal Code, the statute of limitations extinguishes the offence. Art. 54 of the Criminal Code sets out the limitation periods for offences proportionate to the penalty imposed². Art. 183 of the Criminal Code provides for the offence of defamation the punishment of second degree arrest or daily fine. The offence of "public libel" is subject to the punishment of first-degree imprisonment or second-degree fine or arrest or third-degree daily fine. The period of limitations for such offences is, therefore, two years.

As regards the *animus*, worth specifying is that the *offender's animus diffamandi is not an integral part of the offence of defamation*: for the wilful intent to be established, it is sufficient that the offender wanted the action to be committed (communication of the determined fact) and that, at the same time, he/she was aware of the discredit that he/she was able to cause to the reputation of another person. According to San Marino case-law "*there is no defamation in case of lack of consciousness and willingness to commit facts damaging the reputation of another person*" (Judgement no. 23 of 4 March 1988).

[Also with regard to the offence of insult, general intent is requested, whereas the *animus iniurandi*, i.e. the aim of damaging the reputation of others, is not required: therefore, for the commission of the offence it is sufficient that the offender has acted being aware of the insulting nature of the words spoken or written, as well as of their suitability to endanger the protected legal value (reputation)].

The exonerating evidence, defined as "exceptio veritatis" is allowed for the offences of defamation and public libel as such offences refer to a specific fact. As regards exonerating evidence, Art. 189 of the Criminal Code provides that: "*In the cases of defamation under Articles 183 and 185, the offender shall be permitted to give evidence of the truth of the facts attributed to the offended person in the following cases:*

- 1) *if the offended person formally permits it;*
- 2) *if criminal proceedings are pending for the defamatory facts;*
- 3) *if the assessment of the facts is in the public interest for the status of the offended person or for other reasons.*

If the truth of the fact is proven or if the offended person is subsequently convicted, the offender shall be exempt from punishment".

In the light of the above-mentioned provision, a person that has attributed to someone a fact damaging his/her reputation and public esteem shall be exempt from punishment if he/she proves the truth of the fact in the following cases: when the offended person so permits or, in the absence of consent, when criminal proceedings are ongoing for such defamatory fact, or in the absence of

²Art. 54 **Statute of limitations** - Prosecution for an offence is time-barred:

- 1) *after two years if the offence is punished by reprimand, daily fine, arrest, first or second degree disqualification, first-degree imprisonment, alone or combined with each other;*
- 2) *after three years, if the offence is punished with second degree imprisonment, third or fourth degree disqualification, a fine [in lire], alone, combined with each other or with any other penalty;*
- 3) *after four years if the offence is punished by third degree imprisonment, alone or combined with any other penalty;*
- 4) *after five years if the offence is punished by fourth degree imprisonment, alone or combined with any other penalty;*
- 5) *after eight years if the offence is punished by fifth degree imprisonment, alone or combined with any other penalty;*
- 6) *after six years if the offence is punished by sixth degree imprisonment, alone or combined with any other penalty;*
- 7) *after twenty years if the offence is punished by seventh or eight degree imprisonment, alone or combined with any other penalty;*

In order to determine the time required for the statute of limitations, consideration shall be given to any change in the degree of the penalty due to aggravating or mitigating circumstances.

consent and of pending criminal proceedings, when the assessment of the facts is in the public interest for the status of the offended person or for other reasons that will be assessed by the Court.

According to the case law "(...) it can be said that in San Marino legal system the right to report is exercised with no restrictions whenever information is objectively true and relevant to general public interests. Consequently, the sole error made in reporting the facts is not a valid justification, as the non-veracity of the facts published is considered as prevailing (the error may be taken into consideration only if, because of it, the mental element necessary for the very existence of criminal defamation is lacking; therefore the journalist should provide valid proof of the attention and care paid by him/her while verifying the information reported to him/her)". (Judgement of Judge Emiliani no. 120 of 2002).

The veracity of the facts as a valid justification in the offence of defamation does not apply to the offence of insult. In this respect the above mentioned case law points out that "*despite the veracity of the facts attributed and the public interest of the assessment to be carried out on them - defamation containing a real insult or degenerating into insult, as may occur by using epithets and offenses, shall be punishable. Consequently, in order not to be punished, journalists should report the defamatory fact (...) without remarks and evaluations which are offensive to human dignity and can denigrate people (...) omitting any form of moral aggression (...)*".

6) In the domestic legal framework, are state officials protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty?

Title IV "Offences against the State", Chapter II of the Criminal Code deals with "Offences against public authority" (Articles 341-346). As regards, in particular, acts intended to harm the reputation or insults against public officials, worth mentioning are the following offences:

- "**Damage to the reputation of the Captains Regent**"(Art. 342 of the Criminal Code) (which is linked with the provisions referred to in Art. 345 of the Criminal Code "Common provision"): "*Anyone damaging the reputation or prestige of the Captains Regent shall be punished with second degree imprisonment.*" Art. 345 of the Criminal Code also provides that "*If the damage to the Captains Regent and those vested with public authority is made in their presence, the punishments provided for in Articles 342 and 344 respectively shall be increased by one degree*".
- "**Damage to the reputation of persons vested with public authority**" (Article 344 of the Criminal Code): "*If the damage to reputation or prestige affects one of the persons mentioned in the preceding Article, first-degree imprisonment shall apply*".

7) 7. Do laws on the protection of public order, national security or anti-terrorism have safeguards for the right to freedom of expression? What are these safeguards?

No.

8) Are the following instruments translated into the national language and disseminated widely, in particular brought to the attention of judicial authorities and police services? Are these made available to representative organisations of lawyers and media professionals?

No.

- Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media, 21 September 2011

- Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (2011)
- Recommendation 1876 (2009) of the Parliamentary Assembly on the state of human rights in Europe: the need to eradicate impunity
- Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted on 26 September 2007
- Recommendation CM/Rec(2004)16 of the Committee of Ministers to member States on the right to reply in the new media environment
- Recommendation CM/Rec(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.
- Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns
- Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content
- Recommendation No. R (2003) 13 on the provision of information through the media in relation to criminal proceedings
 - Belgrade Conference of Ministers Resolution n° 3 Safety of Journalists