

ITALY

MINISTRY OF FOREIGN AFFAIRS
Inter-ministerial Committee for Human Rights
Comitato Interministeriale per i Diritti Umani

**ITALY'S REMARKS
ON FREEDOM OF OPINION AND EXPRESSION AND
THE SITUATION OF JOURNALISTS**

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ITALY'S REMARKS

Introductory remarks

1. The Basic Law determines the political framework for action and organization of the State. The fundamental elements or structural principles of the constitutional law governing the organization of the State are as follows: Democracy, as laid down in Article.1; the so-called *personalistic* principle, as laid down in Article. 2, which guarantees the full and effective respect for human rights; the pluralist principle, within the framework of the value of democracy (Arts. 2 and 5); the importance of work, as a central value of the Italian community (Arts. 1 and 4); the principle of solidarity (Article.2); the principle of equality, as laid down in Article.3 (it is also the fundamental criterion applied in the judiciary system when bringing in a verdict); the principles of unity and territorial integrity (Article 5); and above all the relevant principles, including the social state, the rule of law and the respect for human rights and fundamental freedoms, such as freedom of correspondence, freedom of movement, freedom of religion or belief, and freedom of opinion and expression – as also mentioned in your report.

2. The Italian legal system aims at ensuring an effective framework of guarantees, to fully and extensively protect the fundamental rights of the individual. Indeed, we rely on a solid framework of rules, primarily of a constitutional nature, by which the respect for human rights is one of the main pillars.

3. Within our national system of protection of human rights, mention has to be made, among others, of the Italian Constitutional Court that deals only with infringements of a constitutional level (the constitutional court consists of fifteen judges; one-third being appointed by the President of the Republic/Head of State, one-third by the Parliament in joint session, and one-third by ordinary and administrative supreme court). The constitutional court exercises its duty as one of the highest guardian of the Constitution in various ways. It becomes active when it is called on. For example, it supervises the preliminary stages of referenda and is competent in case of presidential impeachment. Complaints of unconstitutionality may be submitted to the Italian Constitutional Court by central and local authorities claiming that a state or a regional Act might be unconstitutional. Therefore, the Court monitors Authorities to see whether they have observed the Constitution in their actions. It also arbitrates in cases of disagreements between the highest State's organs and decides in proceedings between central and local authorities.

- Procedurally, the court must examine *ex officio* (the prosecutor) or upon request of the plaintiff/defendant whether the provisions to be applied are in compliance with the Basic Law. When the court considers that an act is unconstitutional, such evaluation brings to a suspension of the *a quo* proceeding. Accordingly, a decision is made by the Court itself, pursuant to Art. 134 of the Italian Constitution. The Constitutional Court decides (and its decisions cannot be appealed) disputes: 1. concerning the constitutionality of laws and acts with the force of law adopted by state or regions; 2. arising over the allocation of powers between branches of government, within the state, between the state and the regions, and between regions; 3. on accusations raised against the head of State in accordance with the Constitution. More generally, this Court decides on the validity of legislation, its interpretation and if its implementation, in form and substance, is in line with the Basic Law. Thus, when the Court declares a law or an act with the force of law unconstitutional, the norm ceases its force by the day after the publication of its decision.

Defamation

4. Turning to the specific concern, we would like to stress that Senate Act No. 1932, approved by the Senate on June 8, 2016 and currently before the Chamber of Deputies does not make any reference to Art.595 of the criminal code (concerning defamation). The plenary of the Senate has decided to remove the provision which would have increased prison terms from six to nine years in case of defamation of elected officials and judges – given the risk chilling effect on media freedom.

- In this regard, it should be borne in mind that freedom of expression and freedom of the press are protected by the Italian Constitution of 1948 in its Article 21, which sets forth: “*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 [...]*”.

5. Article 594 of the Italian Criminal Code addresses insult (“*ingiuria*”), an offence which is distinct from defamation. Defamation is defined under Article 595 as a damage to the reputation/honor 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).

6. Article 596 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.

7. 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. Plus, Articles 57 and 57bis of the Criminal Code provide for liability of the editors/deputy editor and publisher or the printer, in case the offence of defamation is committed, for failure to conduct supervision of the content of the publication. Article 58 extends the scope of these provisions to the clandestine press. Should the condemnation not be suspended, an additional penalty is applied (*pena accessoria*) concerning the temporary interdiction from labour (Art.20, p.c.). However as for the latter the Court of Cassation has clarified that it is not automatically applied but it depends on the further ascertainment of abuse by the journalist in accordance with Art.31, p.c. by which “abuse of the profession” stands for absurd performance aimed at an objective other than the traditional one stemming from the job position under reference. The abuse of the profession requires an illegitimate conduct from both a subjective and objective standpoint, such as the repetition of the conduct, seriousness of the intentionality.

8. More specifically, the aim and the rationale behind the relevant provisions of the domestic criminal code indicate the constant balancing between opposite stances. As for the “reputation/honor”, there is a common understanding to refer to “those conditions on the basis of which the social value of the individual is expressed”; as for “the dignity”, there is a common understanding to refer to “the intellectual, physical and social features of individuals”. Thus, consideration should be given to the fact that the protection of the reputation/honor of individuals may result in a stance opposite to freedom of expression, including press, and vice-versa.

9. The limits to the so-called “right to chronicle” are of the utmost importance and are to be considered therein. 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 application 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”.

10. The case-law has further clarified that these three criteria cannot fully operate in relation to the right to criticize and to satire (See Cass. Sez.1, Decision No. 40930 dated September 27, 2013; Cass. Sez. 5, Decision No. 37706, dated 23/05/2013; Sez. 5, Decision No. 3356, dated October 27, 2010; Sez.5, Decision No. 15060, dated 23/02/2011; Sez.5, Decision No. 43403, dated 18/06/2009; sez.1, Decision No. 4496, dated 14/01/2008). 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. Importantly, in most cases the truthfulness of the communicated information excludes criminal defamation.

11. In brief, the defence of truth, public interest and responsible journalism are largely recognised by the Italian case law. The Supreme Court has often stated that such a right is lawful when it is exercised under the following circumstances/requirements: 1. social value; 2. truth; 3. correct exposition of the episode under consideration. Along these lines, the so-called “right to criticism” must be exercised within specific borders: 1. correctness of the language; 2. respect for one’s rights (Cass. No. 40930/13). However, as a matter of fact, freedom of the press and freedom of expression relating to politics and trade union-areas enjoy more extensive interpretations.

12. At present, various pieces of legislation aimed at amending the criminal discipline of defamation are under discussion before the Italian Parliament. In this context mention has to be made of the so-called Costa Bill, as approved by the Chamber of Deputies in June 2015 and currently before the Senate.

- The amendments proposed to the current legislation aim at limiting the use of criminal sanctions for defamation, and introducing the abolishment of imprisonment as a sanction for defamation.

13. In this context, the Venice Commission commended the above Bill in its relevant Opinion 715/2013 of last December 6-7, 2013.

CONCLUSIONS

17. Before concluding, Italian Authorities take this opportunity to reiterate their firm willingness to continue cooperating with the Council of Europe and all its mechanisms.