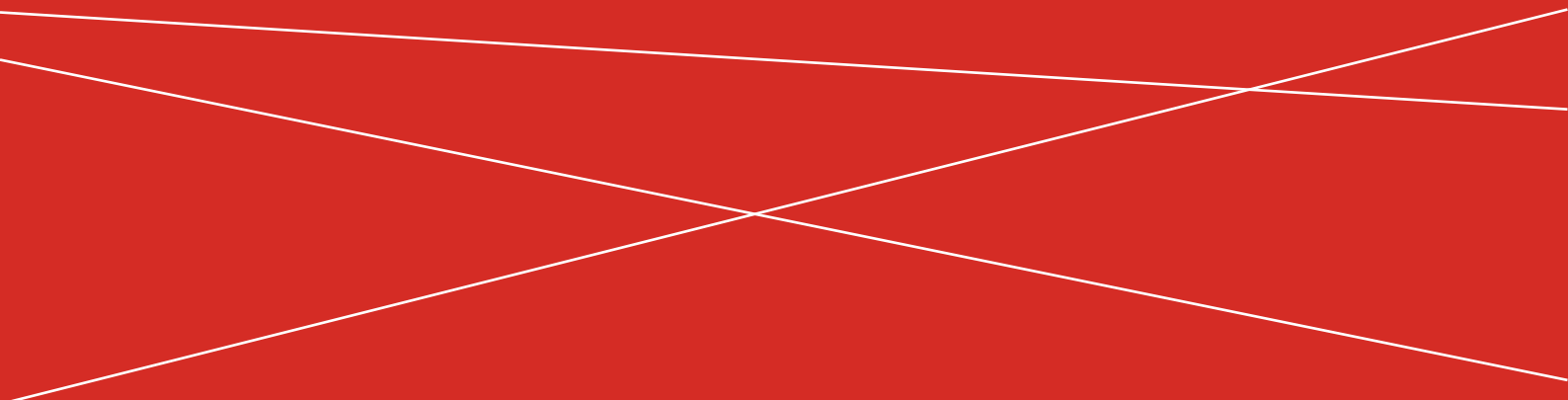




Italy: Half-baked defamation reforms will not protect journalists

Legal briefing

24 May 2023



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ARTICLE 19 Europe's work is part of the Media Freedom Rapid Response (MFRR), which tracks, monitors, and responds to violations of press and media freedom in EU Member States and Candidate Countries. This project provides legal and practical support, public advocacy, and information to protect journalists and media workers. The MFRR is organised by a consortium led by the European Centre for Press and Media Freedom (ECPMF) including ARTICLE 19 Europe, the European Federation of Journalists (EFJ), Free Press Unlimited (FPU), International Press Institute (IPI), and CCI/Osservatorio Balcani e Caucaso Transeuropa (OBCT). The project is co-funded by the European Commission. www.mfrr.eu

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Introduction

ARTICLE 19 Europe is concerned that the proposed reform of defamation legislation in Italy fails to meet international standards on freedom of expression and will not lead to much needed protection of media freedom. None of the proposals include full decriminalisation of defamation and in fact would result in a substantive rise in criminal fines and additional sanctions. Although we appreciate that the Government finally undertook steps to reform the existing law, far more comprehensive reform is needed. Defamation must be decriminalised and replaced by appropriate civil legislation. New legislation should also tackle the growing phenomenon of strategic litigation against public participation (SLAPPs) in the country and bring national legislation in line with international and European standards on freedom of expression.

Background

The reform of Italian defamation legislation is long overdue. Over the last decade, the existence of criminal defamation, with sanction of imprisonment for defamation through the press, have been challenged at the European Court of Human Rights (European Court) and at the Italian Constitutional Court. Both found that the penalty of imprisonment for defamation constitutes a disproportionate interference with the right to freedom of expression.¹ The Constitutional Court even recommended a legislative reform and warned that if Parliament failed to amend the law by 22 June 2021, the Court itself would have to abolish prison sentences.²

Subsequently, several bills were discussed and put forward to the Parliament but none of them resulted in actual legislation.³ Hence, on 22 June 2021, the Constitutional Court expanded its original ruling on the respective legal provisions and renewed its call on Parliament to pass the reform that could adequately balance the right to freedom of expression with the protection of individual reputation.⁴

¹ See in particular the European Court, *Belpietro v. Italy*, App. No. 43612/10, 24 September 2013; *Ricci v. Italy*, App. No. 30210/06, 08 October 2013 and *Sallusti v. Italy*, App. No. 22350/13, 07 March 2019; and Constitutional Court, [order 132/2020 of 9th June 2020](#).

² ARTICLE 19 Europe, [Italy: Defamation laws must be reformed](#), 23 June 2021.

³ See e.g. [Draft Law on the initiative of Senator Caliendo](#), Amendments to the Law of 8 February 1948, n. 47, to the Penal Code, the Code of Criminal Procedure, the Code of Civil Procedure and the Civil Code, in matters of defamation, defamation by the press or other means of dissemination, insult and conviction of the plaintiff as well as professional secrecy, and provisions for the protection of the defamed subject.

⁴ ARTICLE 19 Europe, [Italy: Defamation laws must be reformed](#), 23 June 2021.

In September 2022, MP Balboni ⁵ put forward a proposal to amend the Criminal Code, the Criminal Procedure Code, and the Press Law.⁶ At the same time, members of the Parliament from opposition parties also put forward their proposals, currently four draft laws:

- The proposal of Senator Verini on behalf of Democratic Party (FD) to amend the Criminal Code, the Criminal Procedural Code, and the Press Law as well as the proposal to amend Article 96 of the Code of Civil Procedure regarding vexatious litigation;⁷
- The proposal of Senator Martella, also on behalf of Democratic Party (FD), to amend the defamation law;⁸
- The proposals of Senators Lopreiato⁹ and Mirabelli¹⁰ to amend Article 96 of the Code of Civil Procedure regarding vexatious litigation.

Three MPs' proposals (Verini, Lopreiato, and Mirabelli) also seek to introduce measures to curb the abusive practice of strategic litigation against public participation (SLAPPs), meritless claims brought in clear abuse of the judicial process. In Italy, the use of SLAPPs is widespread, with both civil and criminal defamation charges being the most commonly-employed legal tools to instigate SLAPPs.¹¹ Any legislation on the use of SLAPPs goes hand in hand with defamation reform.

ARTICLE 19 Europe welcomes the initiatives to strengthen the protection of freedom of expression and media freedom through a reform of defamation law. We have long urged the Italian Government to adopt a comprehensive reform of defamation laws and provide

⁵ Senate of the Republic, [DDL 466 of 16 January 2023](#).

⁶ The legislative decree 9 April 2003, no. 70, on matters of defamation, defamation by means of the press or by other means of dissemination and condemnation of the plaintiff as well as professional secrecy, and provisions for the protection of the individual defamed.

⁷ [DDL S.81 \(Senator Verini\) Amendments](#) to the law of 8 February 1948, n. 47, to the penal code, to the code of criminal procedure and the law February 3, 1963, n. 69, in the matter of defamation by means of the press or other means of dissemination, of professional secrecy and establishment of the Jury for correctness of information.

⁸ [DDL S. 573 \(Senator Martella\) Provisions](#) on defamation, defamation through the press or other means of dissemination.

⁹ [DDL 616 \(Senator Lopreiato\) Amendment](#) to Article 96 of the code of civil procedure regarding vexatious litigation.

¹⁰ [DDL 95 \(Senator Mirabelli\) Amendment](#) to Article 96 of the code of civil procedure regarding vexatious litigation.

¹¹ According to the Italian National Statistics Institute (Istat), a total of 9,479 proceedings for defamation were initiated against journalists, 60% of which were dismissed after preliminary investigation and 6.6% of which went to trial. Plaintiffs are often public figures – politicians, businessmen, or individuals involved in organised crime.

protection from the pervasive practice of SLAPPs. We also reiterated these calls to the new Italian Government in autumn 2022.¹²

ARTICLE 19 Europe is also concerned about the lack of consultation about these proposals with a broad range of stakeholders. Unfortunately, despite a public hearing for stakeholders that was called by the Opposition Party (Partito Democratico) at the beginning of April 2023, they decided to hear a small number of stakeholders. This decision severely impairs meaningful participation of civil society and other key actors in the process. The situation must be urgently remedied. As the legislative reform progresses, all stakeholders must be able to shape the outcome of the process.

In this brief, ARTICLE 19 Europe examines how the MPs' proposals comply with international freedom of expression standards and offers key recommendations on how to improve these proposals.

¹² ARTICLE 19 Europe, [The need to strengthen the protection of the right to freedom of expression and information through legal reforms in Italy](#), Legal briefing (2022).

Proposed amendments to criminal defamation through the press

Three MPs' amendments (Balboni, Verini and Martella) propose Article 13 of the Press Law in a new test,¹³ which provides for criminal defamation committed through the press. At present, the offence is punishable with a fine of no less than EUR 516 or imprisonment from one to six years. In order for defamation to be liable under the Press Law, it must involve an accusation of a specific fact and must be committed via the press.

The proposed amendments aim to abolish imprisonment in line with the decisions of the European Court and the Constitutional Court. However, they do not propose to abolish criminal defamation; they rather want to replace criminal sanctions with higher fines:

- Balboni and Verini's bills propose to increase the fine to EUR 10K to 50K; and
- Martella's bill proposes a range of EUR 7K to 15K.

Balboni's and Verini's bills also introduce several additional sanctions:

- fines to the director or editor-in-chief if they reject a request of correction or rectification (they would face the same fine as journalists); and
- the disciplinary measures sanctioned by the Order of Journalists.

These two bills also refer to Article 596 of the Criminal Code, which provides a defence of truth in criminal defamation cases. The inclusion of this provision is problematic because it was declared unconstitutional by the Constitutional Court in 1971 as they excluded journalists from the possibility of relying on this defence.¹⁴ Building this provision back to life means that journalists would once again not be able to prove that the publication was true in order to avoid liability, which cannot be possible in light of the decision of the Constitutional Court.

All the proposals fall short of international standards on freedom of expression. Although the right to freedom of expression is not an absolute right, it may be legitimately restricted by the State only in limited circumstances, as outlined in international standards.¹⁵ In particular, the restriction must be provided for by law, pursue one of the legitimate aims explicitly enumerated in the treaties, and be necessary and proportionate. This requires an assessment

¹³ Law no. 47 of 8 February 1948.

¹⁴ For a more extensive analysis on Article 596 of the Penal Code, see ARTICLE 19 Europe, [The need to strengthen the protection of the right to freedom of expression and information through legal reforms in Italy](#), Legal briefing December 2022, pp. 6-7.

¹⁵ C.f. e.g. UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 43; and European Court of Human Rights (European Court), *The Sunday Times v United Kingdom*, App. No. 6538/74, 26 April 1979, para 49.

of whether the proposed limitation responds to a “pressing social need” and whether the measure is the least restrictive method of achieving the objective.

There is increasing recognition that criminal defamation laws are incompatible with international standards on freedom of expression, and various parts of the UN system have condemned criminal defamation laws. The UN Human Rights Committee in its General Comment No. 34 calls on states to consider decriminalising defamation and notes that imprisonment is never an appropriate penalty.¹⁶ Additionally, a number of international and regional organisations have called for reform of defamation laws.

International consensus have been replicated in many national legislations and practices. In many countries, the protection of one’s reputation is treated primarily or exclusively as a private interest and states have either decriminalised defamation or significantly curtailed its criminal consequences with a movement towards decriminalization. Such states include Argentina, Mexico, Georgia, Ghana, UK, Ireland, the Maldives, Sri Lanka, and Togo, and more recently Burkina Faso,¹⁷ South Africa,¹⁸ and Zimbabwe.¹⁹ As demonstrated by the successful repeal of criminal defamation laws in an increasing number of countries, it is unnecessary to rely upon criminal law to protect reputation and maintain public order.²⁰

The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals’ reputations. There is always the potential for abuse of criminal defamation laws, even in countries where they are generally applied in a moderate fashion and where there is rule of law, such as Italy. For these reasons, criminal defamation laws should be repealed.

ARTICLE 19 Europe believes that if the Government aims to conduct a comprehensive reform of defamation laws it should abolish criminal defamation entirely.

¹⁶ General Comment No. 34, para 47.

¹⁷ In Burkina Faso, a new press Code was adopted in September 2015; fines replaced imprisonment as a sanction for defamation or the dissemination of false news; see BBC, Burkina: The New Criminal Code, 5 September 2015.

¹⁸ In September 2015, the ANC has taken a stance against criminal defamation, which should be followed by legislative action; see D. Milo, The Case Against Criminal Defamation, 29 September 2015.

¹⁹ The Constitutional Court of Zimbabwe, Madanhire and Another v The Attorney General, Judgment No CCZ 2/14.

²⁰ Civil defamation and criminal incitement laws are sufficient; it is possible to draft and implement them effectively in order to achieve appropriate protections for freedom of expression. At the same time, compensation in civil cases should be proportionate in order not to have a chilling effect on the exercise of the right to freedom of expression and information.

ARTICLE 19 Europe recommendation

- Provisions of Article 595 of the Criminal Code and Article 13 of the Press Law should be abolished in their entirety. Subsequently, Article 596 of the Criminal Code should not be referenced.

Proposed amendments to the Civil Code

ARTICLE 19 Europe has long argued that decriminalisation of defamation should be accompanied by a reform of civil defamation legislation to ensure that it fully complies with international freedom of expression standards and the protection of reputation. Hence, it is disappointing that the Balboni proposal does not include any amendments to the civil defamation provisions in the Civil Code.

At the same time, Martella and Verini's bills propose to amend Article 11 of the Civil Code which deals with claims for damages. They suggest adding a new provision (Article 11 bis) that provides new criteria that judges should consider when deciding on level of damages for defamation through the press. These include a) whether the offending content was published in the media at national or local level, and b) whether the media outlet published the correction or reply. These two amendments also propose to reduce the statute limitation for bringing civil defamation claims from 5 years to 2 years from the moment the statement was made or published.

ARTICLE 19 Europe welcomes these proposals. At present, in civil defamation cases, under Article 2043 of the Civil Code, a defamation claim may be brought up to five years after publication,²¹ making the statute of limitation excessively long. Civil cases typically last up to three years for the initial trial, up to another three years for an appeal, and up to five years for a final appeal to the Court of Cassation. If during the course of proceedings a media outlet goes out of business, the individual journalist or editor may be held jointly liable for all damages.²² Shortening the statute of limitation would ameliorate this problem.

ARTICLE 19 Europe recommendations

- Adopt Martella and Verini's bills to amend Article 11 of the Civil Code.
- Undertake a comprehensive review of the remaining civil defamation provisions in light of the international and regional freedom of expression standards, as protection is not limited to the issue of damages.

²¹ Decree of the Ministry of Justice No. 55/2014.

²² For examples and case studies, see section on Italy in ARTICLE 19 Europe, [SLAPPs against journalists across Europe](#), Media Freedom Rapid Response March 2022, p. 52.

Proposed amendments to the Code of Civil Procedure

All MPs' bills introduce provisions that would provide a protection against SLAPPs by adding a new paragraph to Article 96 of the Code of Civil Procedure. These proposals establish that a successful defendant in a SLAPP case will be awarded costs related to the defence of a civil defamation case. In addition, the judge will establish a pecuniary penalty against the claimant. This penalty will be a proportionate amount to the damages sought by the claimant. The pecuniary penalty paid by the claimant will be awarded to the defendant journalist. The amount varies in the different texts of the bills – from one quarter (Lopreiato and Mirabelli's bills) to 5-10% (Verini's bill).

ARTICLE 19 Europe welcomes these proposals as we have long warned about the danger of SLAPPs in Italy and their impact on journalists, editors, and media outlets. At the same time, legislators should be much more ambitious in legislating against SLAPPs. After fully decriminalising defamation and bringing stronger protection of freedom of expression to civil defamation law, legislators should consider comprehensive reform to prevent the misuse of legislation to undertake SLAPPs.

A new type of summary proceeding should be introduced into the Code of Civil Procedure, aimed at ascertaining whether the nature of a lawsuit brought in relation to a behaviour consisting of a form of public participation on matters of public interest is abusive. This should include in particular:

- **Provisions on early dismissal of cases:** The Civil Procedure Code should be amended to provide the opportunity for defendants in SLAPP cases to file a claim for dismissal of the case at the earliest opportunity along with an incidental claim for damages when they believe the claim is a SLAPP. The case should be dismissed if the defendant can show that the statement in question was made in connection with official proceedings or about a matter of public interest, unless the claimant can prove that the claim has legal merits, that it is not manifestly unfounded, and that there are no elements indicative of an abuse of rights or of process laws in which case the motion shall be denied. The Civil Code should ensure that judges can examine a claim for early dismissal as soon as possible (e.g. it should establish a particular deadline) and the defendant should have the opportunity to be awarded damages as a result of such declaration of inadmissibility.
- **Provisions on the reversal of the burden of proof:** The Civil Procedure Code should provide for the possibility of inversion of the burden of proof on the claimant once determined that the information has been published in the public interest.

- **System of financial and legal support for defendants in SLAPPs cases:** The Government should expand admissibility of legal aid for defendants acting in the public interest by extending provisions of Decree of the President of the Republic No. 115 (D.P.R. May 30, 2002 n.115). The extension of the right to access free legal aid would be a helpful step to support media outlets and journalists defending SLAPP cases when they would otherwise face serious financial hardship or even closure due to financial constraints. Such support is important as financial cost is a driving force behind the success of SLAPP cases, where claimants are typically well resourced individuals but defendants often incur significant costs to obtain legal representation. The Government could also consider creating a dedicated fund and/or an insurance scheme for journalists to cover legal and financial costs associated with such legal proceedings.
- **Cap on damages:** The Civil Procedure Code should establish a reasonable and proportionate maximum amount for awards of damages that can be claimed in defamation cases that arise from the exercise of the right to freedom of expression and related public participation activities. Awards should not exceed the median equivalised net income in Italy and should consider the defendant's individual circumstances as well as the broader chilling effect that the award may have on the exercise of the right to freedom of expression.

Apart from legal measures, a comprehensive legislation against SLAPPs should also include measures to raise awareness about the negative impact of SLAPPs on freedom of expression. In particular, it should promote, in cooperation with media and journalists' associations, general and specialist training to increase the awareness and technical knowledge of judges and legal professionals on SLAPPs. Regular training should be provided and should reflect evolving standards under European Court of Human Rights case law.

The urgent need to undertake a comprehensive reform to prevent SLAPPs in Italy should also be propelled by the forthcoming EU Directive on SLAPPs with cross-border implications that proposes a series of anti-SLAPP measures.²³ If the Directive is adopted, the Italian Government will eventually have to transpose it into domestic law. However, the necessary reform does not need to await this EU legal instrument and comprehensive safeguards against SLAPPs – both on legislative and enforcement levels – should be adopted comprehensively and as a matter of urgency.

²³ Proposal for a Directive of The European Parliament and of The Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') COM/2022/177 final.

Conclusions

In light of the above, ARTICLE 19 Europe calls on the Italian Government to extensively review the current proposals to fully decriminalise defamation, introduce comprehensive civil defamation reform, and adopt measures to prevent misuse of these laws through SLAPPs. We urge the Government to draft comprehensive texts that will bring Italian legislation in line with international and European standards on freedom of expression.