

JUDGMENT NO 150 YEAR 2021

**A mandatory custodial sentence for the offence of defamation committed through the press is incompatible with Article 10 ECHR, and therefore with Article 117(1) of the Italian Constitution.**

As already explained in its previous [Order No 132/2020](#), the Constitutional Court had been asked by two referring courts to rule on the compatibility with Article 10 ECHR in conjunction with Article 117(1) of the Italian Constitution of two provisions of the Italian Criminal Code, envisaging custodial sentences for the offence of defamation committed through the press.

In that order, the Constitutional Court postponed its decision so as to grant Parliament adequate time to enact new legislation on the matter.

A year later, noting with regret that Parliament had still not amended the law at issue, the Constitutional Court declared one of the challenged provisions, namely Article 13 of Law No 47/1948, to be unconstitutional.

That provision established a mandatory custodial sentence of up to six years, in addition to a fine, for anyone tarnishing another person's reputation through false representations of facts in the press. According to the Court, such a penalty amounted to a disproportionate interference with freedom of expression, by causing what the ECtHR calls a "chilling effect" on journalists while fulfilling their vital task of "watchdogs" in a democratic society.

By contrast, a different criminal provision prescribing either imprisonment of up to three years or a fine for anyone offending another person's reputation in the press or other media was held not to be unconstitutional if interpreted in accordance with the relevant ECtHR case law. The latter exceptionally allows a custodial sentence to be imposed on journalists, notably where other fundamental rights have been seriously impaired like, for example, in the case of hate speech or incitement to violence or – as the Constitutional Court has pointed out in this judgment – within the context of targeted disinformation campaigns carried out through the press, the internet or social media, fully aware that the allegations against the victim are false.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 13 of Law No 47 of 8 February 1948 (Provisions on the press) and Article 595(3) of the Criminal Code, initiated by the Second Criminal Division of the Ordinary Court of Salerno (*Tribunale ordinario di Salerno, sezione seconda penale*) with referral order of 9 April 2019 and the First Criminal Division of the Ordinary Court of Bari (*Tribunale ordinario di Bari, sezione prima penale*) with referral order of 16 April 2019, registered respectively as Nos 140 and 149 in the 2019 Register of Referral Orders and published in the *Official Journal of the Italian Republic*, numbers 38 and 40, first special series 2019.

*Having regard to* the entry of appearance filed by P.N. as well as the interventions filed by the National Council of the Association of Journalists (*Consiglio nazionale dell'ordine dei giornalisti*, CNOG) and the President of the Council of Ministers;

*after hearing* Judge Rapporteur Francesco Viganò at the public hearing of 22 June 2021;

*after hearing* Counsel Francesco Paolo Chioccarelli for P.N., Counsel Giuseppe Vitiello for CNOG, remotely in accordance with Article 1 of the Decree issued by the President of the Court on 18 May 2021, and State Counsel Maurizio Greco and Salvatore

Faraci for the President of the Council of Ministers;  
*after deliberation* in chambers on 22 June 2021.

*The facts of the case*

1.– By a referral order of 9 April 2019, registered as No 140 of the 2019 Register of Referral Orders, the Second Criminal Division of the Ordinary Court of Salerno raised questions as to the constitutionality of Article 595(3) of the Criminal Code and Article 13 of Law No 47 of 8 February 1948 (Provisions on the press), with reference to Articles 3, 21, 25, 27 and 117(1) of the Constitution, the latter in relation to Article 10 of the European Convention on Human Rights (ECHR), “on the grounds set out in the reasoning”.

1.1.– The referring court states that it has to rule on the criminal liability of P.N., charged with the offence of defamation through the press, and of A.S., charged as editor-in-chief for failure to carry out the required checks, for having falsely accused the victim of affiliation with the mafia, a circumstance that an investigation conducted by the judicial authorities had shown to be untrue.

[omitted]

2.– By a referral order of 16 April 2019, registered as No 149 of the 2019 Register of Referral Orders, the First Criminal Division of the Ordinary Court of Bari raised a question as to the constitutionality of Article 13 of Law No 47/1948 in conjunction with Article 595 of the Criminal Code, with reference to Article 117(1) of the Constitution and in relation to Article 10 ECHR, “insofar as it punishes the offence of aggravated defamation, consisting in making a specific allegation against the victim in the press, with both imprisonment for a term of between one and six years and a fine of not less than 256 [*recte*: 258] euros instead of just one or the other”.

2.1.– The referring court states that it has to rule on the criminal liability of G.D.T., charged with the offence referred to in Article 595 of the Criminal Code and Article 13 of Law No 47/1948, for having, in his capacity as editor-in-chief of a daily newspaper, offended the reputation of F.C. by publishing an unsigned article alleging that the victim had sold drugs to a third person, despite the fact that F.C. had been acquitted in that respect.

The referring court states that, pursuant to the combined provisions of Article 595 of the Criminal Code and Article 13 of Law No 47/1948, the offence with which G.D.T. is charged (defamation through publication of the article in question and consisting in making a specific allegation) is punishable by imprisonment for a term of between one and six years, provided for in addition to, and not as an alternative to, a fine of 258 euros.

[omitted]

*Conclusions on points of law*

1.– [omitted]

The two proceedings [...] pose, in a nutshell, the question as to whether a custodial sentence for the offence of defamation committed through the press is compatible with the Constitution, also in the light of the case law of the European Court of Human Rights (ECtHR). That with regard to both Article 13 of Law No 47/1948, which imposes imprisonment in addition to a fine when defamation through the press consists in making a specific allegation, and – in respect of the question raised by the Court of Salerno – Article 595(3) of the Criminal Code, which provides for imprisonment as a mere alternative to a fine in the case of defamation committed through the press or by any other means of public communication or in an official document.

[omitted]

4.– The questions raised by the Court of Salerno as regards Article 13 of Law No 47/1948, with reference to Articles 21 and 117(1) of the Constitution and in relation to

Article 10 ECHR, are well founded.

4.1.– As already noted, the challenged provision provides for an aggravating circumstance for the offence of defamation, which is fulfilled where the defamation is committed through the press and consists in making a specific allegation. [...]

The penalty provided for in Article 13 of Law No 47/1948 is a term of imprisonment from one to six years and a fine of not less than 258 euros. The two penalties – imprisonment and a fine – are cumulative: the court must impose both, in the absence of mitigating circumstances that are deemed to outweigh or be at least equivalent to the aggravating circumstance at issue.

4.2.– It is precisely the mandatory nature of the application of a custodial sentence in all cases where there are no mitigating circumstances that makes the challenged provision incompatible with freedom of expression, enshrined in both Article 21 of the Constitution and Article 10 ECHR.

As already pointed out by this Court in Order No 132/2020, the mandatory imposition of a custodial sentence (regardless of whether it may be suspended or replaced by alternatives to detention) has now become incompatible with the need not “to deter other journalists from exercising their vital function of holding public institutions to account”: a requirement that the ECtHR has emphasised in its abundant case law cited in the referral order, which this Court also endorses.

As will be further discussed below, a custodial sentence cannot be considered unconstitutional in the most serious cases of defamation. However, its mandatory imposition under the challenged provision – embracing nearly all cases of defamation committed through the press – is incompatible with the requirements of protection of the freedom of expression, and in particular with the freedom of the press, considered to be a “keystone of the democratic order” by the long-standing case law of this Court (Judgment No 84/1969).

That is all the more so in view of the settled case law, which – as already recalled in Order No 132/2020 – grants a defence to journalists only if they reasonably believed that their allegations were true, after diligently checking their sources. Consequently, journalists can be convicted of the offence of defamation even where they mistakenly, albeit negligently, believed in the truth of the allegation made against the victim.

4.3.– Since the function of the challenged provision is solely to make the penalty provided for by Article 595 of the Criminal Code harsher, in terms that are not compatible with either Article 21 of the Constitution or Article 10 ECHR, the provision at issue must be declared unconstitutional in its entirety, in the terms sought by the applicant. Such a declaration does not create any gap in the protection of the right to individual reputation, which continues to be protected by the second and third paragraphs of Article 595 of the Criminal Code, whose scope of application will be widened following this ruling.

4.4.– The other questions of constitutionality raised by the referring court with regard to the same provision are absorbed.

[omitted]

6. – By contrast, the questions raised by the Court of Salerno regarding Article 595(3) of the Criminal Code with reference to Articles 3, 21 and 117(1) of the Constitution, in relation to Article 10 ECHR, must be declared unfounded in the terms set out below.

6.1.– Article 595(3) of the Criminal Code establishes – as already mentioned – an aggravating circumstance for the offence of defamation, when the crime is committed through the press or by any other means of public communication or in an official document. The penalty is imprisonment from six months to three years or a fine of not less than 516 euros.

6.2.– A custodial sentence, this time envisaged only as an alternative to a fine under the challenged provision, cannot be considered in itself to be at odds with the freedom of expression enshrined in Article 21 of the Constitution and Article 10 ECHR.

As mentioned in Order No 132/2020, if it is true that freedom of expression – in particular the right to inform the public and express opinions exercised by journalists – is a cornerstone of any democratic system, individual reputation is equally an inviolable right, closely linked to the very dignity of the person.

Unlawful attacks on that right carried out through the press or through the other means of public communication referred to in Article 595(3) of the Criminal Code – radio, television, online newspapers and other websites, social media, and so on – can have a major impact on the private, family, social, professional, and political life of the victims. And that harm is likely, today, to be enormously amplified precisely by modern means of communication, which make all the defamatory allegations associated with the victim's name easily available to anyone, even many years later. That harm must be prevented by the legal system with suitable, necessary and proportionate tools, within the framework of a fair balance with journalists' freedom of expression.

A custodial sentence cannot be completely ruled out in this regard provided that its application is accompanied by suitable safeguards to shield journalists from the risk of undue intimidation.

Indeed, it must be held that the imposition of a custodial sentence in the case of defamation committed through the press or other media is not per se incompatible with the protection of freedom of expression in cases where the defamation is exceptionally serious (ECtHR, Grand Chamber, judgment of 17 December 2004, *Cumpănă and Mazăre v Romania*, paragraph 115; as well as the judgments of 5 November 2020, *Balaskas v Greece*, paragraph 61; 11 February 2020, *Atamanchuk v Russia*, paragraph 67; 7 March 2019, *Sallusti v Italy*, paragraph 59; 24 September 2013, *Belpietro v Italy*, paragraph 53; 6 December 2007, *Katrami v Greece*, paragraph 39). The ECtHR considers that hate speech and incitement to violence constitute such exceptional circumstances, which may in the specific case also have a defamatory element. Equally exceptional circumstances warranting the imposition of a custodial sentence could, for example, include campaigns of disinformation conducted through the press, the internet or social media, characterised by the spreading of accusations seriously damaging to the reputation of the victim and carried out in the knowledge that the allegations in question are – objectively and demonstrably – false.

Those who engage in such conduct – whether or not they are journalists – certainly do not perform the function of 'watchdog' of democracy, which is typically achieved through the search for and publication of inconvenient truths. On the contrary, they pose a danger to democracy by combatting their adversaries through lies, used as a tool to discredit them in the eyes of public opinion, with predictable distorting consequences with respect to the outcomes of free elections.

If limited to cases such as those envisaged just now, the abstract provision for and actual imposition of custodial sentences cannot intimidate journalists and pose undue obstacles to their essential function for a democratic society. Apart from those exceptional cases, which are very distant from the ethos of the journalistic profession, prison sentences will be ruled out for journalists, as well as for anyone else who has expressed their opinion through the press or other media. Penalties other than imprisonment, as well as civil remedies and disciplinary action, will remain an option in all the ordinary cases in which the conduct harming the reputation of others has exceeded the limits of the lawful exercise of the right to inform the public and express opinions.

6.3.– The provision at issue – Article 595(3) of the Criminal Code – must be

interpreted in a manner consistent with the above premises.

The discretionary power that it grants the courts in choosing between imprisonment (from six months to three years) and a fine (of not less than 516 euros) must be exercised taking into account the sentencing criteria laid down in Article 133 of the Criminal Code, but also and above all the indications deriving from the Constitution and the ECHR as per the interpretations furnished by this Court and the ECtHR. This is necessary, among other things, to avoid criminal convictions that could subsequently give rise to international liability on the part of the Italian State for violations of the Convention (on the importance of the duty incumbent on the courts “to avoid violations of the ECHR” when exercising their functions of applying the law, see Judgment No 68/2017, point 7 of the *Conclusions on points of law*).

It follows that criminal courts may opt for a custodial sentence only in cases of exceptional seriousness of the offence, in terms of both *actus reus* and *mens rea*, where imprisonment can be deemed to be proportionate in accordance with the principles set out above. In contrast, the courts must not go beyond imposing a fine commensurate with the actual gravity of the offence in all other cases.

Indeed, this interpretation has already been endorsed by the most recent Court of Cassation case law in the context of an interpretation that is openly informed by the relevant case law of the ECtHR and Order No 132/2020 of this Court (Court of Cassation, Fifth Criminal Division, Judgment No 26509 of 9 July 2020). The same approach also extends to those guilty of aggravated defamation under Article 595(3) of the Criminal Code who do not engage in journalism in a strict sense (Court of Cassation, Fifth Criminal Division, Judgments Nos 13993 of 17 February 2021 and 13060 of 15 January 2021).

If interpreted in that way, the challenged provision is consistent with both Articles 21 and 117(1) of the Constitution, in relation to Article 10 ECHR.

[omitted]

9.– Pursuant to Article 27 of Law No 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), Article 30(4) of Law No 223 of 6 August 1990 (Provisions on the public and private broadcasting system) must be declared to be unconstitutional as a consequence. The provision states that “[i]n the case of offences of defamation committed by means of broadcasts consisting in making a specific allegation, the penalties provided for in Article 13 of Law No 47 of 8 February 1948 shall be applied to the persons referred to in paragraph 1”. Such a provision can no longer stand, since Article 13 has been declared unconstitutional in today’s ruling.

The provisions of Article 595(3) of the Criminal Code in the terms set out above will instead apply in this case.

10.– While reaffirming the need for the legal system to ensure effective protection of reputation as a fundamental right of the individual, today’s decision does not imply that Parliament should consider itself constitutionally bound to maintain a custodial sentence for the most serious cases of defamation in the future as well (in a similar vein, in relation to the closely related fundamental right to honour, Judgment No 37/2019).

In any case, as already highlighted by this Court in its Order No 132/2020, a comprehensive reform of the current rules is needed, with a view to devising “an overall system of sanctions capable, on the one hand, of avoiding any undue intimidation of journalists and, on the other, of ensuring adequate protection of the individual’s reputation against unlawful attacks carried out in the name of journalism”.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* that Article 13 of Law No 47 of 8 February 1948 (Provisions on the press) is unconstitutional;

2) declares, as a consequence pursuant to Article 27 of Law No 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), that Article 30(4) of Law No 223 of 6 August 1990 (Provisions on the public and private broadcasting system) is unconstitutional;

3) *declares* that the questions as to the constitutionality of Article 595(3) of the Criminal Code, with reference to Articles 3, 21 and 117(1) of the Constitution, the latter in relation to Article 10 of the European Convention on Human Rights (ECHR), raised by the Second Criminal Division of the Ordinary Court of Salerno with the relevant referral order, is unfounded in the terms set out in the reasoning;

[omitted]

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 22 June 2021.

Signed by:

Giancarlo CORAGGIO, President

Francesco VIGANÒ, Judge Rapporteur