ORDER NO. 132 YEAR 2020

The Constitutional Court has examined two referral orders submitted by lower criminal courts concerning the compatibility with the Constitution and the European Convention on Human Rights of criminal provisions envisaging custodial sentences for the offence of defamation committed through the press.

The Court has found that the questions raised require a complex balancing exercise between freedom of expression and the protection of reputation, both key rights within the constitutional order. Any adjustment – by now necessary, in light of the case law of the European Court of Human Rights – of the balance struck is, first and foremost, a task for the legislator.

As several bills on the subject are currently before Parliament, the Court, in a spirit of loyal collaboration between institutions, has decided to postpone the examination of the questions until a public hearing scheduled for 22 June 2021, thereby granting Parliament an adequate time to enact new legislation on the topic in the meantime. Pending the Court's decision, the criminal proceedings in which the questions as to constitutionality were raised will remain suspended.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

issues the following

ORDER

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 with referral order of 9 April 2019 and the First Criminal Division of the Ordinary Court of Bari with referral order of 16 April 2019, registered respectively as Nos. 140 and 149 in the Register of Referral Orders of 2019 and published in the Official Journal of the Republic Nos. 38 and 40, first special series, of the year 2019.

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

after hearing Judge Rapporteur Francesco Viganò, Counsel Francesco Paolo Chioccarelli for P. N., Counsel Giuseppe Vitiello for CNOG and State Counsel Maurizio Greco and Salvatore Faraci for the President of the Council of Ministers at the public hearing of 9 June 2020, held – in accordance with Articles 1(a) and (d) of the Decree issued by the President of the Court on 20 April 2020 – remotely further to applications in that regard received from the attorneys Giuseppe Vitiello, Francesco Paolo Chioccarelli, Maurizio Greco and Salvatore Faraci on 13, 25 and 29 May 2020 respectively;

after deliberation in chambers on 9 June 2020.

[…]

5. – Both of the referring courts question the provision envisaging custodial sentences for the offence of defamation committed through the press consisting of an allegation of a

specific act, maintaining that the said provision is contrary to Article 117(1) of the Constitution, in relation to Article 10 of the European Convention on Human Rights (ECHR), as interpreted by the settled case law of the European Court of Human Rights (ECtHR).

[…]

6. – The reasoning underlying both referral orders hinges on extensive references to the ECtHR's case law on freedom of expression, which is protected by Article 10 ECHR and generally considered to be violated when custodial sentences are imposed on journalists convicted of defamation.

6.1. – That case law dates back in effect to at least the judgment of the Grand Chamber of 17 December 2004, *Cumpănă and Mazăre v Romania*, in which the ECtHR examined an application filed by two journalists convicted of defamation as the authors of an article in which they accused a judge of involvement in corruption. The ECtHR acknowledged the legitimacy of the defendants' criminal conviction, noting that the serious accusations against the victim had presented a distorted view of reality and had not been based on actual facts (paragraph 103). However, at the same time, the ECtHR considered that the imposition of a non-suspended seven-month prison sentence, even if not actually executed as a result of a presidential pardon, constituted a disproportionate interference – and therefore not "necessary in a democratic society" within the meaning of Article 10(2) ECHR – with their right to freedom of expression protected by Article 10(1) ECHR.

In that judgment, the ECtHR cited (at paragraph 93) its case law stating that the press plays the vital role of 'watchdog' in a democratic society (judgment of 27 March 1996, *Goodwin v. United Kingdom*, paragraph 39), noting that "[a]lthough the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention … to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power" (paragraph 113). According to the Strasbourg Court, the fear of prison sentences produces a "chilling effect" on the exercise of journalists' freedom of expression – in particular in the conduct of their investigations and the publication of the results thereof – and is a factor that goes to the proportionality and thus the justification, in light of the Convention, of the sanctions imposed (paragraph 114).

While stressing that sentencing is in principle a matter for the national courts, the ECtHR concluded that "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" (paragraph 115): circumstances that certainly did not exist in the case under consideration.

6.2. – The principles expressed in *Cumpănă* were then constantly reaffirmed by the ECtHR in its subsequent case law (*inter alia*, judgment of 6 December 2007, *Katrami v Greece*), including in two judgments issued against Italy, which the referring courts specifically cite (judgments of 24 September 2013, *Belpietro v Italy*, and of 7 March 2019, *Sallusti v Italy*). In the latter cases – regarding which the respective procedures for supervising the enforcement of the judgments are still pending before the Committee of Ministers of the Council of Europe – the ECtHR, on the one hand, found that the

applicants' criminal convictions at the hands of the Italian courts were legitimate given the untruthfulness and seriousness of the allegations made against the injured parties in the absence of the required checks by the journalists (or the editor-in-chief) but, on the other hand, considered the imposition of a custodial sentence on them disproportionate even if suspended or cancelled by a pardon granted by the President of the Republic.

6.3. – That said, numerous documents from the political bodies of the Council of Europe recommend that the Member States waive custodial sentences for the offence of defamation, in order to better protect journalists' freedom of expression and, in turn, the right of citizens to be informed.

In particular, on 12 February 2004 the Committee of Ministers adopted a Declaration on the freedom of political debate in the media, in which it stated, *inter alia*, that damages and fines for defamation through the press must bear a reasonable relationship of proportionality to the violation of the rights or reputation of the injured parties, taking into consideration possible reparations that may have been made in the meantime. It further stated that defamation should not lead to imprisonment unless the seriousness of the violation of the fundamental rights of others makes it a strictly necessary and proportionate penalty.

In its Resolution 1577 of 4 October 2007, the Parliamentary Assembly of the Council of Europe reaffirmed the central role of information, the cornerstone of a democracy, with particular reference to the fundamental role that it plays in promoting debates on issues of public concern. In particular, it urged States Parties to abolish prison sentences for defamation and to ensure that criminal proceedings for defamation are not misused. At the same time, it was recommended that incitement to violence, hatred or discrimination be made a criminal offence.

In its Resolution 1920 of 24 January 2013 on the state of media freedom in Europe, the Parliamentary Assembly of the Council of Europe once again condemned the distorted use of criminal proceedings for defamation. With specific reference to Italy, in the light of the sentencing of a journalist to a prison sentence upheld by the Supreme Court of Cassation (a sentence that then gave rise to the ECtHR's judgment in *Sallusti v Italy* mentioned above), the Parliamentary Assembly asked the European Commission for Democracy through Law (Venice Commission) to prepare an opinion on whether the Italian laws on defamation were in line with Article 10 ECHR. The relevant opinion of the Venice Commission (No. 715 of 6-7 December 2013) concluded that current Italian legislation did not fully meet Council of Europe standards on freedom of expression, identifying prison sentences for defamation through the press as the issue of most concern.

7. – In the light of the above, it appears to be necessary and urgent to rethink the balance, currently crystallised in the legislation questioned in the referral orders, between freedom of expression and protection of individual reputation, in particular with regard to journalism.

7.1. – Freedom of expression constitutes – even more than a right proclaimed by the ECHR – a fundamental right recognised as "co-essential to the freedom guaranteed by the Constitution" (Judgment No. 11 of 1968), a "keystone of the democratic order" (Judgment No. 84 of 1969) and a "cornerstone of democracy in the whole legal system" (Judgment No. 126 of 1985 and, recently, Judgment no. 206 of 2019). Nor is it a coincidence that in the first judgment in its history, the Constitutional Court – in response

to no less than thirty referral orders submitted by lower courts – declared a provision of law to be unconstitutional precisely because of its conflict with Article 21 of the Constitution (Judgment No. 1 of 1956).

In the context of this right, freedom of the press is of particular importance, because of its essential role in the functioning of the democratic system (Judgment No. 1 of 1981), in which the right of the journalist to inform is matched by a corresponding 'right to information' of citizens: this latter right being "qualified in respect of the founding principles of the form of State outlined in the Constitution, which require that our democracy be based on free public opinion and be able to develop through the equal contribution of all to the establishment of the general will" and "characterised by a pluralism of sources from which knowledge and news may be drawn … so that citizens may have the opportunity to form their judgements from among a variety of voices and conflicting cultural orientations (Judgment No. 112 of 1993, referred to in Judgment No. 155 of 2002)" (Judgment No. 206 of 2019).

There is no doubt, therefore, that journalism deserves to be "safeguarded against any threat or coercion, direct or indirect" (Judgment No. 172 of 1972), which may weaken its vital function in the democratic system, placing undue obstacles in the way of its legitimate role of informing the citizenry and contributing to the formation of strands of public opinion, including through harsh and polemical criticism of the conduct of the powerful.

7.2. – On the other hand, the legitimate exercise by the press and other media of the freedom to inform and contribute to the formation of public opinion requires that a balance be struck with other interests and rights, equally of constitutional rank, which mark its possible limits from both a constitutional and ECHR standpoint.

Among these limits is, most importantly, a person's reputation, which constitutes an inviolable right within the meaning of Article 2 of the Constitution (Judgments No. 37 of 2019, No. 379 of 1996, No. 86 of 1974 and No. 38 of 1973) and an essential component of the right to privacy laid down in Article 8 ECHR (*inter alia*, ECtHR judgment of 6 November 2018, *Vicent del Campo v Spain*), which the State has a clear obligation to protect even in the sphere of the relations of individuals between themselves (see *Cumpănă*, paragraph 91). At the same time, personal reputation is a right expressly recognised by Article 17 of the International Covenant on Civil and Political Rights. It is also a right closely linked to the very dignity of the person (see Judgment No. 265 of 2014 as well as Supreme Court of Cassation case law, including, *inter alia*, Fifth Criminal Division Judgment No. 4938 of 28 October 2010), and one that is likely to be affected by the spreading of allegations that are untrue or relate exclusively to one's private life.

7.3. – The balance between the freedom to 'inform' and to 'form' public opinion in the press and media, on the one hand, and the protection of individual reputation, on the other, cannot be thought of as fixed and unchangeable. This balance is subject to necessary adjustments, all the more so in the light of the rapid evolution of technology and the media in recent decades.

The balance underlying the provisions of the Criminal Code and those of the current Press Law – and in particular Article 595 of the Criminal Code and Article 13 of Law No. 47 of 1948, called into question here – hinges on the imposition, as alternatives or cumulatively, of custodial sentences and fines where the journalist offends the reputation of others, going beyond the limits of the lawful exercise of the right to inform or criticise

laid down in Article 21 of the Constitution. These limits are, in turn, reconstructed by case law both by civil (starting from the landmark Judgment No. 5259 of 18 October 1984 of the First Civil Division of the Supreme Court of Cassation) and criminal courts (see, *inter alia*, Judgment No. 34432 of 12 September 2007 of the Fifth Criminal Division of the Supreme Court of Cassation) on the basis of the traditional criteria of the public interest in the knowledge of the news, the truth of it (or, in case of a journalist's erroneous belief in the truth of the news, in the absence of fault in checking his or her sources) and the lack of inurbanity in the form of expression.

Such a balance has now become inadequate, including in light of the case law of the ECtHR mentioned above, which states that – exceptional cases aside – imposing custodial sentences, even though suspended or not actually implemented, upon journalists who, albeit unlawfully, damage another person's reputation is disproportionate, because such sanction are likely to deter other journalists from exercising their vital function of holding public institutions to account.

That calls for recalibrating the balance underlying the challenged provisions so as to reconcile the needs relating to the protection of journalistic freedom with the equally crucial need to effectively protect the reputation of potential victims of any abuse of that freedom by journalists. These potential victims, indeed, are now exposed to even greater risks than in the past. Think of the effects of the rapid and lasting amplification of defamatory content made possible by social networks and Internet search engines, whose potential damage for the victim – in terms of psychological suffering and actual harm to his or her private, family, social, professional and political life – and for their relatives is greatly magnified compared to what happened even only in the recent past.

8. – Such a delicate balancing act is primarily a matter for the legislator, who is responsible for 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 – and sometimes malicious – attacks carried out in the name of journalism. Indeed, the legislator is best placed to design a balanced system to protect the rights at stake that can resort not only to non-custodial criminal punishment as well as to appropriate civil remedies and reparatory measures in a broad sense (such as, first and foremost, the obligation to rectify), but also to effective disciplinary measures. This would be in line with the interests of journalist associations in demanding that their members strictly observe the ethical standards guaranteeing the authoritativeness and prestige of their profession, as key actors in the democratic system. Within such framework, the legislator may, if necessary, provide for the imposition of a custodial sentence in case of behaviour that, given the national context, is exceptionally serious in objective and subjective terms, including in particular where that behaviour involves defamation that implies incitement to violence or conveys hate speech.

The "natural task" of this Court is to verify *ex post*, at the request of the ordinary courts, the compatibility of the choices made by the legislator with the Constitution (Order No. 207 of 2018) and, indirectly, with the international instruments to which the Italian legal system is bound, on the basis of the principles developed by the case law of this Court. This Court cannot and does not intend to avoid performing this task. But, at the same time, it is aware that its possibilities of intervention – compared to the room for manoeuvre that the legislator enjoys – are necessarily limited by the scope of the referral orders submitted and the remedies available to the Court, which mark the boundaries of

its decision-making powers. And the Court is also aware of the risk that, as a result of a ruling of unconstitutionality, gaps in effective protection for competing interests may be created, in spite of their central importance from a constitutional point of view (for similar concerns, see Order No. 207 of 2018).

As several bills amending the rules on defamation through the press are currently before Parliament, this Court considers it appropriate, in a spirit of loyal collaboration between institutions and within the limits of its powers, to postpone its decision on the issues now submitted to it to a subsequent hearing, so as to grant the legislator adequate time to enact new legislation on the topic in line with the constitutional and conventional principles outlined above.

In the meantime, the main proceedings will also be stayed. In other proceedings, it will fall to the courts to assess whether, in light of what is laid out in this judgment, any questions similar to those under review here should also be considered relevant and not manifestly unfounded, so as to avoid applying the challenged provisions pending the judgment on constitutionality in the present case (Judgment No. 242 of 2019 and Order No. 207 of 2018).

[…]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

postpones the consideration of the issues of constitutionality raised by the Second Criminal Division of the Ordinary Court of Salerno and the First Criminal Division of the Ordinary Court of Bari with the referral orders indicated in the headnote to a public hearing scheduled for 22 June 2021.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 June 2020.

Signed by: Marta CARTABIA, President

Francesco VIGANÒ, Author of the Judgment