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Совет по правам человека
Двадцать шестая сессия
Пункт 3 повестки дня
Поощрение и защита всех прав человека, гражданских, политических, экономических, социальных и культурных прав, включая право на развитие

Доклад Специального докладчика по вопросу о поощрении и защите права на свободу мнений и их свободное выражение Франка Ля Рю

Добавление

Миссия в Италию в период с 11 по 18 ноября 2013 года* **

Резюме

Специальный докладчик по вопросу о поощрении и защите права на свободу мнений и их свободное выражение совершил официальную поездку в Италию в период с 11 по 18 ноября 2013 года. Это была вторая поездка мандатария в эту страну в целях оценки положения в области соблюдения права на свободу мнений и их свободное выражение. Предыдущая поездка состоялась в октябре 2004 года.

На протяжении всех последних лет Италия неоднократно подтверждала свою приверженность делу обеспечения права на свободу мнений и их свободное выражение в соответствии с тем, как оно определено в международном праве. Национальное законодательство страны в основном соответствует международным стандартам в данной сфере. Однако при реализации на практике обязательств страны и соответствующих норм возникают некоторые сложности.

* Представлен с опозданием.

** Резюме настоящего доклада распространяется на всех официальных языках. Сам доклад, содержащийся в приложении к резюме, распространяется только на том языке, на котором он был представлен.

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Так, Специальный докладчик выражает обеспокоенность по поводу сохраняющейся уголовной ответственности за клевету, незащищенности прессы перед лицом предъявляемых ей необоснованных исков, существования неоправданных мер защиты государственных властей от оскорблений, угроз в адрес некоторых журналистов и ухудшения условий работы журналистов в целом. Что касается плюрализма СМИ, то Специальный докладчик выражает озабоченность в связи с конфликтами интересов высокопоставленных государственных служащих и медиахолдингов, ликвидацией запрета на перекрестное владение вещательными и печатными СМИ, существующей процедурой назначения руководства государственной службы вещания и членов советов независимых административных органов, таких как Агентство по регулированию коммуникаций. Помимо этого, он с беспокойством отмечает отсутствие прозрачности в вопросах распространения информации о том, кто владеет частными СМИ и осуществляет контроль над ними.

В отношении доступа к информации Специальный докладчик отмечает, что, несмотря на принятие важных нормативных актов в данной сфере, отсутствует базовое законодательство о доступе к информации всех государственных учреждений, а не только органов государственного управления. Кроме того, следует уделить дополнительное внимание проблеме реагирования государственных учреждений на запросы о предоставлении информации и проблеме несогласованности различных норм. Специальный докладчик обеспокоен также неизжитой проблемой разжигания ненависти на почве ксенофобии и в этой связи подчеркивает значение развития таких инициатив, как программы повышения осведомленности населения, включая информационно-просветительские кампании по поводу разнообразия.

В своих выводах Специальный докладчик представляет ряд рекомендаций в отношении пересмотра законодательства и политики по многочисленным проблемам, затрагиваемым в докладе.

Приложение

[Только на английском языке]

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, on his mission to Italy (11-18 November 2013)

Contents

I. Introduction

1. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, undertook an official visit to Italy from 11 to 18 November 2013, at the invitation of the Government. The visit was carried out pursuant to his mandate to assess the compliance of Italy with international standards on the right to freedom of opinion and expression.

2. During the visit, the Special Rapporteur met with the Minister of Integration and the Deputy Minister for Foreign Affairs in Rome. He also met with the Under-Secretary of State on Publishing; the Under-Secretary of State for Justice Affairs; the Councillor to the Vice-Minister on Economic Development and Communications; the Director of the Postal Police Department of the Ministry of the Interior; the First President of the Court of Cassation; the Attorney General; the President of the IX Civil Chamber of the Rome Tribunal; the President of the Communications Regulatory Authority; the President of the Anti-Trust Authority; the President of the Personal Data Protection Authority; members of the Committee of Justice Affairs, the Bicameral Commission for Radio and Television Oversight, the Committee on Constitutional Affairs, the Committees on Infrastructure and Culture of the Chamber of Deputies; the Committees on Foreign Affairs and the Promotion and Protection of Human Rights of the Italian Senate; the President and Director-General of Radiotelevisione Italiana (RAI); members of the Parliament and a number of other senior officials.

3. In addition, the Special Rapporteur met with journalists, academics and members of civil society organizations. The Special Rapporteur would like to thank all the people he met for their time, valuable contributions and insights.

4. The Special Rapporteur would like to thank the President of the Senate, Senator Piero Grasso, and the President of the Chamber of Deputies, the Honourable Laura Boldrini, for hosting, and inviting him to, a public event on freedom of information at the Senate. That event brought together State media authorities and civil society organizations; he believes it might serve as a useful model for future multi-stakeholder dialogues on the subject.

5. The Special Rapporteur believes that his visit was timely, given the growing demand for more openness and freedom of expression in the country, as well as the desire expressed by the Government to embark on a new process of political reform.

II. International legal standards

6. In the field of human rights, Italy has ratified a number of international conventions.[1] In carrying out his assessment of the situation regarding the right to freedom of opinion and expression in Italy, the Special Rapporteur has been guided by the relevant international legal standards. In the present case, the most pertinent treaties are the International Covenant on Civil and Political Rights (hereinafter the Covenant), which was ratified by

[1] These include the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child as well as its two Optional Protocols, and the Convention on the Rights of Persons with Disabilities as well as its Optional Protocol.

the country on 15 September 1978 and, at the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) ratified on 26 October 1955.

7. Article 19 of the Covenant provides that:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

8. Article 10 of the European Convention on Human Rights reads:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

9. The Special Rapporteur is also guided by relevant declarations, resolutions and guidelines of various United Nations bodies, including the Human Rights Committee's general comment No. 34 (2011) on article 19: freedoms of opinion and expression,[2] Human Rights Council resolutions 16/4 on freedom of opinion and expression and 21/12 on the safety of journalists, and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

III. Domestic legal framework

10. In line with international standards, the Constitution of 27 December 1947 of the Republic of Italy refers in several articles to the right to freedom of opinion and expression. In particular, article 17 states: "Citizens have the right to assemble peacefully and unarmed." Article 18 states: "Citizens have the right to form associations freely, without authorization, for ends which are not forbidden to individuals by criminal law." Article 21 states, inter alia: "All have the right to express freely their own thought by word, in writing and by all other means of communication. The press cannot be subjected to authorization or censorship."

[2] CCPR/C/GC/34.

IV. Situation of the right to freedom of opinion and expression

A. General overview

11. Italy is a multiparty parliamentary democracy and the executive authority is vested in the Council of Ministers, headed by the President of the Council. In the early 1990s, Italy went through a period of political turmoil which led to important reshaping of the political arena. Throughout the past decades, Italy has unequivocally stated its commitment to ensuring the right to freedom of opinion and expression as defined by international law.

12. The previous Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, conducted a visit to Italy from 20 to 29 October 2004. The purpose of his visit was to ascertain whether the media concentration, coupled with conflict of interest, had an impact on the enjoyment of the right to freedom of opinion and expression, as well to investigate allegations of the deterioration of the work environment of media professionals in Italy.

13. The objective of the second visit to Italy was to reassess the situation of freedom of opinion and expression and to highlight new relevant developments in the country. This was done in the same spirit of cooperation and dialogue and bearing in mind the observations and the recommendations made by the previous Special Rapporteur in his report (E/CN.4/2005/64/Add.5).

14. Nine years later, the current Special Rapporteur notes that some concerns noted on the first visit to the country remain valid. In particular, he is concerned at allegations regarding issues such as the continued criminalization of defamation and insult, the emergence of hate speech, the protection of intellectual property at the expense of freedom of expression, the conflicts of interest of senior government officials with holdings in the media, the procedures for appointing members of the Board of the public broadcaster RAI and of independent administrative entities such as the Communications Regulatory Authority (Autorità per le Garanzie nelle Comunicazioni (AGCOM)).

B. Issues of concern

1. Defamation

15. Defamation is a criminal offence under the Italian Criminal Code. It is described as the case when "anyone ... by communicating with more persons, offends the reputation of someone else". Defamation is punishable by imprisonment of up to one year or a fine of up to 1,032 euros. If the offence consists of an allegation that cannot be proved as truthful, the fine can be doubled.[3] Furthermore, in cases where the offence is directed at a "political, administrative or judiciary authority or one of their representatives" or at a collegial authority, the punishment can be further increased.[4]

16. In cases where defamation is committed "through the press or by any other means of publicity, or by public act", it is punishable by imprisonment of between six months and three years or by a fine of no less than 516 euros.[5] Furthermore, if it includes an allegation that cannot be proved as truthful, it is punishable by imprisonment of between one year and six years, in addition to a fine of no less than 250 euros.[6] The director or deputy director of

[3] Criminal Code, art. 595, paras. 1–2.
[4] Ibid., para. 4.
[5] Ibid., para. 3.
[6] Law No. 47 of 8 February 1948 (Press Law), art. 13.

the publication, the publisher and the printing enterprise are criminally liable in all cases of defamation through the press.[7]

17. The crime of insulting a person is also punishable under the Criminal Code, according to which "whoever offends the honour or reputation of a present person" is punishable with up to six months' imprisonment or a fine of up to 516 euros.[8] Furthermore, a journalist accused of defamation through the press must demonstrate the objective public interest of the facts reported, which should be exposed in a civilized way. Moreover, even if a journalist is acquitted of the crime of defamation, he or she is not entitled to claim compensation for the legal costs or moral and patrimonial damages.

18. In addition to the criminal lawsuit, an alleged victim of defamation can also pursue a civil lawsuit and claim moral and patrimonial damages.[9] Further, in cases of defamation through the press, the amount of damages is determined "in relation to the seriousness of the offence and the level of dissemination of the publication".[10] Civil liability is also extended to the director or deputy director of the publication as well as to its publisher and the printing enterprise.[11] In the case where a civil court rejects the claim for compensation and moral or material damages, it may decide to grant the journalist compensation for the legal costs.

19. The Italian defamation law remains a serious concern. The Human Rights Committee[12] has indicated that defamation laws must be crafted with care to ensure that they comply with the requirements of article 19, paragraph 3, of the Covenant, and that they do not serve, in practice, to stifle freedom of expression. The Special Rapporteur would like to recall resolution 1577 (2007) of the Council of Europe Parliamentary Assembly, in which that Assembly recommended the complete decriminalization of defamation for the protection of freedom of expression. Following the adoption of that resolution, defamation, libel and slander have become matters of civil action in most European countries. Considering that in Italy, under the amended defamation law, only the sanction of imprisonment is abolished, the Special Rapporteur encourages the Senate to fully comply with that resolution and completely decriminalize defamation, returning the bill to the Chamber of Deputies.

20. The Special Rapporteur has been informed that a new defamation bill is before the Senate for final approval.[13] That new bill has been revised and no longer contains a punishment of imprisonment. However, defamation remains a criminal offence under the Criminal Code and the fines imposed for defamation committed through the media have been significantly increased to between 5,000 and 10,000 euros. Moreover, if the offence consists of an allegation that cannot be proved as truthful, the fine can be increased up to 60,000 euros.[14] The bill also provides a temporary ban on the exercise of the profession of journalist for a minimum of one month up to a maximum of six months, in cases of repeated offences.[15] Furthermore, the press is obliged to publish a rectification of the alleged defamatory statement without any further commentary. Failure to comply is punished with

[7] Criminal Code, arts. 57, 57 bis, 58 and 596 bis, and Press Law, art. 11.
[8] Criminal Code, art. 596.
[9] Ibid., arts. 185 and 597.
[10] Press Law., arts. 11–12.
[11] Ibid.
[12] See footnote 2 above.
[13] Bill No. 1119 amending provisions of the Law of 8 February 1948, No. 47 (Press Law), of the Criminal Code and of the Criminal Procedural Code on defamation, defamation through the press or by any another means of publicity or by public act, insult and vexatious litigations.
[14] Ibid., art. 1, para. 5.1.
[15] Ibid., para. 5.2.

a fine of between 8,000 and 16,000 euros.[16] However, the prompt publication of the rectification of the statement may only have an influence on the judge's quantification of the damages if the defendant is found guilty. Civil liability is no longer extended automatically to the director or deputy director of the publication, but only if a "cause and effect" link is proved between neglected control of the publication and the damage. On the other hand, the bill establishes that, in cases of frivolous litigation, the plaintiff may be fined between 1,000 and 10,000 euros and no compensation is automatically granted for the legal costs of the defendant. The new bill also extends the crime of defamation through the press to online newspapers and the radio.[17]

21. The new bill also eliminates the sanction of imprisonment in cases of insult and defamation between private individuals; however, it provides for a significantly heavier fine. The fine for insult, including through the Internet, has increased to up to 5,000 euros and for defamation between private individuals up to 10,000 euros.[18]

22. The Special Rapporteur heard from various interlocutors that removing the sanction of imprisonment for the crime of defamation was an important step forward by the Government of Italy. It was also explained that the protection of the honour and reputation of a person was still regarded as very important in the country. Therefore, monetary fines had been increased, as the established compensation to the victim was considered insufficient to prevent episodes of defamation. It was further stated that defamation could not be decriminalized completely, as the purpose was to target people who intentionally disseminated false information.

23. The Special Rapporteur reiterated that for a statement to be considered defamatory, it must be false, it must injure another person's reputation and it must be made with malicious intent to cause injury to another individual's reputation. He also indicated that the following principles must be respected with regard to defamation: (a) public figures should refrain from bringing defamation suits, as they are required to tolerate a greater degree of criticism than private citizens; (b) to require truth in the context of publications relating to matters of public interest is excessive; (c) with regard to opinions, it should be clear that only patently unreasonable views may qualify as defamatory; (d) the onus of proof for all elements should be on those claiming to have been defamed rather than on the defendant; where truth is an issue, the burden of proof lies with the plaintiff; (e) in defamation actions, a range of remedies should be available, including apology and/or correction, and penal sanctions, in particular imprisonment, should never be applied.[19]

24. The Special Rapporteur commends the Chamber of Deputies for its initiative in removing the sanction of imprisonment for the crime of defamation, which he believes is an important step in guaranteeing freedom of expression. However, he considers that defamation should be decriminalized completely and transformed from a criminal to a civil action, with corrections or apologies being applied as remedies. He believes that criminalizing defamation limits the liberty with which freedom of expression can be exercised. He also believes that any criminal lawsuit, even without a prison sentence being foreseen, may have an intimidating effect, particularly on journalists. He would further like to draw attention to the fact that if an economic penalty is applied through criminal law, this will most likely be followed by civil economic reparation for the victim, thus imposing a double economic sanction.

[16] Ibid., para. 2.
[17] Ibid., , para.1.
[18] Ibid., art. 2, para. 3.
[19] See A/HRC/4/27, para. 47. See also A/HRC/14/23, paras. 82–83, A/HRC/14/23/Add.2, A/HRC/7/14, paras. 39–43, E/CN.4/2006/55, paras. 44–55, E/CN.4/2001/64, paras. 43–48, and E/CN.4/2000/63.

25. The Special Rapporteur is concerned as to the amount of the reparation and the fines imposed. A recurring argument that was reiterated in many of the meetings during the Special Rapporteur's visit with regard to keeping the crime of defamation a criminal offence was that a victim of defamation would normally prefer a criminal to a civil proceeding owing to the fact that a criminal procedure is considered faster than a civil procedure. In response to this argument, the Special Rapporteur would like to underline that the solution to this issue would be to establish a more efficient and expedient procedure in civil court proceedings in line with, inter alia, article 6 of the European Convention on Human Rights and article 19 of the Covenant.

26. With regard to the right to rectification of information, the Special Rapporteur believes that it is important to uphold such a right, but that this should be level with the right of the press or the other party to present and defend their arguments. He believes that a public correction should eliminate the cause for any legal action by the offended party. The Special Rapporteur believes that the purpose of a rectification should only be to correct wrong information given and the harm that may have been done, but it should not entail a punishment.

27. The Special Rapporteur noted with concern that frivolous litigation can become a form of "judicial harassment" against the press or anyone exercising the right to freedom of expression. A media enterprise can have its economic capacity seriously undermined when confronted by multiple defamation cases. Even if claims are dismissed at the preliminary hearing, the economic impact of the expenses generated by various lawsuits can intimidate the journalist or the media vehicle, with repercussions for the work of the entire press. In this regard, the Special Rapporteur noted with appreciation that the Committee of Justice Affairs of the Chamber of Deputies is conducting an investigation into cases of frivolous litigation. The Special Rapporteur encourages the Parliament to establish mandatory fines for frivolous litigation representing 25–50 per cent of the amount requested in frivolous claims, to enhance protection against judicial harassment of the press through lawsuits.

2. Crime of insulting public officials

28. In 1999, the crime of insulting a public official (art. 341 of the Criminal Code) was removed from the Code as it was no longer considered in line with "the current necessities and dominant social conceptions in modern society".[20] However, the Special Rapporteur has been informed that it was later reintroduced, with certain modifications, as article 341 bis of the Criminal Code in the "Security Package" Law No. 94 of 15 July 2009, which entered into force on 8 August 2009.[21]

29. The new law defines insult as "in a public venue or a venue open to the public and in the presence of other persons, offend[ing] the honour and prestige of a public official who is performing an official duty and in the exercise of his powers".[22] It no longer includes insults that are uttered "through telegraph or telephone communications, or through writings or drawings directed at a public official and for reasons related to his duties".[23] The new law no longer provides for a "minimum penalty" of six months of imprisonment and it has increased the maximum penalty from two to three years of imprisonment. Furthermore, if the insult contains an allegation that cannot be proved as truthful, the punishment is even higher. However, the charges can be dropped if the defendant agrees to pay damages before the trial.

[20] Law No. 205 of 25 June 1999, art. 18 (repealing art. 341, Criminal Code).
[21] Law No. 94 of 15 July 2009, art. 1, para. 8, containing provisions on public security (introducing art. 341 bis, Criminal Code).
[22] Ibid., art. 1, para. 9 (introducing art. 393 bis, Criminal Code).
[23] Criminal Code, art. 341.

30. The Special Rapporteur is concerned about the reintroduction of the crime of insult directed at public officials in the presence of other people. He underlines that public officials should not be protected by a higher threshold for criticism or insult than any other people as, by its nature, their function is subject to frequent public debate and criticism. Furthermore, he is seriously concerned that the practice of allowing the defendant to pay compensation to the victim in order for the charges to be dropped can serve as a form of blackmail against anyone who would prefer to pay a fine rather than risk prosecution.

3. Conflict of interest

31. The Frattini Law No. 215 of 2004 contains provisions that regulate cases of conflict of interest between holding a government position and carrying out professional activities.[24] Specifically, the Law states that the position of manager of a company is incompatible with exercising public office. However, this incompatibility is not extended to the owner or the controlling shareholder of the company.[25] The Law determines that there is a conflict of interest when an "act of commission … or omission" carried out by a public office holder has a "specific, preferential effect" on the assets of the office holder and also "of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest".[26] Moreover, in the case of a breach of the rules on conflict of interest, it is the company manager and not the owner or controlling shareholder who is sanctioned.

32. The Special Rapporteur is aware that, in 2005, the European Commission for Democracy through Law (the Venice Commission) in Opinion No. 309/2004 on the compatibility of the Laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, concluded that the Frattini Law did not adequately address the problem of conflict of interests. Furthermore, he has been informed that the recommendations made by the Venice Commission have to date not yet been implemented. The Special Rapporteur fully concurs with European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, which states that "conflicts of interests between media ownership concentration and political power … are detrimental to free competition, a level playing field and pluralism".[27]

33. During his visit, the Special Rapporteur had the opportunity to exchange views with many relevant stakeholders with regard to media ownership and control. Although the Special Rapporteur appreciates the openness of the discussion on the legislation on transparency of the media, he believes that there is a need for legislative reform which would introduce an explicit incompatibility between holding elected or government office and ownership and control of media.

34. The Special Rapporteur considers that to ensure transparency, information on the full identity of the ownership of the media and the decision-making and control mechanisms should be disclosed. He understands that the disclosure of information on ownership, control and sources of revenue of the media would contribute to preventing monopolies, cross-ownership and unlawful concentration of the media, and would also allow people to better interpret the position of various media groups.

[24] Law No. 215 of 20 July 2004 on regulations in the field of solving conflicts of interest.
[25] Ibid., art. 2, para. 1.
[26] Ibid., art. 3, para. 2.
[27] European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, para. 5.

4. Public broadcasting service

35. The Gasparri Law (No. 112/2004) contains provisions overseeing a progressive total privatization of RAI and establishes that within 60 days of its adoption, "RAI Radiotelevisione Italiana Spa" should be incorporated into "RAI-Holding Spa". The Law also provides that State-owned shares in RAI-Holding Spa should be sold progressively through a series of public offers until it is completely privatized. However, according to the law, single buyers may only buy up to 1 per cent of the shares. Furthermore, it does not allow the formation of trusts or voting collusion.[28]

36. According to the Gasparri Law and the Consolidated Broadcasting Act (No. 177/2005), the RAI Board is composed of nine members. The Special Rapporteur has been informed that the Ministry of Economy and Finance controls 99.5 per cent of the RAI shares and that the Minister of Economy and Finance and a special Parliamentary Commission for General Guidance and Supervision of the Broadcasting Services appoint members of the Board. The Minister appoints two Board members and also selects which of those two members will be the President of the Board, following the favourable opinion of two thirds of the special Parliamentary Commission. The Commission elects the remaining seven Board members, following a voting system which allows the majority to choose four of them and the opposition to choose the remaining three.[29] The law also establishes that the Director-General of RAI is appointed by its Board "in agreement with the shareholders' assembly". The Director-General is responsible for the management of RAI and has the authority to select the channels and news directors, subject to final approval by the Board.[30]

37. The existence of public service along with private and community broadcasting may often contribute to enhancing plurality in the media. Nevertheless, as indicated by the Human Rights Committee, States should ensure that public broadcasting services operate in an independent manner.[31] In this regard, the Special Rapporteur is concerned that two out of the nine RAI board members are directly appointed by the Government and that six other members are also nominated by the ruling coalition in Parliament. The Special Rapporteur is also concerned that the concession on the frequencies used by RAI, as well as the public service, is granted by the Ministry of Economy and Finance. To ensure the independence of the Board from Government interference, the appointment of its membership should be fully revised and the transparency of the procedure enhanced. For example, members could be appointed at different of time and civil society should be involved in the procedure.

38. In this regard, the Special Rapporteur would like to refer to the recommendations of the Council of Europe Committee of Ministers and Parliamentary Assembly on guaranteeing the independence of public service broadcasting, which state that the rules governing the status of the boards of management of public service broadcasting organizations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference and recognize that public service broadcasters must be protected against political interference in their daily management and their editorial work.[32]

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[28] Law No. 112 of 3 May 2004 on regulations and principles governing the structure of the broadcasting system and RAI as well as authorizing the Government to issue a consolidated broadcasting act, art. 21.

[29] Ibid. art. 20, and Consolidated Broadcasting Act No. 177 of 31 July 2005, art. 49, paras. 7 and 9.

[30] Consolidated Broadcasting Act No. 177/2005, art. 49, para. 11.

[31] See footnote 2 above.

[32] See Parliamentary Assembly of the Council of Europe resolution 1636 (2008) on indicators for media in a democracy; recommendation 1641 (2004) on public service broadcasting and

39. Moreover, with regard to the General Service Contract between RAI and the State, the Special Rapporteur believes that particular attention should be given to guaranteeing the implementation of the principle of diversity and pluralism. Furthermore, the right to judicially challenge the compliance of RAI with the provisions of that public service contract should not be limited to the contractual counterpart of RAI, i.e. the State as represented by the Minister of Economy and Finance, but should be extended to all citizens.

40. In this context, the Special Rapporteur encourages the promotion of open consultations with all stakeholders, including civil society, to discuss the future of the public broadcasting service ahead of the expiry of the licence contract between the State and RAI, which is scheduled to take place in 2016.

41. Another issue of concern is the provision of the Gasparri Law which establishes that RAI must guarantee the free broadcasting of messages that are deemed "socially useful", at the request of the Prime Minister's Office. The Special Rapporteur is concerned that the notion of "socially useful" is relatively unclear and subject to interpretations which could lead to abusive use of this mechanism. In this regard, the Special Rapporteur fully concurs with Council of Europe recommendation 99 (1) on measures to promote media pluralism, which was also quoted by the Venice Commission in its 2005 opinion. It states that "the cases in which public service broadcasting organizations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances."[33]

5. Communications Regulatory Authority

42. The Communications Regulatory Authority (AGCOM) is an independent body which was established under the Maccanico Law No. 249 in 1997. It has the responsibility to ensure equitable conditions for fair market competition and to protect the fundamental rights of citizens in that regard. It also has competence over the publishing, radio and television broadcasting, and electronic communications sectors. AGCOM carries out the following functions, in particular:

(a) Implementation of liberalization in the telecommunication market through regulation and supervision activities, and through dispute resolution;

(b) Rationalization of resources in the audiovisual sector; application of anti-trust rules in the field of communications; conducting inquiries on dominant positions;

(c) Organization of the registry of communications operators;

(d) Quality control and distribution of services and products, including advertising and protection of children;

(e) Resolution of disputes between operators and consumers;

(f) Fostering and safeguarding political, social and economic pluralism in broadcasting.

43. Furthermore, AGCOM should also ensure that companies operating within the integrated system of communications that belong to a holder of a government post, his/her spouse or relatives up to the second degree, do not act in such a way as to provide privileged support to the particular holder of the government post concerned. In the case of mis-

Council of Europe Committee of Ministers recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting.

[33] Venice Commission, Opinion No. 309/2004, para. 155.

conduct by a company, AGCOM should order the company to stop questionable conduct and, if possible, to take corrective measures. In case of non-compliance, the company concerned can be fined.

44. As an independent authority, AGCOM has the mandate to oversee the implementation of the regulations established by the Maccanico Law and its subsequent amendments. For that purpose only, they are empowered to adopt their own administrative regulations, but should refrain from expanding their regulatory mandate. The Special Rapporteur believes that all regulations regarding constitutional rights should be approved by Parliament, in particular those affecting the right to freedom of expression,

45. In this regard, the Special Rapporteur was informed that AGCOM can still issue regulations based on legislation by Parliament and that some of those norms are generic and may be loosely interpreted by various authorities and bodies, with consequences for the right to freedom of expression.

46. The issue of intellectual property, for example, was discussed during the visit and a number of concerns were raised regarding the adoption of additional measures for the protection of copyright at the expense of freedom of expression. For the Special Rapporteur, the establishment of norms protecting intellectual property should remain exclusively within the purview of the Parliament.

47. The Special Rapporteur also underlines that, although AGCOM may by law apply some limitations on online content, the removal of online content should be decided by the Court on a case-by-case basis. In particular, he believes that in no case should the contents of an online newspaper be censored. Furthermore, there should never be any liability for the content by the intermediaries.

48. Another issue of concern is the procedure for the appointment of the five board members of AGCOM. The President of AGCOM is appointed by the President of the Republic upon the advice of the Prime Minister in agreement with the Minister for Economic Development. The Chamber of Representatives and the Senate appoint the remaining four members of AGCOM.[34]

49. In order to ensure the full independence of that regulatory body, additional measures need to be taken to enhance the transparency and objectivity of the procedure for the appointment of its members. In this regard, the Special Rapporteur suggests that the selection criteria for the AGCOM board members, and information on the qualifications and professional experience of the applicants should be published and made accessible to the public, including on the Internet. He also suggests that the shortlisted candidates should be called to a public hearing in Parliament and the final decision should be made through a public vote.

6. Anti-trust provisions

50. The anti-trust provisions of the Gasparri Law establish a ban on the creation and the maintenance of "dominant positions" in the broadcast media market.[35] They also empower AGCOM to identify the existence of a relevant market "in accordance with the principles of articles 15–16 of Directive 2002/21/EC"[36] (European Union Framework Directive), to verify the existence of dominant positions in the relevant market and to take measures necessary for eliminating or preventing the formation of dominant positions. The Gasparri Law also set a cap of 20 per cent on the total number of "television/radio programmes"[37] that a

[34] Art. 1, Law No. 249 of 31 July 1997 as amended by Law Decree No. 201/2011.
[35] Law No. 112/2004, art. 5, para. 1 (a).
[36] Ibid., art. 14, paras. 2–3.
[37] Ibid., art. 15, paras. 1–2.

single broadcaster can operate and a cap of 20 per cent on the total revenues of the Integrated Communications System (SIC). SIC includes television, publishing, radio, the Internet, direct advertising activities, sponsorships, revenues from the RAI annual licence fee, sales of cinema tickets, rented or sold DVDs, and direct State grants to print publishers.

51. The anti-trust provisions of the Gasparri Law replace the norms of the Maccanico Law No. 249/1997, which provided, inter alia, that each operator should not own more than two nationwide analogue non-encrypted television channels. It also provided that any broadcaster with more than 30 per cent of the revenues from advertising, public fees (for public channels) or pay-per-view services in their respective media market would be considered as holding a dominant position.[38] However, the Gasparri Law does not provide any reference to thresholds identifying what would constitute "dominant positions" in the respective media markets; it only contains thresholds related to the number of television channels and the revenues within SIC.

52. Furthermore, a recent amendment to the Gasparri Law replaced the 20 per cent cap on "television/radio programmes" with a broader definition of "television/radio programming", which is defined as "a group of programmes … under the same editorial trademark and destined to the public" and which excludes "delayed transmission of the same programming", "merely repetitive transmissions" and "pay-per-view programmes or programme packages".[39]

53. Moreover, as of 31 December 2012, a provision of the Gasparri Law which regulates cross-ownership of broadcast and print media has removed the ban on television broadcasters who operate more than one national channel owning or purchasing shares of newspaper publishing companies.[40]

54. The Special Rapporteur would like to reiterate the concern that was expressed by the previous mandate holder during his visit in 2004 regarding the negative impact of the concentration of private media in the hands of senior government officials, and of the State's influence over the public media. Such an environment is conducive to a climate of intimidation in which public administrators might exercise censorship, limiting freedom of opinion and expression in the country. He is also concerned that such a climate could lead to a situation of self-censorship where journalists would refrain from making statements that might be construed as critical of the authorities.

55. The Special Rapporteur recalls that the Human Rights Committee has already indicated in its general comment No. 34 (2011) on the right to freedom of expression that States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.[41] In this regard, he regrets the amendment of the Gasparri Law and the removal of the ban on cross-ownership of broadcast and print media. The Special Rapporteur reiterates the concerns raised by the Venice Commission, which stated that those amendments could allow incumbent broadcast media groups to expand into the print media sector.

7. Situation of journalists

56. During his visit, the Special Rapporteur heard testimonies from journalists and social communicators who had suffered threats, intimidation and assault in the exercise of

[38] See Law No. 249/1997, art. 2.

[39] Art. 15, para. 1, of the Gasparri Law as amended by Legislative Decree No. 44 of 15 March 2010 implementing Directive 2007/65/EC, art. 4, para. 1 (g) and (h).

[40] Law No. 112/2004, art. 15, para. 6.

[41] See footnote 2 above.

their profession. A civil society study had compiled over 300 cases of intimidation against journalists in Italy in 2012, including 104 verbal and oral threats and 16 cases of assault.[42] The Special Rapporteur deeply regrets that in many cases, threats and attacks against journalists occur with impunity.

57. The Special Rapporteur was also informed of the deteriorating working conditions of journalists, which might expose them to further harm and affect their independence. He was appalled to hear about the proliferation of informal working arrangements through freelance contracts, and the low remuneration received in such cases. He was further informed that freelance journalists are paid between 5 and 50 euros per article, or sometimes receive 4 centimes per line. He is particularly concerned at the greater possibilities of exploitation due to the irregularity of their work. The Special Rapporteur therefore strongly recommends that standards be set and applied urgently, including tariffs for fair remuneration, in line with the cost-of-living indicators.

58. The role of journalists and social communicators is as relevant to a democratic society as is the role of human rights defenders, because they become a guarantee of the enjoyment of human rights and facilitate the provision of information to society, which allows the full participation of citizens in public life. Therefore, he believes that it is essential to create an environment of professionalism and independence within the media sector where media professionals can work without undue influence from the State. In this regard, the Special Rapporteur welcomes the statement made by the President of the Senate in December 2012 recognizing the need for a law that will sanction anyone who obstructs the exercise of freedom of information.

8. Access to information law

59. Law 241/1995 (Administrative Procedure Act) is one of various instruments regulating access to information held by government institutions in Italy. A number of additional legal instruments[43] have been adopted over the past five years introducing additional core principles, such as full disclosure of all information and total accessibility. Most importantly, Italy recently passed a new transparency law (33/2013) prescribing a number of measures for proactive disclosure. Despite recognizing important advances in the national norms, the Special Rapporteur notes that the current normative framework lacks consistency, since it only applies to government and related public administration bodies and does not cover all types of information, but only information already compiled in existing acts and documents.

60. Furthermore, a recent study[44] identified important challenges to the implementation of norms relating to access to government-held information. It evaluated the response of State entities to 300 requests for information in various thematic areas, ranging from human rights to finance. Only 27 per cent of requests resulted in the provision of what was considered to be fully satisfactory information, which means that by far the majority of responses, 73 per cent, were inadequate. The study also noted the very high level of administrative silence: 65 per cent of the requests had received no response from public authorities after 30 years.

61. In his previous report to the General Assembly,[45] the Special Rapporteur noted that the recent adoption of national laws protecting access to information was a positive step

[42] See www.giornalistiminacciati.it/en/.

[43] Law 15/20097; Law 150/20098; Law 183/20109; Decree Growth 2.0 – Digital Agenda 10; Decree Law No. 83/201211;

[44] Diritto Di Sapere and Access-Info Europe, *The Silent State: Access to Information in Italy* (April 2013).

[45] A/68/362.

towards giving effect to central components of the right to freedom of opinion and expression as established in international treaties. However, the implementation of those laws continues to be hampered by obstacles such as the reluctance of officials to release information, the prevalence of secrecy laws, complex bureaucratic procedures and limited technical capacity.

62. Therefore, the Special Rapporteur underlines the importance of adopting unique coherent framework legislation on access to information held by all the public institutions and not just limited to the public administration. The Special Rapporteur also highlights the need to revise procedures in all State institutions in order to ensure that access to information is rapid, inexpensive and not unduly burdensome.

9. Hate speech

63. The Special Rapporteur considers that the phenomena of hate speech and discrimination seriously affect and undermine the dignity of individuals. He is particularly concerned at the occurrence of hate speech against migrants and other minorities in electoral campaigns, which is unfortunately becoming common in many European countries, partly as a consequence of the impact of the recent financial crisis. He fully agrees with the statement made by the United Nations High Commissioner for Human Rights after her visit to Italy in March 2010 that deliberate negative stereotyping of any group of people was unacceptable and dangerous, and in which she urged politicians, the media and public officials not only to avoid that type of rhetoric themselves, but also to publicly campaign against such behaviour by others".[46] The Special Rapporteur stresses that, in accordance with article 20 of the Covenant, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. He stresses that, although the State does not have the responsibility to protect individuals from offence, it has the responsibility to protect them from harm, whether it be discrimination or violence.

64. In a recent thematic report,[47] the Special Rapporteur addressed the worrying increase in expressions of hate, incitement to violence and discrimination. In the study, he emphasized that the promotion and protection of the right to freedom of expression must go hand in hand with efforts to combat intolerance, discrimination and incitement to hatred. Accordingly, he emphasized that legal measures combating hate speech should be complemented by a broad set of non-legal measures to bring about genuine changes in mindsets. He recommended, for example, that political leaders actively promote tolerance and understanding towards others and support open debates and exchanges of ideas in which everyone can participate on an equal footing. He also called on public officials to systematically denounce and condemn hate speech publicly.

65. In this regard, the Special Rapporteur would like to underline his strong support to the Government, and in particular the Ministry of Integration, in their fight against this scourge through the development of awareness-raising programmes, including information and education campaigns on diversity, which can contribute to better communication and understanding among different ethnic groups. He believes that prevention is the most important tool and that such educational programmes can contribute to eradicating ignorance, which is often the root cause of unacceptable attitudes and behaviour.

66. During his visit, the Special Rapporteur was informed of a proposed bill on homophobia and transphobia. He strongly supports that initiative and believes that it is an important first step in addressing discrimination against the lesbian, gay, bisexual and transgender

[46] Statement by the High Commissioner after her visit to Italy, 10–11 March 2010, available from: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9901&LangID=E.

[47] A/67/357.

population in the country. However, he underlines that the bill should not include any exceptions for institutions or particular groups which might generate loopholes in its application. He also encourages the Parliament to consider adopting a law on other forms of hate speech, such as misogynistic messages and incitement to violence against women and persons with disabilities.

10. National human rights institution

67. The Special Rapporteur reiterates the recommendations, made by the previous Special Rapporteur after his visit to Italy in 2004 and by the United Nations High Commissioner for Human Rights after her visit to the country in March 2010, that the Italian authorities should create a national human rights institution in accordance with the principles relating to the status of national institutions (the Paris Principles).[48] The Special Rapporteur is aware that the Government of Italy, after the universal periodic review, did not accept the recommendation on the establishment of a national human rights institution by the end of 2010. He is also aware that the Government indicated that a bill on the establishment of such an institution "will be submitted to the Parliament as soon as the required budgetary resources are made available".[49]

68. During his visit, the Special Rapporteur was informed that a bill on the establishment of a human rights commission had been presented to the Parliament in February 2013. The Special Rapporteur strongly supports that initiative and encourages the Parliament to adopt the bill, in accordance with the Paris Principles.

69. The Special Rapporteur believes that the creation of a national human rights institution is crucial for promoting and monitoring the effective implementation of international human rights standards in the country and that it can serve as an advisory body to the authorities in drafting new legislation that can have an impact on human rights. By reporting regularly, it would also highlight strong points and weaknesses in the legislation, which could then serve as important indicators to the authorities in developing policies.

V. Conclusions and recommendations

70. **Throughout all his activities, the Special Rapporteur reiterates the importance of freedom of opinion and expression in a truly democratic society. He emphasizes that the protection of the right to freedom of opinion and expression is at the heart of the promotion and protection of human rights. In this respect, he recalls Commission on Human Rights resolution 2003/42, in which the Commission stated that the effective promotion and protection of the human rights of persons who exercise the right to freedom of opinion and expression were of fundamental importance to the safeguarding of human dignity and that restrictions on the exercise of the right to freedom of opinion and expression could indicate a deterioration in the protection, respect for and enjoyment of other human rights and freedoms.**

71. **Italy has made clear commitments in ratifying multiple international treaties establishing the right to freedom of opinion and expression. The national legal framework of Italy mostly reflects those commitments. However, as indicated above, a number of concerns remain, both with regard to the persistence of inadequate legislation and to the implementation of existing regulations regarding issues such as defamation, media ownership and oversight.**

[48] General Assembly resolution 48/134, annex.

[49] A/HRC/14/4/Add.1, recommendation No. 14, p. 3.

72. **The Special Rapporteur appreciates that Italy is in a period of transition and that the State authorities recognize the need to further debate this issue and enhance their attention to freedom of expression in the country. During its universal periodic review in 2010, Italy accepted recommendations related to concerns addressed in the present report, such as the need to adopt measures and safeguards to ensure the independent functioning of the media without the influence of the State, and the need to address concerns over media concentration.**

73. **In this regard, to further strengthen the democratic foundations of Italy, the Special Rapporteur, in a spirit of constructive engagement, recommends the steps out below.**

A. Defamation

74. **Defamation should be decriminalized completely and transformed from a criminal to a civil action, in order not to dissuade freedom of expression. The Senate should revise the amount of reparation and maintain the principle of proportionality. The Parliament should repeal article 341 bis of the Criminal Code, which punishes insults directed to public officials in the presence of other people.**

75. **The Government should promote a culture of tolerance regarding criticism, particularly of public officials and bodies and other influential figures, which is essential for democracy.**

76. **Defamation claims should never be used to stifle criticism of State institutions and policies. Public officials and bodies should refrain from filing defamation suits, as public office entails public scrutiny as part of the checks and balances in any democratic society. In order to further discourage the practice of frivolous litigation, in addition to the legal costs, the law should establish a mandatory economic penalty representing a percentage of the amount of civil reparation requested.**

B. Media ownership and conflict of interest

77. **The Special Rapporteur urges the Government to promote and protect media diversity and pluralism by preventing cross-ownership of print and broadcast media.**

78. **The Frattini Law should be amended to introduce an explicit incompatibility between holding elected or government office and ownership and control of the media.**

79. **In order to enhance transparency, an obligation to disclose the full identity of the ownership of the media and their internal decision-making mechanisms, should be established. This information should be made fully accessible to the public by the competent regulatory body, AGCOM.**

80. **AGCOM should also make information on the sources of revenue of the media fully accessible to the public.**

C. Public broadcasting service

81. **RAI should be placed under the control of an independent body, such as a trust fund or a broadcasting institution, and be administered as a public asset.**

82. **The appointment of the members of the Board of RAI should be conducted in a transparent way, as with regulatory bodies. The selection criteria for Board members, and information on the qualifications and professional experience of the applicants**

should be published and made accessible to the public, including on the Internet. The shortlisted candidates should be called to a public hearing in the Parliament and the final decision should be made through a public vote.

D. Communications Regulatory Authority

83. **The Parliament should establish a mechanism that would ensure the transparency of the election processes for members of the boards of regulatory bodies. The selection criteria for the AGCOM Board membership, and information on the qualifications and professional experience of the applicants should be published and made accessible to the public, including on the Internet. The shortlisted candidates should be called to a public hearing in the Parliament and the final decision should be made through a public vote.**

E. Anti-trust provisions

84. **A legislative overhaul should be undertaken of the radio and television normative system, especially the anti-trust provisions. The lack of clarity on thresholds identifying what would constitute "dominant positions" in the media market and the recent removal of the ban on broadcasters who operate more than one national channel owning or purchasing shares in newspaper publishing companies are among the concerns which would need to be addressed in the review.**

F. Situation of journalists

85. **All acts of intimidation and violence against journalists need to be fully investigated. In this regard, consideration should be given to the adoption of specific initiatives dedicated to preventing and investigating attacks, and bringing those responsible to justice.**

86. **Attention should be paid to the working conditions of journalists. Standards should be set, including tariffs for fair remuneration of journalists' work subject to periodic review.**

G. Access to information law

87. **The Parliament should enact a full access to information law applicable to all public institutions, which would guarantee access to public information on financial and political matters to citizens, with the fewest restrictions possible. Procedures for accessing information need to be fully revised in order to ensure that access to information is rapid, inexpensive and not unduly burdensome. Access to information can be further enhanced through the appointment of a focal point, such as an independent information commissioner, or the establishment of a specialized institution to promote and monitor the implementation of national norms on access to information.**

H. Hate speech

88. **Legal measures combating hate speech should be complemented by a broad set of non-legal measures to bring about genuine changes in mindsets. The Special Rapporteur underlines his full support to the work of the Ministry of Integration in developing awareness-raising programmes, including information and education cam-**

paigns on diversity. Political leaders and public officials must systematically denounce and condemn hate speech publicly, and actively promote a culture of tolerance. The proposed bill on homophobia and transphobia should be amended to eliminate all exceptions for institutions or particular groups.

I. National human rights institution

89. **A national human rights institution should be established in accordance with the Paris Principles. Such a body could play an important role in catalysing legal and policy initiatives relevant for the promotion of the right to freedom of opinion and expression.**