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UNDER ARTICLE 40 OF THE COVENANT**

**Second periodic report**

**SAN MARINO\***

[31 October 2006]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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## I. LAND AND POPULATION

1. The Republic of San Marino is geographically located within Italy, between the provinces of Rimini (Emilia-Romagna) and Pesaro- Urbino (Marche). Its territory covers an area of 61.19 square kilometres on the slopes of Mount Titano and has a perimeter of 39.03 km.
2. Population, as of June 2006, reached 30,164. Population density is about 493 inhabitants per square kilometre. More than 4,500 are citizens of other countries, mainly of Italy. Over 12,000 San Marino citizens reside abroad; the largest communities are in the northern regions of the United States, in France, in Argentina and, of course, in Italy.
3. The majority of the population is Roman Catholic.
4. Literacy rate is 97 per cent (secondary school) and 58 per cent (university) for the 2005-2006 period. Schooling in San Marino is compulsory up to the age of 16. The younger generations tend to be highly educated.
5. Life expectancy in San Marino is very high: 78.57 years for men and 84.95 years for women. The birth rate is 10.6 births per 1,000 and the mortality rate is 6.9 deaths per 1,000 (2000-2004 period).
6. The number of households is 12,664 and the average number of members per household is 2.37 people (2005 data).
7. The marriage rate is 0.70 per cent (2000-2004 data). In 2005, 223 marriages took place, out of which 95 were Catholic, 123 civil, the remaining 5 by other rites.
8. Domestic employment rate is 70.99 per cent, and the total unemployment rate is 3.57 per cent (2005 data).
9. In 2004 per capita health expenditure was €1,882.83, while per capita expenditure per student (attending schools in San Marino) was €8,815.64.

## II. INSTITUTIONAL AND LEGAL FRAMEWORK

10. The constitutional order of the Republic of San Marino is set forth in Law No. 59 of 8 July 1974 (Declaration on the Rights of Citizens and Fundamental Principles of San Marino Constitutional Order, hereinafter “the Declaration”), as amended by Law No. 95 of 19 September 2000 (Amendment to Art. 4 of Law No. 59 of 8 July 1974) and Law No. 36 of 26 February 2002 (Review of Law No. 59 of 8 July 1974).
11. The Declaration may be amended only by a law approved by a two-thirds majority of the Great and General Council (Parliament), or by an absolute majority, subsequently confirmed by a referendum to be held within 90 days of the approval of the amending law. Such a Declaration is equal to a constitutional charter, i.e. the highest law stipulating the country’s institutional framework and sanctioning the fundamental civil, political and social rights recognized by the Republic of San Marino.

12. As a consequence, the whole San Marino legal system must comply with these principles. Otherwise a petition may be submitted to the Guarantors' Panel on the constitutionality of rules, established by Law No. 36 of 26 February 2002 (Review of Law No. 59 of 8 July 1974, Declaration on the Rights of Citizens and Fundamental Principles of San Marino Constitutional Order), and subsequently regulated by Law No. 55 of 25 April 2003, and passed by a qualified majority. The functioning of the Panel is described in a following part of this report.

13. Article 2 of the Declaration stipulates that the Republic's sovereignty is vested in its people, thus recognizing the fundamental role of the active participation of citizens in the life of the country. Such active participation is exercised through the electorate. It is governed by Law No. 6 of 31 January 1996 and made up of all San Marino citizens of full age who are not affected by any temporary or permanent special incapacity. Voters elect the Great and General Council (Parliament), exhaustively described in another section of this report. They have the duty to express their opinion in case of referendums and have the power of legislative initiative.

14. With a view to regulating people's direct sovereignty, Law No. 101 of 28 November 1994 introduced the institution of a referendum in its three forms.

15. The referendum process for the total or partial abrogation of laws, acts, rules, including customary ones with force of law (*referendum abrogativo*), cannot be invoked to suppress bodies, organisms or fundamental powers of the State, nor fundamental rights and principles. Nor can it concern any subject related to taxes or duties, amnesty or pardon, and ratification of international conventions or treaties.

16. Voters can also propose the guidelines and principles under which a law shall regulate the issue forming the subject of the referendum (*referendum propositivo o di indirizzo*). Without prejudice to the prohibitions concerning those issues limiting the right to vote, the free movement and establishment of people, or concerning the violation of human rights and the introduction of principles in conflict with those of the Declaration, this type of referendum can be proposed for the same issues for which the abrogative referendum can be invoked.

17. Another type of referendum enables voters to reject a provision promulgated but not yet in force (*referendum confermativo*). This type of referendum only applies to laws governing the fundamental powers of the State. If this referendum is invoked by the Parliament (i.e. expressly provided for in an article of a law subject to referendum and upon request of at least 31 members of Parliament), it can concern any issue with the exception of tax and financial matters, amnesty and pardon.

18. In all cases, a referendum petition must be subscribed by a number of citizens making up 1.5% of the electorate. The petition, drawn up in a precise, clear and unequivocal manner, must be submitted by the Promoting Committee to the Captains Regent.

19. Subsequently in a special hearing in which an Opposing Committee may participate, the Guarantors' Panel is competent to establish whether the petition is admissible and receivable. A petition is approved if it obtains the majority of valid votes cast but never less than 32% of the votes cast by registered voters.

20. Under Law No. 101 of 28 November 1994, the electorate may also submit to the Great and General Council bills drawn up in articles, accompanied by an explanatory report and indicating the necessary expenses to cover. Bills deriving from popular initiative must undergo the same debating procedure within the Great and General Council as those submitted by Parliament.
21. Moreover, according to Law No. 72 of 24 May 1995, the electorate can exercise the power of petition through an institution called “*Istanza d’Arengo*”. These petitions, concerning issues of public interest, must be voted by the parliamentary assembly. Petitions so approved impose on the Congress of State (the executive body) the obligation to comply with them, in line with the will of the Parliament.
22. Article 3 of the Declaration sets forth the main features of the bodies vested with the three main institutional functions which, as sanctioned in its last paragraph, act in mutual respect for their autonomy and competence.
23. Under article 3 of the Declaration, the Captains Regent, appointed by the Great and General Council, represent national unity and are the guarantors of the constitutional order. Constitutional Law No. 185 of 16 December 2005 sets forth the functions, attributions and responsibilities of the Captains Regent in their capacity as Heads of State. Article 2 of this Law stipulates the constitutional functions, while article 3 specifies the attributions not included in the Declaration as subsequently amended. They preside over the Great and General Council, the Congress of State and other bodies, on the basis of law provisions and in compliance with the principle of separation of powers. Under article 6 of Law No. 186/2005, approved by a qualified majority, the Captains Regent promulgate and order the publication of the laws approved by the Great and General Council. However, prior to promulgating a piece of legislation, in line with article 4 of said Law No. 186/2005, when the formal or substantial conformity with the principles of the Declaration is doubtful, they may submit a reasoned request for new deliberation to the Council. If the Council confirms its approval, the new piece of legislation must be promulgated. The Captains Regent may also adopt Decrees and Regulations, under article 5 of Constitutional Law No. 185/2005, in compliance with articles 8, 9, 11 and 13 of Law No. 186/2005 approved by qualified majority.
24. The Great and General Council, composed of 60 members, is entrusted with the legislative power. It also performs a political function *par excellence* and other supervisory powers. By virtue of its legislative power, the Council approves new bills and ratifies the decrees issued by the Captains Regent.
25. Under article 3 *bis* of the Declaration, the legislative initiative may be exercised by each member of the Council, by the Parliamentary Commissions, by the Congress of State, by the Township Councils (*Giunte di Castello*) and by the citizens.
26. According to the ordinary procedure, a bill, after a first reading, is passed on to the competent Parliamentary Commission, which examines and approves each single article and amendment, as well as the final text, before submitting it to the Council for a second reading.

27. According to the extraordinary procedure, the Council may also decide, by a two-thirds majority, to examine a bill in a single reading by passing it on directly to the competent Parliamentary Commission. After having examined and approved all articles and amendments, the Commission submits the bill to the Council for the final vote.
28. In cases of particular urgency, confirmed by two-thirds of its members voting by secret ballot, the Council may decide that a bill, at any stage of the procedure, should be debated and approved by the Council itself in a single reading and during the same session.
29. The political function of the Parliament takes on concrete form, in particular, (a) in the appointment of the Executive and approval of its programme, (b) in controlling the Government's activity, through the submission of motions, questions and interpellations, and (c) in the annual approval of the State budget and subsequent adjustments.
30. The Congress of State is vested with executive power according to the principles of collegiality and responsibility. Under the Declaration, its members are appointed by the Council, to which they are politically responsible, both individually and jointly. This is set forth in Constitutional Law No. 183/2005 with article 2 identifying the attributions of the Congress of State and article 8 indicating both the individual and the joint responsibilities of the members.
31. Moreover, it directs the Public Administration in conformity with the principle of separation of powers and in line with article 2.b) of Constitutional Law No. 183/2005, which reads:
- “the Congress of State shall direct the general administrative activity by setting its overall goals and programmes and issuing the appropriate general directives of the Public Administration in respect for its autonomy as recognised by law”.
32. Section V of Law No. 184/2005, approved by a qualified majority, regulates in detail the relations between the Congress of State and the bodies of the Public Administration. Notably, article 17.vi makes special reference to the separation of powers and implementation thereof.
33. In accordance with article 3 of the Declaration, Constitutional Law No. 183/2005 stipulates, moreover, that the Congress of State - in implementing the guidelines of the Council - shall direct international policy, administrative activity in general and, in cases of emergency, adopt decrees having force of law to be subsequently ratified by the Council.
34. The Congress may also adopt decrees delegated under article 3 *bis* of the Declaration, issue administrative decisions in accordance with the law, approve regulations for implementing the law, as well as the budgets and balance sheets of the State and of the public corporations.
35. With a view to ensuring effective separation of powers, article 3 of the Declaration guarantees to the judicial bodies, established by constitutional law, full independence and freedom of judgement in the fulfilment of their functions.
36. In application of the above-mentioned constitutional principles, Constitutional Laws Nos. 144 and 145 of 30 October 2003, approved by a qualified majority, have reformed the Judiciary and laid down new provisions on the institution, definition and responsibilities of judges.

37. Article 1 of Law No. 144/2003 stipulates that the Judiciary is exclusively subject to the law, and judges must strictly interpret and apply the existing laws, while article 1 of Law No. 145/2003 provides that a Single Court has ordinary and administrative jurisdiction. This Court consists of two specialized sections, “administrative” and “ordinary”, the latter being subdivided into civil, criminal, juvenile and family.

38. Work distribution and the organization and supervision of the Court’s activity are entrusted to a Chief Magistrate, appointed for a five-year term by the Judicial Council in plenary session from among the law commissioners (judges) having served for at least 10 years.

39. Under article 2 of Law No. 144/2003, the ordinary jurisdiction is entrusted to: the Highest Judge of Appeal (*Giudice di Terza Istanza*), the Judge of Appeal, the Law Commissioner, the Conciliating Judge, the Clerk. The administrative jurisdiction is entrusted to: the Administrative Judge, the Administrative Judge of Appeal, the Highest Judge of Appeal of the civil jurisdiction acting as Highest Administrative Judge of Appeal. The *Procuratore del Fisco* and the *Pro-Fiscale* are prosecuting magistrates.

40. Article 2 further assigns extraordinary jurisdictional functions to a Judge of Extraordinary Remedies and the task of verifying the civil liability of magistrates to Judges for Civil Liability Actions.

41. The Civil and Criminal Judge of Appeal and the Administrative Judge of Appeal decide on any appeal against the decisions made by the law commissioners in civil and criminal matters, and by the Conciliating Judge, only with regard to judgements in civil proceedings concerning movables exceeding €12,500 in value, and by the Administrative Judge respectively.

42. The Law Commissioner performs jurisdictional functions in the court of first instance, both in civil and criminal matters. With regard to civil matters, the judge is responsible for hearing litigations of any nature, except for cases where the economic value is less than €25,000. The judge also performs voluntary jurisdictional functions and reviews the decisions made by the Conciliating Judge in case of civil proceedings concerning movables not exceeding €12,500 of value. With regard to criminal matters, the Law Commissioner is vested with investigating functions and makes decisions in the first instance. The Administrative Judge performs jurisdictional functions of first degree in administrative matters.

43. The functions of the Conciliating Judge, in non-litigation matters, are to settle civil disputes of any nature and value, except for cases related to personal capacities and status and any other lawsuit related to non-disposable rights. In litigation matters, the Conciliating Judge settles civil disputes related to movable and immovable property, the value of which does not exceed €25,000.

44. The Law Commissioner’s Clerk assists the Law Commissioner in his activities and may be entrusted with preliminary investigation functions both in civil and criminal matters.

45. In criminal matters, the Highest Judge of Appeal decides on appeals concerning the legitimacy of precautionary measures involving both people and property and on the execution of penalties. In civil matters, the Highest Judge of Appeal decides on pleas of lack of competence, and in civil and administrative matters he decides in the third instance.



46. In civil and administrative matters, it is worth noting that judgements are final when the terms for proposing an appeal have expired and when they meet the so-called “*doppia conforme*” requirement (two concordant decisions), that is to say when the first instance judgement, if appealed against, is totally confirmed in the second instance. On the contrary, if the second instance judgement differs from that of first instance, the matter cannot be considered *res judicata* and the losing party in the appeal, who does not agree on the judgement, may request a third instance judgement. In this case, the relevant judge shall confirm either the first instance or the appeal decision, which thus becomes the final judgement.

47. The Judge of Extraordinary Remedies decides on disputes between civil, criminal and administrative jurisdictions, on appeals for the review of criminal judgements, on *querela nullitatis* and *restitutio in integrum* remedies against final civil judgements.

48. Under the present system, the *Procuratore del Fisco* and the *Pro-Fiscale* support, in criminal proceedings, the accusation. However, it must be noted that their appointment and functions are being reconsidered in the context of the reform of the Code of Criminal Procedure, according to which each will become a real and proper Public Prosecutor according to the accusatory model.

49. Under article 3 of Law No. 145 of 30 October 2003, highest judges of appeal and judges of extraordinary remedies are appointed by the Judicial Council (body representing and guaranteeing the judicial order), in plenary session, by a two-thirds majority. They are chosen from among legal experts of repute who meet the minimum requirements for magistrates of appeal. Judges of Appeal are appointed subsequent to a written and oral examination for qualified candidates, chosen from among magistrates having at least the qualification of magistrate of appeal or of tenured professors of law, aged no less than 45, or from among Law Commissioners and Administrative Judges in the first instance having served for at least 10 years.

50. Law Commissioners and Administrative Judges in the first instance are chosen from among magistrates, or tenured professors of law, or professors of law who subsequent to a public competition are employed in a university, or attorneys with at least six years experience in the practice of law, or conciliating judges and clerks having served for at least four years.

51. The *Procuratore del Fisco* and the *Pro-Fiscale* are selected by means of public competition from among attorneys aged no less than 30 or tenured professors of law, or professors of law who subsequent to a public competition are employed in a university.

52. Conciliating Judges are selected by means of public competition from among attorneys that have been members of the Bar for at least four years.

53. Clerks are selected by means of public competition from among candidates with a university degree in law. After two years of service, they can be appointed *Procuratore del Fisco*, *Pro-Fiscale* and Conciliating Judge.

54. Under article 4 of Law No. 145/2003, highest judges of appeal, judges of extraordinary remedies and judges for civil liability action are appointed by the Judicial Council, in plenary

session, for a five-year term with possibility of renewal. Judges of appeal, law commissioners, administrative judges in the first instance, conciliating judges and clerks are subject to a three-year trial period, after which, the Judicial Council, having assessed the competence acquired, decides whether to terminate or confirm the appointment on a permanent basis.

55. Under article 4 of Law No. 144/2003, the Judge of Extraordinary Remedies, expert in the matter to which the proceedings and related requests refer, decides on abstentions and challenges of judges of first degree, judges of appeal and highest judges of appeal; under article 5 of the same Law, the Guarantors' Panel for the constitutionality of rules decides on abstentions and challenges of judges of extraordinary remedies and judges for civil liability actions.

56. Moreover, article 7 of Law No. 36 of 26 February 2002 (Review of Law No. 59 of 8 July 1974) established a Guarantors' Panel responsible for the constitutionality of rules. This Panel is competent to decide on the acceptability of referendums, as already mentioned above, in case of conflicts between constitutional bodies, on the "Regency Syndicate" and verifies the constitutional legitimacy of law provisions.

57. Such verification may be requested by at least 20 members of Parliament, by the Congress of State, by 5 township councils or by a number of voters representing at least 1.5 per cent of the electorate as results from the latest final annual review of electoral lists. In the context of pending judicial proceedings, verification may be requested by the parties involved, by the *Procuratore del Fisco* or *ex-officio* by the judge by means of a special order. According to Law No. 55 of 25 April 2003, all decisions of admissibility or rejection made by the Guarantors' Panel must be immediately notified to the applicants and to interested parties and transmitted to the Captains Regent, who immediately inform the Great and General Council thereof.

58. Without prejudice to the immediate validity of the judgement in respect of the parties concerned, the decision of unconstitutionality becomes effective after six months. Within this period, the Council may issue a new law provision to comply with the decision of unconstitutionality.

## **Analysis**

### **PART I**

#### **Article 1**

##### **Paragraph 1**

59. Article 2 of the Declaration clearly sets forth that "The Republic's sovereignty is vested in its people who shall exercise it through the statutory forms of representative democracy" and through the other institutions of direct democracy. Through this constitutional principle, the San Marino legislator attributed a primary role to the electorate. Voters have the right and duty to contribute directly to the country's political, social and economic development by electing the members of the Great and General Council (Parliament), and through other institutions of direct democracy such as referendums, popular legislative initiatives and right of petition, as described in the Institutional Framework.

### **Paragraph 2**

60. The Republic of San Marino recognizes the right of people to freely dispose of their wealth and natural resources in conformity with domestic legislation and the international treaties to which the Republic is a party.

### **Paragraph 3**

61. The Republic of San Marino has no responsibility for the administration of Non-Self-Governing and Trust Territories.

## **PART II**

### **Article 2**

#### **Paragraph 1**

62. Article 4 of the Declaration sets forth that “All shall be equal before the law, without any distinction based on sex or personal, economic, social, political and religious status. All citizens shall have access to public services and elective posts, in accordance with the procedure laid down by law.”

63. This principle is further strengthened by the amended article 1 of the Declaration, by virtue of which the Republic of San Marino has committed to recognizing, guaranteeing and enforcing “the rights and fundamental freedoms set forth by the European Convention for the Protection of Human Rights and Fundamental Freedoms”. The same article states that “Regularly signed and implemented international agreements on the protection of human rights and freedoms shall prevail over domestic legislation in case of conflict.”

64. The Declaration subsequently lays down the following rights and fundamental freedoms:

Art. 5 - Inviolability of human rights;

Art. 6 - Civil and political freedoms, in particular personal freedoms, freedom of residence, establishment and expatriation, freedom of assembly and association, freedom of thought, conscience and religion, the privacy of any form of communication, freedom of art, science and teaching, right to education, free and at no cost;

Art. 7 - Right to vote and be voted, and to universal secret and direct suffrage;

Art. 8 - Right to form, in a democratic way, political parties and trade unions;

Art. 9 - Right to work and social security;

Art. 10 - Right to private property and freedom of entrepreneurship;

Art. 12 - Protection of the institution of the family, based on moral and legal equality of spouses;

Art. 15 - Jurisdictional protection of subjective rights and legitimate interests. Right of defence at any stage of the judicial proceedings. Humane and rehabilitation punishments can be inflicted only by judges authorized by law to exercise judicial power and according to non-retroactive rules. Presumption of innocence of the accused until final judgement.

## **Paragraph 2**

65. The principle of equality before the law and of equal protection of the rights and fundamental freedoms recognized by law is corroborated by article 4 above, which states that the Republic shall promote the conditions for the effective participation of citizens in the economic and social life of the country.

66. Indeed, all rights and fundamental freedoms sanctioned at a constitutional level are effectively implemented through various sectoral laws, the constitutional legitimacy of which can be questioned under the terms already described in the institutional framework.

## **Paragraph 3**

67. To ensure respect for human and political rights, recognized *in primis* by the Declaration and consequently by application laws, on the part of other members of society and public authorities, the San Marino legal system provides for three forms of protection.

68. Where the above-mentioned rights are injured by third parties, protection is ensured first of all, on a criminal basis, by the Judicial Authority. Criminal action does not require, as a rule, any complaint by the offended party, nor can the consent of the offended party prevent such action. Secondly, protection is ensured on a civil basis for the purpose of compensating the damages caused by the violation of a fundamental right. Where a constraint of rights and fundamental freedoms is caused by an illegitimate act of the Public Administration, protection is guaranteed by the bodies of the administrative jurisdiction.

69. In all cases, the rules governing the criminal and civil proceedings, as well as the law regulating the administrative jurisdiction, provide for procedures aimed at guaranteeing the conclusion of proceedings initiated due to a violation of a right or fundamental freedom through the pronouncement of a judgement by the Judicial Authority.

70. Moreover, article 9 of Law No. 144 of 30 October 2003 sets the rules for the civil liability of magistrates, already provided for in the preceding law on the judicial system and aimed at punishing any intentional or negligent behaviour of judges who - in the fulfilment of their jurisdictional functions - have caused damage to private individuals. According to this article, anyone who has suffered damage as a consequence of a measure taken by the Judicial Authority intentionally, for gross negligence or failure of justice, may bring an action against the State to obtain compensation.

71. However, to avoid the delicate functions of judges being compromised by pretextual claims for compensation, the legislator has provided for the following cases. Failure of justice occurs when the magistrate refuses or omits to fulfil his official duties, or does so with delay, and

when, having expired the term established by law for the fulfilment of such duties, the party has filed a new petition to obtain a pronouncement by the judge and sixty days have passed without any justification since the deposit of such petition.

72. Gross negligence occurs in the following cases: (a) gross violation of law caused by inexcusable negligence; (b) the affirmation or negation, caused by inexcusable negligence, of a fact the existence of which is indisputably excluded or evident from the records of the proceedings; (c) the adoption of a measure affecting personal freedom outside the cases envisaged by law or without any reason.

73. By virtue of the Republic's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, any injured party, having exhausted all domestic jurisdictional remedies, has the possibility to bring their case to the European Court of Human Rights.

74. In this regard, it is worth mentioning Law No. 89 of 27 June 2003 "Provisions regulating the criminal process - Amendments to Law No. 20 of 24 February 2000", which introduced the possibility to appeal for review of final criminal judgments not only in the cases already envisaged by Law No. 20/2000, but also when the European Court of Human Rights has declared that such judgements violate the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the serious and negative consequences thereof can be removed exclusively by means of review.

### **Article 3**

75. Legal equality between men and women is expressly sanctioned by article 4 of the Declaration, which prohibits any discrimination based on sex. This principle has been implemented in greater detail by numerous laws regulating different sectors of daily life, ranging from the political to the electoral, working and educational contexts.

76. In this regard, San Marino has acceded to several international conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, ILO Convention No. 103 on Maternity Rights and ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers. By virtue of the amended article 1 of the Declaration, the above-mentioned international treaties are an integral part of San Marino's juridical system and prevail over domestic legislation in case of conflict.

### **Article 4**

#### **Paragraph 1**

77. The only derogation envisaged by the Declaration from the enjoyment of political and civil rights is contained in article 6, which stipulates that "Everybody shall enjoy civil and political freedoms in the Republic. [...]. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary for the protection of public order and general welfare."

78. Limitations to the enjoyment of rights and freedoms are therefore admitted only under exceptional and particularly serious circumstances (for example, offences that may seriously threaten civil coexistence). In such cases, the legislator provides for the adoption of restrictive measures aimed at restoring order.

#### **Article 5**

79. No other limitations are admitted besides those expressly provided for in the above-mentioned Article 6 of the Declaration.

### **PART III**

#### **Article 6**

##### **Paragraph 1**

80. Being inherent to the human being, the right to life is protected by a wide range of public law legislation, most importantly the Declaration and the Criminal Code. Indeed, article 5 of the Declaration stipulates the inviolability of human rights, and as such they must be given priority as opposed to the other rights recognized in the same Declaration. The right to life is indirectly safeguarded by a punitive system which, under article 15, fourth paragraph, of the Declaration, provides only for humane and rehabilitation punishments, excluding therefore death penalty and life imprisonment. On the other hand, such a right is directly protected by the relevant provisions of the criminal code aimed at suppressing crimes against life and personal safety. Worth mentioning are article 150 and the following articles of the Criminal Code which protect the right to life both of the born person (criminalizing homicide and injury, both intentional and negligent, infanticide for honour or mercy, instigation or assistance to commit suicide, beating) and of the unborn (criminalizing abortion also for reasons of honour).

##### **Paragraph 2**

81. The San Marino legislator, by affirming the inviolability of human life, has subordinated the punitive power of the State to the right to life, and therefore excluded capital punishment. Moreover, the Criminal Code does not even provide for life imprisonment in that such punishment deprives the convict of any hope for freedom and social rehabilitation. Life imprisonment is indeed contrary to the rehabilitation purpose under article 15 of the Declaration.

##### **Paragraph 3**

82. San Marino ratified the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on their Destruction.

##### **Paragraphs 4, 5 and 6**

83. As already stated, criminal punishments applicable in the Republic of San Marino do not include the death penalty for any crime. The San Marino Criminal Code provides for both

amnesty and pardon. Under article 52 of the Criminal Code, amnesty before conviction is a general act of clemency by the State which, through a decision made by the Parliament, renounces exercising its punitive power and, by so doing, extinguishes an offence. Conversely, under article 112, amnesty after final conviction, mercy and pardon are means that extinguish a punishment. Mercy, concerning a single individual, and pardon, of a general nature, are acts of clemency granted by the Parliament which remit, completely or partially, the punishment inflicted or commute it into a different one.

### **Article 7**

84. According to article 15 of the Declaration - which guarantees the jurisdictional protection of subjective rights and legitimate interests by the bodies of the ordinary and administrative jurisdictions and by the Guarantors' Panel for the constitutionality of rules, and affirms the right to defence at any stage of judicial proceedings - the punitive system may only consist of humane and rehabilitation punishments inflicted by a judge authorized by law to exercise judicial power.

85. Consistent with the foregoing, the Republic of San Marino ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, whose articles 3 and 4 categorically exclude torture, slavery and servitude, inhuman and degrading treatments, and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (Decrees No. 136 and 137 of 19 November 1996).

86. With regard to medical treatment, in accordance with the inviolability of human rights, sanctioned constitutionally by the Declaration, the Republic of San Marino ratified the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Decree No. 45 of 26 February 1998).

87. Moreover, Law No. 43 of 28 April 1989 introduced the Charter of the Rights and Duties of Sick People, with article 1 providing for the right of citizens to express their informed consent to any health treatment. In emergency cases, the medical staff is authorized to provide treatment also in the absence of the patient's consent. Under the same article, citizens have the right not to be subjected to any experimentation or research without their explicit consent, which is always revocable.

88. Law No. 69 of 23 May 1995 introduced a regulation for vaccinations, in order to guarantee the health both of individuals and the community. The law distinguishes between compulsory and recommended vaccinations and sets forth how they have to be carried out, excluding from mandatory vaccinations people affected by illnesses which could be incompatible. With regard to compulsory vaccinations, article 3 of that law provides for the right to refuse vaccinations. In case of a minor, such a right can be exercised by the person having parental authority. To refuse a vaccination, the objector must file an application to the relevant health bodies, and formally state that he has been duly and exhaustively informed by the health bodies of the importance of the vaccines. The objector must also underwrite a specific insurance policy for civil liability towards third parties in case of damage caused by contagion.

### Article 8

89. In addition to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment, as mentioned above, the Republic of San Marino ratified the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Decree No. 27 of 23 June 1967), and ILO Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Decree No. 19 of 23 February 2000).

90. By virtue of new article 1 of the Declaration, such Conventions, like any other international treaty concerning human rights and fundamental freedoms, form an integral part of San Marino's juridical system and prevail over domestic legislation in case of conflict.

91. The provisions contained in such conventions are accompanied by those of the Criminal Code: article 167 criminalizes the forcing into slavery, article 168 the slave trade or traffic, article 169 kidnapping, article 179 private violence, article 171 the violation of sexual freedom, article 173 indecent assaults on a minor or a consenting incapable person, article 174 sexual harassment, article 176 the abduction for the purpose of indecent assault, article 177 the corruption of minors. These provisions were further supplemented by Law No. 61 of 30 April 2002, Law for the Suppression of Sexual Exploitation of Children, introducing articles 177 *bis*, 177 *ter* and 177 *quater*.

92. Without prejudice to the existing criminal provisions, article 177 *bis* criminalizes the exploitation of child prostitution and punishes anyone who performs sexual acts with a minor under 18 and paying an amount of money or offering a corresponding other economic advantage. Penalties are increased if the act is committed to the detriment of a minor under 14, or under 18 if affected by physical or mental disability.

93. Article 177 *ter* criminalizes child pornography. This crime has been broadly defined and covers not only the use of minors under 18 in the production of performances, pornographic works and material, visually representing minors engaging in explicit sexual activity for the purpose of sexual excitement, but also the trade and supply, against payment or free of charge, and the dissemination, distribution, circulation and advertisement, also through telecommunications, of such pornographic material, as well as the dissemination of information for the purpose of enticing or sexually exploiting minors.

94. Article 177 *quater* punishes anyone who organizes, promotes, or advertises travels, meetings, and transfers abroad destined to facilitate the performing of the sexual activities mentioned in the preceding articles.

### Article 9

#### Paragraph 1

95. Personal freedom is expressly recognized by article 6 of the Declaration and constitutes the logical and juridical basis for all freedoms mentioned in the Declaration itself. Article 6, first



paragraph, by stating that “[...] No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary for the protection of public order and general welfare”, mandates the legislative power, through a specific legal reservation, to determine the terms and circumstances under which personal freedom may be legitimately restricted.

### **Paragraphs 2 and 3**

96. In the San Marino legal system, limitations to personal freedom are precautionary measures involving deprivation of liberty referred to in articles 53 and 54 of the Code of Criminal Procedure as amended by Law No. 9 of 2 February 1994. Precautionary measures are generally governed by the principles of legality, absolute necessity and proportionality of the measure to the crime perpetrated.

97. Article 14 of that Law establishes that measures involving deprivation of liberty include preventive detention either in prison or a treatment facility, home arrest, the obligation or prohibition to stay on the territory of the Republic or part of it, and the prohibition to expatriate. Nobody can be subject to coercive measures in the absence of adequate evidence leading to believe that the defendant is responsible for the facts for which he or she is being prosecuted and that such facts constitute a crime punishable by terms of any of these measures. Penalties involving deprivation of liberty are ordered by the Judicial Authority only if there is a risk of withholding of evidence, or of the defendant’s escape, or a real necessity to protect the community.

98. With regard to preventive detention, article 15 of the above-mentioned Law provides that such measure “can be ordered in the following cases: 1) if the crime for which an action is brought is punishable by terms of first-degree imprisonment and if there is a risk of withholding of evidence, misprision of felony, or that the convicted avoid the enforcement of the penalty 2) if the crime for which an action is brought is punishable by terms of at least second-degree imprisonment and whenever any other measure has proved to be inadequate”.

99. The public order and interest reasons which, under exceptional circumstances, can entail limitations to personal freedom include the stopping and holding by the judicial police. In this respect, Law No. 20 of 24 February 2000 recognized - in cases where preventive detention is applicable - the possibility to arrest anyone in the act of committing an offence punishable with imprisonment, having regard to the individual’s rights. This possibility becomes an obligation in case of offences punishable with at least third-degree imprisonment.

100. Besides these cases, the police can stop and hold people suspected of a crime punishable with imprisonment whenever there is a risk of escape, for investigation reasons or on security grounds. The police shall draw up a report and notify the interested party and his or her counsel.

101. Stop and arrest reports shall be transmitted to the Law Commissioner within 48 hours. Within the following 96 hours, the Law Commissioner shall either order the release or adopt one of the security measures envisaged by the Code of Criminal Procedure, otherwise the measure expires.

102. The adoption of any such precautionary measures must fully respect the right to defence, i.e. the right to be assisted by an advocate of one's choosing or, failing this, by a public defender.

103. According to Law No. 86 of 11 December 1974, counsels have the right to be present during interviews and confrontations involving the defendant, to attend experiments, judicial visitations, search of people, things and premises. To this end, the Judicial Authority must notify the counsels of the time and place fixed for these acts by any means and at least 24 hours in advance.

104. Article 229 of the Code of Criminal Procedure, as amended by Law No. 9 of 2 February 1994, punishes by terms of nullity any procedural acts performed in violation of the above-illustrated rights. Coercive measures involving an individual or an individual's property can be appealed against before the Judge of Criminal Appeal and, in the last instance, before the Highest Judge of Appeal in criminal matters.

#### **Paragraph 5**

105. With regard to the right to fair compensation for the victims of illegal arrest or detention, see discussion on civil liability of Magistrates under article 2 of the International Covenant on Civil and Political Rights.

### **Article 10**

#### **Paragraph 1**

106. In compliance with article 15 of the Declaration, article 1 of Law No. 44 of 29 April 1997 (Penitentiary Law) provides that the penitentiary treatment must be humane and safeguard the detainee's dignity. The same article sanctions that the treatment must be based on full impartiality, i.e. without any discrimination on grounds of nationality, race, economic and social conditions, political and religious opinions, and it must be aimed at the detainee's social rehabilitation.

#### **Paragraph 2**

107. Under article 10 of Law No. 44 of 29 April 1997, penitentiary treatment must meet the specific needs related to the personality of each individual. To this end, the competent health personnel, after assessing the detainee's personality in order to establish any psycho-physical deficiency or cause of social maladjustment, devise a special rehabilitation treatment programme which can be changed and complemented, when necessary.

108. In this connection, article 11 provides that the placement of detainees in the cells be determined in consideration of possible joint rehabilitation treatments and preventing detainees from negatively influencing one another. Under the same article, detainees under 25 must be kept separately from adults. Equally, there must be separate cells for men and women.

### **Paragraph 3**

109. For the purpose of the detainee's re-education and social rehabilitation, article 13 envisages the participation of private individuals, institutions and associations, both public and private. It also envisages that, subject to the prior authorization and conditions established by the Judge responsible for the execution of sentences and having heard the prison management, access to the penitentiary institution be allowed to people directly concerned with the rehabilitation programme.

### **Article 11**

110. Failure to pay a pecuniary obligation is not punished by terms of imprisonment in the Republic of San Marino.

### **Article 12**

#### **Paragraph 1**

111. Freedom of residence, guaranteed by article 6 of the Declaration, safeguards the special interests of individuals in preventing any intrusion into their private dwellings. It should be noted that the constitutional protection of this freedom does not coincide with the civil one, in that it covers any private dwelling, even temporary, where an individual carries out his activity.

#### **Paragraph 2**

112. The right of establishment and expatriation, guaranteed by article 6 of the Declaration, includes freedom of movement on the whole national territory, both on foot and by vehicle, freedom to fix one's domicile in any place of the national territory, freedom to expatriate, either temporarily or permanently, and to re-enter the national territory.

#### **Paragraph 3**

113. Limitations to this right are envisaged by the rules on inspections, searches and seizures contained in the Code of Criminal Procedure. To this end, article 74 of the Code of Criminal Procedure stipulates that any search of property in the house of the accused or of any other person must be ordered in writing by the investigating judge. The search warrant shall indicate all precautions to be observed and for which the chief law enforcement officer is responsible.

114. Also the seizure of the *corpus delicti* must be ordered by the investigating judge. Article 18 of Law No. 9 of 2 February 1994 establishes that "in case of need and urgency, the police forces may seize the *corpus delicti* and any other related object, and shall formally report to the Law Commissioner within 48 hours, who, if circumstances so require, shall confirm the measure within the following 96 hours. Failing such confirmation, the measure shall expire." All coercive measures involving the property of an individual, related to seizures or their confirmation, can be appealed against by the accused before the Judge of Criminal Appeal and, in the last instance, before the Highest Judge of Appeal.

115. Further restrictions on the right of establishment and expatriation are envisaged by the laws, regulations and orders in road traffic matters (Law No. 24 of 28 February 1996) and concerning the granting of driving licences for motor vehicles (Law No. 106 of 20 September 1985).

116. The right of establishment is further limited by the provisions concerning the stay of foreigners on the territory of the Republic. Such provisions are justified by the small size of the country. Law No. 23 of 4 August 1927, amended by Law No. 22 of 24 February 2000, stipulates that any foreigner may freely enter and circulate within the national territory. However, for those wishing to dwell in the Republic, a stay permit is required.

117. Law No. 95 of 4 September 1997 and subsequent implementing rules amended past provisions on the granting of stay and residence permits to foreigners. Stay permits are granted under special circumstances ranging from business or professional relations, to study, health treatment or assistance, family reasons, tourism and religion. Permanent residence permits are issued by the gendarmerie to foreigners having been granted an ordinary or special stay permit for at least five years, provided that there have been no interruptions and that the applicant is not involved in any criminal proceedings for felonies, has not been convicted for any of such felonies, and there are no major public security reasons.

118. However, under article 4 of Law No. 114 of 30 November 2000 (Law on Citizenship), the five-year requirement referred to above does not apply to the foreign spouse of a San Marino citizen, who is granted a residence permit upon request submitted to the Vital Statistics Office.

119. Pending criminal proceedings, convictions for serious crimes, as well as major public security reasons, determine the rejection or revocation of stay or residence permits. Under Law No. 22 of 24 February 2000, the police authorities can also order a foreigner without a residence or stay permit to leave the country immediately or within a reasonable period of time for reasons of crime prevention, security or public order. Such a measure must be notified to the Law Commissioner, who, if circumstances so require, confirms it within the following 96 hours. It can be appealed against before the Administrative Judge of Appeal within 10 days.

120. It should also be noted that, under Law No. 79 of 16 June 2004, expatriation is subject to the issuance of a passport by the Captains Regent and the Secretary of State for Foreign Affairs to citizens and stateless residents. Article 5 of the Law lists the impediments to the issuance of a passport.

### **Article 13**

121. The expulsion of foreigners from the national territory is a security measure laid down in article 127 of the Criminal Code and is applied by the Judge upon conviction or acquittal. Such a decision can be appealed against under the terms described above. Article 14 of Law No. 9 of 2 February 1994 includes among personal coercion measures also the obligation or the prohibition to stay on the national territory or in part of it, as well as the prohibition to expatriate. Such precautionary measures are adopted by the Judicial Authority in the presence of appropriate and serious indications of guilt, provided that there is a risk of withholding of evidence or a serious need to protect the community. These measures can be appealed against before the Judge of Criminal Appeal.

## Article 14

### Paragraphs 1, 2, 3, 4 and 5

122. The principle of equality is expressly sanctioned by article 4 of the Declaration, the last paragraph of which states that the Republic shall guarantee equal social dignity and equal protection of rights and freedoms. Article 15, moreover, reads: “Everyone shall be entitled to jurisdictional protection of subjective rights and legitimate interests before the competent ordinary and administrative courts and before the Panel responsible for guaranteeing the constitutionality of any rule. Everyone shall be entitled to defend himself at any stage of the judicial proceedings. All judgements shall be pronounced by independent courts within a reasonable time and shall not be subject to undue financial burden. Such judgements shall be made public. Humane and rehabilitation punishments shall be inflicted only by judges authorised by law to exercise judicial power and according to non-retroactive rules. Their retro-active application shall be possible only if more favourable. Everyone charged with an offence shall be presumed innocent until convicted. Any form of limitation of personal freedom, also as precautionary measure, shall be admitted only in conformity with the law.”

123. In the Republic of San Marino, a civil action is initiated upon a complaint submitted by a party, either a citizen or a foreigner, against another party who allegedly injured a right of the applicant.

124. The civil process is based on statutory rules (in particular Law No. 55 of 17 June 1994) and customary laws. Such proceedings, recorded in writing, are governed by the principles of equality of the parties, public hearing and impartiality of the judge, who is responsible for directing the course of proceedings but has no power to act *ex officio*. The power to determine the subject matter of the proceedings is entrusted to the litigants, who are required to provide the judge with any document, opinions by experts, testimonial or circumstantial evidence supporting their applications. Having established the right and that the same has been injured by the adverse party, and having applied the relevant legal provisions, the judge either orders the adverse party to compensate the damages sustained by the injured party, and to fulfil pending obligations, or, more in general, enact the provisions requested by the parties and provided for by law in relation to the different offences envisaged. The decisions made by the Judge can be appealed against before the Judge of Appeal under the terms described in the Institutional Framework.

125. The criminal process is regulated by the Code of Criminal Procedure which entered into force in 1878 and which is of a clearly inquisitorial nature. Subsequent laws, more specifically Law No. 43 of 18 October 1963, Law No. 86 of 11 December 1974 and Law No. 9 of 2 February 1994, as well as the Declaration and ratified international conventions on human rights, have greatly adjusted this Procedure to enhance the safeguarding and protection of human rights and fundamental principles.

126. The criminal process is divided into an inquiry and a hearing stage. The preliminary investigations, conducted by a Law Commissioner performing criminal investigation functions, consist of a diligent and scrupulous search initiated by the Judicial Authority upon receipt of a *notitia criminis*, in order to establish the offender (Art. 20 of the Code of Criminal Procedure).

The accused must be interrogated as soon as possible and, in any case, within 24 hours of imprisonment. The interrogation must be conducted in the presence of an advocate chosen by the accused or of a public defender.

127. Article 13 of Law No. 86 of 11 December 1974 stipulates that, “with regard to all acts performed by the Judge, the counsels of the parties are entitled, during appraisals, to receive formal notification of the appointment of the expert and of questions and to submit observations and further questions by the date fixed for the starting of appraisals; to appoint, contextually, an expert of their choosing who is entitled to assist to appraisals and submit oral deductions to the expert appointed ex officio; to be present whenever the official expert conducts appraisals before the judge or is heard for clarifications. The counsels of the parties have furthermore the right to be present during interviews and confrontations involving the defendant, to attend experiments, judicial visitations, search of people, things and premises with at least a 24 hour notice”. Article 229 of the Code of Criminal Procedure punishes by terms of nullity any procedural acts performed in violation of the above-illustrated rights. Defendants also have the right, at any stage of the proceedings, to obtain the examination of witnesses on their behalf and of any evidence that could serve in their defence or mitigate their punishment.

128. Having collected all evidence, if the Investigating Judge concludes that such evidence does not provide legal ground for arraignment, he or she transmits the affair to the *Procuratore del Fisco* for an opinion. If also the latter is of the same opinion, the Investigating Judge orders the dismissal of the case. On the contrary, the Investigating Judge serves a summons indicating the nature and cause of the charge and informing the defendant of the right to have legal assistance of his or her own choosing or, failing this, to have legal assistance assigned.

129. At the preliminary stage, the Investigating Judge may adopt, if appropriate, the personal precautionary measures already described above.

130. The summons concludes the inquiry stage. The following full hearing, which is public and oral, is assigned to a Law Commissioner different from the Investigating Judge. Having heard again the witnesses in a public hearing the *Procuratore del Fisco*, who supports the accusations, and subsequently the counsel illustrate their closing arguments.

131. Then the Law Commissioner decides the sentence in camera and formulates the purview of the sentence, which is publicly read in court. The sentence is made public after its reading, while the grounds thereof must be deposited with the registry within 30 days of its publication.

132. The convict has the right to challenge the sentence before the Judge of Criminal Appeal, who is competent to judge only those aspects of the sentence that are appealed against. Article 196 of the Code of Criminal Procedure also prohibits the *reformatio in peius*, establishing that when the appeal is filed by the convict, the judge cannot inflict a more severe punishment or revoke earlier benefits.

133. In case of appeal, the affair is transmitted by the Law Commissioner to the Judge of Criminal Appeal, who serves a summons to all parties, besides the appellants, to their advocates and to the *Procuratore del Fisco*, at least 30 days prior to the date fixed for the public hearing.

134. All the parties having appeared before the Judge, they take the floor in the following order: the advocate of the injured party, the *Procuratore del Fisco* and the counsel of the accused. At the end of the public hearing, the Judge of Appeal either reads the purview of the sentence or reserves to deposit his decision within three months, together with the purview and the grounds of the sentence.

135. The sentences rendered by the Judge of Appeal are final and no ordinary remedies are allowed. Only with a final conviction is the defendant found guilty, under article 15 of the Declaration.

136. However, if after a final decision, new elements prove the innocence of the convict, the latter may request, under article 3 of Law No. 144 of 30 October 2003, that the sentence be reviewed by a Judge of extraordinary remedies.

137. According to Law No. 89 of 27 June 2003, an appeal for review of final criminal judgments can be filed, not only in case of newly discovered facts, but also when the European Court of Human Rights has declared that a national judgement violates the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto, and that the serious and negative consequences of such a judgement can be removed exclusively by means of review.

138. The functions of the Judge for the execution of criminal judgements are attributed to a Law Commissioner, whose measures can be appealed against either by the convict, or the *Procuratore del Fisco*, or any interested party.

139. As previously stated, criminal hearings are public. However, in compliance with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Judicial Authority may order that a hearing should take place behind closed doors, for reasons of public morals, public order or national security, or whenever it is in the interest of minors or of the interested parties' privacy.

## **Paragraph 6**

140. See comments on article 2 of the Covenant.

## **Paragraph 7**

141. With regard to the *ne bis in idem* principle in criminal matters, it is worth noting that the Republic of San Marino ratified the European Convention on the International Validity of Criminal Judgements.

142. Moreover, article 7 of the Criminal Code stipulates that, in case of crimes committed abroad to the detriment of a San Marino citizen, procedural requirements are not met under any of the following circumstances: 1) the citizen or the foreigner has been judged and acquitted abroad; 2) the offender, convicted abroad, has served the whole sentence, even if the punishment is less severe than that under the San Marino law; 3) the offender, convicted abroad, has served part of the sentence and that part equals the punishment under the San Marino law.

## **Article 15**

### **Paragraphs 1 and 2**

143. The principle of non-retroactivity of the criminal law is expressly sanctioned by article 15, paragraph four, of the Declaration, which reads “Humane and rehabilitation punishments shall be inflicted only by judges authorised by law to exercise judicial power and according to non-retroactive rules. Their retro-active application shall be possible only if more favourable”, as well as by article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been incorporated in the San Marino legislation by virtue of article 1 of the Declaration.

144. The non-retroactivity principle is further stated by article 3 of the Criminal Code, which reads “No one can be punished for a fact which did not constitute an offence at the time when it was committed, or by terms of a more severe penalty than that inflicted by the then existing law. Any new legislative provisions decriminalizing a fact shall have retroactive effects. Where there has been a conviction, the execution and criminal effects thereof shall cease. Any new law which is more favourable to the offender shall have retroactive effects, except where an irrevocable judgement has been pronounced. This nonetheless, the judge shall review, even ex officio, the punishment associated with a conviction if a lesser punishment by two degrees is inflicted under the new law.”

## **Article 16**

145. Under San Marino law, any natural person enjoys the general legal capacity to have rights and duties. Such capacity is acquired at birth and lost at death.

146. In this regard, Law No. 43 of 12 August 1946, Law on the Vital Records System, stipulates that a birth declaration be made by the father, mother, a special delegate or, failing these, the physician or any other attendant at birth to the Vital Statistics Registrar within 10 days of the birth. The birth certificate must indicate the place, date and hour of birth, and the sex and name of the newborn. If the informant does not provide the child’s name, a name is given by the Vital Statistics Registrar within 10 days following the child’s birth. A family name (surname) is also given by the Vital Statistics Registrar in case of unknown parents.

147. Article 229 of the Criminal Code punishes anyone who suppresses the civil status of an individual by failing to declare his birth or, if the individual is entered into the vital records, by concealing his status.

148. Article 230 of the Criminal Code punishes anyone who, by supposition or substitution of a child, or by providing false information at the time of reporting the birth, ascribes to someone a status of filiation which does not exist or is different from that recognised by law.

149. Capacity to make juridical acts is acquired at the full age of 18 in accordance with Law No. 15 of 25 June 1975, except where otherwise provided for by law (emancipation of 16-year-old minors by marriage).



150. Limitations and restrictions to the enjoyment of civil and political rights are allowed only under the law and more specifically derive from an order of disqualification or unfitness issued under Law 27 April 1911, or from a conviction entailing disqualification from public offices or political rights, or from the starting of judicial bankruptcy proceedings.

### **Article 17**

#### **Paragraphs 1 and 2**

151. The right of any individual to privacy is one of the main limitations to the freedom of thought. While freedom of thought is fully protected under article 6 of the Declaration, it is constrained by other constitutional rules protecting rights which may potentially conflict with the actual exercise of the freedom of thought.

152. Privacy is safeguarded respectively under article 190 of the Criminal Code, which punishes any unauthorized person who fraudulently learns the content of a communication, reveals it or prevents its transmission in any way; and under article 191, which punishes anyone who, having fraudulently learnt the content of confidential public or private acts or documents, reveals or uses it to his or other people's advantage. Significantly, there are no legislative provisions in San Marino allowing the judicial authority to order wire tapping.

153. Law No. 70 of 23 May 1995, regulating the computerized collection of personal data, stipulates that the setting up and use of electronic or computerised files or databases containing names and personal information must primarily go to the benefit of all citizens, and not prejudice, in any way, the respect for human rights and fundamental freedoms, nor injure the dignity and identity of any person, whose private life is inviolable.

154. The right to reputation, which is the right of a citizen not to be injured in his honour, dignity and estimation in which he is held by the community, is protected under article 183 of the Criminal Code, which punishes anyone who in a public meeting or communicating with other people ascribes to an individual, present or absent, a fact which injures his honour, and under article 185 of the Criminal Code, which provides for a more severe punishment if such offence is committed by using social communications, even abroad. Article 184 of the Criminal Code punishes anyone who, in a public meeting or communicating with other people, injures the honour of a person, present or absent. If the fact is committed only in the presence of the injured party, the punishment is reduced.

### **Articles 18 and 19**

#### **Paragraph 1**

155. Freedom of thought, sanctioned by article 6 of the Declaration, means that any individual can express and disseminate his thoughts by any means (orally, or through press, radio, images, billboards, etc.). Freedom of thought also includes the right to report information and news, the right to express views, comments, and criticism and the right to propaganda.

156. Under article 6 of the Declaration, freedom of thought may be limited only for reasons of public interest or to protect the subjective rights of individuals or other interests equally guaranteed by the Declaration. Such limitations have been dealt with in the paragraphs referred to in article 17 of the International Covenant on Civil and Political Rights.

157. Further constraints may be placed to safeguard public decency. Article 275 of the Criminal Code punishes anyone who publicly commits obscene acts. Article 276 punishes anyone who, through communications directed to the public at large, represents actions or things which, especially in respect of minors, may incite to violence, cruelty, hooliganism and sexual corruption or may offend the sentiment of family cohesion. Article 282 criminalizes the performing of acts contrary to public decency in public places or places open to the public, as well as the description, illustration, representation or reproduction of such acts through any means of communication.

158. For the purpose of protecting facts which, by law, have to remain secret, articles 329 and 328 of the Criminal Code criminalize, respectively, the disclosure of political secret and espionage. Article 289 criminalizes aiding and abetting and provides for a more severe punishment if aiding and abetting is committed through any communications media.

159. Freedom of thought exercised through the press is regulated by the 28 May 1881 Law. Under this Law, printers and reproducers of signs or figures illustrating thoughts are required to provide the Judicial Authority with copy of any printed material. Moreover, anyone wishing to issue a periodical or other numbered publication is required to submit to the Secretariat of State for Internal Affairs a written statement indicating the name of the publisher, the editor, the nature of the publication and the name of the printing house.

160. Moreover, under Law No. 41 of 27 April 1989 the San Marino Broadcasting Company was established as the sole agent authorized to exercise the right of the Republic to operate a radio and television broadcasting service.

### **Paragraphs 2 and 3**

161. Freedom of religion and worship, meaning that anyone is free to profess any religious faith, either alone or in community with others, is fully recognized by article 6 of the Declaration and by article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the latter forming an integral part - under article 1 of the Declaration - of San Marino's juridical system and prevailing over domestic legislation in case of conflict.

162. Besides stating this principle, the legislator also included criminal provisions to protect religious freedom: article 260 criminalizes the profanation of the symbols of a religion not contrary to public decency, of objects of worship, as well as the denigration of acts of worship; article 261 punishes anyone preventing a person, by means of force or threat, from professing his religion, from disseminating it or from participating in public or private ceremonies; article 262 punishes anyone impeding or disturbing rites, ceremonies and processions taking place in the presence of a religious minister.

163. To avoid any serious limitation to the freedom of religion, further provisions have been specifically adopted with regard to various domains of public and individual life (family, school, workplace, etc.).

#### **Paragraph 4**

164. The Republic of San Marino ratified the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11. According to article 2 of the Protocol, “in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” By virtue of the amended article 1 of the Declaration, the Protocol also forms an integral part of San Marino’s juridical system and prevails over domestic legislation in case of conflict.

#### **Article 20**

165. Under article 1, paragraph two, of the Declaration, the Republic of San Marino “rejects war as a means to settle disputes between States and, in its international policy, adheres to the principles enshrined in the Charter of the United Nations.” Article 284 of the Criminal Code punishes anyone committing an act aimed at unleashing civil war on the territory of the Republic, while article 288 criminalizes the unauthorized formation of armed corps.

#### **Article 21**

166. In conformity with the principle of freedom of assembly, guaranteed by article 6 of the Declaration, people are free to meet or gather, temporarily and voluntarily, in a given place, following prior agreement among the parties. The assembly may be either public or private and have various purposes, including religious, political or cultural. The constraint generally placed on freedom of assembly is that any meeting or gathering has to take place peacefully and participants are not allowed to carry weapons.

167. Public assemblies must be authorized by the Police Authorities, who may prohibit them under circumstances liable to cause accidents or disorder. In this regard, article 291 of the Criminal Code punishes anyone who, taking part in an assembly or assemblage in a public place or in a place open to the public, does not obey the lawful dismissal ordered by the authority due to imminent disorder or committed crimes that actually jeopardize public order and security.

#### **Article 22**

#### **Paragraph 1**

168. In conformity with the principle of freedom of association, guaranteed by article 6 of the Declaration, any individual is free to form, join or not an association and to withdraw from it.

169. The setting up of associations is regulated by article 4 of Law No. 68 of 13 June 1990. Under this article, more persons, wishing to jointly pursue a non-profit objective and the

majority of whom being residents, may form a non-commercial association, the organization and management of which is to be agreed upon by the associates. Where a non-commercial association pursues broader objectives than the personal interest of the associates and has articles of association similar to those of a partnership, such a non-commercial association may obtain formal recognition as a legal person by the Court.

170. Article 8 of the Declaration recognizes the freedom to form trade unions as expression of the freedom of association. Under Article 1 of Law No. 7 of 17 February 1961, Law for the Protection of Labour and Workers, the organization of trade unions is free, and Trade Unions must be registered with the Court. Registration, by which a Trade Union acquires legal personality, is subject to prior verification of the democratic nature of the internal organization and of compliance with the relevant legislation.

### **Paragraph 2**

171. Under article 6 of the Declaration and similar to other freedoms guaranteed by the same article, constraints on freedom of association may be placed by law only under exceptional circumstances and for serious reasons or public order and interest.

172. Besides the relevant legislation on the formation of associations, through which the legal system prevents entities not conforming to their actual purpose from being created, there are also criminal provisions. Article 287 of the Criminal Code punishes conspiracy, that is the association of three or more people aimed at carrying out a criminal activity; punishment is increased if the confederates carry arms publicly. Article 288 punishes the unauthorized formation of armed corps.

### **Paragraph 3**

173. The Republic of San Marino ratified numerous ILO Conventions, in particular Convention No. 87 concerning the Freedom of Association and Protection of the Right to Organise, ratified by Decree No. 131 of 10 November 1986.

## **Article 23**

### **Paragraphs 1, 2 and 3**

174. Article 12 of the Declaration reads “The Republic shall protect the institution of the family, based on moral and legal equality of spouses. Mothers shall be entitled to assistance and protection by the community. Children born outside wedlock shall enjoy spiritual, legal and social protection and be treated on an equal footing as legitimate children.” These principles sanctioned at the constitutional level have been implemented by Law No. 49 of 26 April 1986 reforming Family Law.

175. Article 1 of that Law defines marriage as the union between a man and a woman, based on the free and responsible choice and on the moral and legal equality of both partners, while under article 3 civil effects derive from civil marriage or religious marriage contracted by any rite and celebrated in accordance with the domestic legislation.

176. The Law, in setting forth the subjective requirements for intending spouses, stipulates that marriage cannot be contracted by a minor, unless the minor is at least 16 years old and has been authorized by a judge to marry on serious grounds, and by a person in respect of whom a judgement for disqualification has been passed or is pending.

177. Article 132 of the same Law stipulates the nullity of any marriage entered into without the free and full consent of any of the spouses, or contracted by an unemancipated minor or disqualified person. Under article 133, legal action to obtain a decree of nullity may be brought by the spouses, by direct ascendants in case of marriage contracted by a minor, by the legal guardian in case of marriage contracted by a disqualified person, or by the *Procuratore del Fisco* upon request of any legitimately interested party. Legal action expires by limitation after 6 months of reaching full age in case of marriage contracted by a minor, after 12 months of discovering the lack or defect of consent to marry, while it never expires if marriage was contracted by a mentally disabled person.

#### **Paragraph 4**

178. Under article 28 of the same Law, both spouses assume with marriage the same rights and duties. Their duties, in particular, include mutual respect, moral and material assistance, cohabitation, fidelity and cooperation in the interest of the family. Both spouses are entitled to gainful occupation outside the family and have the duty to contribute to the household work and to the needs of the family according to their resources and capabilities.

179. Under article 29, both spouses have the duty to jointly organize the family life. In case of disagreement, either spouse may request the Judicial Authority to intervene. The Judicial Authority shall hear all family members of at least 16 years of age.

180. With regard to a couple's duties towards their offspring, Art. 31 sets forth that both parents have common responsibilities for the maintenance, upbringing and education of their children, in respect of their personality and aspirations and proportionally to the family resources and respective capacities.

181. Under article 81 and following articles, children are subject to parental authority until they reach full age. Parental authority is jointly exercised by both parents. In case of disagreement on particularly important issues, either parent may apply for the intervention of the Judicial Authority who, having heard both parents and the minor, if at least 14 years old, expresses an opinion on the decision to be made in the best interests of the child. If disagreement persists, the Judicial Authority attributes the decision-making power to the parent deemed most suited to take care of the child.

182. In case of separation, declaration of nullity or dissolution of marriage, only the parent who has been awarded the custody of children exercises parental authority, although the most important decisions in the children's interests are to be made by parents by common agreement. Failing such agreement, the will of the parent who has the custody of children prevails, without exempting the other parent from his responsibilities for the maintenance, upbringing and

education of the children. However, where an essential decision made by the parent having the custody is deemed to be of prejudice to the children's best interests by the other parent, the latter may apply to the Judicial Authority.

## Article 24

### Paragraph 1

183. At the constitutional level, the protection of minors is ensured in articles 11 and 12 of the Declaration. Article 11 stipulates an obligation for the Republic to promote, within the fields of education, work, sports- and leisure activities, the development of the personality of the young and to educate them towards the free and responsible exercise of their fundamental rights. Article 12 ensures protection of the family and of maternity.

184. Various measures safeguarding children and mothers are importantly included in labour law provisions, such as puerperium leave (Laws No. 7 of 17 February 1961 and No. 41 of 22 December 1972, recently amended by Law No. 137 of 29 October 2003), post-partum and parental leaves (Law No. 137 of 29 October 2003), part-time work after childbirth (Law No. 112 of 16 December 1994). These measures are devised to enable working parents to meet their responsibilities towards their children.

185. As for criminal law provisions, under article 10 of the Criminal Code minors under 12 are not punishable. Minors over 12 but under 18 may be inflicted a reduced punishment by the judge having ascertained the minor's full mental capacity based on an examination. The judge may also impose a reduced punishment on an individual who was not yet 21 at the time when the offence was committed.

186. The Criminal Code also provides for more favourable provisions in respect of minors when it comes to granting probation. Under article 61 of the Criminal Code, probation, which is generally granted to convicts sentenced to imprisonment not exceeding two years, may be granted to a minor under 18 convicted to imprisonment not exceeding three years. In this case the judge also orders supervision to be carried out by competent people for rehabilitation purposes.

187. Special references to minors are also contained in provisions concerning release on parole (article 103) and other correctional, rehabilitation and detention measures (article 21 and following articles of the Criminal Code).

188. In civil matters, it is again worth recalling Law No. 49 of 26 April 1986 reforming Family Law, based on the primary concern to protect the child's best interests. Law No. 21 of 3 May 1977 establishing the Social and Health Service, is a response to child and youth-related social issues. Article 3 of this Law provides for a Minors Service with medical, social, psychological and pedagogical services for minors before they reach full age. Similarly, Law No. 22 of 12 February 1998 reforming the school system draws on state-of-the-art pedagogical methods.

189. Most recently, Law No. 145 of 30 October 2003, Provisions on the Judiciary, has provided for the appointment of judges specifically entrusted with the protection of minors and the family, consistently with Law No. 83 of 20 July 1999 which, implementing article 2 of reformed Law No. 83 of 28 October 1992, Law on the Judiciary, established the Juvenile Court within the Civil and Criminal Court.

## **Paragraph 2**

190. See preceding paragraphs under article 16 of the International Covenant on Civil and Political Rights.

## **Paragraph 3**

191. According to Law No. 114 of 30 November 2000, Law on Citizenship, recently amended by Law No. 84 of 17 June 2004, San Marino citizens by origin are children that are: born of parents who are both San Marino citizens; born of a San Marino parent, the other parent being unknown or stateless; adopted by a San Marino citizen; born on the territory of the Republic, both parents being unknown or stateless; born of a San Marino parent, provided that within 12 months from reaching full age they declare their intention to maintain San Marino citizenship.

192. Citizenship is acquired by naturalization in case of continued residence or domicile in the Republic for at least 30 years and if other requirements under Law No. 115 of 30 November 2000 are also met. Under the same Law, naturalization is automatic for minor children of naturalized parents or of a naturalized father, the mother already being a San Marino citizen. Where citizenship is acquired by naturalization by only one parent with the other remaining a foreigner, minor children are naturalized only when reaching full age and provided that they are residents.

## **Article 25**

193. The participation of citizens in the political life of the country is fully ensured by the following constitutional provisions: article 2 of the Declaration states that the Republic's sovereignty is vested in its people and exercised by the people through the statutory forms of representative democracy and the other institutions of direct democracy; article 4, paragraph two, recognizes that all citizens have access to public services and elective posts; article 7 provides for universal, secret and direct suffrage and stipulates that every citizen has the right to vote and be voted, at the age and under the requirements laid down by the relevant legislation (Law No. 6 of 31 January 1996, Electoral Law, and Law No. 22 of 24 February 1994, Law on Township Councils).

194. Moreover, Law No. 29 of 10 September 1973, granting women (whose right to vote was recognized by Law No. 17 of 29 April 1959) equal rights as men, abolished all restrictions to women's access to public offices and employment.

## **Articles 26 and 27**

195. San Marino is not affected by the problem of racial discrimination as there are virtually no ethnic minorities living on the territory. This notwithstanding, article 4 of the Declaration

prohibits any discrimination on grounds of sex, or personal, economic, social, political and religious status, and imposes an obligation for the Republic to guarantee equal social dignity and equal protection of rights and freedoms. This principle has been fully implemented in a number of laws regulating the various fields of civil coexistence: labour and family law, schooling, criminal law, etc.

196. The Republic of San Marino ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. Under article 1 of the Declaration, all these conventions form an integral part of San Marino's legal system and prevail in case of conflict over domestic legislation.



## **Annexes**

1. Criminal Code
2. Laws:
  - Law No. 59 of 8 July 1974
  - Law No. 95 of 19 September 2000
  - Law No. 36 of 26 February 2002
  - Law No. 6 of 31 January 1996
  - Law No. 101 of 28 November 1994
  - Law No. 72 of 24 May 1995
  - Law No. 185 of 16 December 2005
  - Law No. 186 of 16 December 2005
  - Law No. 183 of 15 December 2005
  - Law No. 184 of 15 December 2005
  - Law No. 144 of 30 October 2003
  - Law No. 145 of 30 October 2003
  - Law No. 55 of 25 April 2003
  - Law No. 89 of 27 June 2003
  - Law No. 20 of 24 February 2000
  - Law No. 43 of 28 April 1989
  - Law No. 69 of 23 May 1995
  - Law No. 61 of 30 April 2002
  - Law No. 9 of 2 February 1994
  - Law No. 86 of 11 December 1974
  - Law No. 44 of 29 April 1997
  - Law No. 24 of 28 February 1996

Law No. 106 of 20 September 1985

Law No. 23 of 4 August 1927

Law No. 22 of 24 February 2000

Law No. 95 of 4 September 1997

Law No. 114 of 30 November 2000

Law No. 79 of 16 June 2004

Law No. 55 of 17 June 1994

Law No. 43 of 18 October 1963

Law No. 43 of 12 August 1946

Law No. 15 of 25 June 1975

Law of 27 April 1911

Law No. 70 of 23 May 1995

Law of 28 May 1881

Law No. 41 of 27 April 1989

Law No. 68 of 13 June 1990

Law No. 7 of 17 February 1961

Law No. 49 of 26 April 1986

Law No. 41 of 22 December 1972

Law No. 137 of 29 October 2003

Law No. 112 of 16 December 1994

Law No. 21 of 3 May 1977

Law No. 22 of 12 February 1998

Law No. 83 of 20 July 1999

Law No. 83 of 28 October 1992

Law No. 84 of 17 June 2004

Law No. 115 of 30 November 2000

Law No. 29 of 10 September 1973

Law No. 17 of 29 April 1959

3. Decrees:

Decree No. 136 of 19 November 1996

Decree No. 137 of 19 November 1996

Decree No. 45 of 26 February 1998

Decree No. 27 of 23 June 1967

Decree No. 19 of 23 February 2000

Decree No. 131 of 10 November 1986

4. Articles of the Code of Criminal Procedure:

Art. 53

Art. 54

Art. 229

Art. 74

Art. 20

Art. 196

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