

Freedom of expression in political speech
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Intervention at panel “The importance of political expression for democracy”

PACE has dealt with the issue in several reports. The latest one where I was the rapporteur was discussed in June 2021 and reflected members’ concerns about the growing number of national, regional and local politicians prosecuted for statements made in the exercise of their mandate, in particular in Spain and Turkey. I will briefly describe the Assembly’s approach and conclusions. Needless to say, they are based on the experience and work of other CoE bodies, notably the ECtHR, as well as the Venice Commission.

As a rule, “political” speech, even very critical of the State and the government, is protected by Article 10 – there is no “pressing social need” in a “democratic society”, in the terms of Article 10, to suppress such speech.

Freedom of political debate is at the very core of the concept of a democratic society. One of the principal characteristics of democracy is the possibility to resolve a national and international problems through dialogue, without recourse to violence, even when those problems are annoying and bothersome. Democratic dialogue cannot exist without pluralism, broadmindedness and tolerance. Political debate should be tolerated even when it is provocative and divisive, and even when it promotes “ideas that offend, shock or disturb”.

In 2020, the Venice Commission summarized its position as follows: “when political debate, including calls for radical constitutional change, is concerned, there is a very strong presumption in favour of the freedom of expression... The ‘radical’ character of the constitutional changes advocated by

the speaker cannot justify any restrictions, let alone criminal sanctions”.

The Assembly consistently urged the member States’ governments to refrain from abusing the criminal justice system for the persecution of political opponents.

However, in some cases political speech may exceed the limits set by the Convention, in particular, when it incites violence, racism, or xenophobia. Remarks and statements inciting hatred, violence or the destruction of democratic rights and freedoms must be excluded from the scope of protection by Art.10.

Regarding the specific situation of politicians, the Venice Commission stresses their crucial role in the democratic process, but also their special responsibility as community leaders and role models when it comes to avoiding hate speech and incitement to violence, which are generally accepted exceptions from the protection of political speech by Article 10.

Parliamentary immunity is a fundamental democratic safeguard to preserve the integrity and independence of elected politicians, in particular, to ensure freedom of speech as an intrinsic part of parliamentary work. Elected parliamentarians must be able to debate, without fear, various issues of public interest, including controversial or divisive subjects or matters relating to the operation of the executive or the judiciary.

It should be mentioned that criminal sanctions for political speech that is not protected by Article 10 can still be a violation of the Convention when the punishment is disproportionate, discriminatory or the result of an unfair trial. The Court’s case law on these issues is of paramount importance.

The question of whether political speech calling for non-violent, but nevertheless unlawful actions can be sanctioned is also highly relevant. On this aspect, the Court stated that “while a

political party is entitled to campaign for a change in the State's legislation or legal or constitutional structures, the party in question may only do so if the means used are absolutely lawful and democratic". On this basis, the Venice Commission concluded that "campaigning for unlawful actions may call for sanctions. The nature and severity of permissible sanction (imprisonment, fine, or sanctions of non-criminal-law character) is not specified in the case-law. The proportionality of the sanction should be evaluated in each particular case depending on the context, and in particular of the kind of the unlawful action which was advocated by the speaker."

To assess whether restrictions of the "political" freedom of speech are justified, the Court examines if three conditions are met:

- the restrictions to freedom of speech must be "prescribed by law",
- serve a "legitimate aim" - such as public order, national security or territorial integrity,
- and the last, the most complicated component of the test is where the Court has to assess whether the interference was 'necessary in a democratic society'.

This last part of the test is often called 'proportionality analysis'. In assessing whether the interference with the politician's freedom of expression was proportionate to the legitimate aim it pursued, the Court has to examine all factors it deems relevant, such as the content, the form and the intensity of the speech, the position of the speaker, the intention of the speaker, the medium used and the audience it is addressed to, possible impact of the speech, severity of the sanctions imposed on the speaker etc.

The proportionality analysis is contextual. The Court analyses the language of the speech and the effects it may have in the light of cultural traditions of a given country, the current political situation, the public standing of the speaker, etc.

Finally, I ought to raise a sensitive and difficult issue, somewhat playing the devil's advocate. As we see, currently the list of grounds for justified restriction of the freedom of speech is very limited. Deliberate lie, fakes, propaganda are, in fact, protected by Art.10. In the meantime, we witness the results of effective brain-washing campaigns – in particular, as a broad support for Russia's military aggression in Ukraine and related gross human rights violations inside Russia, and also to a considerable extent outside. This is a direct consequence of abuse of the freedom of speech, including – and even predominantly – by politicians.

Isn't it time to think about stricter limitations on political speech in order to promote politicians' responsibility – and accountability – for their words when these words, formally covered by the freedom of expression, facilitate or even cause aggressive war, human sufferings, and mass violations of human rights?

Frankly, I don't have a clear answer. Let's discuss the issue together.