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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPORT

CRIMINAL LIABILITY FOR PEACEFUL CALLS FOR RADICAL CONSTITUTIONAL CHANGE FROM THE STANDPOINT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Adopted by the Venice Commission at its 124th online Plenary Session (8 - 9 October 2020)

On the basis of comments by

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I. Introduction

1. At its meeting of 1 October 2019, the Committee on Legal Affairs and Human Rights (the Committee) of the Parliamentary Assembly of the Council of Europe (PACE) asked the Venice Commission to prepare a report on the following question: in which circumstances the European Convention on Human Rights (the ECHR) allows the criminalization of calls by politicians or representatives of civil society for radical constitutional changes by peaceful means – including calls for independence or far-reaching autonomy for parts of the national territory?

2. The request by the Committee was triggered by 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.[1] That being said, the present report will not deal with specific cases or countries but rather with the general approaches and principles formulated in the case-law of the European Court of Human Rights.

3. Ms C. Bazy Malaurie, Ms H. Kjerulf Thorgeirsdottir, Ms A. Nussberger and Mr B. Aurescu acted as rapporteurs for this Report. It was drafted on the basis of comments by the rapporteurs, examined by the Commission members through a written procedure replacing the sub-commission meetings and adopted by the Venice Commission at its online 124th Plenary Session (8-9 October 2020).

II. Analysis

A. Preliminary remarks: the focus and the scope of the Report

4. Under international human rights law, the freedom of expression is protected under Article 19 of the International Covenant on Civil and Pollical Rights (the ICCPR), and, at the European level, under Article 10 of the ECHR. There is considerable jurisprudence of the Human Rights Committee (the HRC) and the European Court of Human Rights (the Court or the ECtHR) respectively on the application of the mentioned articles, albeit there are certain differences in how those international bodies approach the freedom of expression.[2]

5. At the national level, from a comparative perspective, there are visible differences in legal regulations even amongst liberal democracies. In the United States, the freedom of political speech is almost absolute and restrictions are only permitted if the speech creates a “clear and present danger” of ”imminent lawless action”.[3] By contrast, many European countries allow for some content-based restrictions of political speech, even where there is no such danger.[4] The

[1] See the report by Mr Boris Cilevičs for Committee on Legal Affairs and Human Rights: “Should politicians be prosecuted for statements made in the exercise of their mandate?”, AS/Jur (2019) 35, 1 October 2019.

[2] The Court applies, in the context of Article 10, the concept of the “margin of appreciation” accorded to the States in regulating those matters. Under the ICCPR, the concept of “margin of appreciation” is not used to delimit the scope of the freedom – see the General Comment no. 34 on Article 19, CCPR/C/GC/34, para. 36, and the jurisprudence cited in the footnote,

[3] The American approach to the limits of permissible speech evolved over time. Thus, the “clear and present danger” test appeared first in *Schenck v. United States*, (1919). In *Abrams v. United States* (1919), the Supreme Court used the so-called “bad tendency” test, which allows restrictions if the speech has a sole tendency to incite or cause illegal activity (also used in *Whitney v. California*, 1927). In *Brandenburg v. Ohio* (1969), the “imminent lawless action test” became the new standard: under this test speech is protected unless the speaker intends to incite lawless action that is both imminent and likely. The Supreme Court further developed the term ‘imminent’ in *Hess v. Indiana* (1973) where it found that speech that “amounted to nothing more than advocacy of illegal action at some indefinite future time” was protected under the First Amendment. As one of the concurring opinions in *Dennis v. United States*, 341 U.S. 494, 545 (1951) put it: “Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."

[4] CDL-AD(2015)015, Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, § 21.

ECtHR has tolerated regulation of speech on the basis of content in many different areas. This Report will mostly look at the freedom of speech from the European, i.e. ECHR-based perspective. However, the Venice Commission will also consider other relevant international authorities, as well as the Venice Commission's previous opinions and reports on this matter.

6. Most of the following analysis is based on the Court's case-law under Article 10 of the ECHR. The Venice Commission will occasionally refer to cases under Article 11 of the ECHR (guaranteeing the freedom of assembly and association) since in some situations those two articles overlap. As repeatedly held by the Court, "the protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association as enshrined in Article 11".[5] Cases under Article 10 are often examined "in the light of Article 11".[6] Thus, the Court's case-law under Article 11 may be of some relevance, and should be applied in the present context *mutatis mutandis*.[7]

B. What amounts to an interference with the "expression" protected under Article 10 of the ECHR?

7. In cases under Article 10, the first question to be answered by the Court is whether sanctions or other limitations imposed on the applicant constituted an *interference* with his/her freedom of expression.[8] To answer this question, it is important to keep in mind a delicate distinction between words and deeds, between expressive acts and physical, material acts.

8. It is clear that press articles, TV interviews, public speeches and the like qualify as expression protected under Article 10. Such forms of expression can still be penalised if they create certain material effects. Thus, many countries have criminal law provisions on rebellion, treason, usurpation of power, sedition, overthrow of constitutional order, etc.[9] The distinction between the incitement to commit specific unlawful acts and the general advocacy of the need for political change is not always evident. It will be examined further in the study, under the heading of proportionality. However, it is clear that those forms of expression are at least in principle protected by Article 10, even if some limitations are permissible.

9. Certain *physical* acts may also be qualified as protected expressions. Article 10 covers *expressive acts*, such as artistic performances, if their primary aim is to spread a message, to inform or influence the public, to express inner feelings and thoughts of the speaker, etc.[10]

10. Thus, a distinction should be made between, on the one hand, verbal and written expressions or expressive acts aimed at conveying a message to the public, and, on the other hand, conduct which is aimed at achieving specific and immediate material result as opposed to merely

[5] *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 52, ECHR 2011.
[6] Ibid.
[7] In the context of the present study it may be useful to examine Article 11 test which the Court used to assess restrictions on anti-democratic political parties. For example, the *Refah Partisi* judgment of the Grand Chamber of 2003 established the test which focused both on the doctrine of the party (its incompatibility with the concept of democracy) and on the consequences, i.e. continued existence of such party must also present *sufficiently imminent* danger to the democratic regime – see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, § 104, ECHR 2003-II.
[8] Interference with Article 10 does not necessarily amount to a violation of this right. To decide whether there has been a violation the Court has to examine whether the interference was lawful, pursued a legitimate aim and whether it was proportionate – see the following sections of the study.
[9] For example, Article 302 of the Italian Criminal Code penalises the incitement inter alia to commit any violent act (i) aiming at impairing the independence or unity of the Italian State, and (ii) capable of producing such a result. A mere political action seeking the independence of a part of the Italian territory is not criminally relevant, but an incitement to commit a violent act will be criminally punishable.
[10] See *Murat Vural v. Turkey*, no. 9540/07, § 54, 21 October 2014.

"influenc[ing] the audience". Where these two purposes intertwine, the Court may still find Article 10 applicable and resort to a proportionality analysis, as described below.[11]

C. The test applied by the Court under Article 10

11. The restrictions to the freedom of expression[12] are permitted under Article 10 of the ECHR if the following conditions are met (each condition being assessed on its own):

- they are prescribed by law;
- these limitations have a legitimate aim (protecting "national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary");
- they are "necessary in a democratic society".

12. The Venice Commission will not comment on the second prong of this test ("the legitimate aim"). Such aims as protection of health and morals, protection of reputation or confidential information, or maintaining authority of the judiciary are largely irrelevant in the present context. By contrast, it can be assumed that calls for the "radical constitutional change" may – at least arguably – endanger "national security, territorial integrity" or cause "disorder or crime". The Court has not developed these specific terms in its jurisprudence so far; at the same time, it acknowledged previously that "national security or territorial integrity are […] 'vital interests of the State'".[13] So, given the context of the present request, it is safe to assume that imposing restrictions on the calls for a radical constitutional change, especially "calls for independence or far-reaching autonomy" may pursue a legitimate aim.

D. Lawfulness of the interreference with the freedom of speech

13. Restrictions must always be based on law and be foreseeable.[14] This means that criminal laws have to be sufficiently clear in order to enable to understand what kind of behavior is sanctioned. This requirement follows not only from the case-law of the ECtHR under Article 10,[15] but also from Article 7 of the Convention, which embodies the principle *nullum crimen sine lege*, and requires that the laws establishing criminal liability should be sufficiently clear, accessible and foreseeable.[16]

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[11] In many cases the impugned physical act will contain an element of "expression" covered by Article 10, be intertwined with it. This element should be duly considered by the domestic courts in their analysis, amongst other factors. An example of an expression intertwined with a physical conduct is the case of *Steel and Others v. the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VII, where the applicant protested against the building of a motorway extension. As a part of this protest, she placed herself in front of machinery in order to impede the works. She was arrested and detained for seventeen hours and was subsequently imprisoned to seven days' imprisonment. The Court did not find a violation of Article 10 of the ECtHR in this case, in view of the leniency of the sanction. Another example of expressions mixed with the physical acts the case concerning appearing naked in public: it may be seen as an offence of the breach of peace or as a way of expressing oneself – see *Gough v. the United Kingdom*, no. 49327/11, 28 October 2014.

[12] Also called in the case-law of the ECHR "interferences" – which, under Article 10, may take form of "formalities, conditions, restrictions or penalties" related to the exercise of this freedom.

[13] See *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 59, ECHR 1999-IV: "While the press must not overstep the bounds set, inter alia, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones."

[14] See, for example, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I.

[15] *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 49, Series A no. 30

[16] See, in the context of the freedom of speech, *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 62 et seq., 3 December 2019.

14. That being said, it is unrealistic to expect that statutory rules are always formulated with perfect precision: "while certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice [refs. omitted]".[17] Foreseeability of the law should be defined not only with reference to the text of the statutory rule itself, but in the light of the whole legislative framework, which includes case-law of national courts, rules of the European and international law, customary law, etc.[18]

15. The Venice Commission has previously acknowledged that the use in the relevant legislation of such vague terms as "constitutional order", "morals" etc. is not contrary to European standards.[19] Indeed, it naturally belongs to the national judges to interpret the words of the statute. There is nonetheless a risk that some terms be interpreted too broadly, to the detriment of the freedom of expression. There are certain techniques how to make statutes more precise. Where an exhaustive and all-encompassing definition is impossible, certain terms (like "statement", "public figure", "matters of public interest" etc.), may be explained, for instance, by giving relevant examples, which may guide the courts in examining analogous situations. It may also be useful to develop guidelines at the sub-legislative level explaining the meaning of these terms. At any rate, in any such case a judge will have to give an interpretation that stays within the limits of the legal term used.

E. "Necessary in a democratic society" (proportionality analysis)

16. Under the last prong of the test, the Court has to assess whether the interference in question was "necessary in a democratic society". This part of the test is often called "proportionality analysis". In assessing whether the interference with the applicant's freedom of expression was proportionate to the legitimate aim(s) it pursued, the Court has to examine all factors it deems relevant, such as the content,[20] the form and the intensity of the speech,[21] the position of the speaker,[22] the intention of the speaker,[23] the medium used and the audience it is addressed to,[24] possible impact of the speech,[25] severity of the sanctions imposed on the speaker,[26] etc.

17. 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. More importantly, there is no exhaustive list of

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[17] *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 122, 17 May 2016; see also § 125: "The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed".

[18] As the Venice Commission held in CDL-AD(2015)015, Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary", § 27, "it is an illusion that absolute legal certainty may be achieved through a legal text".

[19] CDL-AD(2015)015, Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, §§ 22 et seq.

[20] See, for example, *Öztürk v. Turkey* [GC], no. 22479/93, §64, ECHR 1999-VI; *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 62, ECHR 1999-IV.

[21] See, for example, *Karácsony and Others v. Hungary*, cited above, § 137 and 140, 17 May 2016; *Stomakhin v Russia*, no. 52273/07, § 99, 9 May 2018.

[22] See, for example, *Zana v. Turkey*, 25 November 1997, § 60, Reports of Judgments and Decisions 1997-VII; *Hogefeld v. Germany* (dec.), no. 35402/97, 20 January 2000.

[23] See, for example, *Sürek v. Turkey (no. 1)*, cited above, § 62.

[24] See, for example, *Karataş v. Turkey* [GC], no. 23168/94, § 52, ECHR 1999-IV; *E.K. v. Turkey*, no. 28496/95, § 88, 7 February 2002.

[25] See, for example, *Zana v. Turkey*, cited above, § 60; *Vajnai v. Hungary*, no. 33629/06, § 49 and 55, ECHR 2008.

[26] See, for example, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 63-77, ECHR 201; *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI; *Stomakhin v Russia*, cited above, § 131.

factors which the Court takes into account when entertaining the proportionality analysis. In the following paragraphs the Venice Commission will focus on those factors which are *usually* considered in cases where calls for radical constitutional changes are at issue.

1. Political speech is within the core protected area under Article 10

18. The Court has consistently treated freedom of expression as a fundamental human right, emphasising its importance not only directly, but also as a core underpinning of democracy and other human rights. It has repeatedly emphasized that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention".[27] Democracy is a foundational concept of the Council of Europe, it is "the only compatible model contemplated by the Convention, and accordingly, the only one compatible with it".[28] There is a corollary right of the public to receive all sort of views on political matters, since uninhibited political debate ensures that voters can make informed choices.

19. One of the principal characteristics of democracy is the possibility to resolve a country's problems through dialogue, without recourse to violence, even when those problems are irksome.[29] Democratic dialogue cannot exist without pluralism, broadmindedness and tolerance.[30] Political debate should be tolerated even when it is provocative and divisive, and even when it promotes "ideas that offend, shock or disturb".[31] Political debate is by definition a matter of public interest, so there is little scope for restrictions.[32] Even speech that is at odds with mainstream (democratic) values must be permitted as it may contain a relevant political message.[33] Political debate may concern matters of everyday politics or go further and call into question the very structure of the State and foundations of the constitutional order. This should be the starting point for any discussion about the possibility to curtail calls for a radical constitutional change, including "independence or far-reaching autonomy" of a region.

2. Factual allegations vs. opinions

20. The focus of this Report is on calls for radical constitutional change. Sometimes such calls remain very abstract, but more often they are mixed with other types of expression: they involve harsh criticisms of the Government and its policies, verbal attacks on certain groups of the population, accusations of misbehaviour directed against officials and other public figures, etc. Different types of expression are governed by different rules under the ECHR. Factual claims can be proven or disproven. Other statements constitute opinions or value judgements, so questions of the burden and the standard of proof generally do not arise, or at least should be analysed differently by domestic courts.[34] This Report will concentrate on the case-law of the ECtHR dealing with the general advocacy of radical constitutional change. It will not discuss cases of defamation or personal insults. Equally, it will not deal with obscene publications, with disclosure of confidential information, etc. That being said, different kinds of speech are often intertwined. The legislation and practice of member States should distinguish between them, and to develop legal responses accordingly. Most importantly (in the context of calls for constitutional change) if

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[27] See, for example, *Lingens v. Austria*, 1986, § 42; see also *Mehmet Hasan Altan v. Turkey,* no. 13237/17, § 210, 20 March 2018, and *Sahin Alpay v. Turkey*, no. 16538/17, § 180, 20 March 2018.
[28] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, Reports of Judgments and Decisions 1998-I.
[29] *Stankov and the United Macedonian Organisation Ilinden v. Bugaria*, nos. 29221/95 and 29225/95, § 88, ECHR 2001-IX
[30] See, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24
[31] *Ibid.*
[32] *Öztürk v. Turkey* [GC], no. 22479/93, §66, ECHR 1999-VI; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV.
[33] As put by John Milton in Areopagitica, a speech written for Parliament of England in 1644, "Let [the Truth] and Falshood grapple; who ever knew Truth put to the worse, in a free and open encounter."
[34] See *Lingens v. Austria*, cited above; but see *Brasilier v. France*, no. 71343/01, § 36, 11 April 2006, and *Morice v. France* [GC], no. 29369/10, § 126, ECHR 2015.

the speaker is required to prove an opinion which is not susceptible of proof, this by itself may constitute a violation of Article 10 of the Convention.

3. Freedom of political debate and calls for violence

21. The Venice Commission recalls that the Committee's request specifically focused on the advocacy of "independence or far-reaching autonomy". In this specific context the Court held as follows:

> "The mere fact that a political party calls for autonomy or even requests secession of part of the country's territory is not a sufficient basis to justify its dissolution on national security grounds. In a democratic society based on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through, *inter alia*, participation in the political process".[35]

22. In the ECtHR case-law, advocacy of *violence* is the main limit to political speech of this type. For instance, in the Turkish context the Court observed that convictions for separatist propaganda were contrary to Article 10 since "they cannot be reasonably regarded as advocating or inciting the use of violence".[36] Similarly, in *Dmitriyevskiy v. Russia*, the Court noted that "where the views expressed do not comprise an incitement to violence […] Contracting States cannot rely on protecting territorial integrity and national security, maintaining public order and safety, or preventing crime, to restrict the right of the general public to be informed of them".[37] It follows that under the ECHR speakers must be allowed to advocate "radical constitutional change", including "independence or far-reaching autonomy" by peaceful means.

23. The Venice Commission used the same approach in its opinions. In one opinion it stressed that in the absence of an element of violence, the prohibition on expression favoring territorial separatism may be seen as a legitimate expression of a person's views.[38] It also considered, in another opinion, that "*peaceful* [italics added] advocacy for a different constitutional structure […] is not considered to be [a] criminal action, and should on the contrary be seen as legitimate expression".[39]

24. In sum, when political debate ("calls for radical constitutional change") is concerned, there is a very strong presumption in favor of the freedom of expression. In the specific context of the present Report, the "radical" character of the constitutional changes advocated by the speaker cannot justify any restrictions, let alone criminal sanctions. This should be the starting point of any further analysis. There are, however, two major exceptions from this general rule which will be examined in the following sections.

4. Propaganda of ideology hostile to democracy and human rights; hate speech

25. As shown above, the main limit to political speech is the incitement to violence. However, there is a narrow category of cases in which the Court accepted limitations on the political speech even without an element of incitement to violence. The Convention does not protect expression that is contrary to the *most basic values* of the Convention, when it is "aimed at the destruction

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[35] See *The United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria*, no. 59489/00, § 61, 20 October 2006.
[36] *Özgür Gündem v. Turkey*, no. 23144/93, § 77, ECHR 2000-III.
[37] No. 42168/06, § 100, 3 October 2017.
[38] CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, § 73.
[39] CDL-AD(2014)043, Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan, § 49; see also the Guidelines on political party regulation, CDL-AD(2010)024, § 96, and CDL-AD(2012)016, Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation, § 33.

of any of the rights and freedom set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention" (Article 17 of the ECHR). For example, the denial of Holocaust or Nazi propaganda can be legitimately curtailed by means of criminal liability, even if it is a part of a political debate and even if it does not incite to unlawful violence.[40] In some of those cases the Court and the former European Commission on Human Rights used Article 17 in combination with Article 10 § 2 of the Convention to conclude that the complaint was inadmissible. In other cases of this kind the Court's and the Commission's conclusion was based on Article 10 § 2 alone.[41]

26. The above category of cases coincides with instances of "hate speech". Hate speech is defined in the Court's case-law as "sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups".[42] There are international documents which require the States to adopt measures, including measures under criminal law, to fight hate speech.[43] Hate speech is often accompanied by open or implied calls for violence, but this is not a necessary condition for this speech to be legitimately supressed.[44] As was recently held by the Court, "inciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner".[45] A comparative research conducted by the Venice Commission in the Report on the relationship between freedom of expression and freedom of religion[46] showed that in many international and European documents the definition of hate speech does not include violence as a necessary condition. As to the national legislation, some member States see calls for violence as an aggravating factor for the hate speech but not as its constituent element,[47] whereas in some other States the definition of the hate speech contains a reference to "violence".[48]

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[40] See, most recently, *Pastörs v. Germany*, no. 55225/14, 3 October 2019; see *also Kühnen v. Germany*, no. 12194/86, Commission decision of 12 May 1988, DR 56, p. 205, and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007, *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII (extracts).

[41] *Perinçek v. Switzerland* [GC], no. 27510/08, § 114, ECHR 2015 (extracts), further references omitted. In the Convention case-law it is possible to distinguish between two groups of cases – those were Article 17 was applied as a "guillotine" solution, leading to the outright inadmissibility of the complaint, and those cases where the conclusions were based on 10 § 2, i.e. on the analysis of proportionality.

[42] *Ibid.,* § 206, with further references.

[43] Article 20 of the ICCPR requires the States to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" although it does not mention specifically criminal sanctions. Recommendation of the Committee of Ministers of the Council of Europe no. R(97)20 mentions criminal sanctions amongst means of combatting hate crime but calls the courts imposing such sanctions to "ensure strict respect for the principle of proportionality" (Principle 5). PACE Recommendation 1805(2007) calls for "penalisation" of hate speech and "prohibition" of calls for public violence by references to religious matters, "as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention" (see point 17 of the Recommendation).

[44] The Court often distinguish between "hate speech and speech inciting violence" as if these are two different phenomenon – see, for example, *Delfi AS v. Estonia* [GC], no. 64569/09, §§ 110 and 114, ECHR 2015, or *Fatullayev v. Azerbaijan*, no. 40984/07, § 103, 22 April 2010. In *Dmitriyevski v. Russia*, cited above, § 99, the Court held that "inciting hatred does not necessarily entail a call for an act of violence, or other criminal acts". However, some judgments may be construed as suggesting that hate speech should always involve an element of violence: see, e.g. the conclusion in the case *Han v. Turkey*, no. 50997/99, § 32,13 September 2005: "[…] [The] speech in question consisted of a critical assessment of Turkey's policies concerning the Kurdish problem, whereas the State Security Court considered that the impugned speech contained separatist propaganda […]. The Court […] considers that, taken as a whole, the applicant's speech does not encourage violence, armed resistance or insurrection and, therefore, does not constitute hate speech. In the Court's view, this is the essential factor (contrast *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 62, ECHR 1999-IV, and *Gerger v. Turkey* [GC], no. 24919/94, § 50, 8 July 1999) in the assessment of the necessity of the measure."

[45] *Atamanchuk v. Russia*, no. 4493/11, § 52, 11 February 2020, with further references.

[46] CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, § 33.

[47] *Ibid*. § 35.

[48] *Ibid.* § 33.

27. Most often, hate speech exploits prejudices about historically disadvantaged minorities and is directed against them. However, hate speech does not necessarily need to be directed at minorities. Advocacy of secession may sometimes be accompanied by hate speech directed against the representatives of an ethnic, religious or other. majority of a given country. Curtailing such speech with criminal law sanctions would be, in principle, permissible; however, radical criticism of the Government, its institutions and policy should not be presented as hate speech.[49] "The dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries".[50]

28. Crucially, the concept of "hate speech" should be handled with caution, in order not to impede political debate. There is a risk that the national authorities, under the pretext of combatting hate speech, will try to shield themselves or some dominant groups or ideologies from reasonable criticism. Thus, for example, in *Savva Terentyev v. Russia* the Court concluded that scathing verbal attacks on the Russian police forces, even combined with aggressive and vulgar language, did not amount to hate speech directed against policemen as a social group.[51] Similarly, in *Mariya Alekhina and Others v. Russia* an unauthorised performance by a punk group in an Orthodox church was not seen by the Court as stirring religious hatred against the Orthodox majority, contrary to the opinion of the Russian courts, even though it involved a breach of public peace.[52] In *Aydın Tatlav v. Turkey*, the ECtHR found a violation of Article 10 on account of an applicant being sentenced for having criticised Islam as a religion legitimising social injustice.[53] This critical remark about some aspects of this religious system was not seen by the Court as a hateful message against all Muslims.

29. In sum, spreading ideology which is aimed at destroying human rights or hate speech can be curtailed by means of criminal law,[54] but robust political debate calling for radical changes or even secession does not as such amount to hate speech, and radical political ideas do not necessarily imply incitement to hatred .

5. What amounts to "peaceful" advocacy?

30. The question put by the Committee focused on "peaceful" calls for constitutional change. What amounts to a "peaceful" advocacy is central to this Report.

31. Even when the national law protects "peaceful" forms of expression, national courts and the ECtHR may disagree as to whether, in the circumstances, the expression at issue was "peaceful" or "violent". This is largely a question of fact; in determining whether a statement incited to violence, national courts should not view the statement in isolation, but in light of the overall message of the speaker and its broader context.[55]

32. In some cases, it may be relatively easy to demonstrate that a statement incited specific violent acts. A good illustration of a direct nexus between inflammatory speech and unlawful

[49] In *Stomakhin v Russia*, cited above, the Court recommended a "cautious approach" to the hate speech crimes, in order to avoid excessive interference with the right to freedom of expression – especially when action is taken against radical opinions that are "mere criticism of the Government, State institutions and their policies and practices" (§ 117).
[50] Ibid, § 89.
[51] No. 10692/09, § 84, 28 August 2018.
[52] No. 38004/12, § 227, 17 July 2018.
[53] No. 50692/99, §§ 27-28, 2 May 2006.
[54] The above said does not exclude that in some cases permissible political message may be accompanied with statements which can be qualified as "hate speech". In this case, however, the national courts should clearly specify which part of the "speech" gives rise to the liability.
[55] *Demirel and Ateş v. Turkey* (no. 3), no. 11976/03, § 26, 9 December 2008; see also *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298.

violence is the case of *Rufi Osmani and Others v. the Former Yugoslav Republic of Macedonia*,[56] in which the applicant, who was an elected mayor of Gostivar and an ethnic Albanian, ordered the display of the Albanian and Turkish flags along with the Macedonian flag in front of the town hall. The Constitutional Court, by way of an interim decision, suspended the order of the mayor. Afterwards, the mayor spoke to a public gathering of citizens of Albanian origin. In his speech he called on them to disobey the decision of the Constitutional Court, and to resist any attempts to remove the Albanian flag. He organised armed shifts to protect the Albanian flag, set up crisis headquarters, organised shelters for injured people if the hostilities would start, etc. An attempt by the police to remove the Albanian flag led to skirmishes with both sides using firearms. Three persons lost their lives, many citizens and policemen were injured, and considerable material damage was caused. The Court in this case concluded that many parts of the applicant's speech encouraged the use of violence and that his speech, together with his more practical actions, "played a substantial part in the occurrence of the violent events that followed". The Court noted in particular that the applicant was "not charged immediately after the speech and the assembly but only after their consequences were felt" – so, the nexus between the speech and the unlawful violence was evident.

33. Calls for violence are not necessarily open and clear but can be the subtext to seemingly harmless or ambiguous messages. Violent messages – or, rather, messages which may exacerbate an on-going violent conflict - are sometimes camouflaged as peaceful ones. For the US Supreme Court, the mere abstract advocacy of the unlawful use of force is not sufficient to justify a limitation on the freedom of speech, unless there is a clear and imminent danger that the speech will cause an unlawful action.[57] The position of the ECtHR is different: there is jurisprudence – analysed in the following paragraphs – showing that Article 10 does not prevent restricting expression even when it does not incite to any immediate and specific lawless action and where the causal connection between the message and possible unlawful actions is weak or remote.

34. The most illustrative case is *Zana v. Turkey*[58] – one of the few cases in which the Court found no violation of the Convention although political speech was criminally sanctioned. In the relevant part of the judgment the Court observed as follows:

> "58. [The applicant's words] could be interpreted in several ways but, at all events, they are both contradictory and ambiguous. They are contradictory because it would seem difficult simultaneously to support the PKK [a Kurdish separatist movement], a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because whilst Mr Zana disapproves of the massacres of women and children, he at the same time describes them as 'mistakes' that anybody could make.
>
> 59. The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. As the Court noted earlier […], the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.
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> 60. In those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region."

35. Another example is the case of *Herri Batasuna and Batasuna v. Spain*, where the Court did not find the dissolution of a political party as being in breach of Articles 10 and 11 of the

[56] Cited above.
[57] *Brandenburg v. Ohio*,395 U.S. 444, 447 (1969).
[58] 25 November 1997, Reports of Judgments and Decisions 1997-VII.

Convention, observing "that in the actions and speeches to which the Supreme Court referred, the members and leaders of the applicant parties had not ruled out the use of force with a view to achieving their aims". The Court further referred to "the climate of confrontation created by the applicant parties".[59] In *Sürek v. Turkey (No. 1)*,[60] the Court, referring to the context in which the expressions occurred, namely "serious disturbances between the security forces and the members of the PKK, involving heavy loss of life and the imposition of emergency rule in a large part of south-east Turkey," assessed that State interference was justified since "the content of the article must be seen as capable of inciting to further violence in the region. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor." Similarly, in *Leroy v. France*, the Court, in face of the circumstances of the case, in particular the fact that the expression occurred in a "sensitive region" (Basque country), considered that the cartoon had provoked a certain public reaction capable of stirring up violence and demonstrating a plausible impact on public order in the region.[61] These examples show that the dissolution of political parties for the propaganda of violence – even when it does not take form of inciting to specific violent acts but rather justifying violent means of resistance and change in general – is not incompatible with the European Convention, at least if it takes place against the background of an ongoing violent conflict.

36. What counts, thus, is the likelihood with which a statement, which is peaceful on the face, could lead to violence, when seen in context, in particular in light of an "explosive" political situation. Still, even against the background of an ongoing violent conflict, advocacy for "radical constitutional change", including "independence or far-reaching autonomy", cannot be automatically considered to contribute to this violence. For instance, the Court concluded in *Özgür Gündem v. Turkey* that "the Court is not convinced that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation".[62] It follows that, as a rule, a *concrete* danger that advocacy for radical change will exacerbate ongoing violence has to be proven.

37. Another group of cases concerns the apology or justification of unlawful violence, in particular terrorism.[63] The Court often qualifies these criminal convictions as justified under Article 10 § 2 – see, for example, *Resul Taşdemir v. Turkey,*[64] or, in the Russian context, *Stomakhin v. Russia*, where the applicant was convicted *inter alia* for "glorification of the Chechen separatists' insurgence and armed resistance as well as the violent methods used by them".[65] Again, in these cases the Court has to examine the true purport of the speech in the overall context: not everyone who criticises the Government from the same positions as a terrorist organisation is supporting the latter's violent methods.[66] Moreover, accurate media reporting of events, containing no element of incitement to violence or overt support for the use of violence by the terrorist groups, cannot lead to the imposition of criminal liability.[67]

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[59] Nos. 25803/04 and 25817/04, § 86, ECHR 2009, emphasis added.
[60] [GC], no. 26682/95, § 62, ECHR 1999-IV.
[61] No. 36109/03, § 45, 2 October 2008.
[62] Cited above, § 70.
[63] Which is, in some legal orders, is qualified as a crime of aiding and abetting terrorism
[64] (Dec.), no. 38841/07, 23 February 2010.
[65] Cited above, § 108.
[66] See *Şener v. Turkey*, no. 26680/95, § 45, 18 July 2000: "The Court notes in addition that, although certain phrases seem aggressive in tone, such as the one highlighted by the Government, the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. On the contrary, the article is an intellectual analysis of the Kurdish problem which calls for an end to the armed conflict. In the Court's view these are the essential factors which should be considered [refs. omitted]." See also *Öztürk v. Turkey* [GC], no. 22479/93, §§ 65 and 68, ECHR 1999-VI. Similarly, in *E.K. v. Turkey*, cited above, the Court held that a conference paper, even if it could be interpreted as "a praise of armed struggle", was protected by Article 10.
[67] *Özgür Gündem*, cited above, § 66.

6. Comparative insight

38. To decide individual cases, the Court sometimes considers whether there is a European consensus on the substantive question at the heart of the case. Existence of a consensus amongst the member States is not determinative *per se* but defines the width of the margin of appreciation accorded to the respondent State in regulating these questions. If the consensus exists, the margin is narrower, and this would call for closer scrutiny of the domestic restrictions in this area by the Court.

39. From a comparative perspective, many criminal codes mention "force", "violence" or "threat of violence" as a constituent element of the crimes of propaganda of separatism and alike.[68] To avoid any ambiguity, several countries prefer to specify the scope of *protected* political speech in the legislation or in the case-law, in order to clearly show which types of political speech *cannot* be criminally prosecuted.[69]

40. That being said, a number of countries allow for criminal sanctions when calls for independence are not joined by calls to violence. Thus, some criminal codes refer not to violence but to the *unconstitutionality* of the territorial change advocated by the speaker – a term which may be interpreted quite broadly.[70]

41. The Venice Commission identified only one clear example of an unqualified prohibition in the legislation of any advocacy of separatism, even a peaceful one. Thus, according to Article 280.1 of the Criminal Code of the Russian Federation, "public calls to commit acts aimed at breaching the territorial integrity of the Russian Federation" are criminalised. As explained by the Russian Supreme Court, to be punishable, those "public calls" need not incite specific persons to commit

[68] See, for example, Section 82 (1) no. 1 of the German Criminal Code which penalises "a person who undertakes, *by force or through threat of force*, to … separate a part of a member state from [the Federal Republic]" (emphasis added). See also Article 302 of the Italian Criminal Code which penalises incitement to *violent* acts (i) aiming at impairing the independence or unity of the Italian State, and (ii) capable of producing such a result. Another example would be the Criminal Code of Bulgaria. The Code does not contain a specific provision on the advocacy of independence or separatism. However, such activity can fall within the scope of a more general offence concerning public calls for forcible change of the social and state order established by the Constitution of the Republic of Bulgaria: Article 108, par. 1 of the Criminal Code: "whosoever propagates...*forcible* change of the social and state order established by the Constitution of the Republic of Bulgaria shall be punished by …". Article 2 of the Constitution states that Bulgaria is a unitary state. It proclaims the inviolability of its territorial integrity and prohibits the establishment of autonomous territories within the Bulgarian state. The unitary state structure and the prohibition of local autonomy are fundamental principles of the Constitution and as such are essential elements of the constitutional order. Therefore, public call for "forcible" independence or autonomy of a part of the national territory encroaches upon the order established by the Constitution and as such falls within the remit of Article 108 of the Criminal Code.

[69] The two clear-cut examples are Spain and Canada. The Spanish Supreme Court in the case 459/2019 noted that the political defence of the need to declare the independence of any part of the national territory does not constitute a crime. In Canada the Criminal Code in Section 60 provides explicitly that "seditious words" are not criminally punishable if the intention of the speaker is (c) to procure, by lawful means, the alteration of any matter of government in Canada. Such provisions permit to exclude political speech from the sphere of the criminal law. Both in Spain and in Canada independentist movements and parties lawfully operate in the political sphere for many years.

[70] For example, Article 111 of the Criminal Code of Ukraine prevents public calls for the change of the territorial structure "contrary to the procedure established by the Constitution". The question is what "unconstitutionality" means in this context, and what if the Constitution does not provide for any change of the national territory, or if it is directly opposed to any such change. An interesting example is provided by the Latvian Criminal Code, where "violence" is not a constitutive element of the offence proscribed by Article 81 – it only speaks of "a manner that is not provided for in the Constitution". In theory, it implies that a person could be convicted even for advocating pacific separatism. In Latvia there is an on-going discussion whether the territory of Latvia constitutes an element of national identity and hence the immutable core of the Constitution and therefore substantial changes to the territory of Latvia are not permitted by the Constitution.

specific criminal offences. Thus, the mere dissemination of ideas "breaching territorial integrity" may already be criminally punishable.[71]

42. The Venice Commission recalls that the degree to which political speech is protected depends not only on the statutory formulas but also on their interpretation by the courts. As stressed above (see paragraph 31), the term "incitement" may be construed by the courts more or less broadly, depending on the context of the given country and of the given historical moment. Therefore, in reality, the list of countries where separatist propaganda may be penalised as such, even without calls for violence, may be longer.

43. In sum, while many European criminal codes mention force, violence or threat of violence as a constituent element of the crime of separatist propaganda (or seditious speech more generally), there are some examples to the contrary, where *any* advocacy of secession, even achieved by peaceful means, is criminally punishable, as a matter of law or practice. Consequently, it may be difficult to detect a clear European consensus on this matter.

7. Advocacy for constitutional change by "peaceful" – yet unlawful – means

44. The Court's case-law cited above mostly deals with calls for *violence*. However, not every unlawful act is violent. The question is whether it is permissible for the States, under the ECHR, to penalise calls for unlawful but non-violent acts – such as, for example, calls to stop paying taxes or other forms of passive civic disobedience. In the case *Forcadell I Lluis and others v. Spain,* the ECtHR 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".[72] From this quote it appears 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 (for more details on the proportionality of the sanctions see below, Section 9).

45. The "unlawfulness" of any future course of action advocated by the speaker is to be assessed by the Court autonomously – otherwise, the State may evade liability under the Convention by arbitrarily labelling certain actions as unlawful. Moreover, as suggested by the Court's case-law under Article 11, the authorities should tolerate some forms of unlawful action when the freedom of expression is at stake.[73] Thus, in the case of *Elvira Dmitrieva v. Russia* (examined under Articles 10 and 11),[74] the applicant was fined for "calling on the public to participate in an unauthorised public event" through a social media network. The ECtHR noted that the mere "unlawfulness" of the campaigning did not warrant the punishment: "the public event advertised by the applicant in her social networking account [did not present] a risk to public safety [and] was [not] capable of leading to public disorder or crime". The Court recalled that "enforcement of

[71] On 28 March 2017 the Russian Constitutional Court (see ruling N 665-O) rejected a complaint where the applicant alleged that Article 280.1 was unconstitutional because it criminalized "statements of non-violent character concerning territorial integrity of the Russian Federation".

[72] Dec., no. 75147/17, § 37, 7 May 2019. In this case, the applicants, 76 members of the Catalan Parliament, complained about a breach of article 11, due to the suspension of the Catalan Parliament of the convening of a parliament sitting on 9 October 2017, in order to announce the results of an unconstitutional referendum on the subject of the self-determination of Catalonia (the applicants also complained under article 10 of the ECHR, but the Court analysed their complaints only under article 11). The UN Human Rights Committee in its General Comment on freedom of expression has affirmed that: "extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3" of article 19 ICCPR, which requires that restrictions on freedom of expression be provided for by law and must be necessary for a legitimate purpose, such as national security or public order. The right to participate in public life is protected under Article 25 ICCPR.

[73] See *Navalnyy v. Russia*, [GC], nos. 29580/12 and 4 others, § 143, 15 November 2018.

[74] Nos. 60921/17 and 7202/18, § 66, 30 April 2019.

rules governing public assemblies cannot become an end in itself", and that "the fact that the applicant breached a statutory prohibition by 'campaigning' for participation in a public event that had not been duly approved is not sufficient in itself to justify an interference with her freedom of expression".[75] The Court recalled that "it is important for the public authorities to show a certain degree of tolerance towards peaceful unlawful gatherings [ref. omitted]. There was no reason to believe that the event in question, although not duly approved, would not be peaceful. Indeed, the impugned Internet post did not contain any calls to commit violent, disorderly or otherwise unlawful acts during the public event".[76]

46. In sum, the character and degree of domestic "unlawfulness" have to be assessed. In the *Elvira Dmitriyeva* case cited above, the Court noted that "it is also significant that the refusal to approve the location of the applicant's event was later found to be unlawful by the domestic courts".[77] However, even where unlawfulness of the actions advocated by the speaker is not in doubt, it should not automatically trigger a sanction, let alone a penal sanction. There should be a relation of proportionality between the degree and the character of "unlawfulness" and the ensuing sanction. Notably, in some cases the mere unlawfulness of an action may not be sufficient to justify any interference with the freedom of expression at all.

8. The importance of the position of the speaker

47. The question put by the Committee concerns the freedom of speech exercised by "politicians or representatives of the civil society". The status of the speaker is relevant: for example, some categories of civil servants – like judges or military personnel[78] – have a duty of restraint when speaking in public. So, the legal regime governing the freedom of speech of those categories of speakers may be less favorable than the general legal regime.

48. However, elected representatives are not in this category. Freedom of expression is more important in the case of the elected representatives, since they represent and defend the interests of the electorate and thus, interference with their freedom of expression must be carefully assessed.[79] In *Incal v. Turkey* the Court expressly stated that "[w]hile precious to all, freedom of expression is particularly important for political parties and their active members".[80] Together with civil society leaders and journalists they play a central role in fostering the public debate. In relation to politicians, the ECtHR has underlined that there can be no justification for hindering public figures who seek debate in public to find, according to democratic rules, political solutions to current problems.[81]

49. If elected representatives are submitted to a special legal regime in some countries, it is often even more favorable than the general one. This is demonstrated by the special immunities attached in the status of a member of parliament. For instance, in the case of *Karácsony and Others v. Hungary*[82] the Court stressed that speech in Parliament enjoys an elevated level of protection. But this immunity is functional. Outside parliamentary debates, or on matters not related to the business of Parliament, this special legal regime does not apply,[83] but the general regime governing political speech is still valid.

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[75] Ibid., § 84.
[76] Ibid, § 86.
[77] Ibid., § 87.
[78] See *Engel and Others v. the Netherlands*, 8 June 1976, § 100, Series A no. 22; but see *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, § 38, Series A no. 302.
[79] *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236.
[80] [GC], 9 June 1998, § 46, Reports of Judgments and Decisions 1998-IV. See also *Jean-Jacques Morel v. France*, no. 25689/10, § 39, 10 October 2013.
[81] *United Communist Party of Turkey*, cited above, § 45.
[82] Cited above, § 138.
[83] CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist, §§ 147 et seq.

50. So, the starting point should be that elected representatives, in performing their mandate, enjoy a higher protection of their freedom of speech. That being said, there may be situations where the position of the speaker as an active politician (or even as a retired but influential one) would constitute a factor justifying a restriction of his/her freedom of expression. For instance, in *Zana*, discussed above, the Court stressed that the applicant was a former mayor of Diyarbakır, thus implying that his reputation and his public standing could have amplified the effect of his interview. In *Erbakan v. Turkey* the Court noted in particular that the applicant was a "notorious political figure", again implying that this might have had an effect on the impact of his words.[84] From this reasoning one may infer that if influential politicians, even when they are elected representatives, encourage a riot, such speech gives a gloss of "legitimacy" to otherwise unlawful actions and thus may justify sanctions. In *Rufi Osmani*, discussed above, the Court specifically noted that a mayor, in calling to resist the decision of the Constitutional Court, clearly went beyond his political mandate. Speech that is not related to the *normal exercise of an elected representative's mandate*, would arguably not be covered by his/her "functional immunity". Still, in ordinary situations, elected representatives enjoy a heightened protection on matters related to the rational exercise of their political mandate.[85]

9. Proportionality of the sanctions

51. The nature and the severity of the penalty imposed are amongst the factors to be taken into account when assessing the proportionality of the interference.[86] The "rule of the thumb" for the Court is that "the imposition of a custodial sentence (even a suspended one) for a media-related offence will be compatible with journalists' freedom of expression […] only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence".[87] However, both "hate speech" and "incitement to violence" may be of different degrees of intensity and have different outreach or impact, and will thus require legal responses of different levels, even within the ambit of criminal law.

52. For example, in the case of *Abedin Smajić v. Bosnia and Herzegovina*,[88] the applicant was found guilty of describing, on an Internet forum and in great detail, how to attack Serbian settlements in the event of a war. The Court did not find a violation of Article 10 on account of the sentence of one year's imprisonment, suspended for a period of three years, coupled with the confiscation of the personal computer and laptop. In the case of *Müslüm Gündüz v. Turkey*,[89] the applicant was sentenced to four years' imprisonment for the calls to "stick the dagger" in the "soft belly" of a moderate Islamist thinker. The Court accepted this as a proportionate penalty. Finally, in the *Rufi Osmani* case, analysed above, which concerned direct calls for unlawful violence which led to the loss of lives, the Court noted that "[the applicant's initial overall sentence] was reduced from thirteen years and eight months to seven years' term of imprisonment. Eventually, the applicant was granted amnesty. The applicant spent one year and three months in prison. Therefore, even if the original sentence can be considered severe, one year and three months spent in prison cannot be considered disproportionate, regard being had to the facts of the case".

53. By contrast, in *Karataş v. Turkey* the term of thirteen months' imprisonment was considered a disproportionally harsh sentence for "a private individual who expressed his views through poetry – which by definition is addressed to a very small audience – rather than through the mass

[84] No. 59405/00, § 62, 6 July 2006.
[85] Political debates in Parliament may (and sometimes must) be reported by the press. Even though politicians may initiate the political debate these voices would not be heard without being published in the press or broadcast.
[86] *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI; see *Karataş v. Turkey* [GC], no. 23168/94, § 53, ECHR 1999 IV.
[87] *Atamanchuk v. Russia*, cited above, § 67.
[88] Dec., no. 48657/16, 16 January 2018.
[89] Dec., no. 59745/00, 13 November 2003.

media" and whose verses "were artistic in nature".[90] In the case of *Stomakhin v. Russia,* the Court found a breach of Article 10 due to the conviction of the applicant for "promoting extremism" in the context of the Chechen conflict. The applicant was given a 5-year prison sentence and an additional 3 years' ban on practising journalism; the Court concluded that the severity of the penalty was an extremely harsh measure, noting, in particular, "that the impugned statements were disseminated in a self-published newsletter, the number of copies of which was very low".[91]

54. There are other illustrations of what the Court has previously considered as proportionate or disproportionate criminal sanctions in respect of the seditious or inflammatory speech. The problem of the holistic approach of the Court to the proportionality analysis is that it is not always easy to discern whether the finding of a violation was based on the fact that the speech in question did not deserve any sanction at all, did not deserve a criminal sanction, or did not deserve a criminal sanction of a particular severity.[92] That being said, the Court repeatedly stated that it "must examine with particular scrutiny cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence".[93] So, it is safe to conclude that prison sentences for non-violent speech are not ruled out but are, in the eyes of the Court, particularly problematic.

III. Conclusion

55. The question put by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly to the Venice Commission concerned the possible criminalisation of calls by politicians or representatives of civil society for radical constitutional changes by peaceful means, including calls for independence or far-reaching autonomy for parts of the national territory. The Venice Commission has looked at the issue from the perspective of the case-law of the European Court of Human Rights (the Court), mostly under Article 10 of the European Convention on Human Rights (the ECHR).

56. The case-law on this matter is very complex and based on the contextual analysis of various factors. The analysis of those factors enables the Court to strike the right balance between the freedom of speech and the legitimate interests of the State and of the society in preserving national security, territorial integrity, public safety, and in preventing disorder or crime. With some degree of approximation, the approach of the Court to these matters can be summarised as follows.

57. Any limitations to the free speech, especially criminal sanctions, should be foreseeable and based on clearly formulated legal rules. That being said, laws in this area are inevitably couched in rather general terms, so that their meaning may be clarified at the sub-legislative level in the jurisprudence of national courts, for example by way of references to the European and international law. At any rate, in any such case a judge will have to give an interpretation that stays within the limits of the legal term used.

58. As a rule, political speech cannot be criminalised, even if the speech is provocative or divisive and advocates for radical changes, including potential independence or far-reaching autonomy

[90] Cited above, § 52.
[91] Cited above, § 131.
[92] Thus, in *Özgür Gündem*, cited above, the Court noted that the articles impugned to the applicant newspaper and criticising the authorities policy in the South-East Turkey "cannot be reasonably regarded as advocating or inciting the use of violence". That element normally should be enough to conclude that the applicant newspaper was penalised for the permissible political speech and this, by itself, is a breach of Article 10. However, in the same paragraph the Court continued as follows: "Having regard to the severity of the penalties, [the Court] concludes that the restrictions imposed on the newspaper's freedom of expression disclosed in these cases were disproportionate […]". This reasoning implies that if the penalty was lower, the Court's conclusions might be different (see § 70).
[93] See *Taranenko v. Russia*, no. 19554/05, § 87, 15 May 2014.

of a region. When analysing political speech, the courts should distinguish between factual statements and opinions.

59. Political speech enjoys a heightened protection; however, there are some exceptions from this general rule. The first exception concerns ideologies which are aimed at the destruction of democracy and human rights. Thus, for example, glorification of the Nazism is a crime in certain European countries. The second exception concerns hate speech. Criminalisation of hate speech is recommended in many international instruments. Most often, hate speech is directed against disadvantaged minorities, but the opposite cannot be excluded either, especially in the context of separatist propaganda. That being said, the notion of "hate speech" should be construed narrowly and not extended to the criticism, even a virulent one, of the Government, State institutions and their policies and practices.

60. The last group of cases where political speech can be legitimately curtailed including by criminal sanctions (those cases are most relevant for the subject-matter of this Report) concerns political speech which incites to *violent* acts. Distinguishing between peaceful speech and calls for violence/hate speech depends very much on the context. Political speech may be criminalised if it is peaceful only on the surface but, if correctly analysed, propagates violence, be it directly or indirectly and thus creates a *concrete danger* of such violence, which has to be proven, especially in the context of an on-going violent conflict.

61. The public position of the speaker is of relevance: in normal circumstances, when no calls for violence are involved, elected politicians enjoy a heightened protection (which sometimes takes form of a parliamentary immunity). In specific circumstances, to the contrary, the political position of an influential speaker may provide for additional force to the calls for otherwise unlawful actions and thus may justify sanctions.

62. Even when criminal sanctions are permissible for speech calling for violence, the Court may find a violation of Article 10 if the resulting criminal sanction was too severe, compared to the negative impact the speech had or might have.

63. As to calls for unlawful but non-violent acts, criminal sanctions in these cases are not ruled out as such but are more problematic. It is important to assess, in particular, the character of the "unlawful actions" called for.

64. The Venice Commission remains at the disposal of the Parliamentary Assembly for further assistance in this matter.