Freedom of Expression: General principles; criminal sanctions for speech offences and other interferences with the freedom of expression during criminal proceedings

Article 10, European Convention on Human Rights

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

1. General Principles on Freedom of Expression

- The freedom of expression is considered as foundational to democracy. "Freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man."[1]
- The protection guaranteed in Article 10 extends to information and ideas that 'offend, shock or disturb'. As the Court as stated, such forms of expression 'are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".'[2]
- In general, the right applies to a broad range of expression including political expression, art, commercial information, photographs, types of conduct (including protests, the 'Like' button on social networks), among others.
- Article 10(2) articulates the restrictions to the freedom of expression, which must be construed strictly and the need for restrictions must be established convincingly.[3]
- In assessing if there was an interference with the right, the Court will look at whether the interference was 'prescribed by law' (lawfulness), in pursuance of one of the 'legitimate aims' (legitimacy), and whether it was 'necessary in a democratic society'.
- In determining if the interference was lawful, the Court will look at whether the law was clear, accessible and with penalties that were certain and foreseeable.
- In determining if the interference was legitimate, Article 10 (2) lists out the legitimate aims for which the freedom maybe restricted.
- In determining if the interference was necessary in a democratic society, the Court will assess if there was a 'pressing social need', an assessment of the nature and severity of the sanctions (the proportionality of the interference), and whether the State has provided relevant and sufficient reasons for the interference.

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[1] *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24.
[2] ibid, § 59.
[3] *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V).

2. Criminal Sanctions for Speech Offences

Under the 'prescribed by law' prong, the law refers to a domestic law, and it must be clear and accessible.

- For instance, in *Semir Güzel v. Turkey* it was held that the legal provision relating to political parties on which the government relied on to convict the applicant, was not clear enough for the applicant to have foreseen that he would be criminally liable for his actions.[4] Thus the interference with the freedom of expression was not prescribed by law.
- In *Savva Terentyev v. Russia*, the Court affirmed that criminal-law provisions must clearly and precisely define the scope of the offences to avoid giving the State too much discretion to prosecute, thereby leaving room for potential selective enforcement.[5]

In relation to assessing the 'necessity' of the interference in a 'democratic society', the Court takes the nature and severity of the sanctions into account. It is accepted that the least restrictive measure (proportionality test) must be used.

- For instance, in *Amorim Giestas and Jesus Costa Bordalo v. Portugal* the Court found that the convictions and orders to pay criminal fines and damages were disproportionate, and the Civil Code remedy could've been invoked instead.[6]

Penalties in response to hate speech and incitement to violence

- The Court has accepted that criminal sanctions in response to cases of hate speech or incitement to violence are not necessarily inconsistent with freedom of expression. For instance, in *E.S. v. Austria* the applicant was convicted for statements accusing the Prophet Muhammed of paedophilia. The Court highlighted that expression which incites or justifies hatred based on intolerance, including religious intolerance do not enjoy Article 10 protection.[7]
- In contrast, in *Tagiyev and Huseynov v. Azerbaijan*, in which the applicants were convicted for publishing an article criticising Islam, the Court found a violation of Article 10 as the national authorities had failed to explain *how* the statements in question constituted incitement to religious hatred and hostility. Moreover, the criminal conviction was considered disproportionate to the aims pursued.[8]

Penalties for defamation/ protection of reputation

- In assessing the proportionality of an interference of the freedom of expression, the nature and severity of penalties plays a crucial role. Thus, the Court has often held that authorities must exercise restraint in using criminal sanctions in defamation cases,[9] and instead use civil and disciplinary penalties.[10]
- Particularly in cases involving the press or public interest speech, the Court has repeatedly found that criminal sanctions may amount to a form of censorship and could deter the press from 'contributing to public discussion of issues affecting the life of the community'.[11] The Court has reiterated that the *nature* of the sanction (i.e. criminal) is more important than the

[4] See *Semir Güzel v. Turkey*, no. 29483/09, § § 35, 39-41, 13 September 2016.
[5] *Savva Terentyev v. Russia*, no. 10692/09, § 85, 28 August 2018.
[6] *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, no. 37840/10, 3 April 2014.
[7] *E.S. v. Austria*, no. 38450/12, § 44, 25 October 2018.
[8] *Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, §§ 48-50, 5 December 2019.
[9] For instance, see *Otegi Mondragon v. Spain*, no. 2034/07, §58, ECHR 2011.
[10] *Raichinov v. Bulgaria*, § 50; *Ceylan v. Turkey* [GC], § 34).
[11] *Bédat v. Switzerland* [GC], no. 56925/08, § 79, 29 March 2016.

severity of the sanction in cases involving the press. Thus, in *Haldimann and Others v. Switzerland*, where the applicants were granted twelve-day and four-day fines considered 'relatively modest', the Court still found these sanctions imposed by the criminal court to be a deterrent to the media from expressing criticism.[12]

- **Mas Gavarro v. Spain** (dec., 26111/15, 18 Oct. 2022):

> « 30. La Cour rappelle que, pour ce qui est des actes interindividuels de moindre gravité susceptibles de porter atteinte à l'intégrité morale, l'obligation qui incombe à l'État, au titre de l'article 8, de mettre en place et d'appliquer en pratique un cadre juridique adapté offrant une protection n'implique pas toujours l'adoption de dispositions pénales efficaces visant les différents actes pouvant être en cause. Le cadre juridique peut aussi consister en des recours civils aptes à fournir une protection suffisante (*Söderman v. Sweden* [GC], no 5786/08, § 85, CEDH 2013).
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> **The Court recalls that the imposition of a prison sentence for an offence in the area of political speech, or speech in the public interest, will be compatible with … Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence** (*Otegi Mondragon v. Spain*, no 2034/07, § 59, 15 March 2011, and *Stern Taulats and Roura Capellera v. Spain*, no 51168/15, § 34, 13 March 2018).
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> In the Spanish legal system, the crimes of insult and calumny are subject to a special aggravated form of *mens rea*, namely either the existence of a purely malicious falsehood … or reckless disregard (contempt) for the truth. The Spanish legislator has therefore chosen to criminalise only certain serious forms of insult and calumny, at the exclusion of other types of defamation or reputational harm."[13]

- It must be noted that Resolution 1577 of the Parliamentary Assembly of the Council of Europe urges member states to decriminalize defamation, particularly abolishing prison sentences for the offence. The Resolution also highlights that disproportionate compensation/damages awards in defamation cases may also violation Article 10 of the Convention. Resolution 1577 has been referred to by the Court.[14]

Penalties for breaches related to national security or public safety

- The Court has reiterated that the principles that apply in general to the application of Article 10 would apply even in the instance of the fight against terrorism which implies that the fight against terrorism in itself doesn't absolve national authorities' obligations under Article 10.[15]
- In this regard the Court has stated that where views expressed don't comprise incitements to violence (advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporter's goals, or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons),

[12] See *Haldimann and Others v. Switzerland*, no. 21830/09, §67, ECHR 2015.
[13] Unofficial translation from French original.
[14] See for instance *Otegi Mondragon v. Spain*, no. 2034/07, ECHR 2011; *Mariapori v. Finland*, no. 37751/07, 6 July 2010 and *Artun and Güvener v. Turkey*, no. 75510/01, 26 June 2007.
[15] See *Döner and Others v. Turkey*, no. 29994/02, 7 March 2017 and *Faruk Temel v. Turkey*, no. 16853/05, 1 February 2011.

States must not restrict the right of the public to receive such information.[16] Thus, if the expression does in fact incite violence against an individual, a public official or a group of the population, the State does have a wider margin of appreciation.

3. Other interferences with freedom of expression during criminal proceedings
(when prosecution/arrest/detention/suspended sentence for a speech offence amounts to an interference with/ restriction on freedom of expression)

There are instances when prosecution, arrest, custody and pre-trial detention and other preliminary actions in response to speech offences, may amount to an interference with the freedom of expression. Often the Court refers to the **'chilling effect'** such interferences have on the freedom of expression and related aspects of the guarantee.[17] The Court is of the view that even in situations where criminal prosecutions based on criminal legislation are discontinued for procedural reason but there are still risks that the affected party will be convicted, the party can claim a violation of the Convention.[18]

Case Examples:

- In *Otegi Mondragon v. Spain*, the applicant was sentenced to imprisonment for 'causing serious insult to the King'. The Court held that the conviction was disproportionate and would have a chilling effect, even though enforcement of the applicant's sentence was stayed.[19]
- In *Krasulya v. Russia* the applicant was convicted and sentenced to one year of imprisonment in criminal proceedings. The sentence was suspended on the condition that the applicant did not commit any further offence in his capacity as editor within six months. The Court held that the condition had a chilling effect by restricting journalistic freedom and reducing his ability to share information and ideas of public interest.[20]
- In *Altuğ Taner Akçam v. Turkey,* the Court assessed whether a mere criminal investigation that was commenced against the applicant (when charges were dropped eventually) amounted to an interference with the applicant's freedom of expression. The Court held that the investigation, coupled with the risk of being investigated/prosecuted based on vague domestic legal provisions and interpretations in the future constituted an interference with the right to freedom of expression.[21]
- In *Yaşar Kaplan v. Turkey* the Court noted that criminal prosecutions on the basis of criminal complaints and leading to a three-year stay of proceedings – even though the criminal proceedings were lifted after that period in the absence of a conviction – constituted an interference based on the chilling effect on journalists.[22]
- In *Dickinson v. Turkey* criminal proceedings were brought against the applicant for his satirical collage 'insulting' the Turkish Prime Minister. The Court held that placing the applicant in custody, his pre-trial detention, the criminal sanction (judicial fine) against him and the sentence

[16] See *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999; *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, § 56, 6 July 2010; *Nedim Şener v. Turkey*, no. 38270/11, § 116, 8 July 2014.
[17] It must be noted however that a 'chilling effect' on the freedom of expression without specific clarification of how it has caused a chilling effect, will not constitute an interference with the freedom of expression.
[18] *Bowman v. the United Kingdom*, 19 February 1998, § 29, *Reports of Judgments and Decisions* 1998-I.
[19] *Otegi Mondragon v. Spain*, no. 2034/07, § 60, ECHR 2011.
[20] *Krasulya v. Russia*, no. 12365/03, § 44 ..., 22 February 2007.
[21] *Altuğ Taner Akçam v. Turkey*, no. 27520/07, 25 October 2011.
[22] *Yaşar Kaplan v. Turkey*, no. 56566/00, § 35, 24 January 2006.

-although suspended for five years and a judgment that was eventually set aside- had a chilling effect on the applicant's willingness to express himself on matters of public interest. This was based on the duration of the criminal proceedings and the inevitable risk of being sentenced to imprisonment.[23]

- In *Şahin Alpay v. Turkey* a journalist was placed in pre-trial detention on serious charges (attempting to overthrow the constitutional authorities and committing offences on behalf of a terrorist organization without being a member of it). The Court noted that even in instances of serious charges, pre-trial detention must only be used as a last resort. The Court highlighted that pre-trial detention for 'anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole' as it would inevitably have a chilling effect on the freedom of expression by intimidating civil society and silencing dissenting voices. The Court also noted that this chilling effect would still be produced even if the detainee is subsequently acquitted. [24]
- In *Nikula v. Finland* the applicant, a lawyer was convicted for negligent defamation based on her criticism of the strategy adopted by the public prosecutor in criminal proceedings. The Court held that although the conviction was ultimately overturned by the Supreme Court and the fin lifted, the actions caused a chilling effect on 'defence counsel's duty to defend their clients' interests zealously'.[25]

[23] *Dickinson v. Turkey*, no. 25200/11, § 58, 2 February 2021.
[24] *Şahin Alpay v. Turkey*, no. 16538/17, §§ 181-182, 20 March 2018.
[25] *Nikula v. Finland*, no. 31611/96, § 58, ECHR 2002-II.