GRATUITOUSLY OFFENSIVE SPEECH AND THE POLITICAL DEBATE

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ABSTRACT

Anti-immigration and anti-Islam rhetoric has become part of political discourse. This raises questions about, on the one hand, politicians' freedom of expression and, on the other hand, the duty not to be gratuitously offensive. How can these two be reconciled? Can and should political speech be curtailed for being (gratuitously) offensive? If so, where does this leave a politician's right to freedom of expression? These questions are the main focus of this article and the case law of the European Court Human Rights will be used in the analysis.

I INTRODUCTION

In many European countries, anti-immigration and anti-Islam rhetoric has become part of political discourse and many politicians have become more outspoken in their criticism of Islam and Muslims, as they see Islam as a religion which is incompatible with the values of a Western democratic society and thus Muslims as a threat to that society. This rhetoric has become even more vociferous after the events at the French magazine Charlie Hebdo and the recent terrorist attacks in Paris, Brussels and Nice. Marine Le Pen in France and Geert Wilders in the Netherlands are good examples of

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politicians using such rhetoric. When challenged, these politicians invoke their right to freedom of speech[1] and defend their expressions by saying that they raise concerns which exist among many people in their country. Some of these politicians have been prosecuted and convicted for incitement to hatred on the grounds of race, ethnicity or religion. They have taken their cases to the European Court of Human Rights and claimed a violation of their freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Court[2] thus had to assess whether the convictions interfered with the politician's freedom under article 10 and, if so, whether this was justified.

Freedom of expression is a fundamental human right guaranteed by all major human rights instruments, including the ECHR. This right applies not only to expressions that are favourably received but also to those that offend, shock or disturb. The right also appears to protect expressions criticizing and denouncing religions and beliefs. But the right to freedom of expression is not an absolute right. Article 10(2) ECHR allows for restrictions under certain circumstances for, among other aims, security and safety, the prevention of disorder and the protection of the rights of others.

The European Court of Human Rights has always stressed the importance of the right to freedom of expression for a democratic society. The freedom is particularly important for politicians, and even more so for opposition politicians. The Court has afforded a very high level of protection to political speech and will thus scrutinize restrictions on such speech very carefully. The Court has also held that politicians can use exaggerated and provocative language as a means of getting their message across.

[1] In this article, the term 'freedom of expression' and 'freedom of speech' are used interchangeably.

[2] In the following, the term 'the Court' will refer to the European Court of Human Rights.

The right to freedom of expression includes the right not only to pass on information, but also to receive information and both play an important role in the political and public debate because how can a person make up their mind about, for example, who to vote for if they cannot get information?

On the other hand, the European Court of Human Rights has also held, in relation to expressions criticizing religions or beliefs and religious believers, that gratuitously offensive expressions are not covered by the protection of article 10. But what does 'gratuitously offensive' mean? In the eye of religious believers, any critique of their beliefs will easily be felt to be gratuitously offensive.

Therefore, on one side is the freedom of expression of politicians, a very important good in a democratic society. On the other side is the opinion of the European Court of Human Rights that gratuitously offensive speech is not protected by article 10. How can these two be reconciled? Can political speech ever be gratuitously offensive? Should political speech be curtailed for being (gratuitously) offensive? If so, where does this leave a politician's right to freedom of expression? These questions are the main focus of this article and the case law of the European Court of Human Rights will be used in the analysis.

II FREEDOM OF EXPRESSION UNDER THE ECHR

Article 10 ECHR determines that '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. …' The European Court of Human Rights has stressed the importance of this right for the proper functioning of a democratic society. In *Handyside v United Kingdom*, the Court referred

to the principles characterizing a democratic society and stated that 'freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'.[3]

However, the right to freedom of expression under article 10 is not an absolute right as article 10(2) allows for restrictions on the right:

> 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.

According to the European Court of Human Rights, the words 'necessary in a democratic society' mean that there must be a pressing social need and this means that the interference must be proportionate to the legitimate aim pursued.[4] States are better placed to assess what is necessary in a democratic society and, therefore, they have a certain margin of appreciation to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity'. However, the European Court

[3] *Handyside v United Kingdom* (1979-1980) 1 E.H.R.R. 737, at [49].

[4] Ibid.

of Human Rights is empowered to give the final ruling.[5] If the Court affords states a wider margin of appreciation, it will scrutinize a restriction less closely.

The European Court of Human Rights has consistently held that exceptions to the right to freedom of expression in article 10 'must be narrowly interpreted and the necessity for any restrictions must be convincingly established'.[6] Despite this, the margin of appreciation is not the same for all types of expressions. This is clear from *Wingrove v United Kingdom*, where the European Court of Human Rights held that, under article 10(2), there is little scope for restrictions on political speech and debates of public interest, but that the margin of appreciation is wider 'in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion'. This is so because there is no consensus in Europe about the requirements of the protection of the rights of others in relation to attacks on their religious convictions and because what causes offence varies, 'especially in an era characterised by an ever growing array of faiths and denominations'.[7]

Therefore, under article 10(2), restrictions on expressions about moral or religious matters will be scrutinized less closely than restrictions on matters contributing to the political and public debate.

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5 Ibid. at [48] and [49].

6 See, for example, *Observer and Guardian v United Kingdom* (1992) 14 E.H.R.R. 153, at [59]; *Oberschlick v Austria* (No. 2) (1997) 25 E.H.R.R. 357, at [29]; *Ceylan v Turkey* (2000) 30 E.H.R.R. 73, at [32]; *Balsyte-Lideikiene v Lithuania* (App. No.72596/01), judgment of 4 November 2008, at [75].

7 *Wingrove v United Kingdom* (1997) 24 E.H.R.R. 1, at [58]. This was repeated in a number of later cases, see, for example, *Murphy v Ireland* (2004) 38 E.H.R.R. 13, at [67], *Balsyte-Lideikiene v Lithuania*, at [81]; and, *Perinçek v Switzerland*, (2016) 63 E.H.R.R. 6, at [197].

The European Court of Human Rights has also repeatedly stressed the importance of freedom of speech for the public debate and for politicians.[8] For example, in *Lingens v Austria*, the Court held that 'freedom of political debate is at the very core of the concept of a democratic society',[9] while in *Castells v Spain*, it mentioned that freedom of expression is especially important for an elected representative of the people and for opposition politicians.[10]

Moreover, the European Court of Human Rights has explained that politicians must be able to canvass for votes and have the right to defend their opinions in public and can use offensive, shocking, disturbing language,[11] they can use a degree of exaggeration and provocation,[12] and immoderation[13] and be controversial and virulent[14] because of their important contribution to the political and public debate. But this does not mean that their freedom of speech can never be restricted, because article 10(2) is still applicable. The Court has found restrictions on expressions of politicians to be

[8] On the importance of freedom of speech for the public debate, see the conclusion in: P. Noorlander, "In Fear of Cartoons", (2015) 2 E.H.R.L.R. 115, 121.

[9] *Lingens v Austria* (1986) 8 E.H.R.R. 407, at [42]. See also: *Erbakan v Turkey* (App. No.59405/00), judgment of 6 July 2006, at [55].

[10] *Castells v Spain* (1992) 14 E.H.R.R. 445, at [42]. See also: *Incal v Turkey* (2000) 29 E.H.R.R. 449, at [46].

[11] *Féret v Belgium* (App. No. 15615/07), judgment of 16 July 2009, at [76] and [77].

[12] *Le Pen v France* (App. No. 18788/09), Decision of 20 April 2010. See also on this: D. Voorhoof, *European Court of Human Rights Jean-Marie Le Pen v. France* (2010) < http://merlin.obs.coe.int/iris/2010/7/article1.en.html.

[13] *Otegi Mondragon v Spain* (2015) 60 E.H.R.R. 7, at [54].

[14] *Perinçek v Switzerland*, at [231].

compatible with article 10 because these expressions incited to hatred and violence against a particular ethnic or religious group.[15]

In many European countries, anti-immigration and anti-Islam rhetoric has become part of political speech and not only of far right parties. For example, at the recent UK conservative party conference, it was said that uncontrolled immigration from Europe must be halted because foreigners are taking British jobs. Many politicians have also become more vociferous in their criticism of Islam and Muslims and the supposed incompatibility of Islam with a Western democratic society. As Sottieaux writes, 'the type of speech at issue in *Féret* and *Le Pen* is representative for the current anti-immigration and anti-Islam discourse found in many European countries'.[16] The criticism by politicians has been seen as offensive by the group targeted, often Muslims. But should this be a reason to restrict such speech? The following part will address this question.

III (GRATUITOUSLY) OFFENSIVE EXPRESSION

Barendt writes, 'the proscription of any type of speech on the ground of its offensiveness is, of course, very hard to reconcile with freedom of expression, for a right to express and receive only inoffensive opinions would hardly be worth having'.[17] Just being offensive is thus not enough to hold that an expression breached article 10

[15] See, for example, *Féret v Belgium*; and, *Le Pen v France*.

[16] S. Sottieaux, ""Bad Tendencies" in the European Court of Human Rights's "Hate Speech" Jurisprudence" (2011) 7(1) E.C.L.R. 43.

[17] E. Barendt, "Religious Hatred Laws: Protecting Groups or Belief?" (2011) 17(1) *Res Publica,* 41, 44.

ECHR as the European Court of Human Rights has stated that the right to freedom of expression applies

> not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[18]

Moreover, speech criticizing religions or religious believers attracts the protection of article 10 because the Court has held that those who choose to exercise the freedom to manifest their religion under article 9 ECHR 'cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith'.[19]

Article 9(1) determines that everyone has the right to freedom of thought, conscience and religion and that this right includes the freedom to change and to manifest one's religion or belief. The freedom to change one's religion would be meaningless if one could not receive or impart views that criticize or deny the tenets of one's religion or support those of another religion. Therefore, 'the right to freedom of expression implies that it should be allowed to scrutinise, openly debate, and criticise,

[18] *Handyside v United Kingdom*, at [49].

[19] *Otto-Preminger-Institute v Austria* (1995) 19 E.H.R.R. 34, at [47].

even harshly and unreasonably, belief systems, opinions and institutions …'.[20] So, in a democratic society there should be room to criticize and deny religious beliefs even if this might be offensive to believers. This holds true for expressions of other (e.g. political) beliefs and opinions, but this article focuses on religious expressions.

Political speech attracts very strong protection under article 10 (2). The term 'political speech' is defined by Barendt as 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.[21] This clearly includes expressions about religion and belief and, therefore, an open, democratic society requires that strong protection should be given to expressions about religions or beliefs. This is, for Cram, a reason to argue for strong protection of speech about Islam, because of 'the overt desire of certain Islamic groups to attain political power so that they might advance their goal of creating a theocratic society'.[22]

On the other hand, article 10(2) makes clear that the exercise of the freedom of expression brings with it 'duties and responsibilities' and the European Court of Human Rights has held that

> amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that

[20] European Commission for Democracy through Law (Venice Commission), *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* (Strasbourg, 2008, Council of Europe, Study No. 406/2006, CDL-AD(2008)026), at [49].

[21] E. Barendt, *Freedom of Speech* (Oxford, Claredon Press, 1985) p. 162.

[22] I. Cram, "The Danish Cartoons, Offensive Expression, and Democratic Legitimacy", in I. Hare and J. Weinstein (eds) *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009) 311, 323.

> are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.[23]

This paragraph raises a number of questions. First, what does 'in the context of religious opinions and beliefs' mean? In the same case, the European Court of Human Rights refers to 'the manner in which religious beliefs and doctrines are opposed or denied' and considers that 'the respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration'.[24] Therefore, the Court appears to give a wide meaning to the terms 'in the context of religious opinions and beliefs' to include both criticism of beliefs and offence to believers. Therefore, politicians' expressions about Islam and Muslims would both be covered.

The second question raised by the above quote is: what does 'gratuitously offensive' mean? And who determines this? In the eyes of religious believers, any criticism of their beliefs will be seen as gratuitously offensive, but the speaker or author will dispute this and claim that they are making a contribution to the public and political debate.

It is submitted that the term 'gratuitously offensive', in its everyday meaning refers to an expression which is needlessly and unnecessarily offensive and which is

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[23] *Otto-Preminger-Institute v Austria*, at [49]. The same or similar expression has been used in other cases, see, for example: *Wingrove v United Kingdom*, at [52]; *Gündüz v Turkey* (2003) 41 E.H.R.R. 5, at [37]; *Giniewski v France* (2007) 45 E.H.R.R. 589, at [43].

[24] *Otto-Preminger-Institute v Austria*, at [47].

made with the sole purpose of causing offence to certain people without serving any further purpose. This is supported by what the European Court of Human Rights also states in the quote given, that 'gratuitously offensive' expressions do not contribute to the public debate and/or are not capable of furthering progress in human affairs. And, it follows from this that, if a remark contributes to the public debate and/or is capable of furthering progress in human affairs, it will not be 'gratuitously offensive'. Nathwani points out that the duty to avoid gratuitously offensive expressions cannot easily be reconciled with the right to offend, shock and disturb' postulated in *Handyside v United Kingdom'.*[25] However, she continues that 'the point is that gratuitously offensive expressions might be needed and justified as an expression of dissent or protest against a dominant group, ideology or religion'.[26] It is suggested that his does not accord with what the European Court of Human Rights has said in the case above, as an 'expression of dissent or protest against a dominant group, ideology or religion' is part of the public debate and thus, as such, it would not, in the definition of the Court, be gratuitously offensive.

So, can the duty to avoid gratuitously offensive expressions be reconciled with the European Court of Human Rights' judgment that freedom of expression includes expressions that offend, shock or disturb? It is submitted that they can because the Court allows offending, shocking, disturbing, exaggerated, provocative and controversial

[25] N. Nathwani, "Religious Cartoons and Human Rights – a Critical Legal Analysis of the Case Law of the European Court of Human Rights on the Protection of Religious Feelings and its Implications in the Danish Affair Concerning Cartoons of the Prophet Muhammad" (2008) 4 E.H.R.L.R. 488, in fn. 44.

[26] Ibid.

expressions by politicians if they contribute to the public debate, but it does not allow gratuitously offensive comments because they do not do so and because they are not capable of furthering progress in human affairs. Therefore, restrictions on expressions by politicians that contribute to the public debate should be held to violate the freedom of expression of the speaker or author unless some of the circumstances discussed below are present.

Support for this can also be found in the case law of the European Court of Human Rights. For example, in *Giniewski v France,* the Court held that the applicant 'had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate … without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought'.[27] And, although the article in question contained conclusions and phrases which might offend, shock or disturb some people, this did not preclude the enjoyment of freedom of expression. The article was not gratuitously offensive or insulting and did not incite to disrespect or hatred. The Court thus found a violation of article 10.[28]

In *Gündüz v Turkey*, the applicant had taken part in a television programme and was then convicted for incitement to religious hatred because of what he had said in the programme. The European Court of Human Rights found that his conviction had breached his right to freedom of expression. The Court considered that the applicant contributed to a programme on a topic that was widely debated in the Turkish media.

[27] *Giniewski v France*, at [50].

[28] Ibid. at [52] and [53].

The programme was designed to encourage an exchange of views on the role of religion in a democratic society.[29] So, again, the programme did contribute to the public debate.

In *Morice v France*, the European Court of Human Rights held that, when it concerns a matter of public interest, a degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection.[30] All this strongly suggests that speech is not gratuitously offensive if it contributes to the public debate and/or is capable of furthering progress in human affairs. Therefore, the duty to avoid gratuitously offensive expressions in *Otto-Preminger-Institut v Austria* can be reconciled with the European Court of Human Rights judgment in *Handyside v the UK* that freedom of expression includes expressions that offend, shock or disturb.

It is submitted that politicians who use anti-Islam and anti-Muslim rhetoric are contributing to the public debates about immigration, integration and terrorism which currently are taking place all across Europe and that they are raising issues that are of deep concern to many people in Europe. Therefore, their speech cannot be said to be 'gratuitously offensive' just because it offends, shocks or disturbs Muslims.

A further problem with the term 'gratuitously offensive' is that it is very subjective: one person might find something gratuitously offensive while another person might find the same expression perfectly acceptable. Leigh points out that 'gratuitously offensive speech is a vague category that is unpredictable in its

[29] *Gündüz v Turkey*, at [43] and [44].

[30] *Morice v France* (2016) 62 E.H.R.R. 1, at [125].

application'.[31] This, according to Cram, confers on the state wide and vaguely defined powers to prescribe the manner in which ideas and opinions are expressed'.[32] And, O'Reilly warns that 'the European Court of Human Rights should be mindful of the difficulty in conceptualising objectively offensive expression, and the potential for the imposition of uncertain or unforeseeable standards on individuals'.[33]

Therefore, the vagueness, subjectivity and uncertain meaning of the term 'gratuitously offensive' could lead to abuse by the state to suppress the speech of politicians and others because of the way this is expressed.

IV FOSTERING INTOLERANCE

In *Erbakan v Turkey*, the leader of a political party had been convicted for incitement to hatred and hostility in criminal proceedings more than four years after he had made a public speech about distinctions between religions, races and regions. The speech had been made in an area that had been subject to terrorist attacks. The European Court of Human Rights found that Turkey had violated Erbakan's right to freedom of expression under article 10 ECHR. The Court stated that combating all forms of intolerance was an integral part of human rights protection because tolerance and respect for equal dignity of all human beings constitute the foundations of a democratic pluralist society.[34]

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[31] I. Leigh, "Damned if They Do, Damned if They Don't: the European Court of Human Rights and the Protection of Religion from Attack" (2011) 17(1) *Res Publica* 55, 71.

[32] Cram, in Hare and Weinstein, 323.

[33] A. O'Reilly, "In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights" (2016) 19 *Trinity College Law Review*, 234, 240.

[34] *Erbakan v Turkey*, at [56].

Therefore, the Court continued, it may, in principle, be considered necessary in democratic societies to sanction or prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, including religious intolerance, provided that the formalities, conditions, restrictions or sanctions are proportionate to the legitimate aim pursued.[35] So these restrictions still have to pass the justification test of article 10(2). The Court also held that it was crucially important that, in their public speeches, politicians should avoid making comments likely to foster such intolerance.[36]

In *Féret v Belgium*, a politician was convicted of incitement to discrimination and hatred. His party had distributed leaflets, written by him, and posters which presented non-European migrant communities in Belgium as criminally-minded and keen to exploit the Belgian benefit system. The European Court of Human Rights held that political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic states and that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The conviction was thus held not to interfere with Article 10 ECHR.[37]

Two reasons could be suggested for the different decisions in these two cases. First of all, the criminal proceedings against Erbakan were not instituted until more than 4 years after the speech was made, while there was no such delay in *Féret v Belgium*. Second, Erbakan's remarks were related to religion and religious believers while Féret's

[35] Ibid.

[36] Ibid. at [64].

[37] *Féret v Belgium*, at [73] and [75].

remarks appeared to have a racial basis. The European Court of Human Rights might have considered the latter more serious for this reason.[38] Whether the fact that different countries were involved in these cases played a role in the decisions of the Court in is unclear.[39]

Whatever the reasons for the different outcome in the two cases, the considerations of the European Court of Human Rights in both cases suggest that politicians also have a duty not to foster intolerance. But what does this mean? It is a very vague term which could be open to very different interpretations. In *Erbakan v Turkey*, the Court also considered that 'it had not been established that at the time of Erbakan's prosecution the speech in question had given rise to, or been likely to give rise to, a "present risk" and an "imminent" danger for society'[40] and, thus, a violation of applicant's freedom of expression was found. This suggests that combating mere intolerance is not sufficient to justify infringing the freedom of expression and that real – and not potential - impact on the rights of other needs to be demonstrated. The latter is

[38] See on the argument that there is a difference between racial and religious hate speech, for example, the following authors: Barendt, "'Religious Hatred Laws: Protecting Groups or Belief?', 46; R. Plant, "Religion, Identity and Freedom of Expression" 17(1) *Res Publica* (2011) 7, 12; J. Vrielink, "Islamophobia and the Law: Belgian Hate Speech Legislation Speech and the Wilful Destruction of the Koran", 14 (1) *International Journal of Discrimination and the Law* (2014) 54, 57; O'Reilly, "In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights", 248.

[39] Discussion of this goes beyond the subject of this article.

[40] *Erbakan v Turkey*, at [68].

what the three dissenters stated in *Féret v Belgium*.[41] These three dissenters expressed their opinion that there had been a violation of Féret's freedom of expression under article 10 but the four majority judges concluded that there had not.

Therefore, the European Court of Human Rights itself is not very clear about the meaning of 'fostering intolerance'. In *Féret v Belgium,* the judges were divided over this issue, while *Erbakan v Turkey,* appears to suggest that the dissenters in *Féret v Belgium* are right and that real impact, present risk and imminent danger of violence needs to be established rather than a mere 'fostering intolerance'. An example of an expression of intolerance that has real impact would be a speech inciting hatred and violence where actual violence was likely to follow, where there was a present risk and imminent danger of violence.

It is submitted that expressions should not be restricted just because they foster intolerance and that the European Court of Human Rights should require real impact, present risk or imminent danger, because any other interpretation would allow states to curtail (political) speech based on a hypothetical and unsubstantiated danger of fostering intolerance. As Buyse writes, the dissenters in *Féret v Belgium*

> pointed out the difference between incitement--with direct effect--and the long term consolidation of prejudice and intolerance. Such potential future dangers should not be presented as an apocalyptic scenario which warrants limits on freedom of expression in the present. To do so would limit free political debate

[41] *Féret v Belgium*, dissenting opinion. See also: A. Buyse, "Dangerous Expressions: the ECHR, Violence and Free Speech" (2014) 63(2) I.C.L.Q. 491, 499.

and deny the power of counter-arguments and the independent formation of opinions.[42]

Therefore, fostering intolerance is too vague a term which is too open to a very wide interpretation and just fostering intolerance should not be sufficient to restrict the freedom of expression of politicians without evidence of imminent risk or present danger.

V CHILLING EFFECT

Based on the above, it is submitted that a politician's expression should not be restricted just because it offends the religious feelings of some people or fosters intolerance without evidence of real impact. The European Court of Human Rights should thus scrutinize restrictions imposed on the freedom of speech of politicians very strictly and this freedom should not be limited to protect the right of others unless real impact on society can be demonstrated. This real impact can only be established when the expression constitutes a present risk or imminent danger of violence or, when the expression factually stops people from holding, manifesting or practising their religion. And, even then, this is still subject to the justification test in article 10(2) ECHR and thus the European Court of Human Rights should carefully examine whether the means used to achieve the aim of protecting public safety or the rights of others are proportionate and necessary.

[42] Buyse, ibid. 499-500.

It is thus argued here that freedom of expression of politicians should not be restricted except in the very limited circumstances described above because of the crucial importance of an open debate in a democratic society. Allowing for wide restrictions on political speech, especially those involving the imposition of criminal sanctions, would have a 'chilling effect' on freedom of speech: it would lead to self-censorship and stop people from expressing themselves and this would have serious effects on the public debate, especially if it stopped (opposition) politicians from speaking out. In *Erbakan v Turkey*, the European Court of Human Rights pointed out that the severe sanction imposed on the applicant in that case invariably produced a dissuasive effect.[43] And, the Venice Commission underlined that

> it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated and should be proportional, lest they should have a chilling effect on freedom of expression.[44]

This chilling effect of restrictions on freedom of speech is exacerbated by the imposition of severe sanctions and this is why the severity of the sanction is also taken into account by the European Court of Human Rights when deciding whether an interference with a person's freedom of expression is justified, as is clear from *Erbakan v Turkey* above.

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[43] *Erbakan v Turkey*, at [68]. This has also been stressed in relation to journalists, see, for example, *Lingens v Austria*, at [44] and *Surek v Turkey* (No 2) (1999) 7 B.H.R.C. 339, at [40].

[44] European Commission for Democracy through Law, *Report on the Relationship between Freedom of Expression and Freedom of Religion* at [76].

If expressing mere intolerance or offending certain people is enough to curtail expressions in the public debate, it would make it too easy for the state to stifle opposition. The European Court of Human Rights should thus not accept this as sufficient justification for restriction the freedom of expression of politicians and others and it should scrutinize national restrictions on such expressions very closely. If the Court does not do so, then, as Cram writes 'there will be likely to be self-censorship on the part of commentators'.[45] Boyle writes about the Danish cartoon controversy,[46] and points out, that 'few would challenge that there has been a vast expansion of self-censorship in the media over Islam in the aftermath of the affair'.[47] And Cram, also writing about the violent protests after the publication of these cartoons, expresses that, if the European Court of Human Rights does not scrutinize national restrictions on expressions about Islamic links to terrorist activity very strictly these 'violent protests on behalf of those who have been "insulted" will have succeeded in creating a "chill" on freedom of expression that robs the public domain of a range of opinions concerning the links between religious fundamentalism and terrorism'.[48]

[45] Cram, in Hare and Weinstein, 324.

[46] In 2005, a Danish newspaper published a series of cartoons of the prophet Muhammad and this led to violent protests and demonstrations by Muslims in Denmark and subsequently in other places around the world. See on this: Noorlander, "In Fear of Cartoons", 117-119.

[47] K. Boyle, "The Danish Cartoons" (2006) 24 N.Q.H.R. 185, 189.

[48] Cram, in Hare and Weinstein, 324.

VI CONCLUSION

The European Court of Human Rights has always stressed that freedom of expression is a fundamental and necessary right for the proper functioning of a democratic society because of the importance of open and public debate in such a society. This right is of particular importance to (opposition) politicians. The Court has afforded a very high level of protection to political speech and will thus scrutinize restrictions on this very carefully. Politicians can use offensive, shocking or disturbing language, can exaggerate and provoke, and be immoderate, controversial and virulent to get their views across because of their important contribution to the public and political debate. The Court has also held that speech criticizing religions or religious believers attracts the protection of article 10 ECHR. But this does not mean that states can never restrict the speech of politicians who use anti-Islam and anti-Muslim rhetoric.

It has been argued that restrictions on the freedom of expression of politicians must be scrutinized very strictly by the European Court of Human Rights even if they concern religious issues. Anti-Islam or anti-Muslim speeches by politicians cannot be said to be 'gratuitously offensive' because they contribute to the very current public debates on immigration, integration and terrorism taking place all over Europe. These are issues that worry many people and politicians should be able to raise these in the public debate. The freedom of expression of politicians should thus not be restricted just because it is offensive to some people nor should it be curbed because it merely fosters intolerance. It should not be limited to protect public safety or the rights of others unless real impact on society can be demonstrated because the expression constitutes speech with an imminent risk or present danger that violence will occur, or, because the

expression factually stops people from holding, manifesting or practising their religion. And, even then, the justification test from article 10(2) ECHR applies. Because of the crucial importance of an open public and political debate for a democratic society and because of the chilling effect restrictions and sanctions can have, only in these very limited circumstances should a state be allowed to restrict the freedom of expression of politicians and the European Court of Human Rights should always scrutinize such restrictions extremely carefully. Such expressions should not be restricted merely because they are offensive to some people. Indeed, much political speech might, by its nature, be offensive to opponents.