

Workshop B : **Should electoral campaigns be regulated ? Theoretical and practical aspects of a restricted political area**

Pierre Garrone

Ladies and Gentlemen,

This workshop deals with theoretical as well as practical aspects. Since I am representing an international body which defined a number of standards in the electoral field, I will rather focus on the theoretical aspect - on the standards. Standards are however no abstract ideas, but are a guide to all those in charge of drafting legislation and, above all, applying it when taking concrete decisions. These standards are applied by the national stakeholders, and previous rapporteurs have already referred about their experience. Standards are also applied by international organisations when assessing specific pieces of legislation or when drafting election observation reports. So standards are guidelines for practice. This should enable us to be topical and to address theory as well as practice. As you will see, I will go back and forth with them, as we have all to do in our professional practice: we base our behaviour on theoretical principles but act on concrete situations.

Let us come to the core of our subject: Electoral campaigns cannot go unregulated, but the levels of regulation vary from state to state, and can vary without going against international principles. Some regulation is necessary to ensure at the same time liberty and equality.

This leads immediately to a theoretical approach, since there appears to be a typical conflict between liberty and equality – especially in the financial field

The conflict appears to be between:

- Liberty to campaign without restriction
- Equality of opportunity

This is a caricature. In practice the conflicting aspect is not central, as we will see.

What are the basic references in international law? Art. 25 ICCPR and 3 Protocol 1 ECHR.

The issue is also dealt with under freedom of expression, and there is plenty of case-law of the ECtHR under 10 ECHR concerning political speech. I will address this issue shortly before coming more in detail to rules applying specifically to electoral campaigns.

A few words about political speech: Here the balance is clearly in favour of liberty.

As already said in the 1976 *Handyside* case, freedom of expression is applicable 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.

Article 10.2 ECHR allows for restrictions prescribed by law and necessary in a democratic society, in particular 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. Respect for the principle of proportionality is central and the exceptions must be narrowly interpreted, meaning that there is a pressing social need for the limitation. The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.

I will not develop the case-law of the Court further because EMBs are in general not in charge of addressing possible limits to freedom of expression (unless limits to campaign expenditure are considered as such, but this has not yet been the case at European or universal level – contrary to the case-law of the US Supreme Court).

Let us then come back to electoral campaigns and the articulation between liberty and equality, which is addressed more in detail in the Council of Europe's reference document in the field, the Code of Good Practice in Electoral Matters.

Equality and liberty go hand in hand when dealing with access to publicly owned media and other limited resources, such as billposting. Neutrality of the state means that it gives equal access. Equality of opportunity and freedom of voters to form an opinion are two sides of the same coin.

What does however equal access mean in the electoral field? It may be strict: political parties are treated on equal footing irrespective of their current parliamentary strength or support among the electorate – or proportional: they are treated according to the results in the elections. The approach will depend on the subject matter, but also on the specific situation of the country. I would say that strict equality should apply to the access to billboards and, in principle, to media. Concerning public funding, on the contrary, previous results can be taken into account.

Equality of access to publicly owned media means not only equality of time, but access to similar time-periods. Some parties cannot be given prime viewing times and others off-peak slots. The Code of Good Practice in Electoral Matters also states that, "in conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections." In particular, equal financial conditions should be ensured for advertising.

Equality also applies to public funding, and may here be strict or proportional too (or partially proportional). International organisations recommend balanced financing: providing for some public funding in order for electoral stakeholders not to be dependent on private interests, but also for access to private funding in order not to make them dependent on the state.

A level playing field also implies that administrative resources in general are not abused to favour one or several political stakeholders. This is a theme in itself which is presently addressed by a conference co-organised in London by the Parliamentary Assembly of the Council of Europe and the Venice Commission

Up to now, we have discussed more about equality, and in particular equality of opportunity, than about liberty. The situation is however different if we address private

funding, since limitations are often provided for in order to ensure a level playing field. It is even the absence of any limitation which would go against international and in particular European standards.

Before going into more detail, I would like to say that the distinction between financing of campaigns and financing of parties is not very clear-cut and has even become moot in a number of countries which make no distinction, for example by providing for permanent public political party funding.

The issue is therefore limitations in private funding of campaigns – and funding of campaigns cannot be separated from funding of political parties in general. It is true that legislation often makes the distinction, in particular in new democracies, but the issue has to be addressed in its globality. Who implements the various pieces of legislation is another issue, and consistency should be ensured.

In order to avoid politics to need excessive amounts of money available only to the happy few, good practice would be to limit at the same time the total amount of contributions and the amount of the contribution of a single donor.

The more classical form of party funding is the membership fees. They should be of a reasonable amount in order for party membership not to be reserved to the wealthy; and membership fees should not be used to circumvent contribution limits for individuals.

The main issue is however gifts by individuals (and possibly loans, since it is not always certain that they will be refunded...). Gifts include financial and in-kind contributions.

It is suitable for candidates' own contributions to be limited in order not to reserve politics to the wealthiest. However, the main concern is of course financing by other persons. In particular, anonymous donations should be limited or forbidden to avoid fraud, while donations by companies may also be forbidden. Contributions from foreign sources may be forbidden, but the proportionality principle has to be respected: the concrete situation of each country will have to be analysed. Moreover, the prohibition should not include contributions by nationals residing abroad or having properties abroad.

At any rate, as already said, to avoid corruption, there should be a cap for every single donor.

Good practice includes limitation in donations, but what about campaign expenses: should they be unlimited?

General comment No. 25 of the UN Committee of Human Rights states that "[r]easonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party".

Let us then come back to some theory. At first sight, we have to solve a conflict between freedom (to finance and spend) and equality. Which freedom? Which aspect of the principle of equality?

First, which freedom? In the United States it would be freedom of speech, but in other countries, as well as at universal and European level, this is not so clear. Free suffrage? It has been denied by the Human Rights Committee: spending limitations, on the contrary, ensure free choice, and more precisely freedom of voters to form an opinion. In other words, contrary to the first impression, such restrictions are not intended to restrict freedom but to protect it. Freedom of voters to form an opinion and equality of opportunity go hand in hand.

Second, which aspect of the principle of equality? Equality of opportunity, and not an egalitarian kind of affirmative action in favour of small parties.

That being said, we must not forget that restrictions to funding and expenses are restrictions to a freedom. While they may favour free suffrage if not strict, they may go against it and against freedom of association if they are very strict – for example if private funding is totally prohibited or very limited compared to public funding. Freedom of voters to form an opinion, in particular, implies a vibrant electoral campaign. Money is central there, it is well known: as already said in the 19th century in the United States, the three main factors in an elections are money, money – and then I do not remember about the third one.. In other words, another fundamental principle of constitutional law has to be applied: proportionality, under its various aspects. The limitations must permit reaching the intended goal, they should not go further than necessary, and a balance of interests should be made. I would define these interests as follows: the need to collect and spend as much money as possible and the need to ensure a level playing field.

These principles have then to be applied in real life, in order not to stay *lex imperfecta*; in practice, this will lead to campaign finance reporting requirements as well as political party finance reporting requirements, which will often be dealt with by EMBs. Transparency is the key word: it requires disclosure of contributions and an explanation of expenditures.

As a representative of the Venice Commission, I would like to remind you that the issue of the financing of political parties and campaigns has already been addressed in a number of documents of the Venice Commission. The guidelines on political party regulation, drafted by the OSCE/ODIHR and the Venice Commission, are the main achievement in this field and I am pleased to inform you that an updated version will be issued next year. A part of the information I have given to you is based on the draft now discussed. All details will be found in the final document.

To conclude: (on the theoretical aspect first) as much liberty and as much equality of opportunity as possible have to be ensured. However, in some cases – but not in so many -, these fundamental principles may collide; then, another basic principle of constitutional law, proportionality, has to be applied to ensure a balanced solution. (Practical aspect) then, the legislator and the bodies applying legislation, such as the EMBs, have to translate these principles into concrete reality.

Thank you very much for your attention.