Politicians and Hate Speech:

A Legal Comparison - South Africa and the Netherlands

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ABSTRACT

Freedom of expression within a political context is of vital importance for democratic societies. However, such freedom can have dangerous effects where utterances amount to political hate speech. Balancing the right to freedom of expression and the prohibition of political hate speech proves to be a dilemma; where hate speech is prohibited, the right to freedom of expression is limited. While universal instruments may give the idea that a universal approach to this dilemma exists, case law suggests otherwise. Hence, this thesis answers the question: "*How is, by comparison, the use of hate speech by politicians constitutionally regulated in the Netherlands and in South Africa?*" Whereas both constitutional legal frameworks show a determination to guarantee the right to freedom of expression, they simultaneously provide legislation with which hate speech can be prohibited. Nonetheless, significant differences exist as well, primarily due to differences in the working of the constitutional legal orders, the application of diverse definitions, and the societal contexts.

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CHAPTER 1. INTRODUCTION

"If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind."[1]

1.1. Contextualization of the research

While renowned philosophers, such as John Stuart Mill, had already acknowledged the importance of liberalism in the freedom of expression[2] decades ago, it was not until the aftermath of the Second World War that the significance of the freedom of expression – and fundamental human rights in general[3] – within the political processes of democracies was recognised on a large scale in the Western world.[4] Simultaneously, the great risks of such liberal thoughts about the right to this freedom had become painfully evident during Hitler's rule in Europe.[5] As a result, it has been widely agreed that the right to the freedom of expression knows two sides.

On the one hand, the freedom of expression proofs to be a quintessential right for politicians in democracies, due to the fact that this freedom safeguards the working of political processes;[6] the right to freedom of expression is of vital importance for, *inter alia*, guaranteeing political pluralism in political decision making,[7] providing the opportunity to test opposing claims in democratic discourse,[8] and giving the possibility to criticize and challenge politicians who act on behalf of the inhabitants of a state.[9]

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1 John Stuart Mill, *On Liberty*, 2 ed., Boston: Ticknor and Fields, 1863, p. 35.

2 Within academic literature the notions "right to freedom of expression" and "right to freedom of speech" are used interchangeably. Throughout this thesis the notion "freedom of expression" will be used, based on the definition provided in Article 19(2) of the 1966 International Covenant on Civil and Political Rights, which states that the freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." This definition was chosen since it is most inclusive in nature. Moreover, it was considered that the wording of "right to freedom of speech" would result in a definition which scope is too small, since by definition it seems to limit itself to spoken words.

3 Christian Tomuschat, 'International Law', in Christian Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective*, The Hague: Kluwer Law International, 1995, pp. 281-282.

4 Fareed Zakaria, 'The Rise of Illiberal Democracy', 76 *Foreign Affairs* 1997, p. 27.

5 Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: a Comparative Analysis', 24 *Cardozo Law Review* 2003, p. 1525.

6 Calvin R. Massey, 'Hate Speech, Cultural Diversity, and the Foundation Paradigms of Free Expression', 40 *UCLA Law Review* 1992-1993, pp. 116-117.

7 Alexander Tsesis, 'Dignity and Speech: the Regulation of Hate Speech in Democracy', 44 *Wake Forest Law Review* 2009, p. 497.

8 Ibid.

9 Nigel Warburton, *Free Speech: A Very Short Introduction*, New York: Oxford University Press Inc., 2009, pp. 2-4.

On the other hand, it must be recognised that words can have dangerous effects when they are uttered by influential individuals, such as politicians, in the form of hate speech,[10] since their expressions have the ability to reach and move large groups of people within a society.[11]

Acknowledging this flipside of the right to the freedom of expression and its possible clash with other human rights, most nations around the globe have adopted legislative measures through which the right to the freedom of expression may be limited.[12] Such national laws, attributed to act against political hate speech, predominantly find their roots in the principles and provisions enshrined in international instruments, such as the 1966 International Covenant on Civil and Political Rights (hereinafter "ICCPR").[13] While clearly based on these same universal principles and provisions, relevant legislation on hate speech on a national level may actually vary greatly from country to country. As a result, states around the world may deal with the problem of how to frame the right to the freedom of expression in such a way that this fundamental right is sufficiently protected, while simultaneously, the dangers of hate speech within a political context are properly limited within their national legal order.

Signs which initially seem to confirm this idea are found in the outcomes of recent highly publicised legal cases in which politicians have been accused of hate speech. If one for instance considers the case of Dutch politician Geert Wilders[14] and the very recent case of South African politician Julius Malema[15] simply on the basis of the outcome of these cases, it

[10] While many different definitions of hate speech are found within academic literature and legislation on a national and international level, the most inclusive definition is believed to be the definition used by the European Court of Human Rights, which holds that hate speech exists of "all forms of expression which spread, incite, promote or justify hatred based on intolerance". This definition can, inter alia, be found in the following cases: ECtHR, *Gündüz v. Turkey*, judgment of 4 December 2003, case No. 35071/97, para. 40 and ECtHR, *Erbakan v. Turkey*, judgment of 6 July 2006, case No. 59405/00, para. 56. This definition is found to be most inclusive, since it does not exclude hate speech on specific grounds by not including them specifically in the definition and leaves much room for including hate speech based on various grounds. However, it is considered that this definition is not necessarily the best definition when brought into connection with hate speech legislation which limits the right to the freedom of expression, since the wider the scope of a definition of hate speech, the more the right to the freedom of expression is limited.

[11] Thomas J. Webb, 'Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System', 50 *Washburn Law Journal* 2011, p. 445.

[12] Ibid., p. 446.

[13] Article 20(2) of the ICCPR states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

[14] Rechtbank Amsterdam, *Wilders*, judgment of 23 June 2011, case No. 13/425046-09. Wilders was accused of hate speech on the basis of religion which targeted Muslims in the Netherlands. He was acquitted by the Court of Amsterdam in 2011. A more elaborate account on this case can be found in para. 2.4 of this thesis.

[15] Equality Court, *Afri-Forum and Another v Malema and Others*, judgment of 12 September 2011, case No. 2011 (6) S.A. 240 (EqC), 2011 (12) B.C.L.R. 1289 (EqC). Malema was accused and convicted for hate speech targeting "the white Afrikaans speaking community including the farmers who belongs to that group" by singing

appears that the approaches taken to limit the effects of hate speech are indeed far from universal. This situation sparks an interest in conducting sound comparative legal research on hate speech in the Netherlands and South Africa.

1.2. Research Question

It is against this background that this thesis attempts a comparative legal study on constitutional legislation on hate speech in the Netherlands and South Africa and aims to answer the following research question: "*How is, by comparison, the use of hate speech by politicians constitutionally regulated in the Netherlands and in South Africa?*"

In order to form a substantiated answer to this main question, parts of this question will be answered in each following chapter. As such, Chapter 2 provides an answer to the question "How is the use of hate speech by politicians constitutionally regulated in the Netherlands?" The subsequent chapter answers the sub-question "How is the use of hate speech by politicians constitutionally regulated in South Africa?" Next, Chapter 4 answers the question "What are the main similarities and differences between constitutional legislation on hate speech in South African and the Netherlands?" In conclusion, Chapter 5 answers the main research question as posed in this Introduction.

1.3. Embedding

Due to the limited scope of this thesis, it is important to properly embed the topic of research in order for the thesis to be kept within its scope and for it to only include those themes which are needed to answer the core research question. Hence, the following choices are made.

First, since the notion of hate speech seems to be intrinsically linked to the right to freedom of expression, it seems inevitable that this freedom must be included in this study. Hence, while the main focus lies on political hate speech, this thesis will discuss the concept of the right to freedom of expression, in as much as it is connected to the constitutional legislation on hate speech in the Netherlands and South Africa.

Secondly, this study will compare constitutional legislation on political hate speech in both the Netherlands and South Africa. The choice for precisely these two nations is mainly based on academic interest. While the choice for the Netherlands as one of the compared states seems evident from the place where this thesis is written, it is based on the presence of a written constitution, relevant case law on political hate speech, and an academic interest in

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an ANC liberation song called "*Dubul'ibhunu*", which include phrases which translate as "kill the Boer" in English. A more elaborate account on this case can be found in para. 3.3 of this thesis.

Dutch law as well. The choice for South Africa is equally based on academic interest and the presence of a written constitution and relevant recent case law on political hate speech. Moreover, South Africa knows a legal system which is different from the Netherlands' legal system, and hence, the combination of the two countries seemed to be relevant within this comparison on hate speech legislation. Nevertheless, it must be acknowledged that it would have been interesting and challenging to compare legislation on hate speech between more than two states. However, the space and time limitations of the thesis did not allow for this. Additionally, considering the fact that this thesis is the author's first experience with writing a legal comparison and concerns Dutch and South African legislation on which only basic knowledge is acquired during the undergraduate level of study, comparing the legislation of two nations poses a challenge deemed large enough.

Furthermore, it is important to clarify that for South Africa the focus of research will lie on the South African Constitution of 1996,[16] while for the Netherlands mainly international law - the European Convention of Human Rights (hereinafter "ECHR") and the ICCPR - will form the basis of research within this comparative study. However, national constitutional legislation will be considered as well. This focus is based on an important distinction between the legal structures of South Africa and the Netherlands; while the Netherlands' legal system is characterised by monism,[17] South Africa knows a dualist legal system[18].[19] Hence, whereas in the Netherlands international law has in principle direct effect and takes precedence over national legislation, international law must first be transformed into national legislation in South Africa before it is entered into the national legal system. Moreover, international law has a subordinate position towards the South Africa's principal national legislation, that is, the 1996 Constitution.[20]

Lastly, this research will focus on hate speech expressed by politicians, and hence, on political hate speech. This decision was made on the basis of the idea that hate speech in a political setting is expressed in the public eye and can therefore be understood to have a wide reach. Hence, there could be more reason for limiting such speech uttered by politicians. On the other hand, as stressed before, the freedom of speech for political purposes, and hence for politicians, seems particularly important within democracies, and therefore, it may be

[16] Chapter 2 of the South African Constitution of 1996 contains the Bill of Rights, which proves to be relevant for this thesis.
[17] More information on monism within the Dutch legal system may be found in Chapter 2.
[18] More information on dualism within the South African legal system may be found in Chapter 3.
[19] Gerhard van der Schyff, *Limitation of Rights: A study of the European Convention and the South African Bill of Rights*, Nijmegen: Wolf Legal Publishers, 2005, p. 7.
[20] Ibid., pp. 7-8.

considered that politicians need to enjoy more freedom in their expressions. This paradox seems to be especially interesting.

1.4. Methodology

Characteristic for the methodology applied in this thesis is that it involves a non-empirical study in the form of a comparison of the law on hate speech in two distinct legal systems, namely, the Netherlands and South Africa. Hence, this thesis concerns a legal comparison[21], which is "a method […] that facilitate[s] the systematic comparison of two or more legal systems or sub-divisions thereof […]."[22] The choice for this method of study is founded on the intention to gain more insight in the legal systems of the Netherlands and South Africa and hate speech therein; hence, to locate and understand the sources of constitutional law and the hierarchy of legal authority within both legal systems. As such, this study is conducted out of academic interest, which is one of several motivations one can have for performing comparative legal research.[23] Use is made of a literature review study, whereby books, journals, articles, legislation (Dutch, South African, and international), international human rights instruments, and case law (Dutch, South African, and international) have been studied and compared.

Before the constitutional regulation of political hate speech in the Netherlands and South Africa may be compared, it was found that first the situation in both states should be studied separately. The Netherlands is analysed first, since during the BA Liberal Arts & Sciences more – though very limited - prior knowledge about the Dutch legal system had been acquired. As such, it formed a good starting point.

1.5. Structure

First, Chapter 2 contains the analysis on constitutional legislation on political hate speech in the Netherlands. Hereby, it will be argued that while the right to freedom of expression is protected under Article 7 of the Dutch Constitution, international law has a higher position within the Dutch legal order and therefore takes precedence over Dutch constitutional law.

[21] This thesis constitutes micro-comparison, since the study entails a specific aspect – legislation on hate speech - of two legal systems, and not, as in the case of macro-comparison, the study of two legal systems in their entirety. See P. De Cruz, *Comparing Law in a Changing World*, 2 ed., London: Cavendish Publishing Limited, 1999, p. 213.
[22] *Supra* note 19, p. 3.
[23] *Supra* note 21, pp. 18-19. See also M. Salter and J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, Essex: Pearson Education Limited, 2007, p. 183.

This working of the Dutch constitutional legal order will be illustrated by means of the Wilders hate speech case.

Subsequently, Chapter 3 focuses on constitutional legislation on hate speech in South Africa. In this regard, it will be argued that the South African Constitution is the supreme law within the nation's legal order. By means of the Malema hate speech trial, the working of the South African constitutional legal order will be explained.

Next, in Chapter 4 both constitutional legal frameworks will be compared. Hereby, the main similar and different approaches taken to limit political hate speech will be considered and explained. It will be argued that while both the Netherlands and South Africa seem to have developed constitutional legislation with which hate speech may be limited, this legislation is based on different constitutional frameworks and different societal contexts, and as a result, differences exist.

In conclusion, Chapter 5 answers the main research question by providing an overview of the findings in the previous chapters.

CHAPTER 2. HATE SPEECH IN THE NETHERLANDS

The aim of this chapter is to study the Dutch Constitutional framework on political hate speech. It will first discuss the position of international law within the Dutch legal order. Subsequently, it will set out the relevant international law and case law on freedom of expression and hate speech, most prominently the provisions of the ECHR and the ICCPR and case law of the European Court of Human Rights (hereinafter "ECtHR"). Furthermore, Dutch national law on hate speech and freedom of expression will be explained. Finally, this chapter will discuss the case of Dutch politician Wilders.

2.1. International law in the Dutch legal order

Whereas the aim of this chapter is to clarify the Constitutional regulation of hate speech in the Netherlands, it is first of all required to discuss the importance of the position of international law within the Dutch legal order. The relation between the Dutch legal order and the international legal order can be characterized as monist, meaning that international law - under constitutionally regulated circumstances - forms directly part of the Dutch legal order.[24] The basis for this monist approach and the direct effect of international law lies in unwritten Dutch constitutional law.[25] Furthermore, Article 93 and 94 of the written Dutch Constitution of 1983 provide clarity for the judiciary and the legislator about the working of this direct effect of international law; Article 93 and 94 explain that an international provision must be of a generally binding nature before the provision has direct effect within the Dutch legal order.[26] Article 93 of the 1983 Constitution dictates that:

> "Provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their content shall become binding after they have been published."

Article 94 of the Constitution further adds that:

[24] Gerhard van der Schyff, 'The Protection of Fundamental Rights in the Netherlands and South Africa Compared: Can the Many Differences be Justified?', 2 *Potchefstroom Electronic Law Journal* 2008, p. 7.
[25] M.C. Burkens et al., *Beginselen van de Democratische Rechsstaat: Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, 6 ed., Deventer: Kluwer, 2006, p. 331.
[26] Ibid.

> "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law which can bind everyone."

As such, article 94 allows for the judiciary to review national legislation – including acts of Parliament - for compliance with international law where the relevant provision of international law is of a generally binding nature.[27] Thus, provisions of international law are considered to be highest in hierarchy within the national legal order. Hence, international law is the supreme law in the Netherlands and takes precedence over national law.[28] In this respect it is important to decide which public international legislation "can bind everyone",[29] as this forms the basis for the direct application of international legislation. From academic literature it becomes evident that there is not so much clarity as to which legislation falls within the scope of this definition.[30] However, "this usually means that classical rights guaranteed in international treaties are applied, and not socio-economic rights bar a few exceptions, as the latter rights are usually judged not to be so binding."[31] In practice it is the Dutch judiciary which decides whether or not a provision of international law can bind everyone. Thus, the direct working of international law within the national legal system is to a degree limited by the willingness of the Dutch judiciary to rule that a specific provision of international law "can bind everyone". However, it can be found that judges do not often refrain from applying a national law for incompatibility with international law.[32]

2.2. Hate speech in relevant international law

Since international legislation is highest in legal hierarchy, international law on hate speech will be considered before national (constitutional) legislation on hate speech is considered in this chapter. As discussed, classical rights generally have direct working within the Dutch legal order. As is known, legislation on hate speech amounts to limiting the right to the freedom of expression. Given the previous, it is important to decide whether or not the right to

[27] Monica Claes and Gerhard van der Schyff, 'Towards judicial constitutional review in the Netherlands', in Gerhard van der Schyff (ed.), *Constitutionalism in the Netherlands and South Africa: A Comparative Study*, Wolf Legal Publishers, 2008, p. 127.
[28] Ibid. See also *supra* note 25, p. 330.
[29] Article 93 and 94 of the Dutch Constitution of 1983.
[30] See for instance F. Vlemminx, *Een nieuw profile van de grondrechten. Een analyse van de prestatieplichten ingevolge klassieke en sociale grondrechten*, 3 ed., The Hague: Boom Juridische uitgevers, 2002, pp. 203-207 and 221.
[31] *Supra* note 27, p. 17.
[32] L.F.M. Besselink and R.A. Wessel, *Ontwikkelingen in de internationale rechtsorde en Nederlands constitutioneel recht*, Deventer: Kluwer, 2009, p. 52.

the freedom of expression is a classical right in regard to legislation on political hate speech. The freedom of expression is widely agreed to be a classical right[33] and can be found in both the ECHR and the ICCPR. As such, the provisions addressing political hate speech – and in relation the right to the freedom of expression – within these international legal instruments will be analysed in more detail in the following paragraphs.

2.2.1. The ECHR

The ECHR does not contain a specific provision which discusses hate speech.[34] However, while the ECtHR acknowledges the significance of the freedom of expression within a democratic society[35] and even sees the importance of providing individuals the right to "offend, shock or disturb"[36] others with their expressions, the Member States united in the Council of Europe simultaneously see the importance of acting against "extremist" political hate speech.[37] The Council of Europe Committee of Ministers has given the following definition of "hate speech" in Recommendation 97(20):[38]

> "The term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[39]

In this regard, the ECHR provides two options for excluding hate speech from the protection offered to the freedom of expression in Article 10(1) of the ECHR, which states:

> "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."

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[33] *Supra* note 30, p. 8.
[34] ECtHR, 'Factsheet - Hate speech', ECHR Press Unit, February 2012 <www.echr.coe.int/NR/rdonlyres/D5D909DE-CDAB-4392-A8A0-867A77699169/0/FICHES_Discours_de_haine_EN.pdf> accessed 9 June 2012.
[35] Anne Weber, *Manual on hate speech*, Strasbourg: Council of Europe Publishing, 2009, p. 1.
[36] ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, case No. 5493/72, para. 49.
[37] Council of Europe Committee of Ministers, 'Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"'. See also *supra* note 34, p. 1.
[38] *Supra* note 35, p. 2.
[39] *Supra* note 37.

The first option for a Court to exclude hate speech from protection is by applying Article 17 ECHR,[40] which holds:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Given the previous, it can be found that expressions which "amount to hate speech and negate the fundamental values of the Convention"[41] are excluded from the protection offered in the ECHR, and hence, are prohibited.

Secondly, Article 10(2) ECHR lists direct grounds for limitations to Article 10(1) ECHR:[42]

> "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."

Thus, in accordance with Article 10(2), the right to the freedom of expression as enshrined in Article 10(1) ECHR may be limited in order to ban hate speech from its protection, provided that the limitation must be "prescribed by law" and is "necessary in a democratic society".[43] Moreover, where political hate speech is prohibited or criminalized, and hence the right to the freedom of speech is limited, measures doing so must be "accessible" and "foreseeable".[44] Furthermore, the legislation must pursue a "legitimate aim",[45] thus it must be applied for the protection of national security, territorial integrity, public safety, for the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others as mentioned in Article 10(2). These reasons for protection are further not explained by the ECHR itself, but become apparent from relevant case law.[46] Furthermore, it

[40] *Supra* note 35, p. 19.
[41] *Supra* note 34, p. 1.
[42] *Supra* note 35, p. 19.
[43] *Supra* note 34, p. 1.
[44] ECtHR, *The Sunday Times v. United Kingdom*, judgment of 26 April 1979, case No. 6538/74, para. 49.
[45] ECtHR, *Handyside v. the United Kingdom*, para. 49.
[46] ECtHR, *Zana v. Turkey*, judgment of 25 November 1997, case No. 18954/91, para. 48-50 for instance refers to national security and the protection of territorial integrity. ECtHR, *Rekvényi v. Hungary*, judgment of 20 May

must be shown that such legislation is "necessary in a democratic society" as previously mentioned. Case law[47] demonstrates that whereas the ECtHR "stresses that it is of utmost importance in a democratic society to leave room for the political debate",[48] the Court has also considered that "it is of fundamental importance that politicians avoid to use words in their public speeches which could incite to intolerance."[49] In conclusion, it can be understood that there is a narrow margin of appreciation[50] in regard to limiting the right to the freedom of expression of Article 10 ECHR and political expressions – including hate speech – which can only be limited when there is a "pressing social need".[51]

2.2.2. The ICCPR

Article 20(2) ICCPR very specifically addresses hate speech,[52] as it states that:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

This is clear: hate speech must be prohibited by means of national legislation. Furthermore, the right to the freedom of expression is guaranteed in Article 19(2) ICCPR:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

However, Article 19(3) ICCPR adds limitations to Article 19(2):

1999, case No. 25390/94, para. 39-41 for instance refers to the protection of public safety. ECtHR, *Chorherr v. Austria*, judgment of 25 August 1993, case No. 13308/87, para. 26-28 for instance makes reference to the prevention of disorder. ECtHR, *Handyside v. the United Kingdom*, para. 45-52 refers to the protection of morals. ECtHR, *Grinberg v. Russia*, judgment of 21 July 2005, case No. 23472/03, para. 26 refers to the protection of the rights of others.

[47] The ECtHR has stressed this importance in ECtHR, *Féret v. Belgium*, judgment of 16 July 2009, case No. 15615/07 and ECtHR, *Erbakan v. Turkey*.

[48] Amsterdam District Court, 'Wilders verdict of 23 June 2011', English translation, para. 4.3.1 <www.rechtspraak.nl/SiteCollectionDocuments/Translation%20verdict%20Wilders%20230611.pdf> accessed 2 June 2012.

[49] Ibid.; See also ECtHR, *Erbakan v. Turkey*.

[50] As explained in ECtHR, *Handyside v. the United Kingdom.*

[51] *Supra* note 35, p. 37.

[52] Ibid., p. 1. The ICCPR is hereby the only international legal instrument on universal level which explicitly prohibits hate speech on the basis of nationality, race or religion.

> "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals."

It can be seen that the first ground for limitation is on paper comparable with the ground for limitation of the ECHR, namely, that the limitation needs to be "provided by law". Thus, there must be a legal basis for possible limitations of the right to the freedom of expression within national legislation.

2.3. Hate speech in national legislation

Given the previous, it is evident that national legislation on hate speech serves a function, even though international legislation takes precedence over Dutch law. As both the ECHR and ICCPR prescribe, the limitation of the right to freedom of expression must be "prescribed by law". Therefore, it must be considered whether Dutch legislation – both constitutional and other - contains provisions which may be linked to political hate speech and the freedom of expression. Hence, relevant provisions within national legislation, the Dutch Constitution of 1983 and the Dutch Criminal Code, will be considered.

2.3.1. The Dutch Constitution

As can be understood from the phrasing of Article 120 of the Dutch Constitution of 1983, constitutional review has been prohibited in the Netherlands:[53]

> "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

Hence, the judiciary is forbidden to test acts of parliament against the rights enshrined in the Constitution or the procedure prescribed for the promulgation of such laws.[54] While the Dutch Constitution does not contain an article directly including or making reference to the limitation of political hate speech, the Constitution does contain an article which refers to the right to the freedom of expression, namely, Article 7:

[53] *Supra* note 27, p. 125; *supra* note 24, p. 9.
[54] *Supra* note 24, p. 9.

> "1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
> 2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast."
> 3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
> 4. The preceding paragraphs do not apply to commercial advertising."

From the content of this article, it can be seen that this provision is not of great interest in regard to political hate speech; while section 4 is clearly irrelevant, sections 1 to 3 only guarantee that it is not necessary to request prior permission for expression via press, media, or another way. While one might not have to request prior approval for being able to express what he or she wants to express, it is not to say that what is expressed is actually allowed to be expressed. On the other hand, hate speech is also not explicitly forbidden on this account. Nevertheless, it can be argued that the third section of Article 7 provides for reasons to look for provisions which are more specific as to hate speech in other national legislation, as this section requires that no one can be required to have expressions approved before expressing them, however, "without prejudice to the responsibility of every person under the law". From the previous, it can be understood that "the law" may contain provisions which could shed more light on the situation.

2.3.2. The Dutch Criminal Code

The Dutch national legislation indeed contains a provision which lays the basis for criminal proceedings against political hate speech, namely, Article 137(d) of the Dutch Criminal Code[55] which states:

> 1. Any person who publically, either orally, in writing or by image, incites hatred to or discrimination against persons or violence against their person or property on the grounds of their race, religion or personal beliefs, their sex, or hetero- or homosexual orientation or their physical, psychological or mental disability, shall be liable to a term of imprisonment of not more than one year or to a fine of the third category.

[55] John C. Knechtle, 'When to Regulate Hate Speech', 110 *Penn State Law Review* 2005-2006, pp. 548-549.

> 2. If the offense is committed by a person who makes thereof a profession or habit or by two or more united persons a term of imprisonment of not more than two years or a maximum fine of the fourth category will be imposed.[56]

Hatred "shall be characterized as an extreme emotion, of a deep resentment and animosity".[57] Moreover, incitement of hatred can be explained to entail that an expression must contain "an amplifying element" with which an extreme emotion of deep antipathy and animosity is invoked.[58] Furthermore, it is interesting to consider that the text provides very clear guidelines on punishment.[59]

Important to understand is the intention of the legislator regarding this provision. It can be found that the legislator believed it to be unnecessary to include a "general criminal protection for institutes or organizations founded on religion or belief for their oral or practical activities in the Dutch society":[60]

> "As regards criticism for that action, an open space to the maximum extent shall be created. The penal provisions as proposed (addition of the district court: article 137c and 137d Dutch Criminal Code) do not hamper this at all, even if the criticism should concern the most fundamental perceptions on which those institutes or organizations are founded. The criminality starts where criticism results in the defamation of the honour and reputation or the incitement to hatred against or discrimination of the group for the sole reason that its members are followers of the religion or life philosophy against which the criticism is directed."[61]

This intention is interpreted as meaning that Article 137(d) can be applied only if it is proven that (political) hate speech targets persons directly, whereas it cannot be applied in cases

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[56] The original Dutch wording of the Criminal Code is translated, since no official English translation of the Criminal Code exists; hence, the provision stated is an unofficial translation. The original Dutch text of Article 137(d) of the Dutch Criminal Code can be found in C.P.M. Cleiren and M.J.M. Verpalen, *Strafrecht: Tekst & Commentaar*, 8 ed., Deventer: Kluwer, 2010, pp. 790-791, and holds: "1. Hij die in het openbaar, mondeling of bij geschrift of afbeelding, aanzet tot haat tegen of discriminatie van mensen of gewelddadig optreden tegen persoon of goed van mensen wegens hun ras, hun godsdienst of levensovertuiging, hun geslacht, hun hetero- of homoseksuele gerichtheid of hun lichamelijke, psychische of verstandelijke handicap, wordt gestraft met gevangenisstraf van ten hoogste een jaar of geldboete van de derde categorie. 2. Indien het feit wordt gepleegd door een persoon die daarvan een beroep of gewoonte maakt of door twee of meer verenigde personen wordt gevangenisstraf van ten hoogste twee jaren of geldboete van de vierde categorie opgelegd."

[57] *Supra* note 48.

[58] Ibid.

[59] Rijksoverheid, 'Straffen en Maatregelen: Hoe hoog zijn de boetes in Nederland?', 1 January 2012 <www.rijksoverheid.nl/onderwerpen/straffen-en-maatregelen/vraag-en-antwoord/hoe-hoog-zijn-de-boetes-in-nederland.html> accessed 1 June 2012. Per 1 January 2012, the maximum amount payable in the third category is €7800.00. Furthermore, Per 1 January 2012, the maximum amount payable in the fourth category is €19500.00.

[60] *Supra* note 48.

[61] Ibid. The original Dutch text can be found in Staten-Generaal Digitaal, 'Kamerstuk Eerste Kamer 1970-1971', no. 9724, order no. 22a, pp. 3-4 <www.statengeneraaldigitaal.nl> accessed 1 June 2012.

where institutes or organizations founded on religion or belief are targeted in a more general sense.[62]

2.4. Case law: Case Wilders

In order to see the working of the legislation on hate speech as discussed within the Dutch legal system in practice, the case of Dutch politician Geert Wilders - the most recent political hate speech trial in the Netherlands – will be analysed.[63] First, a brief introduction to Geert Wilders as a politician is given. Subsequently the counts of indictment are considered, after which a summary of the most relevant findings will be given, in which reference will be made to the working of the Dutch constitutional law as studied in the former paragraphs of this chapter.

Geert Wilders is a Member of Parliament in the Netherlands and is the leader of the Dutch political party "PVV" ("Party voor de Vrijheid"[64]). He is mostly known as a radical politician who expresses warnings about the dangers of Islam and the Koran for the Dutch society.[65] He was brought before the Amsterdam District Court via a criminal procedure and was accused on five counts. In light of this thesis, it is interesting to consider the Court's judgement on both count 2 and count 4, since they concern themselves with political hate speech against persons, on the ground of religion (count 2) and race (count 4):

> (2) Publicly – either orally, in writing, or by image – incited hatred against persons, namely, Muslims, on the ground of their religion, by placing and/or showing and/or letting hear (by himself or on his request) one or more texts and/or graphics and/or images and/or sound fragments in newspapers, on websites, and/or or in his movie "Fitna", which is available on the website "liveleak.com".[66]
>
> (4) Publicly – either orally, in writing, or by image – incited hatred against persons, namely, non-western immigrants and/or Moroccans, on the ground of their race, by placing (by himself or on his request) one or more texts in a Dutch newspaper and/or on his personal website.[67]

In order to see the working of Dutch legislation on political hate speech in practice, it is interesting to review the outcomes of the case and see whether or not the outcome is based on the legal framework as described earlier.

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[62] *Supra* note 48.
[63] Rechtbank Amsterdam, *Wilders*.
[64] Which can be translated as "Party for the Freedom".
[65] *Supra* note 48.
[66] *Supra* note 63.
[67] Ibid.

As a first step, the Court decided whether or not Wilders did actually make the utterances as accused. The Court argued that Wilders himself had stated during the proceedings that he indeed "expressed those utterances which are charged against him",[68] and that he has done so "as a politician within the framework of the public debate."[69] The Court continued with analysing the counts in connection to the legal framework and case law.[70]

In respect to count 2, the Court considered the legal framework of the case, in which they included the ECHR, national law and jurisprudence.[71] The Court started by quoting Article 10 ECHR, thereby recognizing the right to the freedom of expressions as safeguarded in the ECHR. Secondly, Article 137(d)(1) was cited, after which the Court clarified the intention behind this provision, as explained by the legislator. Hereby, the intention of the legislator not to include "a general criminal protection for institutes or organizations founded on religion or belief for their oral or practical activities in the Dutch society" within Article 137(d) was cited.[72] From the previous, the Court concluded that "the legislator expressly intended to penalize incitement to hatred against or discrimination of people."[73] Hence, the Court believed that utterances about a religion itself should be left outside the scope of article 137d of the Dutch Criminal Code, and hence, many of the utterances made by Wilders were deemed not to amount to hate speech, since they were specifically targeted against "Islam" and the "Koran", instead of against "Muslims", "non-western immigrants" and "Moroccans".

However, in some situations, Wilders had specifically targeted those groups or persons, and the Court did find that some of the utterance made by him amounted to hate speech. Nevertheless, Wilders was acquitted of count 2 since the Court argued that some of the utterances had been made within the context of a larger expression, from which it became evident that the message Wilders spread amounted to the danger or the "Islam" and "Koran".

Moreover, in some instances, the Court stressed the importance of the freedom of expression and made reference to the ECHR in order to emphasize the importance of free expression in a political context, and expressed that the ECHR only limits the right to the freedom of expression for urgent reasons. In this respect, the Court mentioned the decision of the ECtHR in *Féret v. Belgium*.[74] Furthermore, the Court considered that in light of the ECHR

[68] *Supra* note 48, para. 4.1.1.
[69] Ibid.
[70] *Supra* note 48, para 4.3. The Court considers "incitement to hatred against and discrimination of Muslims based on their religion", thus count 2 and 3. "Incitement to hatred against and discrimination of non-Western residents and Moroccans based on their race", thus count 4 and 5, were considered under para. 4.4 of the verdict.
[71] *Supra* note 48.
[72] Ibid.
[73] Ibid.
[74] ECtHR, case *Féret v. Belgium*, judgment of 16 July 2009, case No. 15615/07.

and landmark decision of the ECtHR in *Handyside v. United Kingdom*,[75] "even utterances which 'offend, shock or disturb' are allowed".[76] Nevertheless, the Court acknowledged that limitations to political speech might prove to be necessary, if words could incite to intolerance. Hereby the Court made reference to the case *Erbakan v. Turkey*[77].[78] In light of the previous, the Court decided that the context in which Wilders made his utterances played an important role. As the Court mentioned, "the district court determines that the multicultural society and immigration played an important role in the public debate at the time when the utterances were made. There is more room for the freedom of expression in situations when it is a more vehement debate. As stated, in those cases utterances may even offend, shock or disturb." Hence, it was concluded that the context could "take away the discriminatory character of the utterances", and therefore, Wilders' expressions did not exceed legal boundaries and should not be excluded from the public debate. Based on the foregoing, Wilders was acquitted on count 2.

A decision on count 4 proved to be rather easy, since the Court quickly concluded that it was impossible to prove the component "based on their race" within the count in any case.

2.5. Conclusion

Within the Netherlands, the right to freedom of expression is safeguarded in Article 7 of the Dutch Constitution of 1983. However, international law has a higher position within the Dutch legal order. Therefore, international legislation takes precedence over Dutch constitutional law. For this reason, Article 10 ECHR and Article 19 ICCPR prove applicable to freedom of expression in the Netherlands. While both protect the right to freedom of expression, they simultaneously allow for the limitation of expressions which amount to hate speech when certain conditions are met. Moreover, it was found that Article 137(d) of the Dutch Criminal Code provides for the possibility to prohibit and punish political hate speech. However, it is not to say that expressions made by politicians which fall within the scope of "hate speech" are necessarily prohibited. Due to the importance of freedom of expression within the political debate, such expressions may be considered to lose their unlawful character when made in a clear political context.

[75] ECtHR, case *Handyside v. the United Kingdom*, judgment of 7 December 1976, case No. 5493/72.
[76] *Supra* note 48.
[77] ECtHR, case *Erbakan v. Turkey*, judgment of 6 July 2006, case No. 59405/00.
[78] *Supra* note 48.

CHAPTER 3. HATE SPEECH IN SOUTH AFRICA

This chapter provides insight in the South African Constitutional framework on political hate speech. Hence, this section of the thesis will concern itself with the relevant constitutional law - the South African Constitution of 1996 - and with relevant national legislation - the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (hereinafter "PEPUDA"). Finally, the hate speech trial of South African politician Julius Malema will be studied and discussed in order to gain more insight in the practical working of the constitutional order.

3.1. The Constitution in the South African legal order

The South African Constitution of 1996 very clearly guarantees the supremacy of the Constitution, as can be seen from Article 2:[79]

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Hence, hierarchically the Constitution is the highest legislation within the South African legal order. In regard to the interpretation of the Bill of Rights – which is contained in the second Chapter of the South African Constitution - Article 39 explains:[80]

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum-
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[79] Article 1(c) of the South African Constitution mentions this supremacy as well, by stating that South Africa is founded on the value of "Supremacy of the Constitution and the rule of law."
[80] Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 5 ed., Lansdowne: Juta & Co, Ltd, 2005, p. 9.

Hence, given the previous, the Constitution places itself on a hierarchically higher level than other national legislation, international law, and foreign law.

As mentioned in the introduction of this thesis, South Africa's legal system takes a dualist approach to international law.[81] This entails that international law does not have direct effect within the South African legal order.[82] Rather, international provisions first need to be transformed and passed as national legislation before they can be invoked before national courts.[83]

While the Constitution remains the highest form of law, international standards must be used for interpreting the provisions enshrined in the Bill of Rights, as can be seen in Article 39(b). A "conflict between a transformed treaty and the South African Constitution is resolved by following the latter, this is also the case when a conflict arises between the Constitution and customary international law."[84] Furthermore, it is remarkable that the Bill of Rights even specifically allows for the consideration of foreign law in Article 39(c).[85]

3.2. Hate speech in national legislation

Due to the supremacy of the South African Constitution, and hence the limited role of international legislation within South African courts,[86] it is important to consider if the Constitution contains provisions on political hate speech and the right to the freedom of expression.

3.2.1. The South African Constitution

The second chapter of the Constitution of South Africa contains the Bill of Rights, which safeguards fundamental rights for all South Africans. In Article 16(1) of this Bill the right to freedom of expression is protected in a positive fashion:[87]

> "Everyone has the right to freedom of expression, which includes-
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

[81] *Supra* note 24, p. 7.
[82] Ibid.
[83] Ibid., p. 8. This is found in Article 231(4) of the South African Constitution of 1996.
[84] Ibid., p. 7.
[85] Article 39(c) of the South African Constitution of 1996.
[86] *Supra* note 24, p. 10.
[87] *Supra* note 19, p. 91.

From this provision, it can be seen that it is very clearly defined which types of expression are encompassed by the right to freedom of expression. And on the basis of this section of Article 16, politicians are free to speak their minds in South Africa. However, the second section of Article 16 contains internal limitations to the right to the freedom of expression and is therefore known to be a "transgression of rights provision":[88]

> "The rights in subsection (1) does not extend to-
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

As can be seen from the contents of this article, hate speech is very directly mentioned under section "c" of this provision. Moreover, the article provides for a definition of hate speech within the South African constitutional order; hate speech is the "advocacy of hatred which constitutes incitement to cause harm on the bases of race, ethnicity, gender or religion", as can be taken from the wording of Article 16(2) of the South African Constitution. Interestingly, this article pertains to "non-inclusion"[89] of certain groups of expression – such as hate speech – within the right to the freedom of expression, resulting in the fact that on the basis of this article such speech is not constitutionally protected[90].[91] Hence, "a statute prohibiting hate speech as defined in the Constitution cannot be subject to a freedom of expression challenge, because there is no constitutional right to speech of this nature."[92] This gives rise to the idea that hate speech may be prohibited by law in South Africa, since such law is constitutionally allowed for on the basis of Article 16.[93]

Additionally, the Bill of Rights contains general limitation provisions, namely, Article 7(3) which holds the following on the limitation of all rights protected in the Bill of Rights:[94]

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[88] Ibid., p. 114.
[89] Ibid.
[90] Relevant in this respect is the reasoning of the South African Constitutional Court about the interpretation of Article 16(2) of the Constitution in the case *Islamic Unity Convention v. Independent Broadcasting Authority*, judgment of 11 April 2002, case No. 2002 (4) SA 294 (C.C.), 2002 (5) BCLR 433 (C.C.), 11 April 2002, para. 31-32.
[91] Christa van Wyk, 'Hate Speech in South Africa', para. 4, 2002 <www.stopracism.ca/content/hate-speech-south-africa> accessed 13 June 2012.
[92] Ibid.
[93] Ibid.
[94] *Supra* note 19, p. 235.

> "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

Article 36 further provides exact grounds for the limitation of the freedoms mentioned in the Bill of Rights:[95]

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

Hence, it can be concluded that the right to freedom of expression knows limitations, and hence, the rights in the Bill of Rights are not absolute;[96] both Article 36 of the South African Constitution, which is general in application to all the rights in the Bill of Rights, and the specific limitations contained in Article 16(2) of this Constitution contain the possibility to limit the right to the freedom of expression.[97] The effect of specific limitations, such as Article 16(2) of the Constitution "is to clear up uncertainty over the application of the general limitation provision, or to qualify its limitation requirements so as to create stricter or more lenient justificatory measures."[98] In respect to Article 16(2), it can be understood that this provision allows for stricter justificatory measures. Thus, if "the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution."[99]

Where the right to freedom of expression would be interfered with by means of limiting political speech on the basis of legislation or "other governmental action",[100] the South African courts make use of a two-stage approach for deciding whether or not there is an

[95] *Supra* note 80, p. 163.
[96] *Supra* note 19, p. 25.
[97] Ibid., p. 236.
[98] Ibid., pp. 236-237.
[99] *Supra* note 91, para.4.
[100] Constitutional Court, *Coetzee v. Government of the R.S.A.; Matiso v. Commanding Officer, Port Elizabeth Prison*, judgment of 22 September 1995, case No. 1995 (4) S.A. 631 (C.C.), 1995 (10) B.C.L.R. 1382 (C.C.), para. 9.

infringement of this right.[101] First, it is decided whether there is a right to freedom of political expression, and simultaneously, it is decided if this right has been contravened.[102] If an infringement of the right to free political speech is indeed found, the second stage of the approach entails that the courts decide whether or not the interference with the right can be justified under the limitation clause of Article 36.[103]

3.2.2. The PEPUDA

Besides the Constitution, the South African constitutional legal order knows "a growing body of subsidiary constitutional legislation, designed to amplify and give more concrete effect to key provisions of the Constitution and the Bill of Rights".[104] PEPUDA is an example of such "subsidiary constitutional legislation", which is relevant in regard to political hate speech.[105] This instrument binds the South African State and all persons[106] and "implements and clarifies the constitutional hate speech provision. While the Constitution puts these forms of expression outside constitutional protection, the act clearly prohibits hate speech and creates rights."[107] Hate speech is directly mentioned in Article 10 of this Act:[108]

> "(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
> (a) be hurtful;
> (b) be harmful or to incite harm;
> (c) promote or propagate hatred.
> (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

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[101] *Supra* note 91, para. 7. Acknowledgment of this two-stage approach within the South African constitutional legal order can be seen in, *inter alia*, Constitutional Court, *S. v. Zuma*, judgment of 5 April 1995, case No. 1995 (2) S.A. 642 (C.C.), 1995 (4) B.C.L.R. 401 (C.C.), para. 21; Constitutional Court, *Coetzee v. Government of the R.S.A.; Matiso v. Commanding Officer, Port Elizabeth Prison*, para. 9.
[102] *Supra* note 19, pp. 23-26; Constitutional Court, *S. v. Zuma*, para. 21.
[103] *Supra* note 80, p. 166.
[104] L. Du Plessis, 'The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Explanatory Observation', 14 *Potchefstroomse Elektroniese Regsblad* 2011, pp. 95-96.
[105] Ibid., p. 95. Also see *supra* note 19, p. 115; *supra* note 91, para. 7.
[106] Section 5 of the PEPUDA of 2000. However, section 5(3) explains that it "does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998), applies".
[107] *Supra* note 91, para. 7.
[108] *Supra* note 80, pp. 377-378.

Hence, this section imposes two requirements for expressions to fall within the scope of "hate speech",[109] namely, that (1) the expression must be based on a prohibited ground as established in section 1 (xxii) of the Act[110] and (2) the expression must be "reasonably construed" to show that there has been an intention to be hurtful or harmful, to incite harm,[111] or to promote or propagate hatred.

Section 10 furthermore contains a reference to Section 12 of PEPUDA, which includes a prohibition of "dissemination and publication of information that unfairly discriminates", from which certain *bona fide* forms of expression are excluded:

> "No person may—
> (a) disseminate or broadcast any information;
> (b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

Hence, these *bona fide* engagements, which include engagement in (1) artistic creativity, (2) academic and scientific inquiry, (3) fair and accurate reporting in the public interest or (4) publication of any information, advertisement or notice in accordance with section 16 of the Constitution (which guarantees the right to the freedom of expression and limitations to this right), seem to be exempt from the prohibition of hate speech in section 10 of PEPUDA.

It is interesting to note that on the basis of the previous it could be argued that PEPUDA goes beyond the Constitution in limiting the right to freedom of expression, since it allows for the exclusion of more categories of expression,[112] and hence, has the possibility to prohibit expressions which fall within the protection of the Constitution under Article 16(1). Thus, the Act could be argued to be unconstitutional.[113]

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[109] *Supra* note 91, para. 7.
[110] Prohibited grounds are mentioned in section 1 (xxii) of the South African PEPUDA of 2000, and include: "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground- (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."
[111] Hereby, it is interesting to note that section 2 (v) of the South African PEPUDA of 2000 makes a connection between "incitement to cause harm" in the Act and in Article 16(2)(c) of the South African Constitution of 1996. However, both instruments do not provide a clear definition of the word.
[112] *Supra* note 80, pp. 378-379.
[113] *Supra* note 91, para. 7.

Section 10 of PEPUDA also makes reference to section 21(d)(n) of PEPUDA, which includes provisions on the powers and functions of equality courts:[114]

> "After holding an inquiry, the court may make an appropriate order in the circumstances, including—
> (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation."

Hence, while PEPUDA allows for civil proceedings, it does guarantee for the opportunity for an equality court to refer cases concerning the publication, propagation, advocacy, or communication of hate speech to the Director of Public Prosecutions, which can instigate criminal proceedings.[115]

3.3. Case law: Malema Case

With the purpose to gain more insight in the practical working of the legislation on hate speech as previously discussed within this chapter, the application of legislation on the freedom of expression and hate speech in the recent hate speech trial of South African politician Julius Malema will be analysed. First, a brief introduction to Malema as a politician is given. Subsequently, the counts of indictment are considered and the most relevant findings of the Court are given, whereby reference will be made to the working of the South African constitutional law as analysed in the previous sections of this chapter.

Julius Malema was the President of the African National Congress Youth League (hereinafter "ANCYL"), which is the youth wing of South Africa's ruling party, the African National Congress (hereinafter "ANC"),[116] from 2008 until 2011.[117] He is believed to be "one of the country's most prominent politicians" and has been both celebrated and criticised for his role in South African politics.[118] While parts of the South African inhabitants are

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[114] Department of Justice and Constitutional Development of the Republic of South Africa, 'Stand and Defend your Right to Equality', Pretoria: Department of Justice and Constitutional Development, p. 3, 2011 <www.justice.gov.za/EQCact/docs/2011eqc-a5-booklet.pdf> accessed 15 June 2012. South Africa knows specialized Equality Courts, which are "designated to hear matters relating to unfair discrimination, hate speech and harassment." For their area of jurisdiction, all High Courts are equality courts and all magistrates' courts serve as equality courts in the nine provinces of South Africa.

[115] *Supra* note 91, para. 7.

[116] African National Congress, 'The Youth League', 2011 <www.anc.org.za/show.php?id=4778> accessed 14 June 2012.

[117] BBC, 'Profile: Julius Malema', 2012 <www.bbc.co.uk/news/world-asia-pacific-14718226> accessed 14 June 2012.

[118] The Guardian, 'ANC's youth leader found guilty of hate speech for Shoot the Boer song', 2011 <www.guardian.co.uk/world/2011/sep/12/julius-malema-guilty-hate-speech> accessed 1 June 2012; Also see

supporters of his political ideas, which include land redistribution from white farmers to the black community and the nationalization of the South African mining industry, other groups within the South African society oppose these ideas and claim him to be inciting hatred against specific groups, such as women and white South Africans.[119] Malema has especially been criticised for singing the ANC struggle song "*Dubulu iBhunu*",[120] a song dating back to the ANC's freedom struggle during apartheid.[121]

In this respect, the Afrikaner civil rights group Afri-Forum accused Malema of political hate speech and a case against him was brought before the South Gauteng high court, which referred the case to the Equality Court. During this process, Malema was accused to have:

> "propagated, advocated and/or communicated words based on an ethnic or social origin, culture, language and/or were words that could reasonably be construed to demonstrate a clear intention to be hurtful to particular ethnic groups and to incite or be harmful to certain ethnic groups and to promote and propagate hatred."[122]

In regard to the utterances made, Malema was said to have publically "recited and/or sung and/or chanted certain words (the objectionable utterances)" which were the following:

> "1. '*Awudubula (i) bhulu*' (translated as 'Shoot the Boer/farmer').
> 2. '*Dubula amabhunu baya raypha*' (translated as 'Shoot the Boers/farmers they are rapists/robbers').
> 3. 'They are scared the cowards you should shoot the Boer the farmer! They rob these dogs'".[123]

In his utterances, Malema was accused of literally referring to "Afrikaans farmers and within the context of the utterances referred to white people generally, more particularly white Afrikaners."[124]

While giving the verdict, the Court paid particular attention to the context in which the utterances had been made; even before mentioning the counts on which Malema had been accused, Judge Lamont started by setting out historical facts in order to sketch the "social

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supra note 112; Nathalie Hyde-Clarke, 'Political posturing and the need for peace journalism in South Africa: The case of Julius Malema, 37 *Communicatio* 2011, p. 42.
[119] *Supra* note 117.
[120] Generally translated into English as "Shoot the Boer/Farmer".
[121] Susan Benesch, 'Words as Weapons', 29 *World Policy Journal* 2012, pp. 7-8.
[122] Equality Court, *Afri-Forum and Another v Malema and Others*, para. 49.
[123] Ibid.
[124] Ibid.

interaction of the groups within society", which were deemed of vital importance in this case.[125]

As to the legal framework applied, the Court explained and cited the relevant legislation for its decision, being (1) Article 9 (right to equality), Article 16 (right to freedom of expression), and Article 12 (right to freedom and security) of the Bill of Rights in the Constitution, (2) national legislation, whereby section 10 and section 15 of PEPUDA and customary law (*Ubuntu*[126]) were mentioned, (3) international law,[127] and (4) foreign law[128].[129] On the basis of this legal framework, the Court argued that there was inevitably "a tension between the right of the speaker to freedom of expression and the obligation of the speaker not to use words constituting hate speech".[130]

Having regarded the legal framework,[131] the Court considered that during the occasions the words had been uttered, Malema could have known that his audience did not solemnly consist of the people present; the actual audience being the white South African population.[132] Furthermore, freedom songs such as "*Dubul'ibhunu"*, which had a place during the apartheid struggle, must be understood to be inappropriate in the current South African society, which is aiming to improve race relations. Hence, in September 2011, the Equality Court ruled that "Malema published and communicated words which could reasonably be construed to demonstrate an intention to be hurtful to incite harm and promote hatred against the white Afrikaans speaking community including the farmers who belongs to that group. The words accordingly constitute hate speech".[133]

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[125] Ibid., para. 1. In this respect, it was made clear that the reference to "Boere" in the song can be connected to the white South Africans, who under apartheid had lead a cruel and discriminatory regime, a regime which ultimately "became identified with the Boere". Furthermore, the ANC was explained to have been one of the leading resistance parties, consisting of the black majority, which struggled for freedom from the white minority under apartheid. Moreover, the period of apartheid was sketched, the importance of the Constitution was stressed, the difficult transition period was explained, and the important role of the Constitution and the related legislation it invokes within the new society was mentioned.

[126] This can be understood to be customary law which is used for the resolution of conflicts, as can be seen in *Afri-Forum and Another v Malema and Others*, para. 18.

[127] In respect to international law, the Court mentioned the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the 1966 ICCPR.

[128] The Court mentioned American jurisprudence in respect to the importance of the right to the freedom of expression in para. 32 of the verdict.

[129] *Supra* note 122, para. 14-27.

[130] Ibid., para. 31.

[131] It was remarkable that while the Court mentioned all forms of applicable legislation early in the verdict, the Court did not actually apply these instruments in its reasoning on whether or not the expressions of Malema could be characterized as hate speech. Hence, while the case proves to be insightful when aiming to gain more understanding of the South African constitutional legal order, the cases did not so much help to understand the application of this framework in the Court's reasoning.

[132] *Supra* note 122, para. 94.

[133] Ibid., para. 108.

3.4. Conclusion

Within the South African legal order, the Constitution of 1996 is the supreme legislation. International law has no direct effect, and therefore, international law must first be transformed into national legislation which is in line with the Constitution before such law can be applied in the courts. Hence, the protection of the right to freedom of expression is found in the Constitution, and more precisely, in Article 16 of the Bill of Rights. This provision excludes hate speech from constitutional protection as well. Moreover, section 10 of the PEPUDA provides for additional constitutional legislation, with which hate speech is prohibited. When deciding on whether or not utterances made by politicians can be prohibited on the ground that such expressions amount to hate speech, the context in which such expressions have been made are considered. However, from recent precedent it becomes clear that the fact that expressions are made in a political context does not mean that such expressions are then permitted in order to allow for freedom of expression - which is considered to be important in political debate. Rather, recent precedent shows that the South African Equality Court considered that especially in such circumstances, hate speech can have dangerous effects and may be prohibited on this basis.

CHAPTER 4. HATE SPEECH COMPARED

After having studied the constitutional framework on political hate speech within the legal order of both the Netherlands and South Africa, this chapter will compare the main findings of the previous two chapters. Hence, key differences and similarities between the two systems are explained.

4.1. Constitutional framework

Regarding the constitutional frameworks of the Netherlands and South Africa some significant differences can be found. First, the countries know a difference in constitutional review. On the one hand, the Constitution is the supreme legislation in South Africa.[134] Hence, all legislation is under constitutional scrutiny and the legislator, that is Parliament, is subjected "to the judicially enforced Constitution."[135] On the other hand, the Dutch Constitution of 1983 knows a prohibition on constitutional review of Acts of Parliament, and hence, the judiciary is not allowed to review Acts of Parliament against the Dutch Constitution.[136] This amounts to a difference in the relation between the judiciary and the legislative within the Dutch and South African legal orders; while in both situations the legislative power is vested in the democratically elected legislative, rather than in the judiciary,[137] in the Netherlands the judiciary is not allowed to review Acts of Parliament against the Dutch Constitution, whereas in South Africa the judiciary does have this opportunity. Nevertheless, it must be mentioned that Article 94 of the Dutch Constitution does allow the Dutch judiciary to review Acts of Parliament against international law.[138] Hence, in fact both the Dutch and South African legislators are the bodies vested with legislative power and both the Dutch and the South African judiciary may review legislation in light of respectively international law and the Constitution. In essence, both systems thus give shape to the *trias politica*, the separation of powers, albeit in different ways.

Secondly, there is a difference in the hierarchy of norms within the constitutional legal orders. Whereas unwritten Dutch constitutional law places international legislation

[134] Article 1(c) of the South African Constitution of 1996.
[135] *Supra* note 24, p. 10.
[136] *Supra* note 27, p. 125.
[137] *Supra* note 24, p. 10.
[138] *Supra* note 27.

hierarchically above Dutch national legislation,[139] in South Africa the Constitution is the supreme law, and hence, international law is hierarchically lower than the Constitution.[140]

Furthermore, while the Netherlands knows a *monist* legal system, South Africa knows a dualist legal system. Hence, whereas international legislation has direct working, and can thus be directly invoked in Dutch courts, international legislation first needs to be transformed into national law which is in line with the contents of the South African Constitution before it can be applied in the national courts there.

While these differences exist, it must be concluded that there are similarities between the constitutional legal orders of the two nations as well, namely, both systems clearly "share a commitment to democracy and rights."[141] Moreover, besides the different approaches taken by the Netherlands and South Africa in regard to international law, it is apparent that international law plays an important role in both legal orders.[142]

4.2. Freedom of expression

In the Netherlands, the right to freedom of expression is included in Article 7 of the 1983 Constitution. However, due to the direct working and supremacy of international law, the main provisions which guarantee the right to freedom of expression are found in Article 10 ECHR and Article 19 ICCPR. Interesting is that while the definition of this right within the provisions of both instruments contain many similarities,[143] differences exist as well. Nevertheless, in regard to the Dutch constitutional legal order, it can be considered that the core of the freedom is the same, namely, that the right to freedom of expression in any case includes the freedom to receive and impart information and ideas, regardless of frontiers. Hence, this leaves much room for interpretation when arguing which expressions are allowed.

In South Africa, the right to freedom of expression is safeguarded in Article 16 in the Bill of Rights of the South African Constitution of 1996, and is more narrowly defined, as can, *inter alia*, be seen from the fact that the article specifically mentions freedom of artistic creativity, academic freedom, and freedom of scientific research. Therefore, it seems that the right to the freedom of expression is more restricted than in the Netherlands.

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[139] Ibid.
[140] As can be seen from Article 2 and Article 39 of the South African Constitution of 1996.
[141] *Supra* note 19, pp. 1-2.
[142] *Supra* note 24, p. 8.
[143] If a definition for the right to the freedom of expression would be made which would include all the similar elements of both instruments, this definition would read "Everyone has the right to freedom of expression. This right shall include freedom to receive and impart information and ideas, regardless of frontiers." Clearly, both definitions are heavily based on the definition used in Article 19 of the Universal Declaration of Human Rights.

4.2.1. Limitation of hate speech

In both South Africa and the Netherlands, expressions which amount to hate speech may be prohibited under certain circumstances. In the Netherlands, the definitions of the freedom of expression in both the ECHR and the ICCPR - which are applicable in the Dutch constitutional order - know internal limitations, based on the fact that this right brings certain "duties and responsibilities."[144] These are limitations which are included in the article itself. From the content of those provisions it can be illustrated that limitations to the right to freedom of expression must be prescribed by law and based on specific grounds, which are different in both cases. By means of these limitations, hate speech may be prohibited. Furthermore, Article 17 ECHR places certain expressions, such as hate speech, outside the scope of the ECHR's protection, where such expressions are not in line with the fundamental values of the ECHR. Hence, while this provision does not places any limitations on the freedom of expression, it does allow for hate speech to be prohibited.

The right to freedom of expression as defined in the South African Constitution also knows limitations; both internal limitations in Article 16(2) and a general limitation clause in Article 36 of the Constitution. Interestingly, the internal limitations as mentioned in Article 16(2) are actually not grounds for limitations, but the provision rather lists three forms of expression – including hate speech - which are excluded from constitutional protection. Hence, a link may be made to Article 17 of the ECHR, since this provision excludes hate speech under specific circumstances from the protection of the constitutional law as well.

4.3. Hate speech

Only in the case of the South African Constitution hate speech is directly mentioned within the limitation provisions which are applicable to the right to freedom of expression. Hereby, hate speech is explained as a form of expression whereby hatred is advocated which constitutes incitement to cause harm on the bases of race, ethnicity, gender or religion. Hence, expressions which fall within this scope are excluded from constitutional protection. They are, however, not explicitly prohibited on the basis of the South African Constitution.

In the case of the Netherlands, hate speech is not directly mentioned in the ECHR. However, the ICCPR does contain an article – Article 20(2) - which explicitly states that hate speech on the basis of nationality, race, or religion must be prohibited by law. This definition allows for expressions to be considered as hate speech on less grounds than the South African

[144] Article 10(2) ECHR.

definition. And while the ECHR does not contain provisions which specifically mention hate speech, the ECtHR does provide for a definition in its case law; hate speech exists of "all forms of expression which spread, incite, promote or justify hatred based on intolerance".[145] This definition is wider in its scope than the South African definition. While not providing a judgement, it should be mentioned that in light of limiting hate speech such a wide definition is positive, however, it also provides for much more grounds on which the right to freedom of expression may be limited. Hence, this could provide the judiciary much opportunity to limit the right to freedom of expression in the Netherlands.

4.3.1. Prohibitions

Given that the ICCPR explicitly demands legislation which prohibits hate speech on specific grounds, it is deemed logical that the Netherlands knows legislation on hate speech on a national level. A provision specifically prohibiting such speech is found in Article 137(d) of the Dutch Criminal Code. On the basis of this provision hate speech based on race, religion, personal beliefs, sex, sexual orientation, or physical, psychological or mental disability is prohibited and can be penalized.

In comparison, South Africa does not know such an explicit reference to the need to penalize hate speech on constitutional grounds. It does, however, exclude hate speech based on certain grounds from the protection of the right to freedom of expression. Hence, the Constitution allows for national legislation which penalizes hate speech based on race, ethnicity, gender or religion. Such legislation is found in the form of the PEPUDA. This Act specifically mentions hate speech in section 10, and provides for the prohibition of hate speech based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, or any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on other mentioned grounds. Evidently, PEPUDA allows for many utterances to be deemed hate speech, even though, the literal wording of the Constitution does not allow for this. Thus, it seems that PEPUDA goes against the Constitution.

[145] This definition can, *inter alia*, be found in ECtHR, *Gündüz v. Turkey*, para. 40; ECtHR, *Erbakan v. Turkey*, para. 56.

4.4. Political hate speech

As can be understood from the previous, both constitutional legal orders do not know provisions which specifically mention politicians or a political context in relation to the right to freedom of expression or hate speech. Hence, taken the present legislation it could be considered that expressions amounting to hate speech uttered by politicians are treated similar to every other form of hate speech. However, case law illustrates that this is in practice not the case.

In the Netherlands, the context in which hate speech is uttered clearly plays a role for the judge in deciding whether a political figure can be penalized for uttering offending words. Basing its decisions on judgements of the ECtHR, the Amsterdam District Court in the *Wilders* case for instance explained that there must be more room for the freedom of expression where there is political debate; the more debate exists, the more freedom should be given to the freedom of expression, even if utterances "offend, shock or disturb."[146] Hence, the freedom of speech is deemed extremely important for politicians, and hence, they can be understood to have "more" freedom of expression than other persons in the Dutch society. As a result, political hate speech seems difficult to be limited within the Dutch constitutional legal order, since the right to the freedom of expression within political contexts is given much weight by the judiciary.

In the South African Equality Court's hate speech trial of *Malema*, it became evident that South African courts also attach value to the political context in which utterances are expressed. It is considered that for the South African democracy and for political figures freedom of expression is of great importance. In this regard, in the case of *Malema* - which forms legal precedent for future cases that include political hate speech, due to the common law system of South Africa – the Equality Court considered that in the political context of South Africa, which was argued to be characterized by great social challenge whereby society is divided along racial lines, the political context demanded great caution. Hence, the Court kept close to South Africa's Constitutional legal framework, and after having established that expressions had been uttered which fell within the scope of the definition of hate speech, the Court did not let the political context in which the words were uttered outweigh the importance of limiting hate speech within the South African society.

[146] *Supra* note 48.

4.5. Conclusion

The Netherlands and South Africa both have developed constitutional systems which on the one hand guarantee the right to the freedom of expression and on the other hand provide grounds for legislation which prohibits hate speech. Furthermore, both systems do make a clear distinction between hate speech and hate speech uttered by politicians.

Yet, differences in their approaches exist. While in the Netherlands the constitutional legal framework primarily exists of international legislation, *inter alia* since international law is highest in hierarchy and a monist approach to international legislation is taken, South Africa knows a dualist approach to international law and the South African Constitution is the supreme law, whereby international law plays rather an explanatory role. Moreover, both constitutional orders apply different definitions of the right to freedom of expression and hate speech. In relation to this, they allow for the limitation of the right to freedom of expression and for the exclusion of expressions amounting to hate speech from this protection on different grounds; the Dutch constitutional framework allows for more grounds on which freedom of expression may be limited. Additionally, whereas both the Dutch and South African framework provide for national legislation which prohibits hate speech, the Dutch legislation includes specific penalties, while the South African national law on hate speech does not include these. Furthermore, both frameworks are developed and used in such a way which is most suitable for the society they apply to. Hence, while no specific legislation on political hate speech exists, the context in which hate speech is expressed is considered to be of importance by courts in both countries, as can be seen from their reasoning in political hate speech trials. However, due to the difference in societal context, different decisions are made; while in the Netherlands a political context can prove to be a reason to allow for expressions which amount to political hate speech, in South Africa such expressions which are made in a political context seem to be regarded as being especially dangerous for society, and therefore, they can be prohibited.

CHAPTER 5. CONCLUSION

The right to freedom of expression for politicians within a democratic society is deemed extremely important, since this right allows for vital political processes such as, *inter alia*, open political debate. However, words uttered by politicians have proven to be able to have extreme and dangerous effects within a democratic society, in cases where these words amount to hate speech. Hence, countries all over the world have adopted legislative measures based on universal principles and instruments through which such political hate speech, and thus the right to the freedom of expression, can be limited. Nevertheless, it seems that no universal approach to limiting hate speech exists. Since both the Netherlands and South Africa have known recent and highly publicised court cases in which political figures were accused of publically expressing hate speech, it was thought to be of interest to consider the legislation on hate speech in these respective countries and to compare the constitutional legal framework of both. Hence, this thesis aimed to answer the research question as posed in the Introduction: "*How is, by comparison, the use of hate speech by politicians constitutionally regulated in the Netherlands and in South Africa?*"

If compared, the constitutional legal orders of the Netherlands and South Africa prove to face a similar challenge – how to balance the right to freedom of expression and the need to prohibit and possibly even penalize political expressions which amount to hate speech? While both legal orders guarantee the right to freedom of expression and also provide possibilities for prohibiting hate speech in their respective ways, political hate speech is not explicitly dealt with. Differences between the two approaches for handling this challenge exist as well. The main differences in the respective constitutional legal systems are, *inter alia*, the difference in the hierarchy of norms, the difference between the Dutch monist and South African dualist approach to international law, and between the approaches towards constitutional review. Moreover, key differences exist in the applied definitions of "freedom of expression" and "hate speech", what understandably results in differences in the approaches taken to prohibit hate speech. Furthermore, in deciding on whether utterances expressed by politicians in a political context amount to hate speech, the judiciary of the respective states take different approaches as well. In the Netherlands it seems that expressions amounting to hate speech uttered in a political context are not necessarily prohibited due to the importance of open public debate within the Dutch society, while recent precedent in South Africa shows that

such speech is considered to be especially dangerous seen the difficult political and social environment within the South African society and should therefore be prohibited.

Given the previous, it can be understood that in regard to the Netherlands and South Africa, no similar approach for limiting and prohibiting political hate speech exist at this moment. Hence, a universal approach for balancing the freedom of expression and limiting political hate speech is currently ruled out. However, such a universal approach might not even be desirable if the variety of democratic societies and their particular societal contexts are considered. Ultimately, the purpose of protecting the right to freedom of expression is for this human right to serve its necessary function within these various democratic societies, that is, to further and strengthen these societies in which the rights of all are respected and protected. And since democratic societies may vary around the world, it can be argued that the regulation of freedom of expression should vary accordingly in order to guarantee that this freedom cannot be used to tear those societies apart; hence, while democratic societies should protect the freedom of expression, it is acknowledged that with this right certain responsibilities come which may vary within democratic societies, and these responsibilities should not be neglected. Perhaps Nelson Mandela has put it most beautifully, albeit in a more general context:

"For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others"[147]

[147] Nelson Mandela, *Lange Weg Naar de Vrijheid*, 18 ed., Amsterdam/Antwerpen: Uitgeverij contact, 2012, p. 563. Original English text from "Long Way to Freedom" by Nelson Mandela in 1994.

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