



Applying the boundaries of freedom of expression Article 10 (2) ECHR to political speech

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Introduction

Consider the following statements:

“There is a lot of Moroccan scum in Holland who makes the streets unsafe”¹

“Close our borders and deislamize!”²

“Hate preachers must be expelled, Islamist mosques closed”³

“Are they seeking to appease the barbaric, Muslim, rapist hordes of men?”⁴

“I’m sorry, but for those who really like to talk about World War II, if we’re talking about occupation, we could talk about that [...], because that is clearly an occupation of the territory”⁵

After reading such statements, one could argue that these statements have a discriminating character and contain possibly elements of hate speech. Interestingly, these statements were expressed by politicians of the member states of the European Union, specifically politicians that are characterized as having

¹ Ruptly. (2017). *Netherlands: 'Moroccan scum making Holland unsafe' – Wilders launches election campaign*. YouTube. <https://www.youtube.com/watch?v=8K1AoC-cP3o>.

² Wilders, G. (2016). *Close our borders and deislamize!* [pic.twitter.com/xTOGmBiv0D](https://twitter.com/xTOGmBiv0D). Twitter. <https://twitter.com/geertwilderspvv/status/812315576957804548?lang=en>.

³ Maksić, A., & Ahmić, N. (2020). Constructing the Muslim threat: A critical analysis of Marine Le Pen's Twitter posts during the 2017 French election campaign. *Journal of Regional Security*, 15(1), 131-148. Retrieved from:

https://www.researchgate.net/publication/341401512_Constructing_the_Muslim_Threat_A_Critical_Analysis_of_Marine_Le_Pen's_Twitter_Posts_During_the_2017_French_Election_Campaign/stats

⁴ Nasr, J. (2018). German police accuse AfD lawmaker of incitement over anti-Muslim tweet, Reuters. Retrieved from: <https://www.reuters.com/article/us-germany-afd-idUSKBN1ER0YZ>

⁵ Reuters. (2013). Far-right leader, Marine Le Pen, could lose immunity. Retrieved from: <https://www.dw.com/en/far-right-leader-marine-le-pen-could-lose-immunity/a-16853666>

extreme-right ideologies.⁶ Such politicians disseminate statements that portray their strong anti-Muslim sentiments. The first question that therefore comes to mind is, whether such speech is permitted and the second question, where the boundary lies between hate speech and freedom of expression. Did these politicians exceed their right to freedom of expression, which is a fundamental and universally protected right, or is such speech permissible, and if so under what grounds?

Muslims in Europe have been constantly facing difficulties to integrate and feel included in European societies.⁷ This is because Muslims form part of the minorities in Europe due to their ethnic and religious background. As a result of this, Muslims are often discriminated against and are targets of verbal attacks motivated by hate.⁸ Therefore, the term Muslim minorities is used in this thesis to refer to the race, ethnicity and/or religion of Muslims. Hateful sentiments can be expressed by anyone in society however; politicians in particular also play a role in the dissemination of hate speech against Muslims in Europe.⁹ Generally, they are politicians who do not have an open mind for European integration and are against the migration of Muslims in European societies.¹⁰

Politicians have an important role in communicating clearly with respect to all communities in society and therefore receive a different treatment when it comes to the right to freedom of expression. The phenomenon of politicians expressing hate

⁶ Edwards S.S.M. (2021) Anti-Muslim Speech. In: The Political Appropriation of the Muslim Body. Palgrave Macmillan, Cham. Retrieved from: https://doi.org/10.1007/978-3-030-68896-7_3

⁷ European Union Agency For Fundamental Rights. (2017). Second European Union Minorities and Discrimination Survey, p. 7. Retrieved from: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf

⁸ Ibid

⁹ Edwards S.S.M. (2021) Anti-Muslim Speech. In: The Political Appropriation of the Muslim Body. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-030-68896-7_3

¹⁰ Ibid.

speech against Muslims in Europe is therefore interesting to research because it involves two components. First, the special status of a politician, which will be thoroughly dealt with in this thesis, is different than when hate speech is delivered by an 'ordinary citizen'. Second, the speeches that are directed towards Muslims, which contain elements of, hate, surpass the boundaries of free speech. The question that therefore comes to mind is whether politicians can really say what they want to say without facing any legal consequences. What does it mean for a politician to enjoy more legal protection of freedom of expression? And what are the boundaries of freedom of expression? These questions will be covered by the overarching topic of this thesis, which is a complex debate known as the free speech debate where the right to freedom of expression is carefully balanced against other rights. In this case being the right of a politician to his/her freedom of expression and the rights of Muslims that are affected by such speech.

Therefore this topic revolves around Article 10 of the European Convention of Human Rights (herein referred to as the ECHR or the Convention). The ECHR is the treaty on the European level that deals with freedom of expression and the scope of protection politicians receive under Article 10 ECHR.

Therefore, this thesis aims to answer the following research question:

To what extent is freedom of expression under Article 10 ECHR legally limited in order to prevent politicians from spreading hate speech against the Muslim minority in the European Union?

In order to better answer the research question, the following sub-questions are of importance.

- I. How are freedom of expression Article 10 ECHR and its limitations legally worked out under the European Convention of Human Rights and how does the European Court of Human Rights approach these limitations?
- II. How is the status of a politician perceived when assessing the limits to freedom of expression Article 10 ECHR?
- III. Case study European level: how did the ECtHR assess *Le Pen v. France*?
- IV. Case study domestic level: How has the *Wilders* case been assessed in the Netherlands and to what extent has it followed the principles of ECtHR's case law?

Chapter 1 Methodology

The main focus of this thesis will be on the right to freedom of expression and the limitations to this right on the European level. Therefore, this thesis employs the method of analyzing the main legal document at the European level dealing with the right to freedom of expression. This legal document is known as the European Convention of Human Rights (ECHR) and freedom of expression is laid down in Article 10 ECHR.¹¹ In order to analyze the thin line between freedom of expression and hate speech, this thesis looks at sources of case law and decisions of the European Court of Human Rights (herein referred to as the ECtHR or the Court) to explore the approach the ECtHR has on cases dealing with freedom of expression and the restrictions to freedom of expression under Article 10 (2) ECHR. The case laws were accessed through HUDOC, which is the database of the Court where

¹¹ Council of Europe. (1950). The European Convention on Human Rights, Freedom of Expression Article 10. Retrieved from: https://www.echr.coe.int/documents/convention_eng.pdf

decisions are published. This thesis provides a thorough analysis of the principles and over-all considerations of freedom of expression Article 10 ECHR by the Court. This analysis gives insight on how the Court specifically assesses cases concerning the limitation of the freedom of expression of politicians when delivering hate speech against Muslims.

Deciding on cases of freedom of expression and hate speech is a challenging task because it involves a conflict between on the one hand the highly protected right to freedom of expression and on the other hand the negative consequences such speech may cause to the victims such as harm to reputation, insult and discrimination. What makes this topic more difficult is that freedom of expression is a fundamental and universally protected human right whereas hate speech lacks a universal and commonly accepted definition, which makes it subject to different interpretations and views.¹² Therefore the boundary of freedom of expression and hate speech is not always clear-cut and depends on several factors and circumstances of the case. However, the extensive analysis of the case laws together with journal articles provides for a strong stance on how much legal protection politicians enjoy under Article 10 ECHR. Furthermore, in order to determine the legal protection of politicians, this thesis relies on the definition of freedom of expression as laid down in the Convention and on the definition of hate speech defined by the Council of Europe.

After providing the general considerations of the Court on Article 10, this thesis examines two case studies namely, *Le Pen v. France* and *Wilders v. the Court of*

¹² Brown, A. (2017). What is hate speech? Part 1: The myth of hate. *Law and Philosophy*, 36(4), 419-468. Retrieved from: <https://link.springer.com/article/10.1007/s10982-017-9297-1>

Appeal of The Hague. Both cases share similarities as both involve politicians being accused of hate speech against Muslims. Le Pen v. France is chosen, as it is a case that reached the ECtHR and therefore gives a clear approach by the Court when dealing with cases of state interference with the freedom of expression of politicians. Furthermore, the case has been frequently used as a precedent in similar cases where member states were presented with politicians and hate speech. The case of politician Geert Wilders, has not reached the ECtHR yet, but is a case that has been undergoing a trial by Dutch courts for years. It involves a statement expressed by Wilders, who has been accused of inciting hate and discrimination against Muslims. This particular case is of importance as it reached international media attention because of the nature of the statements and led to a lot of criticism of Wilders referring him as an 'islamophobe'¹³ The case will be analyzed by looking at the arguments and decisions by the Dutch courts and will therefore give insight on to what extent the principles by the ECtHR have been applied on the domestic level. Important to mention however is that, even though the topic of this thesis is on Muslim minorities, the case of Wilders is about Moroccans. Nevertheless, the aim is to still show speech that is discriminatory on the basis of race, ethnicity and/or religion. Therefore the case of Le Pen v. France explicitly mentions 'Muslims' it refers to the ethnicity or race of a group of population, whereas the case of Wilders, the speech also is directed towards a race or ethnicity but mentions 'Moroccans' instead of Muslims.

This thesis does not limit its scope of analysis to certain types of media. Freedom of expression can be practiced on all types of media including the traditional media

¹³ Wildman, S. (2017). Geert Wilders, the Islamophobe some call the Dutch Donald Trump, explained. Vox. Retrieved from: <https://www.vox.com/world/2017/3/14/14921614/geert-wilders-islamophobia-islam-netherlands-populism-europe>

such as television, radio and newspaper as well as the digital media of social media. In order to not limit the findings of cases in which politicians have crossed the line in their speech against Muslims, this thesis does not favor a particular media.

As for the theoretical framework, a theory of liberalism will be presented to give insight on how the philosopher John Stuart Mill interpreted freedom of expression. This theory will give a basis to why freedom of expression is so highly protected by laying down the purposes of free speech according to Mill. The aim is to explore the principles of freedom of expression via a philosophical lens and to possibly demonstrate that the theory of liberalism has some shortcomings when it comes to hate speech. Therefore, it will be demonstrated that such a strong liberal stance of free speech cannot be applied when speech is an insult or offensive to others, in this case when speech is offensive towards Muslims in Europe. It is important to mention however that due to limitations and due to the complex nature of the free speech and hate speech debate, the theoretical framework does not give a rich account into this debate. The theory of Mill is solely used to lie out a starting point for the discussion and provide principles derived from the theory of Liberalism. However, there are shortcomings to this theory when it comes to the debate, as will be seen in the theoretical framework chapter, since there are opposing theories that argue that Mill has not taken into account certain harms of free speech. Nevertheless, Mill's theory is an important theory as it argues for the importance of free speech in correlation with values such democracy.¹⁴

¹⁴ Mill, J. S. (2011). *On liberty*. Andrews UK. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtliburg-ebooks/reader.action?docID=770561>

The topic of this thesis is relevant because ever-growing criticism has been directed towards politicians especially extreme right wing politicians and populists who have found a way to make controversial statements including hate.¹⁵ Therefore it is important to remind the reader that even politicians can be held accountable and have a limit to exercising their right of freedom of expression despite their status in society. It is precisely because of the status and influence that politicians have on society, that they need to be held accountable under the legal system for their expressions. This is because their expressions may influence and mobilize society to adopt the same extreme views as politicians.¹⁶ Even Though this thesis will not look into the specific effects that hate speech may have on society nor the political ideologies of politicians, it is still important to mention that speech disseminated by politicians may have dangerous consequences both on an individual level of the victims as well as on a societal level.¹⁷ Hate speech may impair the further integration into society by the victims of such speech. Especially when it comes to Muslims, the European Union aims to facilitate their integration and publishes Recommendations for member states to combat hate speech against Muslims because the European Union values a peaceful co-living of a diverse society.¹⁸

¹⁵ See Muis, J., & Immerzeel, T. (2017). Causes and consequences of the rise of populist radical right parties and movements in Europe. *Current Sociology*, 65(6), 909–930. <https://doi.org/10.1177/0011392117717294> and Ulrike M. Vieten & Scott Poynting (2016) Contemporary Far- Right Racist Populism in Europe, *Journal of Intercultural Studies*, 37:6, 533-540, DOI: 10.1080/07256868.2016.1235099

¹⁶ Bukar, A. (2020). The Political Economy of Hate Industry: Islamophobia in the Western Public Sphere. *Islamophobia Studies Journal*, 5(2), 152-174. Retrieved June 26, 2021, from <https://www.jstor.org/stable/10.13169/islastudj.5.2.0152>

¹⁷ Barendt, E. (2019). What is the harm of hate speech?. *Ethical Theory and Moral Practice*, 22(3), 539-553. <https://link.springer.com/article/10.1007/s10677-019-10002-0>

¹⁸ See European Union Agency For Fundamental Rights (2017). Second European Union Minorities and Discrimination Survey Muslims – Selected findings

This thesis however solely looks at the approach of the ECtHR on the limitations to freedom of expression when it comes to politicians. The focus therefore is to provide the legal basis as it may serve as precedence for future similar cases.

Chapter 2 Theoretical framework

2.1 Liberalism

Liberalism emerged as a theory of political philosophy aiming to theorize the relationship between the state and the individual. Andrea Borghini acknowledges the dominant position of Liberalism in society and holds that “Liberalism is one of the principal doctrines in Western political philosophy. Its core values are typically expressed in terms of individual freedom and equality.”¹⁹ The Latin word for liberal is *liber* which means free and liberty²⁰, therefore the essence of the theory of liberalism lies in promoting individual freedom where a great amount of freedom is given to citizens. There are many early writers of liberalism that persuasively brought across their views and ideas on how the relationship between the government and society should look like. Thomas Hobbes in ‘Leviathan’ (1651) wrote that there is a social contract in which society agrees upon to be ruled by an absolute sovereign who in turn provides for peace and security.²¹ John Locke in his

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf and see Prpic, M. (2018). Combating anti-Muslim hatred in the EU, European Parliament Research Service, European Parliament.

[https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630305/EPRS_ATA\(2018\)630305_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630305/EPRS_ATA(2018)630305_EN.pdf)

¹⁹ Borghini, A. What is Liberalism in Politics?. ThoughtCo. Retrieved from: <https://www.thoughtco.com/liberalism-2670740>

²⁰ Goldfarb, M. (2010). Liberal? Are we talking about the same thing? BBC News. Retrieved from: <https://www.bbc.com/news/world-10658070>

²¹ Hobbes, T. (2018). *Leviathan*. ProQuest Ebook Central. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtillburg-ebooks/reader.action?docID=5443203>

'Treatise of Government' (1690) argued for the equality of people being invested with human rights in a state of nature in which they live free from outside rule.²² However, there is one particular philosopher pertaining to liberalism who specifically focused on the notion of freedom of expression, and is therefore of importance to this thesis which is John Stuart Mill. Mill's writings of liberalism in 'On Liberty' (1859) are often used by scholars to provide insights into the debate between freedom of expression and hate speech, as it lays down the philosophical foundations for freedom of expression and provides for arguments in favor of its protection.²³ Liberalism in general is a theory that will provide useful insight into the topic of this thesis, as the focus of this thesis is to understand the extent to which freedom of expression can be protected.

2.1.1 Liberalism and freedom of expression

As mentioned above, the ideas of John Stuart Mill are particularly of interest when it comes to the topic of this thesis as he connects his views on liberalism to freedom of expression. In 'On Liberty', which is believed to be one of Mill's works in greatly defending freedom of expression²⁴, he provides several arguments on why freedom

²² Locke, J. (2003). *Two treatises of government and a letter concerning toleration*. ProQuest Ebook Central. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtliburg-ebooks/reader.action?docID=3420119>

²³ See Brink, D. O. (2008). Mill's liberal principles and freedom of expression. *Mill's On Liberty: A Critical Guide*, 40-61. And Anshuman A. Mondal (2018) The shape of free speech: rethinking liberal free speech theory, *Continuum*, 32:4, 503-517, DOI: [10.1080/10304312.2018.1480463](https://doi.org/10.1080/10304312.2018.1480463). Also see Macleod, C., Stone, A., & Schauer, F. (2021). Mill on the Liberty of Thought and Discussion. In *The Oxford Handbook of Freedom of Speech*.

²⁴ Van Mill, D. (2002). Freedom of speech. *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.) Retrieved from: <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=freedom-speech>

of expression needs to be protected. First, Mill gives attention to the notion of truth and the progress of human reason. According to Mill people should be able to give their opinions freely and in open discussion²⁵. Regardless of whether expression is seen as good or bad or as true or false it does not matter because Mill believes that only through open dialogue and discussion people will arrive at the truth. This happens when in a circulation of free speech, opinions are contrasted against each other, which then allows for criticism. This in turn aids to the further growth and development of society where the truth ultimately prevails²⁶. The notion of truth is closely connected to the element of 'market place of ideas' even though Mill does not explicitly mention it and it does not come from his own writings, scholars have linked Mill's ideas to the notion of market place of ideas, which is a metaphor for the market economy.²⁷ According to this theory, speech and opinions are exchanged freely on the market without government intervention. Similar to the market economy where different products are available and consumers ultimately choose the best one, in the market place of ideas people find truth when exposed to different types of speech without the government intervening. This also goes hand in hand with the notion of autonomy that is also often an argument used by liberalists to defend freedom of expression and is also referred to as 'negative liberty'.²⁸ According to this idea, freedom of expression is upheld and protected in cases of limited government intervention where individuals themselves achieve

²⁵ Mill, J. S. (2011). *On liberty*. Andrews UK, p. 38. Retrieved from:

<https://ebookcentral.proquest.com/lib/uvtilburg-ebooks/reader.action?docID=770561>

²⁶ Ibid, p. 60.

²⁷ Gordon, J. (1997). John Stuart Mill and the "Marketplace of Ideas". *Social Theory and Practice*, 23(2), 235-249. Retrieved from:

https://www.pdcnet.org/soctheorpract/content/soctheorpract_1997_0023_0002_0235_0250

²⁸ Brison, S. J. (1998). The autonomy defense of free speech. *Ethics*, 108(2), 312-339. Retrieved from: https://www.journals.uchicago.edu/doi/pdf/10.1086/233807?casa_token=kt2htSFjZ6gAAAAA:LMAejH8kTssExksvnlFc6a6yzjfWnZive8i6xn5WWqBhk-DhYSQRJ6YTPXIFv2JRK9Ho6dclCk

self-fulfillment. This idea comes back to the theory of liberalism where individualism stands at its core where there is opposition of external control and authority in order to emphasize individual liberty.²⁹ Coming back to Mill, he believes that in this way individuals flourish and contribute to social progress.³⁰

If we take the following quote by Mill into account “If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immortal it may be considered”.³¹ It seems that Mill indicates that however immoral the expression may be, it has to be able to freely circulate in open discussions. Therefore, the impression is that Mill considers all types of speech protected without being subject to restrictions.

However, freedom of expression is not an absolute right. This means that there are certain circumstances that permit the right to freedom of expression to be interfered with by the government. One of the circumstances where speech is permitted to be restricted is when it causes harm to the victim of the speech.³² Regardless of defending freedom of expression, Mill recognizes however that freedom of expression may be restricted. This simple principle of restricting speech, Mill refers to as the ‘Harm Principle’ in which he says:

²⁹ Hui, C. H., & Triandis, H. C. (1986). Individualism-collectivism: A study of cross-cultural researchers. *Journal of cross-cultural psychology*, 17(2), 225-248. Retrieved from: https://journals.sagepub.com/doi/abs/10.1177/0022002186017002006?casa_token=SqxCn4xsVakAAAA:KG2Wy473_T-ZpFolxKPDJ_9FQ4W_7aSI9O0sEc6dFXQsbN8TBCNjB4SMHd7T9oru59zIW16AqRPS

³⁰ Mill, J.S. (1859). *On Liberty*, Batoche Books Limited, p. 53. Retrieved from: <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf>

³¹ Ibid, p.106

³² Waldron, J. (2012). *The harm in hate speech*. Harvard University Press. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtliburg-ebooks/reader.action?docID=3301269&query=>

*“The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others [...]”*³³

The ECHR also recognizes that freedom of expression is subject to limitations as Article 10 (2) ECHR lies down the limitations to freedom of expression. This will be thoroughly analyzed in the following chapter.

For now it is important to know that freedom of expression as important as it may be, is still subject to limitations. Especially when it comes to the harms that may be included in the specific type of speech being hate speech. In the following chapter this thesis analyzes whether hate speech falls under the protection of freedom of expression. Returning to Mill’s harm principle when there is a legitimate restriction, individual freedom may be curtailed if it causes harm to another individual. So, freedom of expression can be justifiably limited when harm is caused.

However, opponents of Mill’s notion of the harm principle have argued that this principle only applies to when harm occurs on a physical level and therefore when it incites to violence³⁴ When it comes to hate speech as a verbal attack on the victims, it may cause consequences that are not necessarily physical consequences but rather social consequences on the human dignity or reputation of the victims. Therefore there is room for debate to what is understood under the harm principle,

³³ Mill, J.S. (1859). *On Liberty*, Batoche Books Limited, p. 13. Retrieved from: <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf>

³⁴ Rees, J. C. (1960). A Re-reading of Mill on Liberty. *Political Studies*, 8(2), 113-129. Retrieved from: <https://journals.sagepub.com/doi/pdf/10.1111/j.1467-9248.1960.tb01133.x>

specifically the concept of harm. Opponents of Mill's theory of freedom of expression argue that speech may cause harms that are not accounted for under Mill's ideas.³⁵ Due to limitations of time and resources however, the counter view will not be thoroughly presented but just some short considerations will be mentioned. Jeremy Waldron argues that hate speech may lead to the dignity of others coming under attack.³⁶ Furthermore, Waldron argues that those engaged with hate speech have the intention to make victims feel excluded by society as he explicitly states "The time for your degradation and your exclusion by the society that presently shelters you is fast approaching."³⁷ Under the notion of dignity Waldron defines it as "[...] a sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction."³⁸ Waldron therefore suggests that law must prohibit such speech, as it is the aim to ensure that all people feel included as members of a society. Waldron disagrees with Mill's argument, which goes that speech needs to be circulated freely in an open debate since it aids to the arrival of truth. Waldron questions whether society really needs to be informed of racist speech where minorities are put in a position that their dignity is being attacked.³⁹

Other scholars such as Joel Feinberg proposed a solution to discard the vagueness of the 'harm principle' by Mill by holding that instead the term 'offense principle' ought

³⁵ See for example Van Mill, D. (2002). Freedom of speech. *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.) Retrieved from: <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=freedom-speech>

³⁶ Waldron, J. (2012). *The harm in hate speech*. Harvard University Press, p. 15. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtulburg-ebooks/reader.action?docID=3301269&query=>

³⁷ Ibid, p. 96.

³⁸ Ibid, p. 105

³⁹ Ibid, p. 197

to be used as it has less definitional problems.⁴⁰ This is because the term offense has less serious consequences which means that the repercussions are less severe than if it were to harm.⁴¹

Since these are just reactions to Mill's view on freedom of expression these other theories will not be further discussed and will be lightly touched upon again in Chapter 6 (Discussion & Recommendation). Nevertheless, Mill's view on freedom of expression is still important to include in this thesis as it is the starting point of the discussion between freedom of expression and hate speech. However due to limitations this thesis will not go further into the theoretical framework of liberalism and the following chapter will focus on the approach of the ECtHR on freedom of expression Article 10 ECHR and its limitations under Article 10 (2) ECHR.

2.1.3 The debate between hate speech and freedom of expression

As we have just looked at freedom of expression and hate speech under the lens of liberalism one could see that there is a debate where liberalism is in favor of a wider protection of free speech whereas critiques of liberalism argue for a limited freedom of expression in order to regulate hate speech. Therefore in order to achieve a useful response to hate speech regulation, two interests need to be weighed against. On the one hand the interests of maintaining the conditions of free speech and on the other hand the interests of regulating to prevent the harms that hate speech causes by affecting the rights of others. The issue therefore is that when a state is in favor of

⁴⁰ Van Mill, D. (2002). Freedom of speech. *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.) Retrieved from: <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=freedom-speech>

⁴¹ Ibid.

regulating hate speech such regulation comes into conflict with the right to freedom of expression and the values freedom of expression has. Therefore, states have to think of ways to balance between these two interests. What these principles of freedom of expression are will be discussed in the following chapter under the European Convention on Human Rights.

Chapter 3 The European Convention on Human Rights and the European Court of Human Rights

The European Convention on Human Rights is an international Convention aiming to protect the human rights and political rights of the members of the Council of Europe.⁴² The Convention was adopted in 1950 and was inspired by the Universal Declaration of Human Rights. The aim was to promote a peaceful co-living in Europe after the world wars to avoid future horrors resulting from such human rights violations.⁴³ One of the aims of the Convention was also to achieve a greater unity between the members of the Council of Europe.⁴⁴ By agreeing upon this, member states also agreed to protect the rights of their citizens, uphold democracy and the rule of law.⁴⁵

The judicial organ established by the ECHR is the European Court of Human Rights and therefore the Court hears cases after all legal remedies are exhausted in the

⁴² Equality and Human Rights Commission. What is the European Convention on Human Rights?. Retrieved from: <https://www.equalityhumanrights.com/en/what-european-convention-human-rights>

⁴³ Bates, E. (2011). The Birth of the European Convention on Human Rights. Retrieved from: <https://eprints.soton.ac.uk/176627/>

⁴⁴ Council of Europe. (1950). The European Convention on Human Rights, Preamble. Retrieved from: https://www.echr.coe.int/documents/convention_eng.pdf

⁴⁵Ibid.

member states.⁴⁶ Through case law, the Court has made the Convention a living instrument and applies the principles and rights when analyzing cases brought to the Court. The Court therefore has the authority to determine whether national level judicial decisions violate the values and rights protected under the Convention.⁴⁷ All 47 member states of the Council of Europe have ratified the Convention and must therefore uphold to the rights protected.⁴⁸

3.1 The right to freedom of expression Article 10 ECHR

This section has the purpose of exploring the principles of freedom of expression under Article 10 ECHR. Therefore, this section analyzes the scope of freedom of expression by looking at the principles resulting from landmark cases of the ECtHR. This section therefore does not yet include a thorough analysis of the scope of protection of politicians. Two separate sections will be dedicated to that. Nevertheless, it is important to first analyze how the ECHR places importance on freedom of expression as it may be useful for the further understanding of the boundaries of such speech and how the Court interprets those boundaries.

Why is freedom of expression so important?

Freedom of expression is a protected right under Article 10 of the European Convention on Human Rights (ECHR) and paragraph 1 reads:

“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

⁴⁶ International Justice Resource Center. European Court of Human Rights. Retrieved from: <https://ijrcenter.org/european-court-of-human-rights/>

⁴⁷ Ibid.

⁴⁸ Ibid.

prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”⁴⁹

There are three elements of freedom of expression that are incorporated under the scope of paragraph 1 Article 10 ECHR namely, the freedom to hold opinions, the freedom to receive and impart information and ideas, and the freedom of doing so without interference by public authority.

Of the three elements, the freedom to hold opinions enjoys the widest protection and therefore restrictions to this right are not permitted.⁵⁰ The Committee of Ministers reiterates this by stating, “Any restrictions to this right will be inconsistent with the nature of a democratic society”.⁵¹ The main reasoning behind this strong stance is to prevent states of indoctrinating the opinions of citizens.⁵²

Concerning the second element, the freedom to impart information and ideas, is of particular importance within the context of political life to ensure that society maintains a democratic structure.⁵³ Here reference is made to free elections and how political elections cannot be held freely if information and ideas cannot be shared. Within the same context of political life, the freedom to impart information

⁴⁹ Council of Europe. (1950). The European Convention on Human Rights, Freedom of expression Article 10. Retrieved from: https://www.echr.coe.int/documents/convention_eng.pdf

⁵⁰ Siniarska, B.D.(2017). Protecting the right to freedom of expression under the European Convention on Human Rights, a handbook for legal practitioners, Council of Europe, p.13. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

⁵¹ Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). *Theory and practice of the European Convention on Human Rights*. Martinus Nijhoff Publishers.

p.413. Retrieved from: <https://www.corteidh.or.cr/tablas/32485.pdf>

⁵² Siniarska, B.D.(2017). Protecting the right to freedom of expression under the European Convention on Human Rights, a handbook for legal practitioners, Council of Europe, p. 13. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

⁵³ Ibid.

and ideas also gives the right to criticize the government, which indicates a free and democratic society.⁵⁴

Whereas the freedom to receive information indicates that citizens should have access to seek and receive information through all sources that are lawful including international television programmes.⁵⁵ This right is therefore used in the context of the media, where citizens also have the right to be adequately informed by the media when it comes to matters that are of interest to the public.⁵⁶

Furthermore, the Court often states that freedom of expression and especially when such expression is part of a political debate is a core value of democracy.⁵⁷ Therefore it seems to be the indication that freedom of expression and democracy go hand in hand. In the context of political domain for example, democracy means having free elections and allowing citizens to have the right to vote for political parties. Furthermore, democracy also means that politicians should be able to say whatever they want to, in order to represent their voters and bring across their ideas. The Council of Europe places a lot of importance on the right to freedom of expression as the Preamble of the Convention mentions that freedom of expression promotes other rights, because it aids to the development of other rights.⁵⁸ Therefore, Article 10 ECHR is often used in conjunction with other rights. For example, Article 9 ECHR (freedom of religion, thought and conscience) or Article 11

⁵⁴ Ibid.

⁵⁵ Ibid, p.15.

⁵⁶ Ibid.

⁵⁷ ECtHR, *Castells v. Spain*, 23 April 1992, Application no. 11798/85, par. 43. ECtHR, *Lingens v. Austria*, 8 July 1986, Application no. 9815/82, par. 42

⁵⁸ Council of Europe. (1950). The European Convention on Human Rights, Preamble. Retrieved from: https://www.echr.coe.int/documents/convention_eng.pdf

(the right to freedom of assembly and association) depend on Article 10 ECHR. This is because certain activities cannot be done if there is no enjoyment of the right to freedom of expression.

The most important element of the protection of freedom of expression is the development of democracy. In the *Handyside v. the United Kingdom* case the Court held that “freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man”.⁵⁹ This judgment is often relied upon as a precedent for cases to emphasize that freedom of expression is important in a democratic society.⁶⁰ Therefore, the guiding principle seems to be that democracy prospers on freedom of expression. The Court further established that the scope of freedom of expression extends “[...] not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”⁶¹ The Court argued that there is no “democratic society” if there is no pluralism, tolerance and broadmindedness.⁶² This seems to indicate that the Court allows speech that may have a shocking or offensive nature as it indicates to a tolerant society.

Another interpretation of the importance freedom of expression according to the Court set out in the case *Lingens v. Austria* is that freedom of expression “constitutes

⁵⁹ ECtHR, *Handyside v. The United Kingdom*, 7 December 1976, Application no. 5493/72, par. 49.

⁶⁰ See for example, ECtHR, *Lingens v. Austria*, 8 July 1986, Application no. 9815/82, par. 41, ECtHR, *Oberschlick v. Austria*, 23 May 1991, Application no. 11662/85, par. 57 and ECtHR, *Thorgeirson v. Iceland*, 25 June 1992, Application no. 13778/88, par. 63.

⁶¹ ECtHR, *Handyside v. The United Kingdom*, 7 December 1976, Application no. 5493/72, par. 49.

⁶² *Ibid.*

one of the basic conditions for its progress and each individual's self-fulfillment".⁶³ This is similar to the views of Mill discussed in the previous chapter where freedom of expression aids to the progress and development of society.

Furthermore when assessing whether speech enjoys a certain degree of protection under Article 10 ECHR, the Court considers the role of the speaker, the intent and the context. These elements have to be taken into account in its entirety when the Court is confronted with cases in which it has to decide whether freedom of expression is permitted to be interfered with. The role of the speaker is particularly of interest for this thesis as the focus is on politicians. The consideration of these elements and the restrictions to Article 10 ECHR will be discussed in the following section.

This section laid down the general considerations of freedom of expression Article 10 ECHR and concluded that freedom of expression is an important right to protect as it permits for the development of other rights. Furthermore, this section demonstrated that freedom of expression is an important right within a democratic society. But then the question still remains, how far can this freedom of expression really go? How does the Court assess cases concerning the restrictions of freedom of expression and does this include hate speech as well? These questions will be discussed in the following section, as it focuses on limitations of freedom of expression.

3.2 The limitations to freedom of expression and Article 10 (2) ECHR

⁶³ ECtHR, *Lingens v. Austria*, 8 July 1986, *Application no. 9815/82* par. 41

As mentioned in the previous chapter, freedom of expression is not an absolute right, and therefore is subject to restrictions. The Convention also recognizes this restriction and has laid them down under Article 10 (2) ECHR. The Court therefore also invokes the restrictions laid down under this article when approaching the issue of whether freedom of expression may be limited. The Court either follows a broad or narrow approach. The former approach is analyzing the case through Article 17 ECHR. Whereas the latter approach invokes Article 10 (2) ECHR. Article 17 ECHR states “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.”⁶⁴ This article is also known as the abuse clause and implies that sometimes the nature of speech is so extreme that it goes against the spirit and values of the Convention.⁶⁵ It is often used in extreme cases involving denial of historical established facts such as the Holocaust denial.⁶⁶ The Court nevertheless invoked this Article in cases of incitement to hatred or discrimination as well. For example in the *Norwood v. The United Kingdom* case, a poster of the Twin Towers in flames with the text “Islam out of Britain- Protect the British People” was displayed by a member of the British National Party (BNP). The Court found that such poster was “a public expression of

⁶⁴ Buyse, A. (2014). Dangerous expressions; the echr, violence and free speech. *International and Comparative Law Quarterly*, 63(2), 491-504. Retrieved from: <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/dangerous-expressions-the-echr-violence-and-free-speech/49A85AD61F3BB728BFB8287EFB62147A>

⁶⁵ Siniarska, B.D.(2017). Protecting the right to freedom of expression under the European Convention on Human Rights, a handbook for legal practitioners, Council of Europe. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

⁶⁶ ECtHR, *Garaudy v. France*, 24 June 2003, Application no. 65031/01, par. 2

attack on all Muslims in the country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people”.⁶⁷ Furthermore the Court held that “such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.”⁶⁸ Even though the Court applied Article 17 ECHR in this case, the application has been criticized, as it is not always clear in which instances Article 17 ECHR can be invoked and it does not allow for the balancing of other rights.⁶⁹ The Court therefore has been disinclined in applying this right in cases where freedom of expression include racism and therefore the Court relies predominantly on restrictions to freedom of expression under Article 10 (2) ECHR.

Article 10 (2) ECHR restrictions to freedom of expression

Article 10 (2) ECHR sets down the circumstances that allow for a state to interfere with the right to freedom of expression and reads:

“2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or

⁶⁷ ECtHR, *Norwood v. The United Kingdom*, 16 November 2004, Application no. 23131/03, A. The circumstances of the case.

⁶⁸ *Ibid*, The law.

⁶⁹ Buyse, A. (2014). Dangerous expressions; the echr, violence and free speech. *International and Comparative Law Quarterly*, 63(2), 491-504. Retrieved from: <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/dangerous-expressions-the-echr-violence-and-free-speech/49A85AD61F3BB728BFB8287EFB62147A>

crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”⁷⁰

As can be seen, paragraph 2 of Article 10 ECHR lays down a list of circumstances in which freedom of expression paragraph 1 Article 10 ECHR can be legitimately interfered with. In order to assess whether the requirements have been met for legitimate interference, the Court executes a test containing of three elements. This three-part test will be worked out in more detail below.

The ECtHR’s three-part test

When determining whether freedom of expression Article 10 (1) ECHR is subject to any limitations set out under Article 10 (2) ECHR, the Court employs a three-part test. In this test the following three elements are considered namely, whether the interference was ‘prescribed by law’, whether it ‘pursues a legitimate aim’ and if it the interference was ‘necessary in a democratic society’.⁷¹ If the Court finds that these criteria are not met in a given case, it concludes that the interference with freedom of expression is a breach of the Convention and therefore domestic courts and national authorities must carefully consider these elements when dealing with a case.

I. Prescribed by law test

⁷⁰ Council of Europe. (1950). The European Convention on Human Rights, Freedom of expression Article 10 (2). Retrieved from: https://www.echr.coe.int/documents/convention_eng.pdf

⁷¹ Siniarska, B.D.(2017). Protecting the right to freedom of expression under the European Convention on Human Rights, a handbook for legal practitioners, Council of Europe. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

The first criterion of the test is relatively straightforward and basically means that for a norm to be regarded as law, it must be formulated precisely so that citizens know what kind of conduct and behavior is expected and what actions are punishable. This therefore indicates to the principle of legal certainty and in the case *Sunday Times v. United Kingdom* the Court held that the law must be sufficiently precise and the consequences must be foreseeable.⁷² However, the Court notes that having too much certainty and clarity might lead to a risk of the law becoming rigid which must be avoided so that the law can be flexible enough to changes in the environment.⁷³ Furthermore, in the case *ATV Zrt v. Hungary*, the Court stated that it is not always about the law being precise, but whether the relevant parties in the case knew or ought to have known about the content of the law.⁷⁴ Therefore, when freedom of expression is limited the state has to ensure that the law prescribes the certain enforcement. Generally, “this means that the impugned measure must have a basis in domestic law.”⁷⁵ Nevertheless, if courts in the member states are faced with contradictory laws, these courts should always choose the law that prioritizes the right of freedom of expression.⁷⁶ The court also acknowledges unwritten law to be included under the criteria of prescribed by law as long as these unwritten laws are sufficiently precise.⁷⁷

⁷² ECtHR, *Sunday Times v. The United Kingdom*, 26 April 1979, Application no. 6538/74, par. 49.

⁷³ ECtHR, *Lindon Otchakovsky-Laurens and July v. France*, 22 October 2007, par. 41

⁷⁴ ECtHR, *ATV ZRT v. Hungary*, 28 April 2020, par. 35

⁷⁵ William A. Schabas, *The European Convention on Human Rights a commentary*, Oxford University press, 2015, p. 469. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtillburg-ebooks/reader.action?docID=4310766>

⁷⁶ Siniarska, B.D.(2017). *Protecting the right to freedom of expression under the European Convention on Human Rights, a handbook for legal practitioners*, Council of Europe. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

⁷⁷ *Ibid*, p. 39.

II. Pursues a legitimate aim test

When confronted with the second criterion of the test, the Court looks at the exhaustive list of restrictions under Article 10 (2) ECHR. Accordingly, “The exercise of these freedoms [...] May be subject to such restrictions [...] and are necessary in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or moral, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the and impartiality of the judiciary.”⁷⁸ The restrictions laid down under this article must therefore be relied upon when domestic courts deal with the case. The court may therefore not choose to rely upon a restriction that is not mentioned in the above-mentioned list of restrictions. In *Sürek and Özdemir v. Turkey*, the Turkish court had to consider restricting the right to freedom of expression in protecting the national security of Turkey. Therefore, the legitimate aim was national security. The case concerned the sharing of information about Turkish officials that fought against terrorist organizations. The Turkish courts argued that such interference aimed to protect “[...] national security and territorial integrity and the prevention of disorder and crime.”⁷⁹

The ECtHR therefore affirmed that these were legitimate aims.⁸⁰ When domestic courts therefore consider restrictions freedom of expression, they must base such

⁷⁸ Council of Europe. (1950). The European Convention on Human Rights, Freedom of expression Article 10 (2). Retrieved from: https://www.echr.coe.int/documents/convention_eng.pdf

⁷⁹ ECtHR, *Sürek and Özdemir v. Turkey*, 8 July 1999, Applications nos. 23927/94 and 24277/94, par. 51

⁸⁰ *Ibid.*

restriction on a legitimate aim and indicate a clear reason for the interference. In the case of the aim of protecting national security, the courts would therefore have to explain why not restricting freedom of expression threatens the national security of the member state.

The legitimate aim generally depends on the individual country and the values of each countries, while at the same time ensuring that such legitimate aim is within the boundary of article 10(2) ECHR. In the *Sürek and Özdemir v. Turkey* case therefore, the Court considered the background of Turkey during the time of the publication, which was tension and conflict with terrorist organizations in East Turkey.

At this point one may wonder which restrictions under Article 10 (2) are applicable to politicians exceeding their boundary of free speech when insulting Muslim minority population. The hate speech against Muslims can either be based on religion or xenophobia. Although it is not specifically mentioned in Article 10 (2) ECHR, the Court argued that it falls under the protection of rights of others.⁸¹

III. Necessary for a democratic society test

This third and final criterion is a bit more complex but also the most important one, as it is subdivided into three elements, which the court has to take into account separately. Here the Court looks at whether there is a pressing social need to interfere, whether the interference is proportionate and if the domestic courts

⁸¹ ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application no. 13470/87, par. 48, ECtHR, *Wingrove v. The United Kingdom*, 25 November 1996, Application no. 174519/90, par. 48

provided for sufficient and relevant reasons.⁸² When looking at this part of the test, the Court gives national courts a margin of appreciation in order for them to take into account their perspective circumstances when deciding on the case. However, this margin of appreciation still remains under supervision of the Court.⁸³

The interpretation of these principles can be found in the court's case law, which will be discussed next.

When looking at a 'pressing social need' the Court gives member states a margin of appreciation as it depends on several factors on how such a need is determined. The Court looks at the context and the circumstances. This therefore allows for local social and cultural circumstances to be included in the assessment of the case.

For example in the case *I.A. v. Turkey*, a pressing social need was established because the case involved a novel that was published that concerned issues of a philosophical and theological nature where the Koran was insulted.⁸⁴ Certain phrases in the novel were an offensive attack against Muslims as they directly targeted the Prophet Mohammad. The interference with the right to freedom of expression was done within the context of a pressing social need in order to protect Muslims from offensive attacks.⁸⁵ In this case the Court therefore took into account

⁸² Siniarska, B.D.(2017). Protecting the right to freedom of expression under the European Convention on Human Rights, a handbook for legal practitioners, Council of Europe, p. 44. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

⁸³ Ibid.

⁸⁴ Ibid ,p. 60

⁸⁵ ECtHR, *I.A. v. Turkey*, 13 september 2005, Application no. 42571/98, par. 30.

the offense and insult felt by Muslims on a matter that they perceive as sacred and therefore allowed Turkey a wider margin of appreciation to interfere.

When looking at the ‘proportionality’ the Court primarily looks at the nature and the severity of the sanctions imposed by domestic courts. The Court generally aims to avoid censorship when interfering with freedom of expression and holds that if a sanction is in place it should not lead to a discouragement of expressing criticism.⁸⁶

Now that the ECtHR’s general approach has been explored we can now move on to the specific two elements included in the research question, which is the scope of protection for politicians and hate speech against Muslims.

3.3 The scope of protection for politicians and hate speech

Special protection for politicians and hate speech

The term ‘special’ is meant to indicate a different kind of treatment. In this case, special protection for politicians means that because of their status in a democratic society, politicians are granted a higher protection of freedom of expression compared to ordinary citizens.⁸⁷ In the case *Castells* the Court held:

“While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with

⁸⁶ ECtHR, *Bédat v. Switzerland*, 29 March 2016, 56925/08, par. 79

⁸⁷ ECtHR, *Thorgeirson v. Iceland*, 25 June 1992, Application no. 13778/88, par. 64.

the freedom of expression of an opposition member of parliament like the applicant, calls for the closest scrutiny on the part of the Court.”⁸⁸

Politicians may also include some provocation and exaggeration in their speeches and may do so outside of the context of Parliament.

In *Castells* the Court further mentioned:

“In the case under review Mr. Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticize the Government.”⁸⁹

This indicates that politicians are still protected under the scope of freedom of expression even when statements of a critical nature are made outside of Parliament but within the context of the press for matters of public interest.⁹⁰ The Court however acknowledged that there still are boundaries in place for such statements in order to prevent disorder and in order to protect the reputation of others.⁹¹ Therefore the balance that has to be made when it comes to politicians and their speech is that on the one hand, the Court acknowledges the fact politicians defend views and interests of the people and therefore politicians are allowed a wider scope of free expression but at the other hand, politicians need to be careful

⁸⁸ ECtHR, *Castells v. Spain*, 23 April 1992, Application no. 11798/85, par. 42.

⁸⁹ *Ibid*, par. 43.

⁹⁰ *Ibid*, par. 40.

⁹¹ *Ibid*, par. 43.

when expressing speech because it might influence society. In the case *Erbakan v. Turkey* the Court therefore held that politicians should avoid making any type of comments that might foster intolerance in society.⁹² This therefore indicates that politicians have duties and responsibilities. These duties and responsibilities are set in place in order to maintain social and for preventing politicians from saying gratuitously offensive speech. In the case of *Zana v. Turkey*, a political figure expressed a statement which the Court considered to be causing disharmony as it took into account that the context at the time of the statement was during a period of unrest and conflict in East Turkey and therefore the comment made publicly available by the politician could have an impact on the preservation of the national security and public safety.⁹³ Thus when assessing whether a politician has exceeded his or her right to freedom of expression, the Court looks at whether the speech contributes to a public debate on a matter of general interest. According to the Council of Europe, the Court defines a matter of general interest as “public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concerns it to a significant degree, especially in that they affect the well-being of citizens or the life of community”.⁹⁴ The Court further argued that it may also include matters that give rise to controversy on particular social issues or problems that the public might be interested in.⁹⁵ The important question for the Court is whether such statements may give rise to violence, hatred or intolerance. Freedom of speech has the

⁹² ECtHR, *Erbakan v. Turkey*, 6 July 2006, Application no. 59405/00, par. 64

⁹³ ECtHR, *Zana v. Turkey*, 25 November 1999, Application no. 18954/91, par. 50

⁹⁴ Council of Europe/ European Court of Human Rights. (2021). Guide on Article 10 of the European Convention on Human Rights, freedom of expression, par. 132. Retrieved from: https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf

⁹⁵ *Ibid.*

possibility of extending to hate speech and therefore it is important that there are certain established rules in place such as duties and responsibilities to prevent the consequences of such speech. The next section will look at the element of hate speech.

Is hate speech protected speech under article 10(1) ECHR?

It is first important to define hate speech and to understand what types of speech constitutes hate speech.

The Committee of Ministers of the Council of Europe defines hate speech as :

“All forms of expressions which spread, incite, promote, or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”.⁹⁶

Part of this definition has been used by the ECtHR in its case law for example in *Gunduz v. Turkey* the Court held that hate speech is “all forms of expressions which incite, promote or justify hatred based on intolerance”.⁹⁷ Furthermore the Court held “there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups are not protected by Article 10 of the Convention”⁹⁸.

Also in *Vejdeland and Others v. Sweden* the Court held that “inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups

⁹⁶ Council of Europe. *Hate Speech*. Retrieved from: <https://www.coe.int/en/web/freedom-expression/hate-speech>

⁹⁷ ECtHR, *Gunduz v. Turkey*, 4 December 2003, 35071/97, par. 22

⁹⁸ *Ibid*, par. 41

of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner”.⁹⁹

So, generally one could get the idea that the Court is not very tolerant on expressions concerning hate. Now looking into even more specific case law of the ECtHR it can be said that when it comes to minorities, for example Muslim community in Europe, “[...] the Court has recognised the need to guarantee heightened protection to vulnerable minorities, characterized by a history of oppression or inequality, against insulting or discriminatory discourse.”¹⁰⁰

In *Féret v. Belgium* a politician of the Belgium National Front party, expressed anti-immigration statements and distributed leaflets during an electoral campaign. Féret’s statements were directed towards Muslims in Belgium especially statements against the Islam. The aim of the politician was to put immigrants in Belgium under a negative light in order to win voters for his political party. Therefore, Féret claimed that the state interfered with his right to freedom of expression Article 10 ECHR. However, the Court held that even though a politician has the right to express statements to inform the public about certain issues, it is not permissible for Féret to express the discriminatory statements he did. Furthermore the Court held that “political speeches which incite hatred based on religious, ethnic or cultural prejudices present a danger for social peace and political stability in democratic

⁹⁹ ECtHR, *Vejdeland and Others v. Sweden*, 9 March 2012, 1813/07, par. 55

¹⁰⁰Council of Europe/ European Court of Human Rights. (2021). Guide on Article 10 of the European Convention on Human Rights, freedom of expression, par. 527. Retrieved from: https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf

states”.¹⁰¹ The Court therefore held that there was no violation of freedom of expression.¹⁰²

According to the reasoning of the Court one could say that when it comes to minorities such as Muslims, the Court often emphasizes that it is important to uphold protection for religious and ethnic minorities against hate speech since such speech may impair the peaceful co-living in societies.

The purpose of subduing language that is defamatory and insulting has been described by Andrea Erdosova as “to maintain a certain degree of culture and tolerance in society and not to inflict an emotional pain or humiliation on groups of minorities or individuals to whom such speech is directed”.¹⁰³ Furthermore, Erdosova argues that if insulting speech is not banned then politicians can use this as a way of allowing offensive insults to get into the culture of social expression. As a result such insults turn into norms, which after some time may become tolerated “which leads to fear and destabilization of the ideas of equality and dignity before the law”.¹⁰⁴

When hate speech therefore is expressed by politicians towards Muslim population in Europe, it may lead to Muslims feeling excluded from society and therefore it is important that politicians are held accountable for their expressions. The Court

¹⁰¹ ECtHR, *Féret v. Belgium*, 16 July 2009, Application no. 15615/07, par. 73

¹⁰² *Ibid*, par. 82

¹⁰³ Erdosova, A. (2019). The freedom of political speech in perspective of hate speech. *Vestnik of Saint Petersburg University Law*, 2019(2), p. 359. Retrieved from: https://heinonline.org/HOL/Page?handle=hein.journals/vestnik2019&div=28&g_sent=1&casa_token=TiNauaff2o0AAAAA:HIvC5TwEy3xg-v10yznAaHBMBdOUCc1LZdiH50xUo0c5-o3MUK8GCwGDZjF3cMnLMrmlwOnF&collection=journals

¹⁰⁴ *Ibid*.

decides in the case of *Le Pen v. France* that the political speech by Le Pen insulted to Muslims feeling inferior and that therefore the freedom of expression of the politician had to be limited. This case will be thoroughly analyzed in the following chapter.

Chapter 4 Case study Le Pen v. France

Jean-Marie Le Pen was a politician and president of the National Front Party in France from 1972-2011. In 2003 Le Pen made some statements in the French daily newspaper 'Le Monde' during an interview and specifically said:

*"The day there are no longer 5 million but 25 million Muslims in France, they will be in charge".*¹⁰⁵

After the statements, Le Pen was prosecuted for inciting hatred against the Muslim community in France and was sanctioned a total of 10,000 euros by the Paris Criminal Court¹⁰⁶ After appealing, the case has reached the ECtHR and was therefore the Court's task to decide whether Le Pen's right to freedom of expression under Article 10 ECHR was permitted to be interfered with by the French courts or not.

This chapter will therefore look at the step-by-step analysis invoked by the ECtHR in determining the restrictions of freedom of expression.

Restrictions to freedom of expression article 10 ECHR

¹⁰⁵ ECtHR, *Le Pen v. France*, 20 April 2010, Application no. 118788/09, A.

¹⁰⁶ *Ibid.*

First, the court looked at whether the interference of Le Pen's right to freedom of expression by the French court was *prescribed by law*. When assessing the present case, the ECtHR affirmed that the law provided for the interference of the right to freedom of expression as the French courts included the relevant domestic law Article 23 and Article 24 of the Law of July 29, 1881 on freedom of the press.

Article 23 reads:

"Those who, either by speeches, cries or threats uttered in public places or meetings, or by writings, prints, drawings, engravings, paintings, emblems, images or any other, will be punished as accomplices of an action qualified as a crime or misdemeanor. support for writing, speech or images sold or distributed, offered for sale or exhibited in public places or meetings, either by placards or posters exposed to the public, or by any means of audiovisual communication , will have directly provoked the author or the authors to commit the said action, if the provocation has been followed. This provision will also be applicable when the provocation has been followed only by an attempted crime provided for in article 2 of the penal code."

Article 24 reads:

"[...] Those who, by one of the means set out in article 23, will have provoked discrimination, hatred or violence against a person or a group of persons because of their origin or their membership or their non-membership of an ethnic group, nation, race or religion, will be punished with one year of

*imprisonment and a fine of 45,000 euros or the one of these two penalties only
[...]"*

These two articles fall under the French legislation and clearly state that if a person expresses by any means of speech, discrimination, hatred or violence against a group of persons because of their origin or race the person will be punished. In this case, the speech was clearly directed against Muslims and therefore the speech was directed against people because of their ethnic origin and race. Furthermore, the provisions also clearly lie down the sanctions available that were also applied in this case. Law therefore prescribed for the interference of Le Pen's right to freedom of expression.¹⁰⁷

Moving on to the second criteria being that the interference with Le Pen's right to freedom of expression should *pursue a legitimate aim*. In order to determine this, the French court looked at what other rights had to be protected in order to restrict Le Pen's freedom of expression. Therefore, the court looked at the target the speech was directed to. As Le Pen's speech clearly refers to the Muslim community in France, they are the victims of his speech. The Court argued that Le Pen's statements put Muslims in a negative light and portrayed them as threatening. By saying that France's security depends on whether there are Muslims present or not, the Court found that Le Pen negatively affects the reputation of Muslims and hinders their integration into society. Therefore the ECtHR affirmatively held that it was a legitimate aim to limit Le Pen's freedom of expression because the legitimate aim was to not offend the Muslim community.¹⁰⁸

¹⁰⁷ Ibid, B.

¹⁰⁸ Ibid.

Concerning the third part of the test being that the restriction must *be necessary in a democratic society* the Court held that it was up to the French courts to interpret the situation and that the court must do so in good faith and that the courts had to take all elements into account when interfering with the right to freedom of expression. The French courts must also give relevant and sufficient reasons for the interference and it must be proportionate to the aims pursued.

In doing this, the Court assessed first the position of the speaker. The Court acknowledged that as a politician, Le Pen enjoyed a wider scope of his freedom of expression and that his speech was in the general interest of the public. It was the interest of the public because during the time of the speech, the topic of integration of immigrants was a popular topic of debate in European societies and caused a lot of discussions.¹⁰⁹ Moreover, the Court also affirmed that freedom of expression in the context of a political debate is fundamental in a democratic society and that it was also the right of the public to receive information of a politician. Furthermore, the Court held that freedom of expression may extend to sharing information or ideas that “offend, shock or worry” and that as a politician Le Pen was able to include some level of exaggeration or provocation.¹¹⁰

Despite of this enjoyment of a heightened protection of free speech by politicians, the Court mentioned that such speech is subject to restrictions because it cannot surpass limits such as the respect for the reputation and rights of others. Therefore in the present case, the Court held that Le Pen’s political speech is not a justification to portray Muslims in the negative and offend the Muslim population in France like Le Pen did. When deciding on this, the Court also observed the context of the

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

situation in France and stressed that there is an importance of the “fight against racial discrimination in all of its forms and manifestations.”¹¹¹

When analyzing the element of incitement to hatred and discrimination, the Court held that Le Pen’s speech offended the entirety of the Muslim population in France because the statements of Le Pen had the intent to portray Muslims as a threat to the French security and consequently gives Muslims a bad reputation and hinders their further integration into society.

Furthermore the Court took the integration into account and held that integration is already a difficult process and when statements expressed put a population of a foreign origin in such negative light, this population suffers from the negative consequences. A situation of tension and possibly violence might arise from such integration difficulties.¹¹² The Court furthermore held that when such statements by Le Pen were said that included the growth of the Muslim populations, the French people should be worried and feared, it was the intention of Le Pen to instill in the minds of the public that the safety of France was linked to the presence of Muslims.¹¹³

When further assessing the intent of Le Pen’s speech, the Court looked at the audience of the speech and observed that Le Pen addressed his speech to the French ‘people’.¹¹⁴ Therefore, the Court argued that the speech was addressed to a larger

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

audience namely the entire country of France and not just Le Pen's voters. Such speech would lead to hostility and the rejection of the Muslim community.¹¹⁵

Concerning the *proportionality* of the measure, the Court found the fine of 10,000 being proportionate because Le Pen had risked a sentence of imprisonment. On the grounds mentioned, the Court found that the interference with Le Pen's enjoyment of his right to freedom of expression had been "necessary in a democratic society" and therefore the Court ruled that Le Pen's complaint was accordingly rejected.¹¹⁶

Conclusion

The *Le Pen v. France* case study showed the elements that the ECtHR uses in assessing a specific case concerning a politician's hate speech directed against the Muslim minority in France. The aim of this was to apply the ECtHR's approach and to understand the steps and reasoning used by the Court. In this case it can be seen that France has given the politician a high fine and labeled his speech as hate speech. Therefore, it can be said that in France, the court does not take such speech lightly. The next chapter will look at the domestic level case of the politician Wilders to see to what extent the Dutch courts apply and incorporate the ECtHR's legal reasoning to a case that has similar facts to *Le Pen v. France* and to what extent the Dutch politician enjoys protection under Article 10 ECHR. Furthermore, it is interesting to compare the outcome of the Wilders case to the *Le Pen v. France* case.

¹¹⁵ Ibid.

¹¹⁶ Ibid

Chapter 5 Case study Wilders v. the Dutch state

Geert Wilders is the leader of the Dutch Party for Freedom and is one of the most influential politicians in Europe.¹¹⁷ Wilders is known for his extreme right views on Muslims and is against the integration of migrants into the Netherlands and Europe.¹¹⁸ Wilders is often criticized and had been prosecuted for certain expression and statements he made concerning the Islam and the Koran but was never before found guilty.¹¹⁹ One particular statement however was the “fewer Moroccans” statement that Wilders made in 2014, which led to him being charged guilty of incitement to discrimination and group insult.¹²⁰ This is the case that will be dealt with in this chapter. First, a brief overview will be given of the background of the case.

On the 12th of March, Wilders visited the market in the district of Loosduinen in The Hague, where during a broadcasted interview Wilders said the following:

“The most important thing for the people on the market is the Hagenaaars, Hagenzen and Scheveningers, as Léon always neatly and rightly calls it. We are doing it for those people now. They are now voting for a safer and more social and in any case a city with less burdens and, if possible, also fewer Moroccans.”¹²¹

¹¹⁷ Flemming, R. (2017) Geert wildrs is no hero of free speech. Retrieved from: <https://www.cato.org/commentary/geert-wilders-no-hero-free-speech>

¹¹⁸ Damhuis, K. (2019). “The biggest problem in the Netherlands”: Understanding the Party for Freedom’s politicization of Islam, Brookings. Retrieved from: <https://www.brookings.edu/research/the-biggest-problem-in-the-netherlands-understanding-the-party-for-freedoms-politicization-of-islam/>

¹¹⁹ Hoorn, J. NPO kennis, Waarom word Geert Wilders vervolgd? Retrieved from: <https://npokennis.nl/longread/7475/waarom-wordt-geert-wilders-vervolgd>

¹²⁰ Ibid.

¹²¹District Court of the Hague v. Geert Wilders, 9 December 2016, 09/837304-15.

On the 19th of March during an electoral meeting in a Café in The Hague, Wilders held another speech where he spoke to the audience, which included voters for his political party. This speech was held as the municipal elections were approaching and Wilders asked the audience the following question:

"I ask you, do you want more or fewer Moroccans in this city and in the Netherlands?"

Part of the audience responded to this by shouting several times:

"Less!"

Wilders then replied:

*"Nah, then we'll settle that."*¹²²

After the speech by Wilders, more than 6400 Dutch Moroccans together with the Partnership for Moroccan Dutch (SMN) filed a claim against Wilders as they felt discriminated and hurt by his speech.¹²³ Therefore on the 31st of October 2016 the process of the case began and on the 9th of December 2016 the District Court of The Hague ruled on the case and found Wilders guilty of group insult and incitement to discrimination of Moroccans.¹²⁴ The Public Prosecution however found that Wilders should have also been found guilty for incitement to hatred however the Court did not agree.¹²⁵ Both Wilders and the Public Prosecution appealed to the District

¹²² The Court of Appeal of The Hague v. Geert Wilders, 4 September 2020, [ECLI:NL:PHR:2021:613](#)

¹²³ Heijenga, M. (2018). Hoever reikt de vrijheid van meningsuiting van Geert Wilders? Een Vandaag. Retrieved from: <https://eenvandaag.avrotros.nl/item/hoever-reikt-de-vrijheid-van-meningsuiting-van-geert-wilders/>

¹²⁴ Hoorn, J. NPO kennis, Waarom word Geert Wilders vervolgd? Retrieved from: <https://npokennis.nl/longread/7475/waarom-wordt-geert-wilders-vervolgd>

¹²⁵ District Court of the Hague v. Geert Wilders, 9 December 2016, 09/837304-15.

Court's decisions but for different reasons. Wilders did not agree with the Court's decision that his speech was labeled as incitement to discrimination nor group insult. Wilders believed that such interference went against his freedom of expression.¹²⁶ Whereas the Public Prosecution felt that Wilders should have also been found guilty for incitement to hatred. Consequently, the case went further to the Court of Appeal of The Hague on the 9th of December 2019 where the court published its decision on the 4th of September of 2020.¹²⁷ The court found Wilders guilty of group insult and of incitement to discrimination but not for incitement to hatred. Furthermore, the court did not impose any sanction on Wilders.¹²⁸ Wilders appealed to the decision of the Court of Appeal and now the Dutch Supreme Court will deal with the case.

Now that an overview has been provided of the legal history of the Wilders case the following section will analyze a step-by-step analysis of the legal reasoning of the Court. Before continuing, it is important to mention that throughout the analysis, reference will be made to both the District Court of the Hague and the Court of Appeal of the Hague as both arguments are insightful in looking at Wilder's scope of freedom of protection.

The central question of the case is whether the right to freedom of expression protects Wilder's speech. However, the Netherlands does not have the right to freedom of expression laid down in the Constitution and therefore the Article 10 ECHR has been applied by the Dutch Courts.

¹²⁶ The Court of Appeal of The Hague v. Geert Wilders, 4 September 2020, [ECLI:NL:PHR:2021:613](#).

¹²⁷ Ibid.

¹²⁸ Ibid.

The facts of the case therefore involve the two statements that were made by Wilders, the speech on the 12th of March at the market and the speech on the 19th of March during the election meeting. For both speeches on both dates, Wilders was guilty of group insult and for the speech on the 19th of March Wilders was guilty for incitement to hatred or discrimination.¹²⁹

Restriction of freedom of expression

In order to determine whether the expressions of Wilders went too far and whether his speech can be interfered with, the court looked at the legal framework of the Dutch Criminal Code particularly Article 137c and Article 137d.

Article 137c reads:

“Whoever deliberately insults a group of people in public, orally or in writing or image because of their race, their religion or belief, their heterosexual or homosexual orientation or their physical, mental or intellectual disability, shall be punished by imprisonment of not more than one year or a fine of the third category.”¹³⁰

Article 137d reads:

“Anyone who publicly, verbally or in writing or image, incites hatred or discrimination against people or acts violently against persons or property because of their race, their religion or belief, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental

¹²⁹ Ibid.

¹³⁰ Ibid, par. 8.2

handicap, shall be punished by a term of imprisonment not exceeding one year or a fine of the third category.”¹³¹

Similar to the ECtHR, the Dutch courts followed the step that holds that interference of freedom of expression must be prescribed for by law. The two provisions clearly lay down that speech shall be punished if it incites hatred or discrimination because of someone’s race.

The next issue the court dealt with is determining the target of the speech in accordance to the to provisions listed above. The court therefore aimed to clarify the term of ‘race’ as the speech was directed towards Moroccans. Upon clarifying the term, the court held that there was not a precise definition of the meaning of race in the articles 137c and 137d and therefore the court relied on the definition of race set out in the International Convention on the Elimination of all forms of racial discrimination.¹³² Race is to be interpreted in conjunction with skin color, origin or ethnic origin.¹³³ The court therefore gave a broad interpretation of the term race and applied it to the meaning of term ‘Moroccans’ referring to characteristics of origin, national descent or ethnic descent.¹³⁴ Wilders in his defense mentioned that his speech was merely directed towards people in the Netherlands with Moroccan nationality thereby referring to Moroccan citizenship.¹³⁵ The court disagreed however and held that Wilders spoke of the ethnicity of Moroccans as a whole, and therefore discriminated against the race of Moroccans.¹³⁶

¹³¹ Ibid.

¹³² Ibid, par. 8.3

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid, par. 8.4.3.

The next step the court undertakes is assessing whether Wilder's statements on the 19th of March were offensive and whether they constitute a group insult. The court held that a statement is considered to be of an insulting nature if it has "the intent to portray another in an unfavorable light in the eyes of the public and to assault him in his honor and reputation."¹³⁷ In order to determine this, the court has to look at the context and the wording of the statement. Concerning the words of the statement, the court has to look whether the statement is of an offensive nature. The court held that for a speech to qualify as group insult, the speech is "tarnish one's self-esteem or discredit a group, in this case for the sole reason that it is of a certain race."¹³⁸ After the court established that the statement had an offensive character, the court looked at the context of the statement being the context of public debate. Here the court acknowledged that in the context of a political debate, the insulting character could be pardoned.¹³⁹ Statements that are of public interest in a democracy fall within the scope of a political debate. The court therefore acknowledged that politicians during a political debate enjoy more freedom of expression which requires that sometimes such speech shock, hurt or disturb a large part of the population.¹⁴⁰ In this context, the court also acknowledged that Wilders within the context of his speech was referring to Moroccans that commit crimes in the Netherlands. In his speech on the 12th of March and during an election debate on the 18th of March, Wilders spoke about criminal Moroccans who live in the Netherlands and that presence of such crimes lead to a decrease of security. In order to contribute to this statement, Wilders provided numbers or percentages of

¹³⁷ District Court of the Hague v. Geert Wilders, 9 December 2016, 09/837304-15. Par. 5.4.3.1

¹³⁸The Court of Appeal of The Hague v. Geert Wilders, 4 September 2020, [ECLI:NL:PHR:2021:613](#) par. 8.4.2

¹³⁹ Ibid par. 8.4.3

¹⁴⁰ Ibid.

crimes that were linked to Moroccans.¹⁴¹ Therefore, the political debate of Wilders' speech on the 19th of March were concerning criminality of Moroccans and that his political party would contribute to increasing the sense of safety.

However, even within the context of a political debate, the right to freedom of expression is not unlimited and that speech may not be unnecessarily offensive.¹⁴² In assessing whether the speech was unnecessarily offensive the court looked at the circumstances of the statement. First, the court found that prior to the speech on the 19th of March, Wilders prepared his speech and it was discussed whether he was going to include 'criminal Moroccans' or just 'Moroccans' in his speech. It was decided therefore that his speech should have a strong and clear message.¹⁴³ Furthermore, it was also pre-meditated that three rhetorical questions would be asked to further contribute to the strength of the statement. Moreover, a draft was prepared and available during the speech on the 19th of March.¹⁴⁴ Secondly, the court looked at the intent of the speech reaching a wide public. Wilders knew that his speech would reach wide public as it was broadcasted on national and he was surrounded by audiovisual. The District court here referred to the ECtHR and held that speech that is broadcasted on national television can have much more far reaching consequences as it reaches a wider audience. Therefore the court held that Wilders opted for greatest possible impact.¹⁴⁵

The court also observed that it was the intent of Wilders to direct his speech to the entire Moroccan population because he did not make a distinction between

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid, par. 8.1.2

¹⁴⁴ Ibid.

¹⁴⁵ District Court of The Hague v. Geert Wilders, 9 December 2016, 09/837304-15. Par. 5.4.3.

‘criminal Moroccans’ and ‘Moroccans’ and therefore insulted the entire population of Moroccans, which is minority in the Netherlands.¹⁴⁶

The court noted that on the one hand a politician may raise certain issues in political debates that may be hurtful, but on the other hand a politician also has the responsibility to prevent the dissemination of statements that are contrary to the law and to the basic principles of democracy. Moreover, Wilders should avoid making speech that feed intolerance. Therefore, the court held that the statements were unnecessarily offensive.¹⁴⁷

After establishing that Wilders was guilty of group insult, the court assessed whether the speech qualified as hate speech.

Was Wilders’ speech an incitement to hatred?

In order to determine the incitement to hatred, the court finds that the presence of conditional intent to be sufficient. For the proof of conditional intent the court looks at the nature of the speech and the circumstances under which it was said. After Wilders asked the question of whether the people wanted more or less Moroccans, Wilder said, “we will arrange that”. Therefore this indicates that he makes a promise on behalf of his party in the event of an electoral victory to make sure that there will be less Moroccans in the Netherlands. The court interpreted this as Wilders saying this so to seek political gain and therefore it was not the intention to encourage the public to incite or engage in hate or discrimination against Moroccans.¹⁴⁸ The court also argued that it did not perceive the rhetorical questions as having the intention

¹⁴⁶ Ibid.

¹⁴⁷ The Court of Appeal of The Hague v. Geert Wilders, 4 September 2020, [ECLI:NL:PHR:2021:613](#) par. 8.4.3

¹⁴⁸ Ibid, par. 8.5

to mobilize to evicting nor deportation of Moroccans out of the country.¹⁴⁹ The court defined hate as “an extreme emotion of deep disgust and hostility. In principle, for incitement to hatred there must be a power-enhancing element, in which others are incited or called upon to do something”.¹⁵⁰ The court found that there is no such element in the statements of Wilders. Therefore it was ultimately held that Wilders must be acquitted of the charge of inciting to hatred, as it was not convincingly proven.¹⁵¹

Was Wilders’ speech an incitement to discrimination?

The next part looks at incitement to discrimination. The court holds that for a speech to be qualified as incitement to discrimination, the speech does not require discrimination to necessarily take place nor is the requirement of a force-amplifying element needed¹⁵² Furthermore, Article 137c of the Criminal Code also criminalises when the rights of others are threatened and violated.¹⁵³ Furthermore, the court described discrimination as “any discrimination, exclusion, limitation or preference, the object or effect of which is to prevent recognition, enjoyment or exercise on an equal basis of the human rights and fundamental freedoms in the political, economic, social, cultural or other spheres of social life are nullified or impaired”.¹⁵⁴ The court therefore found that the statements were of a discriminatory character because the statement of Wilders unmistakably distinguishes Moroccans from other

¹⁴⁹ Ibid, par. 8.4.3.

¹⁵⁰ District Court of The Hague v. Geert Wilders, 9 December 2016, 09/837304-15, Par. 5.4.3.2.

¹⁵¹ Ibid.

¹⁵² Ibid, par. 5.4.3.

¹⁵³ Ibid.

¹⁵⁴ ibid.

population groups in the Netherlands. These statements therefore are regarded as inciting discrimination against persons of Moroccan descent.¹⁵⁵

The court found that the statements contributed to a further polarization within the Dutch society and that group insult and incitement to discrimination are punishable by law. The court stated that the main goal of the trial was to confirm that standards apply to everyone in the legal system. That such freedoms cannot be invoked to insult a group or incite discrimination “the same goes for a politician” the court found it therefore sufficient to establish that “the defendant, as a politician was guilty of group insult and inciting discrimination” the court therefore considers him sufficiently punished. Wilders is therefore guilty without penalty.¹⁵⁶

The court decided not to impose a fine because Wilders is already sanctioned in other ways by the society for his offensive statements because he needs security everywhere he goes because of death threats.¹⁵⁷

Conclusion

This case has shown that under the Dutch legal system the politician Wilders is also subject to limitations of his freedom of expression Article 10 ECHR. Even though the outcome of the case did not lead to Wilders being guilty of hate speech like Le Pen v. France did, it the court however did find Wilders guilty of group insult and incitement to discrimination. The reason why incitement to hatred was not found in this case is because the court interpreted Wilder’s speech as aiding to a political gain and did not feel that the public would begin hating nor deporting the Moroccans out

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ The Court of Appeal of The Hague v. Geert Wilders, 4 September 2020, [ECLI:NL:PHR:2021:613m](#) par. 13.

of the Netherlands. Hereby the court acknowledged the importance of a political debate when politicians express their statements. However, the court did find that the statements of Wilders was a discrimination based on race as the statements were directed towards the entire population of Moroccans without distinguishing them to 'criminal' Moroccans as his entire speech was revolving around a correlation between criminality rates and Moroccans and the public safety. Wilders lodged an appeal against this decision and will be taking the case to the Dutch Supreme Court. There exists the chance that Wilders will be taking this case to the European Court of Human Rights. After analyzing the ECtHR's approach on cases concerning politicians and their expression against minorities it is possible that in the case of Wilders the ECtHR would use the similar reason and reach to the similar decision as was reached in the case of *Le Pen v. France*.

Chapter 6 Discussion & Recommendation

After having discussed in detail the cases of *Le Pen v. France* and *Wilders v. The Court of Appeal the Hague*, it is interesting to see that both cases concerned politicians expressing speech that insult a group of the population of a country. Interestingly, the French courts have found *Le Pen* guilty of hate speech and even imposed a fine on him. Whereas, in the *Wilders* case the Dutch courts acquitted *Wilders* of inciting hatred and therefore did not find him guilty of hate speech. The Dutch Courts however, did find *Wilders* guilty of incitement to discrimination and to group insult. The question then one could ask is why one country decides differently on hate speech compared to another country. This thesis has not been able to answer this question however it can be said that the main reason of a lack of unison in labeling speech as hate speech is due to the definitional problem. Hate speech is a

concept that lacks a universally accepted definition. This is because hate speech covers various types of speeches, especially when it comes to racist speech because it may be subject to different interpretations, context and factors.

However, as this thesis has shown, the Committee of Ministers aimed to bring a solution to this problem and conceptualized hate speech under its Recommendation. Regardless of the definition established by the Committee of Ministers, the problem remains that the Recommendation is not a legally binding document on member states.¹⁵⁸ It can be argued therefore that the reason why member states may decide differently on hate speech is because it falls within the interpretation of each member state because there is no document available that binds states to follow a specific definition of hate speech.

However it is still important that hate speech is regulated and member states have made efforts in doing so. In 2020, the Parliament in Belgium decided to revise Article 150 of the Belgian Constitution to now include hate speech as well. Consequently hate speech can be punishable under criminal law and such speech would include “incitement to hatred, discrimination or violence against persons or groups [...]”.¹⁵⁹

The reason why it is necessary to also extend hate speech regulations to politicians is because of the influence they can assert on society. As we have seen throughout this thesis is that the ECtHR acknowledges that politicians enjoy a wider protection of freedom of expression under Article 10 ECHR. This is because their special status

¹⁵⁸ McGonagle, T.E. (2008). Minority rights and freedom of expression: a dynamic interface, p. 304. Retrieved from: https://pure.uva.nl/ws/files/1089087/144204_thesis.pdf

¹⁵⁹ Voorhoof, D. (2020). ‘Hate speech’ and the Belgian Constitution, Legal Human Academy. Retrieved from: <http://legalhumanacademy.org/hate-speech-and-the-belgian-constitution/>

in society where politicians may say speech that may offend, shock or disturb the population as long as speech is done within the context of a political debate for the interest of the public. However, precisely because a politician's role in society to influence others it is important that politicians are careful of what they say. The reason for this is because politicians and especially extreme right wing politicians have the ability to influence and bring over radical ideas to the public. Furthermore as a consequence such influence can end up mobilizing citizens to think the same as politicians and may even lead to cases where hate speech can turn into incitement to violence.¹⁶⁰

However the case analyzed of Geert Wilders, led to criticism of limiting the free speech of a politician. Paul Cliteur for example gave his opinion based on expertise and disagreed that Wilders was prosecuted for the statements he had made on the 19th of March. According to Cliteur, the statements made by Wilders fell within his right to freedom of expression.¹⁶¹ Furthermore, Cliteur supports a high tolerance for politicians to disseminate speech and that such interference with freedom of expression by the state would negatively impact democracy. Cliteur's reasoning can be linked to the theory of freedom of expression as discussed earlier in this thesis. Similar to Mill's account to freedom of expression, Cliteur believes that the state should not interfere with a politician's right to freedom of expression and that such expression was a matter of political debate. Scholars such as Dworkin who has the

¹⁶⁰ Knechtle, J. C. (2006). When to regulate hate speech. *Penn State Law Review*, 110(3), 539-578. Retrieved from: https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/dlr110&id=553&men_tab=srchresults

¹⁶¹ Belinfante, M. (2018). Hoever reikt the vrijheid van meningsuiting van Geert Wilders? Retrieved from: <https://eenvandaag.avrotros.nl/item/hoever-reikt-de-vrijheid-van-meningsuiting-van-geert-wilders/>

same line of thought, also believes that such interference with free speech undermines the legitimacy of democracy.

On the other hand, Bouchra Dibi, councilor of the Partnership for Dutch Morroccans, who together with others filed claims against Wilders' speech had a different view on the Wilders case. Dibi acknowledged that freedom of expression is an important right and needs to be upheld. However, when looking at the to freedom of expression, in this case the statements of wilders, the perspectives of the victims have to equally be acknowledged. Dibi held that Wilders' speech hurt the feelings of others, in this case Moroccans in the Netherlands. Therefore, the ones who were hurt and affected by the speech had the right to be heard as well. Scholars such as Matsuda and Waldron have provided theories that take into account the victims perspective and therefore argue that hate speech should be regulated.¹⁶² Furthermore, within the context of the Netherlands, Peter De Roover also contributed to the issue of hate speech and argued that the problem with hate speech regulation is that in the Netherlands one cannot be punishable under law for merely 'hate' in their speech but rather the law requires there to be 'incitement to hatred'.¹⁶³

This is an interesting debate, which this thesis has not delved upon due to limitations but can however be useful to include in future research. As it is important to also look at the victim's perspective and extend the view of freedom of

¹⁶² See Matsuda, M. J. (2018). *Words that wound: Critical race theory, assaultive speech, and the first amendment*. Routledge. And see Jeremy Waldron, J. (2012). *The harm in hate speech*. Harvard University Press. Retrieved from: <https://ebookcentral.proquest.com/lib/uvtilburg-ebooks/reader.action?docID=3301269&query=>.

¹⁶³ De Roover, P. (2021). I hate blurry restrictions on free speech, de Tijd. Retrieved from: <https://www.tijd.be/opinie/algemeen/ik-haat-wazige-beperkingen-op-de-vrije-meningsuiting/10311015.html>

expression further than it just being necessary for truth, progression and democracy. Furthermore, it is necessary and a current issue because the European Union still publishes Recommendations and reports to call upon member states to ensure that hates speech against Muslims and other minority groups is avoided.¹⁶⁴

This is an interesting point of discussion raised but because of limitations, this thesis has not researched further on to this and is useful to take upon in a future research. Furthermore, it is important to mention once more that this thesis limited itself to case studies of France and the Netherlands. However, it is important to note that hate speech by politicians happen in more member states and other countries in general. Therefore, for future research it can be interesting to look at other countries as well and specifically to find out whether there is a correlation between each country's cultural identity or social factors that might lead to countries deciding differently to cases concerning hate speech. According to Souli Sarah, the Netherlands is less inclined to prosecute and punish hate speech.¹⁶⁵ Furthermore, in most of the instances of hate speech such cases do not get to trial. It is interesting for future research to find out why specifically in the Netherlands there is a lack of interest for the prosecution of hate speech. In order of finding this out, it is interesting to take into account the values and the cultural identity of the Dutch society, which might provide some clarifications.

¹⁶⁴ See for example European Commission. Combating Anti-Muslim hatred. Retrieved from: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-anti-muslim-hatred_en

¹⁶⁵ Souli, S. (2019). The Netherlands' Burgeoning Free Speech Problem, The New Republic. Retrieved from: <https://newrepublic.com/article/153305/netherlands-burgeoning-free-speech-problem>

Despite the limitations mentioned, this thesis aimed to provide a legal basis for the debate between hate speech and freedom of expression. More specifically this thesis aimed to show how the ECtHR assesses the right to freedom of expression and the restrictions o this right.

Conclusion

The goal of this thesis was to demonstrate the scope of freedom of expression when it comes to politicians disseminating hate speech against Muslim minorities and to what extent politicians are legally protected. In order to answer this research question, this thesis provided general considerations on the ECtHR's approach to freedom of expression Article 10 ECHR. Therefore Article 10 ECHR (freedom of expression) stood central in this thesis. After providing the general consideration, this thesis analyzed the principles derived form the ECtHR's case law and found that politicians enjoy a wider protection of Article 10 ECHR. This is because politicians have status in society that allows them to say more to contribute to the general public interests. Citizens have the right to receive information from politicians especially in matters of ongoing societal problems. However, the ECtHR acknowledges that the right to freedom of expression Article 10 ECHR is not an absolute right and therefore is subject to limitations.

When looking at the restrictions to freedom of expression Article 10 (2) ECHR, this thesis analyzed the ECtHR's step-by-step analysis including its three-part test. First, the ECtHR looks at whether law prescribed for the interference, second whether the interferences pursues a legitimate aim and third, whether the interference was necessary in a democratic society. After correctly following the three part test, the ECtHR believes that the right to freedom of expression was legitimately interfered

by the member state. Furthermore, the analysis of the restrictions showed that politicians have certain duties and responsibilities and should therefore be careful not to disseminate speech that might foster intolerance. This consideration is especially of importance when the speech is directed at minorities. In the cases analyzed the thesis showed that the ECtHR is not tolerant in speech that contains racist elements nor speech that incites to discrimination, hatred or group insult. A degree of margin of appreciation is given to member states when deciding on certain circumstance however the ECtHR has the final say. When analyzing the circumstances of the case, the ECtHR often holds that speech should not negatively affect the dignity and reputation of minority groups. In cases such as: *Soulas v. France*, *Le Pen v. France* and *Féret v. Belgium*, the court held that there is a heightened protection for minorities and that speeches that discriminate based on ethnicity or race are not tolerated. If the case of *Geert Wilders* would ever reach the ECtHR, one could argue that the Court decides in a similar fashion as the other mentioned cases and would rule that the Dutch courts legitimately interfered with the right to freedom of expression. Still important to mention is that the debate of freedom of expression and hate speech is a complicated issue because of the lack of a commonly accepted definition of hate speech. Therefore when deciding on cases where politicians express certain elements of hatred in their speech, the Court is faced with a difficult task where rights are balanced against each other. However, it can be concluded that the Court does not take racist speeches lightly nor speech that insult a group based on their ethnicity.

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