

What is the scope of the right to freedom of expression for politicians before the European Court of Human Rights when the expression concerns criticism?

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# INTRODUCTION

## 1. Setting the scene

Suppose that I would make the following statements:

*'The core of the problem is the fascist Islam, a sick ideology of Allah and Mohammed as is enshrined in the Islamic version of Mein Kampf: the Koran.'*<sup>1</sup>

*'The borders of this country will close the same day for all non-Western immigrants.'*<sup>2</sup>

*'From that tsunami of a unworldly culture who is getting more dominant here. This must be stopped at once.'*<sup>3</sup>

If I would make these expressions, the counter reaction of many people would be that I make racial statements, that I do not tolerate other cultures and that I incite to hatred. However, I did not make these statements. They are from Geert Wilders who is a politician in The Netherlands. Wilders has used excessive expressions in criticising the Islam. The question that comes into mind is whether he can say these things without legal consequences – because it falls within his freedom of expression – or can he be held responsible because he exceeded the limits of acceptable criticism of Article 10 European Court of Human Rights – hereafter ECHR? This will be one of the topics of this thesis.

## 2. Reasons for choosing the thesis subject

Since the 1980s, the Dutch political system has known political parties which have been critical about the Dutch immigration system and minorities in The Netherlands. These parties,

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<sup>1</sup> Statement of Wilders in The Volkskrant, 'Genoeg is genoeg: verbied de Koran', 8 August 2007.

<sup>2</sup> Statement of Wilders in The Volkskrant, 'De paus heeft gelijk', 7 October 2006.

<sup>3</sup> Statement of Wilders on <http://www.geertwilders.nl>, 'Stop de tsunami', 6 October 2006.

such as the ‘Centrumpartij’ in the 1980s and the ‘Centrum Democraten’ in the 1990s were considered as – extreme – right parties.

However, at the beginning of this century, there was a Dutch politician called Pim Fortuyn who really shivered the Dutch political world with his remarks. These remarks were – amongst others – about immigrants and the Islam. The criticism of Fortuyn was different with that of the 1980s and 1990s because of its effect: Fortuyn was extremely successful and, according to the polls, Fortuyns party the LPF headed to become one of the biggest political parties in the Dutch Parliament. Fortuyn was murdered before the elections in 2002 and had never the opportunity of giving actions to his words.

When this happened, I was fourteen years old and thought that these developments were very interesting. It was the beginning of my interest in Dutch politics and the Dutch political system.

After Fortuyns death, a gap existed in the Dutch Parliament, meaning that there was no one else who could express themselves as well as Fortuyn about the subjects that he brought forward. However, after a few years, there was another politician who filled this gap successfully. This was Geert Wilders. He started his own party, called the PVV, and has had huge success in criticising the Islam; his party is the third party in the Dutch Parliament. Although Wilders has of course other political points, he is most known for his excessive criticism on this religion. Other politicians in the Parliament thought that his expressions went too far. The question arose whether Wilders could be prosecuted for his statements. Although the Public Prosecution decided in 2008 not to prosecute Wilders, the Court of Appeal in 2009 decided differently. At the beginning of this year, the process of Wilders started in which Wilders is prosecuted for insulting people, incitement to hatred and discrimination. On the 23<sup>rd</sup> of June, the Court of Amsterdam decided that Wilders had not violated the law and therefore was found not guilty of any of the charges imposed on him.

The Dutch Prosecution will probably not appeal this decision, because of its previous decisions and because it had asked for an acquittal of Wilders in its requisitory. However, there are some Muslim organisations who want to try to go to the European Court of Human Rights by stating that Wilders has violated Article 10 ECHR. Of course an interesting aspect and question of these developments is whether such Muslim organisations have standing before the Court: can they be considered victims of the speeches of Wilders? Unfortunately, this question falls beyond the scope of this thesis. Another aspect, which will be examined and is more interesting – is whether Wilders has exceeded the limits of protection of Article 10 ECHR.

Before the start of the Wilders process, other politicians such as F  ret in Belgium and Le Pen in France were convicted for incitement to hatred by their domestic courts. Both politicians went to the European Court of Human Rights and in both cases, the Court came to the conclusion that the convictions did not violate Article 10 ECHR. With the upcoming Wilders process and the knowledge that other politicians were not protected by Article 10 ECHR, my interest started of examining the right of freedom of expression for politicians before the European Court of Human Rights. Especially the question arose what the consequences of these earlier decisions of this Court could be for the Wilders case: what would happen if Wilders is not convicted, but moreover, what would happen if Wilders will be convicted by a Dutch criminal court. These topics will be heavily discussed throughout the thesis.

### 3. Research questions

The subject of this thesis is the scope of the right to freedom of expression of politicians. The word scope in this thesis means the boundaries of this right under Article 10 ECHR. The main question which will be examined in this thesis is:

*What is the scope of the right to freedom of expression for politicians before the European Court of Human Rights when the expression concerns criticism?*

Sometimes this is referred in the thesis as what the scope of political speech is. Since the expressions of politicians can be regarded as political speeches, it should coincide with the main research question.

As the question puts forward, the topic has been reduced, by examining only the scope of freedom of expression when it concerns criticism. Moreover, only the case law of the European Court of Human Rights will be examined, because it is the highest court in Europe concerning human rights that can produce binding decisions.

In order to answer the main research question, there are several sub-questions which will be answered during this thesis. These sub-questions can be divided in three categories, namely questions concerning freedom of expression in general, questions regarding political speech and finally questions regarding criticism. These categories and questions are:

**Freedom of expression in general:**

- *Why is freedom of expression treated so specially by the Court?*
- *What is the scope of the right to freedom of expression in general?*

**Political speech:**

- *Why is political speech more protected than other kind of speeches?*
- *What role does parliamentary immunity play?*
- *What are the consequences of the protection of political speech that follow from the European Court of Human Rights' case law?*
- *Which elements or factors determine the scope of freedom of political speech?*

**Criticism:**

- *How far can politicians go in giving criticism on people and religion?*
- *Are the boundaries of hate speech for politicians and citizens the same?*

There is one question which will be examined throughout the thesis and which cannot be divided in one of the three categories. This question is:

- *Has Geert Wilders exceeded the limits of protection of Article 10 ECHR?*

All of these questions will be answered by scrutinizing and comparing the case law of the European Court of Human Rights and secondary literature. Therefore, the right to freedom of expression will be analysed in light of the right as a human right.

These questions will be discussed in the thesis. Throughout the thesis references will be made to the Wilders case in which the particular elements will be tested on this case. Answers to these questions will be given in the conclusion.

#### 4. Research theory, method and structure of the thesis

##### *a. Research theory and method*

This thesis is a research about the scope of the right to freedom of expression for politicians, in particular the scope of acceptable criticism of these politicians. The premises is that the

freedom of speech of politicians is treated differently before the European Court of Human Rights than speeches of ordinary citizens. The cause for having this premises, is the Wilders case in The Netherlands. It is quite exceptional that a politician is prosecuted for statements that he makes as a politician, since – as will be shown from the Court’s case law – freedom of speech for a politician is regarded as one of the essential values in a democratic society.<sup>4</sup> Therefore, the hypothesis exists that politicians are treated different when it concerns their freedom of expression than speeches of citizens.

In order to discover whether this premises is true, I have used a regional human rights analysis by comparing the case law of the European Court of Human Rights. I have chosen this Court, because it is the most developed regional human rights system and it is the highest court in Europe that can deliver binding decisions. This is one side of the human rights analysis that will be used in this thesis. The other side is that a comparison will be made between freedom of speech in general for ordinary citizens and freedom of speech for politicians in particular. This specific comparison is needed in order to answer questions which emphasis the differences of speeches of citizens and politicians, such as the question whether the boundaries of hate speech for politicians and citizens are the same. The human rights analysis is the method that will be used throughout this thesis.

By using a human rights analysis, it is possible to make an analysis on the scope of the right to freedom of expression in general and that of political speech in particular.

In order to answer the main question, the case law of the European Court of Human Rights will be analysed. By analysing this case law, guidelines can be drawn, but also the differences are brought forward.

However, such an analysis will not only consist of examining case law. The legislation of the Council of Europe – and especially Article 10 ECHR – will be examined as well. Moreover, secondary literature which exist of the doctrine will be discussed.

The aim of the human rights analysis and of this thesis is to discover whether rules or guidelines can be drawn from the European Court of Human Rights’ case law. By using secondary literature, another aim is followed: the case law will be scrutinized and where necessary criticism will be given in which not only the opinion of scholars will be given, but also my own standing in the discussion.

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<sup>4</sup> ECtHR, *Handyside v. The United Kingdom*, 7 December 1976, *Application no. 5493/72*, par. 49.

Part A will analyse the case law of the European Court of Human Rights in general and will give a theoretical framework on what political speech is. The second part, Part B, compares freedom of speech in general and political speech. Thereby, it is easier to distinguish any differences between the two kind of speeches.

*b. Structure of the thesis*

This thesis comprises of two parts. Part A gives an overview of the right to freedom of expression in general and political speech in particular. Both subjects will be treated in two different chapters. The overview is necessary in order to give an answer to the main question. Part B thereafter continues by giving an analyses of the different factors that can determine the scope of political speech. These will be discussed in chapter III. Chapter IV is the last chapter of this thesis in which more attention will be drawn to the acceptable criticism that can be given by politicians.

Part B is different from part A, because more comparisons are made between political speech and freedom of expression in general. By doing that, the differences between those speeches are put forward.

The thesis will end with a conclusion in which the main research question will be answered by providing answers to the sub-questions.

## **PART A: GENERAL REMARKS ON THE RIGHT TO FREEDOM OF SPEECH AND POLITICAL SPEECH**

Part A of this thesis will consist of two chapters. The first chapter will give a small overview of Article 10 of the European Convention on Human Rights – hereafter ECHR – in general. The main question that will be answered is what the scope of freedom of expression in the general sense is. To examine this question, several parts of freedom of speech will be discussed. Since the emphasis of this thesis is on the scope of freedom of expression concerning criticism, several paragraphs will study the scope of criticism as well.

Chapter II will thereafter continue by examining political speech. The main research question in this chapter is why political speech is more protected than other kind of speeches by the European Court of Human Rights – hereafter the Court. In order to answer this question, the emphasis will be placed on politicians in a democracy and the role of parliamentary immunity. Where necessary, references to the Wilders case shall be made in order to answer the question whether Wilders has exceeded the limits of protection of Article 10 ECHR.

Finally, both chapters shall observe hate speech. As it will appear, hate speech exceeds the limits of Article 10 ECHR. It is therefore necessary to examine where hate speech will begin and thus where the protection of Article 10 ECHR ends.

## Chapter I: The right to freedom of speech under Article 10 ECHR

Freedom of expression is regarded as one of the most ‘universally recognized human rights’.<sup>5</sup> This statement can be based on the fact that most States in the world have recognized this right in their constitution. Moreover, the human rights treaties have admitted this right as well. Freedom of expression in international law is mostly developed under Article 10 ECHR and by its Court.

This leads to the first research question, namely why specifically the right to freedom of expression is considered so important by the Court. The chapter will therefore begin with a paragraph which discusses the goals of freedom of expression. These goals can give indications why freedom of speech is protected more than other rights.

The answer of the first research question is required for examining the second research question of this chapter, namely what the scope of freedom of expression in general is. With general I mean that the position of politicians and their speeches will not specifically be examined. It is more about the scope of freedom of speech for citizens. To answer this

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<sup>5</sup> M.W. Janis, *European Human Rights Law. Text and Materials*, Oxford: Oxford University Press 2008, p. 235.

question, some general information and basic principles on the right to freedom of expression (Article 10 ECHR) will be described. After that, the chapter will continue by describing the rules that the Court has established on some topics or factors. These topics and factors are important for the scope and limitation of Article 10 ECHR and especially for the scope and limitations of criticism. The topics include of criticism given by the speaker, duties and responsibilities of the speaker, statements of fact or value judgments and hate speech. In all of these paragraphs the boundaries of the specific topics will be verified.

Examining these questions are necessary for discussing the research questions which will follow after this chapter. The answers to these questions will offer the opportunity of displaying the differences of freedom of expression in general and with political speech.

The chapter will end with a conclusion where the research questions will be answered.

## 1. The goals of the right to freedom of speech

This paragraph will describe the goals of the right to freedom of expression. These goals are important for the fulfilment of the right to freedom of speech.<sup>6</sup> It will give an answer why freedom of expression is such a special right of the ECHR. That it is a special right is indicated by the fact that the goals can be separated in two categories: common goals and democracy.

### *a. Common goals*

The first category of goals is common goals. Common goals is a name that I have given because freedom of speech pursues many goals. These common goals, however, are not the reason why freedom of speech is a special right of the ECHR.

The first goal is that the right promotes the truth.<sup>7</sup> By promoting truth, people will exchange their knowledge which will help their development.<sup>8</sup> It will also help to understand the world, because knowledge has been expanded.

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<sup>6</sup> R. de Rijke, *Grenzen aan de vrijheid van meningsuiting. Een onderzoek naar de reikwijdte van uitsingsvrijheid in het algemeen en in het maatschappelijk debat in het bijzonder*, Rotterdam: Erasmus University, 2010, p. 10.

<sup>7</sup> T. E. McGonagle, *Minority Rights and Freedom of Expression: A Dynamic Interface*, Amsterdam: University of Amsterdam, 2008, p. 166. and D. van Wijk and others (ed), *Rights and Constitutionalism: The New South African Legal Order*, Oxford, Clarendon Press, 1995, p. 267.

<sup>8</sup> D. van Wijk and others (ed), *Rights and Constitutionalism: The New South African Legal Order*, Oxford, Clarendon Press, 1995, p. 269.

A second goal of speech is to promote tolerance in a society and mutual understanding of each other. People should talk and debate in order to prevent conflict.<sup>9</sup>

Thirdly, the Preamble of the Convention suggests that freedom of expression will promote other rights. Otherwise it would not be possible for some rights to develop.<sup>10</sup> For example, freedom of thought is hard to imagine without freedom of expression: Article 9 ECHR is therefore impossible to develop without the support of Article 10 ECHR. Otherwise a preacher is allowed to have freedom of religion, but he would not be able to preach. The same reasoning can be applied to the right to freedom of assembly and association; without Article 10 ECHR there is no reason for having a right of freedom of assembly.<sup>11</sup> Other rights which are hard to imagine without freedom of speech, are the right to vote, the right to privacy and freedom from State interference.<sup>12</sup>

These goals are all important to pursue. However, the most important goal – in which Article 10 ECHR distinguishes itself from other rights – is the development of democracy.

#### *b. Democracy*

There is another goal which has the effect that freedom of expression is more protected than other rights under the Convention. That is the protection and promotion of democracy.

As the Court has established in the *Handyside* judgment, ‘Freedom of expression constitutes one of the essential foundations of a democratic society’.<sup>13</sup> The *Handyside* judgment is established case law of the Court.<sup>14</sup> Without freedom of speech, it is hard to imagine a democracy. Therefore it is a crucial condition for democracy.<sup>15</sup> As Jean-Francois Flauss once stated, ‘the freedom of speech is not only a subjective right of the individual, but also an objective fundamental principle for life in a democracy’.<sup>16</sup>

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<sup>9</sup> T. E. McGonagle, *Minority Rights and Freedom of Expression: A Dynamic Interface*, Amsterdam: University of Amsterdam, 2008, p. 166 and supra note 6, p. 10.

<sup>10</sup> F.G. Jacobs and R.C.A. White, *European Convention on Human Rights*, Oxford: University Press, 2002, p. 279.

<sup>11</sup> Supra note 8, p. 270.

<sup>12</sup> R.K.M. Smith, *Textbook on International Human Rights*, Oxford: Oxford University Press, 2007, p. 267.

<sup>13</sup> Supra note 4, par. 49.

<sup>14</sup> 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.

<sup>15</sup> Supra note 6, p. 10.

<sup>16</sup> J.-F. Flauss, ‘The European Court of Human Rights and the Freedom of Expression’, *Indiana Law Journal*, 2009, p. 814.

However, in order to protect freedom of expression, the Court does not only need to protect this right, but also has to promote democracy.<sup>17</sup> There is an interaction between democracy and freedom of expression. Both need each other. There can be no democracy without free elections and the right to vote. To make free elections fair, parliamentarians and candidates should be in a position in which they should be able to say whatever they want to say. These parliamentarians and candidates have a right to do that, because they represent the people of the State.

The fact that the Court wants to promote democracy is also visible in the Preamble of the Convention: the aim is to work to an effective political democracy.<sup>18</sup>

Although the Court has never stated it clearly, from their case law we can certainly say that ‘democracy thrives on freedom of expression’ and thereby is the most important goal in their case law.<sup>19</sup>

### *c. Conclusion*

There are several grounds for freedom of expression, such as promoting the truth, tolerance and other rights. However, the most important one is to promote and protect democracy, because democracy cannot survive without freedom of speech. It thereby answers the question why freedom of expression is more important than other rights of the ECHR.

This leads to the next question in this chapter, namely what the scope of freedom of expression in general is.

## 2. Principles of freedom of speech derived from the case law of the Court

From the Courts case law some general principles or guidelines can be derived. These principles form a part of the answer to the question what the scope of the right to freedom of expression in general is. First, the general principles of the case law will be discussed. Thereafter, the topics become more specific by examining political debate and the restrictions that can be imposed by State authorities.

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<sup>17</sup> Supra note 10, p. 277.

<sup>18</sup> ECtHR, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Application no. 19392/92*, par. 52 and E. Barendt, *Freedom of Speech*, Oxford: Oxford Clarendon Press, 2005, p. 169.

<sup>19</sup> See for example ECtHR, *United Communist Party and Others v. Turkey*, *Application no. 19392/92*, par. 57 and ECtHR, *Castells v. Spain*, 23 April 1992, *Application no. 11798/85*, par. 43.

*a. General principles derived from the case law*

There are several general principles of Article 10 ECHR. The guiding principle is that the right to freedom of expression constitutes as ‘one of the essential foundations of a democratic society’.<sup>20</sup> The freedom of expression includes ‘not only information and ideas, but also those that shock, offend or disturb’, since these are the demands of pluralism, tolerance and broadmindedness.<sup>21</sup> Especially this last criteria is important: even when the content consists of criticism that is shocking or offending to other people, the Court allows such criticism.

Looking at the case law of the Court, we can see that not all people are treated equally in the same kind of circumstances. In other words, the position of the speaker can determine whether restrictions are accepted or not. Especially the media and politicians have a special position. The position of politicians will be thoroughly described in the next chapter.

The media has a special task, since their news reports are most of the time about topics of general public interest. It is their task to impart this information and a right for the public to receive them.<sup>22</sup> Otherwise it is not possible for the media to act as a ‘watchdog’.<sup>23</sup> Above all, due to the media it is possible for the public to form their ideas about politicians.<sup>24</sup> Because of their position, restrictions on the media will not easily pass the necessity test of Article 10(2) ECHR. Restrictions are therefore harder to impose on the media than on citizens. That is especially applicable when the information is shocking or disturbing. Such information is useful since the public has a right to know this information and it regards a topic of general public interest.

From the case law, it is clear that the content of the speech may even shock, offend or disturb people and that the media and politicians are treated in a different way. From the context of the speech, such as a political debate, some guidelines can be established as well.

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<sup>20</sup> Supra note 4, par. 49.

<sup>21</sup> Supra note 4, par. 49.

<sup>22</sup> ECtHR, *De Haes and Gijssels v. Belgium*, 24 February 1997, *Application no. 19983/92*, par. 37 and ECtHR, *Sunday Times v. The United Kingdom*, 26 April 1979, *Application no. 6538/74*, par. 65.

<sup>23</sup> ECtHR, *Thorgeirson v. Iceland*, 25 June 1992, *Application no. 13778/88*, par. 63 and ECtHR, *Tromsø and Stensaas v. Norway*, 20 May 1999, *Application no. 21980/93*, par. 62.

<sup>24</sup> ECtHR, *Lingens v. Austria*, 8 July 1986, *Application no. 9815/82*, par. 42.

### *b. Political debate and general public concern*

The Court has concluded several times that the freedom of political debate ‘is at the very core of the concept of a democratic society’.<sup>25</sup> However, political debate is not the only context where different rules are applicable. The same is true for matters of general public interest. These two cannot be separated from each other because most of the time a political debate is about a matter of general public interest. Therefore, they are equally important.<sup>26</sup> But what can be considered as a topic of general public interest? The Court has never given a clear interpretation, since it depends on the context of the situation and the subject of the expression.<sup>27</sup> What is clear, however, is that criticism on the government can be put under this heading.<sup>28</sup>

Since this kind of speech is at the core of a democracy, there is very little scope for exceptions of the right of freedom of expression.<sup>29</sup>

From this the conclusion can be made that the reasoning of the Court to give the media and politicians a special place under Article 10 ECHR relates to the topic of political debate and general public interests. This connects the previous discussed general principles and the possibility of making restrictions. Special protection for political debates are necessary, because otherwise restrictions are too soon possible and accepted.

### *c. Restrictions*

The content, kind of speaker and context determine the possibilities that exist for making restrictions on freedom of expression. Restrictions are possible under Article 10(2) ECHR. The requirements are that the interference must be prescribed by law, pursues a legitimate aim and is necessary in a democratic society. The first two requirements do not often lead to a problem before the Court. The law must be sufficiently precise and the consequences must be foreseeable.<sup>30</sup> These requirements make the law transparent. If the law would not be

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<sup>25</sup> Supra note 24.

<sup>26</sup> ECtHR, *Thorgeirson v. Iceland*, 25 June 1992, *Application no. 13778/88*, par. 64.

<sup>27</sup> Supra note 16, p. 815 and K. Henrard, ‘Botsende grondrechten en het EHRM. Een pleidooi voor meer zorgvuldige argumentatie en minder ‘margin of appreciation’’, in: E. Brems, K. Henrard and R. De Lange, *Botsing van grondrechten*, The Hague: Boom Juridische Uitgevers 2008, p. 47.

<sup>28</sup> Supra note 6, p. 37.

<sup>29</sup> ECtHR, *Wingrove v. The United Kingdom*, 25 November 1996, *Application no. 174519/90*, par. 58, ECtHR, *Sürek (no. 1) v. Turkey*, 8 July 1999, *Application no. 26682/95*, par. 61 and ECtHR, *Feldek v. Slovakia*, 12 July 2001, *Application no. 29032/95*, par. 74.

<sup>30</sup> ECtHR, *Sunday Times v. The United Kingdom*, 26 April 1979, *Application no. 6538/74*, par. 49.

transparent, it is harder for citizens to know the consequences of their actions. In most cases, the limitation of freedom of expression fulfils the requirement prescribed by law.

The legitimate goals are mentioned in Article 10(2) ECHR. A question that could arise however in this context, is where the protection of religious feelings should fall under. It is not mentioned in Article 10(2) ECHR as a legitimate goal; only the protection of morals are mentioned specifically, but religion is not the same as morals. Or should religious feelings be protected under Article 9 ECHR? Although it is not specifically mentioned in Article 10(2) ECHR, according to the Court, religious feelings should be protected under Article 10 since these feelings fall within ‘the protection of the rights of others’.<sup>31</sup> As shall be described in the next paragraph, not all scholars agree on this view of the Court.

Overall, the legitimate goals do not create much difficulty. That is, however different with regard to the third requirement.

According to the *Sunday Times* judgment, the question of whether the interference was necessary in a democratic society must be determined by the pressing social need, whether the interference was proportionate towards the legitimate goal and whether the reasons given by the national courts were relevant and sufficient.<sup>32</sup>

For determining whether the interference was necessary in a democratic society, States have a certain margin of appreciation. However, this is not unlimited and ‘goes hand in hand with European supervision’ – the Court – that will give a final ruling on the matter.<sup>33</sup> The margin of appreciation depends amongst other things on the subject matter. For example, when it regards a topic in a political debate or of a general public interest, the margin of appreciation will be small,<sup>34</sup> while incitement to hatred will lead to a wider margin of appreciation.<sup>35</sup> On the other hand, it also depends on the question whether there is a common policy at the European level.<sup>36</sup> Religion, blasphemy and morals do not have a common policy.<sup>37</sup> According to the Court, States and their authorities, including national courts, are in a better position to settle these cases.

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<sup>31</sup> 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 and ECtHR, *Murphy v. Ireland*, 3 December 2003, *Application no. 44179/98*, par. 64.

<sup>32</sup> ECtHR, *Sunday Times v. The United Kingdom*, 26 April 1979, *Application no. 6538/74*, par. 62 and ECtHR, *Nilsen and Johnsen v. Norway*, 25 November 1999, *Application no. 23118/93*, par. 43.

<sup>33</sup> *Supra* note 4, par. 49.

<sup>34</sup> See for example ECtHR, *Wingrove v. The United Kingdom*, 25 November 1996, *Application no. 174519/90*, , par. 37.

<sup>35</sup> ECtHR, *Erdođdu and Ince v. Turkey*, 8 July 1999, *Application nos. 25067/94 and 25068/94*, par. 50.

<sup>36</sup> *Supra* note 5, p. 243.

<sup>37</sup> *Supra* note 34, par. 57 and 58.

These are the two general rules that can be distinguished from the case law of the Court and that can determine the margin of appreciation. In other cases, it will always depend on the circumstances and the background of the case.<sup>38</sup>

Another circumstance that is important for determining whether the restriction was proportionate, is by looking at the penalty that was imposed.<sup>39</sup> Although the right to freedom of expression is one of the core rights of a democratic society, it does not mean that restrictions of a criminal nature are not allowed.<sup>40</sup> This has also been recognized by the European Commission for Democracy through Law – hereafter the Venice Commission. According to the Venice Commission there exist four kind of restrictions that can be imposed on a speaker.<sup>41</sup> First, there are administrative fines. Secondly there are civil law remedies in which the speaker can be hold liable and should pay damages. The third sanction is especially important for the media, since it consists of a prohibition of publication of reports, articles and books. And fourthly, there are the criminal sanctions which are regarded as the heaviest sanctions that could be imposed. That criminal sanctions can be imposed, does not mean that a government may use these kind of sanctions when less intruding sanctions are available. Since the government is a particularly strong organ, it should try to refrain from imposing criminal sanctions.

There are different kind of criminal restrictions. Whether the criminal restrictions will pass the proportionality test, will partly depend on whether a fine was imposed or imprisonment. Another factor that should be taken into account, is whether the convicted person was an ordinary man or a politician. As will be described in chapter III, sentencing a politician for imprisonment can only pass the proportionality test of the Court in the most extreme circumstances.<sup>42</sup> However, as a general rule – in which extreme circumstances are always possible – imprisonment as a sanction for politicians is not in itself unlawful.

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<sup>38</sup> Supra note 5, p. 249 and ECtHR, *Frette v. France*, 26 February 2002, *Application no. 36515/97*, par. 40.

<sup>39</sup> ECtHR, *Scharsach and News Verslagsgesellschaft mbH v. Austria*, 13 November 2003, *Application no. 39394/98*, par. 30.

<sup>40</sup> ECtHR, *Sürek v. Turkey (No. 2)*, 8 July 1999, *Application no. 24122/94*, par. 34 and ECtHR, *Incal v. Turkey*, 9 June 1998, *Application no. 22678/93*, par. 54.

<sup>41</sup> European Commission for Democracy Through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, October 2008, Venice, par 54.

<sup>42</sup> R. Lawson, 'Wild Wilder Wildst. Over de ruimte die het EVRM laat voor de vervolging van kwetsende politici', *Het Nederlands Tijdschrift voor de Mensenrechten*, 2008-4, p. 472.

The severity of the penalty is important, since the penalty could lead to a ‘chilling effect’.<sup>43</sup> This means that the penalty could have the effect that people will stop expressing their feelings and thoughts because they are afraid to be punished for it.

#### *d. Conclusion*

This paragraph has discussed the general principles that can be derived from the Court’s case law. These principles include that politicians and the media are more protected, because of their role in society and the topics that they discuss. For them, there is less room available for imposing restrictions. What is also important, is that criticism is also protected under Article 10 ECHR.

What can be concluded is that these principles are determined by their content, kind of speaker, context and the restrictions imposed. The principles themselves determine a part of the scope of freedom of speech. The question what this scope is, is thereby partly answered.

### 3. Criticism

The emphasis in this thesis lies on the boundaries acceptable criticism given by politicians. Before examining criticism given by politicians, criticism in general – meaning given by other people – and on religion will now be examined.

#### *a. Criticism in general*

It is established case law that acceptable criticism is wider with regard to the government than a politician.<sup>44</sup> In my view, there are three reasons for this. First of all, the government is a strong organ in a State and therefore in a position in which it is better able to deal with criticism. Secondly, criticism – especially that of a politician – on the government is essential, because otherwise a democracy would be under pressure. And thirdly, the government is not a person but an institution and therefore it is harder to offend a government than to offend a person.

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<sup>43</sup> W. Sadurski, *Political Rights under Stress in 21<sup>st</sup> Century Europe*, Oxford: Oxford University Press 2006, p. 113, ECtHR, *Erbakan v. Turkey*, 6 July 2006, *Application no. 59405/00*, par. 70 and ECtHR, *Tonsbergs Blad as and Haukom v. Norway*, 1 May 2007, *Application no. 510/04*, par. 88.

<sup>44</sup> ECtHR, *Sürek and Özdemir v. Turkey*, 8 July 1999, *Applications nos. 23927/94 and 24277/94*, par. 60.

When insulting a person, the acceptable criticism depends on the position of the attacked person. A verbal attack on a politician is more accepted than a verbal attack on a citizen.<sup>45</sup> The idea behind the reasoning of the Court is that such criticism does not serve a public value.<sup>46</sup>

Criticism on religion has a special position. On the one hand, there is a wider margin of appreciation for States to restrict criticism on religion, since there is no common ground or policy in Europe. On the other hand, religious persons should undergo criticism because there are other persons who do not share their views.<sup>47</sup> Therefore, in order to determine the boundaries of acceptable criticism, the Court will answer the question whether the criticism was gratuitously offensive or not and whether it contributed to a topic of general public interest.<sup>48</sup> Thus it takes into account the content and context of the speech. If the criticism is not gratuitously offensive then the criticism is allowed. Otherwise, a wider margin of appreciation exists where a State has more possibilities for restrictions. Moreover, the boundaries of acceptable criticism depend on the topic of the criticism: does the speech concern a political debate or was the statement one of a general public interest. If the question can be answered in a confirmative way, then even harsh words are protected under Article 10 ECHR.<sup>49</sup>

The content and context are not the only factors to be taken into account. Acceptable criticism also depends on the position of the speaker and of the attacked person in society. Again religion has a special role, since criticism could violate the feelings under Article 9 ECHR. The Court has produced many case law on criticism on religion. The trend of the Court was set in the *Otto-Preminger-Institut* case, where acceptable criticism on religious feelings may not be 'gratuitously offensive'.<sup>50</sup> Such criticism goes beyond the scope of protection of Article 10 ECHR. However, this has led to a heavy discussion amongst scholars.

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<sup>45</sup> Supra note 24, par. 42, ECtHR, *Colombani and others v. France*, 25 June 2002, *Application no. 51279/99*, par. 56 and ECtHR, *Oberschlick v. Austria*, 23 May 1991, *Application no. 11662/85*, par. 59.

<sup>46</sup> ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994, *Application no. 13470/87*, par. 49.

<sup>47</sup> Supra note 46, par. 47.

<sup>48</sup> Supra note 46, par. 47 and 49 and supra note 34, par. 52.

<sup>49</sup> See specifically ECtHR, *Oberschlick v. Austria*, 23 May 1991, *Application no. 11662/85*, dissenting opinion of Judge Thór Vilhjálmsson.

<sup>50</sup> Supra note 46, par. 49.

b. *Criticism on religion: a heavy discussion of the Otto-Preminger-Institut criteria*

The criteria of gratuitously offensive criticism in the *Otto-Preminger-Institut* case has been heavily criticised by scholars. Especially the part that criticism on religious feelings could be regarded as gratuitously offensive leads to a lot of questions. The first question that Edge puts forward, is whether religious feelings fall under Article 9 ECHR. According to him, Article 9 protects two interests – freedom of thought conscience and religion on the one hand and freedom to manifest one’s conscience or religion on the other hand. Religious feelings are not mentioned.<sup>51</sup>

Elias and Coppel ask themselves why only religious feelings are protected and not other kind of feelings, such as political and philosophical ones.<sup>52</sup> This question arises because it interconnects with the question of Edge: why do religious feelings fall under Article 9 ECHR? If such religious feelings do not fall under this Article, then the question is why only these religious feelings are more protected.

Moreover, the judgment of the Court is according to Edge not clear, because absolute terms were not used. The justification for a restriction of freedom of expression can be in the protection of ‘other interests’. According to the Court, other interests also means religious feelings.<sup>53</sup> Edge thinks that interpreting Article 9 ECHR in such a way is too broad and that there will be a disbalance between the protection of Article 10 ECHR: individuals are in an inferior position to criticise religion than a State.<sup>54</sup> Unfortunately, he does not continue this presumption. Therefore it is hard to verify whether his assumption can be seen in practice.

The Venice Commission agrees however with the Court’s line of argumentation. According to the Venice Commission, ‘malicious violation’ of religious feelings could lead to intolerance.<sup>55</sup> The Venice Commission also argues that religious feelings are different from other feelings because it could lead to a disproportionate and severe shock.<sup>56</sup> In my view, other feelings as well could lead to such a shock. It therefore gives not a very well distinction why religious feelings should be more protected. However, in the end the Venice Commission’s view becomes unclear. On the one hand it states that even criminal sanctions as a warning not to

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<sup>51</sup> P. W. Edge, ‘The European Court of Human Rights and Religious Feelings’, *International and Comparative Law Quarterly*, 1998, vol. 47, p. 682.

<sup>52</sup> P. Elias and J. Coppel, ‘Freedom of Expression and Freedom of Religion: Some Thoughts on the Glenn Hoddle Case’, in: J. Beatson, Y. Cripps (ed), *Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams*, Oxford: Oxford University Press 2002, p. 54.

<sup>53</sup> Supra note 51, p. 682.

<sup>54</sup> Supra note 51, p. 682.

<sup>55</sup> Supra note 41, par. 47.

<sup>56</sup> Supra note 41, par. 48.

hurt religious feelings should be allowed because this follows from the duty to avoid gratuitously offensive expressions. On the other hand, the Commission underlines that criticizing religious ideas may also include hurting someone's religious feelings.<sup>57</sup>

In my view, it is indeed difficult to incorporate religious feelings under Article 9 ECHR and thus under 'the rights of others' of Article 10 ECHR. For me, it is not clear why only religious feelings should be more protected than other feelings. Additionally, the Court has not made it very clear why religious feelings should fall under Article 9 ECHR.

However – as shall be examined in the next chapters – it seems that the Court has changed its course a little bit in the *I.A.* case. The reason for the restriction in this case was not that religious feelings were violated, but that believers could feel themselves offensive attacked by the words that were used.<sup>58</sup>

### *c. Conclusion*

In this paragraph criticism as an aspect of the question what the scope of freedom of expression is has been examined. In general, the answer to this question can be that acceptable criticism may not be gratuitously offensive. Whether such criticism is gratuitously offensive depends on the circumstances of the case: the position of the victim of the criticism should be taken into account, as well as the context of the situation: did the speech contribute to a political debate or a topic of general public interest. Scholars have criticised the Court's conclusion in the *Otto-Preminger-Institute* case, but it seems that the Court has changed its line of argumentation in the *I.A.* case.

Now that several aspects of the main question of this chapter have been answered, it is time to review another aspect of freedom of expression. That is the duties and responsibilities of the speaker.

## 4. Duties and responsibilities

Article 10 ECHR is unique, because it is the only Article in the Convention that speaks of duties and responsibilities in paragraph 2. It is thereby a factor that influences the speaker and

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<sup>57</sup> Supra note 41, par. 66, 73 and 76.

<sup>58</sup> ECtHR, *I.A. v. Turkey*, 13 september 2005, *Application no. 42571/98*, par. 29 and 30.

the speakers possibility to express his or her opinion and thus the scope of freedom of speech. Duties and responsibilities makes it possible for the Convention to impose restrictions on this right. The ‘task’ of duties and responsibilities is to protect human dignity in order to avoid hate and disharmony.<sup>59</sup> Freedom of speech could lead to hate speech. The duties and responsibilities must therefore prevent the dangerous use of speech in democracy.<sup>60</sup>

Duties and responsibilities were for the first time explicitly mentioned in the *Handyside* judgment as a factor that could determine the scope of Article 10 ECHR.<sup>61</sup> However, this factor was not decisive in the final judgment of the *Handyside* case.

According to the *Jersild* and *Alinak* cases, there are different duties and responsibilities which depend on the position of the speaker and the means that such a person uses.<sup>62</sup> For example, the duties and responsibilities for a politician are different from that of a citizen. The same goes for the means that are used: there are different effects when one uses a television programme, a written newspaper article or the internet.<sup>63</sup> This has to do with the role in society that a politician serves and the impact that a statement can make on the audience.

The case law of the Court distinguishes two situations in which there are particular duties and responsibilities.

First of all, in a situation of conflict, the media and politicians have a special duty and responsibility not to worsen the situation.<sup>64</sup> Secondly, in the *Otto-Preminger-Institute* case, the Court made it clear that there is a duty and responsibility ‘to avoid, as far as possible expressions that are gratuitously offensive to others’ if they were not a part of a public debate.<sup>65</sup> From this perspective, it is important that gratuitously offensive statements should be avoided at all. It does not matter whether these statements would hurt religious feelings. This view has been confirmed in *Giniewski* case. In this case the Court put it in a broader perspective: gratuitously offensive remarks should be avoided since it violates the rights of

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<sup>59</sup> Supra note 42, p. 482-483.

<sup>60</sup> C. Pákozdy, ‘Les effets de la deuxième guerre mondiale dans la jurisprudence de la Cour Européenne des Droits de l’Homme sur la liberté d’expression’, in C. Pákozdy, *L’Histoire en droit international*, 2004, p. 365.

<sup>61</sup> Supra note 4, par. 49.

<sup>62</sup> ECtHR, *Jersild v. Denmark*, 23 April 1994, *Application no. 15890/89*, par. 31 and ECtHR, *Alinak v Turkey*, 29 March 2005, *Application no. 40287/98*, par. 44.

<sup>63</sup> In *Jersild*, the case concerned a television programme where racist people were talking about their views. Since this was a serious television programme in which the presenter distinguished himself at the beginning

<sup>64</sup> ECtHR, *Sürek v. Turkey (No. 2)*, 8 July 1999, *Application no. 24122/94*, par. 36, supra note 35, par. 54 and supra note 44, par. 63.

<sup>65</sup> Supra note 46, par. 49, supra note 34, par. 52 and ECtHR, *Gündüz v. Turkey*, 4 December 2003, *Application no. 35071/97*, par. 37.

others.<sup>66</sup> This goes beyond the religious feelings. The Court decided however, that Giniewski's were not gratuitously offensive – he accused Catholicism as a cause for the Holocaust – because the remarks made were a part of a public debate.<sup>67</sup> Thus, one must avoid that too much criticism is restricted; only when it can be stated that it is gratuitously offensive, restrictions on Article 10 ECHR are possible.

Both situations will be examined more thoroughly in chapter III.

### *Conclusion*

The duties and responsibilities is one of the aspects that can influence the scope of freedom of expression. Article 10 ECHR is unique by mentioning these duties and responsibilities which should be taken into account by the speaker. The duties and responsibilities depend as far as their scope is concerned on the position of the speaker in society, the subject of the debate – content – and the background of where the speech was held – context.

The question of what the is scope of freedom of expression, is thereby almost answered. Only one other factor and hate speech should be further analysed.

## 5. Statements of fact and value-judgments

The space for someone's opinion depends on the type of statement that he or she makes. In *Lingens* the Court determined for the first time that there is a distinction between a value-judgment and a statement of fact.<sup>68</sup> The difference has an important procedural effect. Statements of facts need to be proven in court. If there is a statement of fact, it is easier for a judge to determine whether the statement was factual. This punctuality is especially important for the media, since they have a duty to verify whether their news is based on correct facts and the truth.<sup>69</sup>

However, that does not mean that it is not possible for the media to use value-judgments. Whether a statement is a value-judgment, depends on the wording: are they intended to influence the opinion of the audience?<sup>70</sup> If that is the aim then journalist, by using value-

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<sup>66</sup> ECtHR, *Giniewski v. France*, 31 January 2006, Application no. 64016/00, par. 43.

<sup>67</sup> *Supra* note 66, par. 51.

<sup>68</sup> *Supra* note 24, par. 46.

<sup>69</sup> ECtHR, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application no. 21980/93, par. 55.

<sup>70</sup> ECtHR, *Nilsen and Johnsen v. Norway*, 25 November 1999, *Application no. 23118/93*, par. 50.

judgments, are in a position to say more about a topic than when they are only reporting about facts.

As mentioned, the difference between these two statements has more a procedural effect. Value-judgments do not need to be proven. In fact, if national courts demand someone to prove their value-judgment, than this is in itself a violation of Article 10 ECHR.<sup>71</sup> Thus, there is a difference in the degree of the burden of proof. That does not mean, however, that a value-judgment does not need any factual support. Without any factual support or basis, a value-judgment can be excessive as well.<sup>72</sup>

### *Conclusion*

The scope of freedom of expression depends on the type of statement: was it a statement of fact or a value-judgment? The scope is wider when it concerns a value-judgment, because the opinion of someone only needs to have a factual basis.

## 6. Hate speech

A boundary of the scope of freedom of expression is the ban on hate speech. It is important to know the definition and to understand what could be brought under the heading of hate speech, because the beginning of hate speech means the end of the scope – of protection – of Article 10 ECHR for the speaker. The question in this paragraph is what can constitute as hate speech.

### *a. The definition of hate speech and the connection with Article 17 ECHR*

According to the Committee of Ministers of the Council of Europe, hate speech are ‘all forms of expressions which spread, incite, promote, or justify racial hatred, xenophobia, anti-semitism or other forms of hatred based on intolerance.’<sup>73</sup> The Court has used a part of this

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<sup>71</sup> Supra note 24, par. 46, supra note 49, par. 63 and ECtHR, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, *Application no. 13778/88*, par. 65.

<sup>72</sup> ECtHR, *De Haes and Gijssels v. Belgium*, 24 February 1997, *Application no. 19983/92*, par. 47 and ECtHR, *Jerusalem v. Austria*, 27 February 2001, *Application no. 26958/95*, par. 43.

<sup>73</sup> Council of Europe, Committee of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on ‘hate speech’.

definition in its case law. The Court defines hate speech as ‘all forms of expressions which spread, incite, promote or justify hatred based on intolerance’.<sup>74</sup>

What should be taken into account, is that hate speech and Article 17 ECHR are not the same. Article 17 ECHR concerns the abuse of rights conveyed in the Convention and has been used by the Court only for the most extreme expressions. The meaning of Article 17 ECHR is that when statements fall under the heading of this article, these statements are not admissible for an examination of other Articles of the Convention. Not all forms of hate speech do automatically fall under Article 17 ECHR. Only some do, such as questioning clearly established historical facts. Therefore, denial of the Holocaust falls under Article 17 ECHR.<sup>75</sup> In the *Lehideux* case, there was a deviated interpretation of a historical fact, linked to the Second World War. However, since it was not about the denial of the Holocaust the Court allowed the expression.<sup>76</sup> Spreading Nazi-ideas also falls within the scope of Article 17 ECHR. Nevertheless, using only the word Nazi itself cannot lead to the conclusion that Article 17 ECHR is applicable, because using this word is most of the time used as a value-judgment. For a value-judgment the scope of expressing ones opinion extends to exaggeration.<sup>77</sup>

As previously mentioned, not all kind of hate speech fall automatically under Article 17 ECHR. According to some scholars, the usual approach of the Court is that all forms of speech, including hate speech, fall under Article 10 ECHR. An example of such an approach is the *Sürek* case.<sup>78</sup> When in general all speeches fall within the examination of Article 10 ECHR, the first step of the Court is to examine whether the expression also deserves the protection of Article 10 ECHR.

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<sup>74</sup> See for example ECtHR, *Gündüz v. Turkey*, 4 December 2003, *Application no. 35071/97*, par. 40-41.

<sup>75</sup> ECtHR, *Lehideux and Isorni v. France*, 23 September 1998, *Application no. 24662/94*, par. 47, ECtHR, *Garaudy v. France*, 24 June 2003, *Application no. 65031/01*, par. 2 and D. Keane, ‘Attacking hate speech under Article 17 of the European Convention on Human Rights’, *Netherlands Quarterly of human rights*, 2007, vol. 25, nr. 4, p. 642.

<sup>76</sup> ECtHR, *Lehideux and Isorni v. France*, 23 September 1998, *Application no. 24662/94*, par. 47. The discussion was about Philippe Pétain, a soldier who collaborated with the enemy, and whether the applicants could refer to him as ‘supremely skillful’.

<sup>77</sup> *Supra* note 42, p. 476, *supra* note 39, par. 43 and ECtHR, *Karman v. Russia*, 14 December 2006, *Application no. 29372/02*, par. 39-43.

<sup>78</sup> ECtHR, *Sürek v. Turkey* (No. 1), 8 July 1999, *Application no. 26682/95*, par. 43 and 62. See also *supra* note 10, p. 290 and A.J. Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting: theorie, rechtsvergelijking, discriminatie, pornografie*, Nijmegen: Ars Aequi Libri 2006.

Other scholars are of the opinion that Article 17 ECHR should not at all be used by the Court because of the effects that the use of this Article has.<sup>79</sup> Article 17 ECHR is an Article about the admissibility of a case. If the Court finds that Article 17 ECHR is applicable, no substantive session of the Court will take place where Article 10(2) ECHR will be applied. When no substantive session of the Court takes place, the speakers who are convicted by their national authorities have less protection than speakers whose cases are examined under Article 10(2) ECHR. Cannie and Voorhoof strongly encourages the Court to use Article 10(2) ECHR often more because this will benefit democracy better protects human rights.<sup>80</sup> On the one hand I agree with Cannie and Voorhoof that indeed human rights are protected better when Article 10(2) ECHR is used than Article 17 ECHR. On the other hand, there are procedural arguments not to use this Article; the Court has already difficulty to cope with all the cases that are attended to them. An Article 17 ECHR procedure takes less time to handle than a substantive session of the Court about Article 10(2) ECHR. And although Cannie and Voorhoof state that using Article 10(2) ECHR will benefit human rights, it will not benefit Article 6 ECHR and the right to have a trial within a reasonable time. A further discussion however goes beyond the scope of this thesis.

#### *b. Guidelines and conclusions*

From the case law, the following guidelines on what constitutes as hate speech can be derived:

- Incitement to racial hatred or other words, directed at person(s) who are belonging to the same race.<sup>81</sup> However, the Court has stated that there must be a real danger that the incitement to racial hatred would happen;<sup>82</sup>
- Hatred against people of a certain religion or insulting remarks about ethnic minorities.<sup>83</sup> In the *Jersild* case, the expressions made by the guests of the television programme were regarded as more than insulting by the Court and therefore constituted as hate speech;<sup>84</sup> The question was whether Jersild, the television host of

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<sup>79</sup> H. Cannie and D. Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention', *Netherlands Quarterly of Human Rights*, (2011), vol. 29, nr. 1, p. 82.

<sup>80</sup> Supra note 79, p. 83.

<sup>81</sup> A. Weber, *Manual on hate speech*, Strasbourg: Council of Europe Publishing 2009, p. 4 and J.H. Gerards and others (ed), *EVRM Rechtspraak en Commentaar*, The Hague, Sdu Uitgevers, 2006.

<sup>82</sup> ECtHR, *Alinak v. Turkey*, 29 March 2005, *Application no. 40287/98*, par. 45 and ECtHR, *Dicle v. Turkey*, 10 November 2004, *Application no. 34685/97*, par. 17.

<sup>83</sup> A. Weber, *Manual on hate speech*, Strasbourg: Council of Europe Publishing 2009, p. 4.

<sup>84</sup> ECtHR, *Jersild v. Denmark*, 23 September 1994, *Application no. 15890/89*, par. 35.

the programme, could be hold accountable for hate speech. The Court concluded that he could not be hold responsible because Jersild distanced himself from these remarks. Additionally the people who were watching the programme were beforehand well informed about the content of the show.<sup>85</sup>

- Other expressions that are intolerant and directed against the values of the Convention.<sup>86</sup> In *Gündüz* case the Court's conclusion was that supporting the Sharia is difficult to identify with the values of the Convention. However, only defending the Sharia itself cannot constitute as an expression that does not deserve the protection of Article 10 ECHR.<sup>87</sup> Especially politicians should avoid statements on religion which are hard to identify with the values of the Convention; such statements could feed intolerance behaviour.<sup>88</sup>

The question of this paragraph was what hate speech exactly is. The Committee of Ministers of the Council of Europe has made a definition which is similar to the one that the Court uses. Some guidelines can also be derived from the Courts case law. Hate speech exists when the expression incites to racial hatred, hatred against people of a certain religion or insulting remarks about ethnic minorities and other expressions that are intolerant.

Knowing what hate speech means is important for determining the scope of the right to freedom of speech. The scope – of the protection – of Article 10 ECHR will end when hate speech exists. Thus, freedom of expression does not extent to hate speech. Hate speech will fall under Article 17 ECHR or will be examined under Article 10(2) ECHR.<sup>89</sup> The last method is preferable according to some scholars. In the latter case, restrictions on hate speech are earlier accepted than on other forms of speeches.

## 7. Interim conclusion

This chapter has given some general information about the freedom of expression of Article 10 ECHR.

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<sup>85</sup> Supra note 84, par. 31.

<sup>86</sup> E. Barendt, *Freedom of Speech*, Oxford: Oxford University Press 2005, p. 182, ECtHR, *Lehideux and Isorni v. France*, 23 September 1998, *Application no. 24662/94*, par. 53 and supra note 84, par. 35.

<sup>87</sup> Supra note 74, par. 51.

<sup>88</sup> ECtHR *Erbakan v. Turkey*, 6 July 2006, *Application no. 59405/00*, par. 62.

<sup>89</sup> D. Keane, *Attacking hate speech under Article 17 of the European Convention on Human Rights*, *Netherlands Quarterly of human rights*, 2007, vol. 25, nr. 4, p. 655-657.

First, the reasons were examined for the question why Article 10 ECHR is protected more than other rights of the Convention. The reasons were found in the goals of Article 10 ECHR: next to the common goals the protection and promotion of democracy is the decisive goal that makes freedom of speech so special.

The chapter has examined specific factors which are important for answering what the scope of the freedom of expression is. The scope will always depend on the circumstances of the case. These circumstances consist of the content, context, position of the speaker and the victim and the consequences of the speech – meaning restrictions. This is very abstract. However, the emphasis of the chapter has been placed on the scope of freedom of expression in general and more specifically on criticism. Some factors which are important for the boundaries of acceptable criticism have been examined, including the criticism itself, general principles, duties and responsibilities, value-judgments and statements of fact and hate speech. Thereby some more general rules can be formulated.

General principles have been derived from the Court's case law. The general principles made it clear that the media and politicians are treated differently when it concerns their expressions and speeches. The scope furthermore depends on the subject of the debate and whether the debate was a political debate or a matter of public concern. The restrictions can determine the scope of freedom of expression afterwards.

Acceptable criticism ends when it concerns criticism that is gratuitously offensive and does not contribute to the public debate. Although criticism has been given by scholars that gratuitously offensive remarks also included remarks that could hurt religious feelings, the Court has reduced this line of reasoning in the *I.A.* case. The position of the speaker should also be taken into account, because the speaker has duties and responsibilities which he or she bears. From this point of view, the media and politicians again have a different position because they have different duties and responsibilities than citizens.

Furthermore, the scope of freedom of expression will be wider when the statement was a value-judgment than a statement of fact.

Finally, the scope of freedom of expression ends when hate speech begins. The last paragraph has examined what hate speech is in order to determine this line. When hate speech exist, restrictions are more allowed than on other kind of speeches.

The questions which have been examined in this chapter are necessary to answer the other questions of this thesis. Knowing the scope of the freedom of speech in general, makes it

easier to distinguish the differences with the scope of political speech. In the next chapter the meaning of political speech will be discussed.

## Chapter II: Some theoretical remarks about political speech

In the former chapter some general information was given about the freedom of speech in order to answer the question what the scope of freedom of expression in general is. This chapter will continue by examining more thoroughly political speech. There are three questions which concern political speech and will be examined in this chapter. The first question is why political speech is more protected than other kind of speeches. This question will be discussed in the first paragraph. One of the reasons that political speech is a special category, has to do with the parliamentary immunity. This raises the second question, namely what the role of parliamentary immunity is in freedom of speech. The scope of this parliamentary immunity will be discussed in the fourth paragraph.

The third question is what the consequences are of protecting political speech. The question will be answered by examining the position of politicians – paragraph 2 –, political speech itself – paragraph 3 – and the duties and responsibilities of politicians – paragraph 5. In the sixth paragraph, some information will be given on hate speech in the context of a politician.

Throughout this chapter, references will be made to the Wilders case. On the 23<sup>rd</sup> of June of this year, Wilders was found not guilty of any of the charges brought against him. Although it seems that both parties will not appeal this decision of the Dutch court, there is a possibility that the case will be brought before the Court by Muslim organisations. This chapter – and the next chapters – will presume that the case will be brought before the Court. By creating such a situation, one of the research questions can be answered. In this chapter, a part of that research question shall be answered, which is whether Wilders has exceeded the limits of protection of Article 10 ECHR.

All of these questions are necessary to determine the scope of freedom of expression of politicians.

### 1. Why political speech is a special category

This paragraph will examine why political speech is more protected than other kind of speeches. In order to provide an answer, philosophical and political arguments shall now be

used and discussed.<sup>90</sup>

As described in the first chapter, one of the most important reasons that freedom of expression is considered so significant, is that it constitutes one of the essential foundations of democracy.<sup>91</sup> It has both a special status in democratic States as it does before the Court.<sup>92</sup>

According to the Court in the *Lingens* judgment, political speech is at the very core of a democratic society and prevails throughout the Convention.<sup>93</sup> In other words, without political speech, democracy would not be able to exist.<sup>94</sup> For this assumption, there are two reasons.

First of all, the special status of political speech is important for the separation of powers: due to the special status politicians are in a better position to say anything they ought to say. They can do this independently and without the fear that they will be prosecuted for their statements.<sup>95</sup>

Secondly, political speech is especially important for political parties and politicians. Political parties represent the electorate and defend the interests of society.<sup>96</sup> Without the freedom of political speech, it would be hard for political parties to exist and to have different opinions. Therefore, Article 11 ECHR – the right of association – should be read in connection with Article 10 ECHR. Some years later, the Court also recognized the importance of political speech for politicians in the *Jerusalem* case. Restrictions call for the closest scrutiny when it concerns a speech of a politician.<sup>97</sup> This is necessary because politicians and political parties protect collective and individual interests. They do this, by discussing political matters in a public sphere. Citizens can thereby receive information and exchange opinions on public matters.<sup>98</sup>

Taking these two reasons together, the conclusion can be that without the protected status of political speech, it would be hard for a democracy to function properly. The players in the political field would not be able to say what they ought to say without this freedom.<sup>99</sup>

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<sup>90</sup> E. Barendt, *Freedom of Speech*, Oxford: Oxford University Press 2005, p. 169.

<sup>91</sup> Supra note 4, par 49.

<sup>92</sup> I. Hare, 'Is the Privileged Position of Political Expression Justified?', in J. Beatson and Y. Cripps (eds), *Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams*, Oxford: Oxford University Press 2000, p. 105.

<sup>93</sup> Supra note 24, par. 42.

<sup>94</sup> Supra note 6, p. 42.

<sup>95</sup> Supra note 6, p. 43.

<sup>96</sup> ECtHR, *Incal v. Turkey*, 9 June 1998, *Application no. 22678/93*, par. 46. See also ECtHR, *United Communist Party and Others v. Turkey*, 30 January 1998, *Application no. 19392/92*, par. 43-44 and 57.

<sup>97</sup> ECtHR, *Jerusalem v. Austria*, 27 February 2001, *Application no. 26958/95*, par. 36.

<sup>98</sup> W. Sadurski, *Political Rights under Stress in 21<sup>st</sup> Century Europe*, Oxford: Oxford University Press 2006, p. 84.

<sup>99</sup> Supra note 92, p. 116 and supra note 83, p. 37.

Besides democracy there are also other reasons for the better protection of political speech. According to Barends, it is also possible to look at the constitutions of the Member States of the Convention. In most of these constitutions the freedom of speech is incorporated with other political rights, such as the right to vote. This is called a structural argument: because it is situated with other political rights, freedom of speech is especially important for a politician.<sup>100</sup>

However, in my view, the structural argument does not provide an answer to the question why political speech in particular should be more protected than other speeches. If it is one of the rights in a political context then a privileged status is not needed.<sup>101</sup>

Other reasons that Barends brings forward, are the spirit of the constitution which gives the political speech a privileged status and the commitment to society. Still, these reasons have never been mentioned by the Court as a decisive factor for a better protection of political speech. It has been established case law that political speech is at the core of the democratic society and thereby has a special status.<sup>102</sup>

Although it seems clear that democracy is the most important reason for protecting political speech, some modifications are necessary. First of all, although political speech is at the core of democratic society, it cannot be used as the only reason for not restricting political speeches.<sup>103</sup> Other aims are necessary.

Secondly, although the Court has made it clear that there is less margin of appreciation for restrictions on political speech, it has never actually given it a 'generic privilege'.<sup>104</sup> It does not have a generic privilege, because the Court has refused to make a distinction between political speech and matters of general public concern.<sup>105</sup>

### *Conclusion*

This paragraph has tried to provide an answer to the question why political speech is more protected than other kind of speeches. The answer could be that the protection is necessary for

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<sup>100</sup> Supra note 90, p. 155.

<sup>101</sup> Supra note 92, p. 121.

<sup>102</sup> ECtHR, *Castells v. Spain*, 23 April 1992, *Application no. 11798/85*, par. 49, supra note 24, par. 42 and supra note 49, par. 58.

<sup>103</sup> ECtHR, *Ahmed and Others v. UK*, 2 September 1998, *Application no. 22954/93*, par. 53.

<sup>104</sup> L. Zines, 'Freedom of Speech and Representative Government', in: J. Beatson and Y. Cribbs (ed), *Freedom of Expression and Freedom of Information. Essays in honour of Sir David Williams*, Oxford: Oxford University Press 2000, p. 47.

<sup>105</sup> ECtHR, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, *Application no. 13778/88*, par. 64.

the protection of democracy. When State authorities want to restrict political speech, there is a small margin of appreciation. Democracy, however, may not be the sole aim for not restricting political speeches.

The first question of this chapter has now been answered. The following paragraph will discuss the position of politicians. Their position can have consequences for the scope of freedom of political speech.

## 2. The protected party: politicians

The reasons for a better protection of political speech better leads to another question: what are the consequences of this kind of protection? The question can partly be answered by verifying the position of politicians.

According to the case law of the Court politicians, union leaders and other persons who have a public function, have a privileged status with regard to a political speech.<sup>106</sup> For political parties this has been recognized in the *Incal* case and for politicians in the *Jerusalem* case.<sup>107</sup> Again, the reason for protecting politicians and other persons who defend a public function, is to protect democracy since these people have a public interest.<sup>108</sup>

According to Beloff, the consequences of this privileged status is that ‘it enables someone, without incurring legal liability, to make statements about another person which are defamatory and factually incorrect, or which cannot be proven by admissible evidence to be true.’<sup>109</sup> However, that is not exactly true. It is true that a politician is not often liable for his statements. But statements must be made in good faith.<sup>110</sup> Moreover, there is a difference between statements of facts and value-judgments: the first one needs to be proven and therefore must be correct, while the second one should at least have some factual basis.<sup>111</sup>

The privileged status of a politician leads to the consequences that politicians and citizens are not treated equally towards each other. This inequality is inevitable, because of the different

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<sup>106</sup> Supra note 70, par. 44.

<sup>107</sup> Supra note 97 and 98.

<sup>108</sup> M. J. Beloff, ‘Politicians and the Press’, in: J. Beatson and Y. Cribbs (ed), *Freedom of Expression and Freedom of Information. Essays in honour of Sir David Williams*, Oxford: Oxford University Press, p. 71.

<sup>109</sup> Supra note 108, p. 71.

<sup>110</sup> ECtHR, *Colombani and others v. France*, 25 June 2002, *Application no. 51279/99*, par. 65 and ECtHR, *Feldek v. Slovakia*, 12 July 2001, *Application no. 29032/95*, par. 84.

<sup>111</sup> See chapter I, par. 5.

roles in society that citizens and politicians have.<sup>112</sup> However, for such an inequality a powerful justification should exist. Otherwise this could lead to discrimination.<sup>113</sup> The justification for this inequality is the protection of democracy.

Some examples of this inequality of the Court can be given. The Court has concluded several times that the scope of acceptable criticism on the government is wider than on a politician. The same is applicable to the relationship between politicians and citizens: the scope of acceptable criticism is wider when the criticism concerns politicians than citizens.<sup>114</sup> Here, people are not treated equally because of their status. Another example is that comedians have more space to give criticism as a way of satire than an ordinary citizen, because of their profession.<sup>115</sup>

The consequences of protecting political speech better, is that politicians are also better protected. It leads to an inequality between politicians and citizens. However, this inequality has justifications, which are the protection of democracy and the protection of the separation of powers.

That does not mean that politicians always have this privileged position. It is clear that a politician has the privileged status in Parliament. But when statements are made outside Parliament, the position of the politician should be closely looked at: is he acting as a politician or not?<sup>116</sup> If not, then there is more room for restrictions on the statements because the politician was acting as a private person who did not have a privileged status at that time. This leads to the question when someone can be identified as a politician. Especially in elections this question is important. Do candidates during an election – and who are not a politician – have the same privileges as a politician has? According to Sadurski candidates and politicians do not have the same kind of status. He uses this for his argument that politicians should not be treated differently. When candidates are eligible during an election, they do not have the same status as politicians. Sadurski states that candidates are not equal, while they both aim at the same thing: represent the people in their society.<sup>117</sup> Although one could argue this way, the Court has stated that not only politicians should be protected for the

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<sup>112</sup> I. Buruma, *Grenzen aan de Vrijheid. Van de Sade tot Wilders*, Stichting Maand van de Filosofie 2010, p. 65. Buruma even states that it is impossible to treat everyone equal.

<sup>113</sup> Supra note 108, p. 85.

<sup>114</sup> ECtHR, *Oberschlick v. Austria*(2), 1 July 1999, *Application no. 20834/92*, par. 29 and ECtHR, *Lopes Gomes da Silva v. Portugal*, 28 September 2000, *Application no. 37698/97*, par. 30.

<sup>115</sup> Supra note 112, p. 64.

<sup>116</sup> Supra note 6, p. 43.

<sup>117</sup> Supra note 98, p. 115.

political speech, but also those who have a public function. When a candidate is eligible, he or she has a public function and therefore is protected.

### *Conclusion*

The position of politicians is different because of the better protection of political speech. This leads to a special position of politicians. The Court has recognized this special position of politicians and other persons who have a public function. This means that politicians are better protected than other persons, because they represent the electorate which is at the core of a democratic society. However, there are some rules that should also be taken into account by a politician. One of them is that a politician should make statements in good faith. Another nuance is that politicians do not always have their protected status; only when he is acting as a politician, the politician is more protected. That is also applicable for candidates who are eligible during elections.

The consequences of protecting political speech has thereby partly been answered: the consequence is that the position of politicians is different than that of citizens. This leads to an inequality which can be justified by looking at the role of politicians in society. However, it cannot clarify all the consequences of protecting political speech. For that, an examination of what political speech means is necessary.

### 3. Defining political speech

As stated in the previous paragraph, the question of the consequences of a better protection of political speech better, has partly been answered, but the answer is not yet complete. Another piece of the answer can be given by examining political speech itself: what does political speech exactly mean and what can be regarded as political speech. An example of the reach of political speech will be given by making a reference to the Wilders case.

#### *a. What is political speech?*

Political speech could be defined as ‘all speeches relevant to the development of public

opinion on the whole range of issues that an intelligent citizen could think about'.<sup>118</sup> This includes political debates as the Court has recognized in the *Rekvényi* case.<sup>119</sup> But it is more than just the political discussions, debates and speeches: it also includes speeches about the public concern. There are good reasons for including speeches about the public concern, since political speeches are most of the time about topics of public concern.<sup>120</sup> What constitutes as a public discussion has never been made clear by the Court. What can be concluded from the case law of the Court, is that it determines rather quickly that some speeches effect 'the life of the community' and thereby constitutes a public concern.<sup>121</sup>

In the *Thorgeirson* case the Court was very clear that political speech and topics about public general interests cannot be treated separately.<sup>122</sup> Thorgeirson was a writer who published an article about police brutality that existed in the police force of Iceland. Thorgeirson was after this publication prosecuted for defamation of the Reykjavik police. The government's argument was that a restriction was possible since this publication was not a political speech and therefore could not have the protection of a political speech. The Court did not agree: political speech and matters of a general public interest – such as the publication of Thorgeirson – are the same.<sup>123</sup> Although this conclusion of the Court has become established case law, one has to be careful not to draw too quick a conclusion that political speech and public debates are treated the same way. In the *Thorgeirson* case, the Court came to this conclusion as a reply to the argument that political speeches should not have a special protection. The Court answered this submission by stating that indeed, political expressions alone do not have a special status but that they should have the same status as public debates have.<sup>124</sup> Thus, in this context it is true that there is no distinction between the two. However, one has to look at the argumentation of the Court. From this, we cannot make a general conclusion that every time political speech will always be treated the same way as a public discussion.

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<sup>118</sup> D. Murray, 'Freedom of Expression, Counter-Terrorism and the Internet in Light of the UK Terrorist Act 2006', *Netherlands Quarterly of Human Rights* 2009, vol. 27/3, p. 355.

<sup>119</sup> ECtHR, *Rekvényi v. Hungary*, 20 May 1999, *Application no. 25390/94*, par. 26.

<sup>120</sup> *Supra* note 39, par. 35.

<sup>121</sup> ECtHR, *Barthold v. Germany*, 25 March 1985, *Application no. 8734/79*, par. 58, ECtHR, *Bergens Tidende and others v. Norway*, 2 May 2000, *Application no. 26132/95*, par. 51 and ECtHR, *Stambuk v. Germany*, 17 October 2002, *Application no. 37928/97*, par. 46.

<sup>122</sup> *Supra* note 105, par. 63.

<sup>123</sup> *Supra* note 105, par. 64.

<sup>124</sup> *Supra* note 104, p. 48.

An argument for the fact that political speech is still treated somewhat different from a public discussion, is the fact that in practice, the Court emphasizes that it will protect especially speeches in a political context.<sup>125</sup>

The consequences of political speeches or public discussions, is that for such speeches a smaller margin of appreciation exists.<sup>126</sup> That does not mean that no restrictions at all are possible: they only call for the closest scrutiny of the Court in order to examine restrictions on these kind of speeches. Whether restrictions are possible, depend on the topic of the speech and the place where the speech was held. Where the speech was held is important because absolute parliamentary immunity could exist in which no restrictions are possible – such as in Parliament. This subject will be more thoroughly discussed in the next paragraph.

The topic of the debate also determines whether restrictions are possible. Especially criticism on religion and hate speech are possible subjects in which the Court allows more restrictions than on other topics.<sup>127</sup> The reasoning for the Court is that although protection of democracy is an important aim to follow, it does not mean that other aims cannot be as important or more important than this aim. For example, when someone incites to hatred, the aim of national security and integrity is more important than free speech. This is especially so in a State of conflict or a region where terrorist attacks or tension occur.<sup>128</sup>

#### *b. The Wilders case*

Wilders is prosecuted for intentionally insulting Muslims because of their religion, for incitement to hatred against the Muslims and discrimination.<sup>129</sup> The indictment contains examples of these allegations, such as Wilders' statement that the problem in the Netherlands is the fascistic Islam – which belongs to the accusation of insulting Muslims.<sup>130</sup> Not only statements have been made about the Islam as a religion, but also about immigration: he does not want any Muslim immigrant anymore in The Netherlands.<sup>131</sup> This example belongs to the charges concerning incitement to hatred.

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<sup>125</sup> Supra note 98, p. 85.

<sup>126</sup> Supra note 70, par. 43 and 44, supra note 35, par. 50 and ECtHR, *Sürek v. Turkey* (No. 1), 8 July 1999, *Application no. 26682/95*, par. 61.

<sup>127</sup> Supra note 88, par. 64.

<sup>128</sup> ECtHR, *Zana v. Turkey*, 25 November 1999, *Application no. 18954/91*, par. 60.

<sup>129</sup> Article 137c, Article 137d and Article 137e of the Dutch Criminal Code.

<sup>130</sup> *Volkskrant*, 7 October 2006, 'De Paus heeft volkomen gelijk', by S. ten Hoove and R. du Pré.

<sup>131</sup> Supra note 131.

The situation is a complex one. On the one hand, Wilders is a politician, which means that he and the speeches that he makes are better protected than other speeches. This has to do with Wilders' role as a politician in society. On the other hand, restrictions should be made possible, especially when someone incites to hatred in which the aim of national security and integrity is more important than free speech. This last situation is also applicable for restrictions on political speeches. As previously mentioned, this is especially possible in a region where there is a conflict or where terrorist attacks have occurred. In the examples just given, the Dutch court concluded that Wilders did not intentionally insult Muslims, because he speaks about the Islam as a religion and not about its believers. Judging only on this example, I agree with the Court, but not with its reasoning. The Dutch court makes a separation between criticism on religion and its believers.<sup>132</sup> However, it is difficult not to insult the believers by only insulting the religion. That is even more difficult because of the words that Wilders chooses: he compares the Islam with a fascistic regime. Still, the conclusion of the Dutch court is correct, since Wilders as a politician should be in a position where he can criticise anything that he wants. Therefore, for this example it is hard to say that the decision of the Dutch court violated Article 10 ECHR by not protecting the victims of the statements.

Considering the previously given aspects of political speech – where the speech was held and under which circumstances – I can understand the Dutch court's conclusion that Wilders has not incited to hatred. Restrictions are not possible because no situation of conflict or terrorist attacks have recently occurred in the Netherlands. What constitutes as a situation of tension is not very clear from the Court's case law, except that the Court has used this line of arguments in some cases concerning the speeches of PKK leaders in Turkey.<sup>133</sup> In that context, a situation as in Turkey does not exist in The Netherlands.

Although the Court looks more critical at criticism on religion or hate speech, in this context it is still difficult to restrict the speeches given by Wilders, since most of these statements can be considered as a political speech and there are no circumstances present in which restrictions are possible. I also do not think that the speeches should fall under Article 17 ECHR; only the most extreme speeches fall under this heading, such as denying the Holocaust. Wilders' statements cannot be regarded as being that excessive. Therefore, his statements should be examined under Article 10 ECHR.

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<sup>132</sup> Court of Amsterdam, 23 June 2011, *LJN: BQ9001*, par. 4.3.2.

<sup>133</sup> See for example the cases ECtHR, *Sürek v. Turkey* (no. 1), 8 July 1999, *Application no. 26682/95*, ECtHR, *Sürek v. Turkey* (no. 2), 8 July 1999, *Application no. 24122/94* and *supra* note 44.

### *c. Conclusion*

Political speech and public discussions on matters of general public concern are more protected than other speeches. What a discussion of public concern exactly is, has not been made clear by the Court. Though both kind of speeches cannot be distinguished from each other, there are indications that the Court does give more protection to political speech in some circumstances. Restrictions are therefore only possible by examining them very closely. From the perspective of political speech, it is difficult to restrict the statements of Wilders. Another piece of the puzzle of the research question what the consequences are of protecting political speech, has been given. However, the puzzle is not yet complete. A complete answer can only be given by examining the duties and responsibilities of the politicians. But before doing that, a more pressing question should be answered about parliamentary immunity.

## 4. Parliamentary immunity

Parliamentary immunity plays an important part of political speech. It has a long tradition and was for the first time admitted in the Bill of Rights of 1689. At that time, the aim of parliamentary immunity was that parliamentarians were protected from the king. Parliamentary immunity has evolved itself throughout the centuries. Most constitutions in Europe have nowadays a form of parliamentary immunity. Some of these constitutions limit this immunity to everything that is said and done in Parliament, while other constitutions have a more broader version of immunity.<sup>134</sup>

Parliamentary immunity protects political speech because the immunity makes it possible not to prosecute politicians. Therefore examining political speech is not possible without examining parliamentary immunity. This paragraph will examine what the exact role of parliamentary immunity is. First, it will provide the reasons for the existence of parliamentary immunity. Thereafter, the possibility of absolute immunity will be discussed. The findings of the conclusions will be applied to the Wilders case.

### *a. Reasons for existence parliamentary immunity*

The reason that parliamentary immunity was introduced in the Bill of Rights, is not the same

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<sup>134</sup> C.J. Van der Pot and others, *Handboek van het Nederlands Staatsrecht*, Deventer: Kluwer 2006, p. 572.

reason as that it exists today. There are two reasons for the parliamentary immunity. Both have been recognized by the Court. Along with it the Court has recognized that parliamentary immunity in itself does not violate the Convention. The first reason is that it protects the separation of powers.<sup>135</sup> This separation of powers has two aspects. On the one hand, politicians should not be afraid of the decisions made of the executive and judiciary because of the immunity.<sup>136</sup> On the other hand, they also do not have to fear that they will be prosecuted for what they have said. They are in a position to say what they should say as representatives of the electorate.<sup>137</sup> This leads us to the second reason why parliamentary immunity has been recognized by the Court, namely to protect the freedom of speech.<sup>138</sup> No legal consequences will be attached to the speeches given by politicians in Parliament. The only restrictions that are possible, are those made by the internal organs. For example, the Chairman of the Parliament and Senate in The Netherlands is in a position to stop the speech made by the politician.<sup>139</sup> Because there are no legal consequences attached to the statements made by the politicians, no chilling effect will arise in which politicians should be afraid for being prosecuted.<sup>140</sup>

These two reasons cannot be distinguished from each other and cannot be used solely. In the *A. v. United Kingdom* case, both reasons were mentioned as a justification for the parliamentary immunity.<sup>141</sup> The case concerned a politician who made serious allegations about a family. Above all, he revealed the name of the family and their address. The family could not prosecute the politician since he was protected by his parliamentary immunity. To break through the immunity, very important reasons must exist, because the justifications for the immunity themselves are very high reasons for allowing it.<sup>142</sup>

*b. Absolute parliamentary immunity?*

Parliamentary immunity is however not absolute. Additionally, most constitutions also do not provide absolute immunity for its politicians. It is common that parliamentary immunity only

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<sup>135</sup> See for example ECtHR, *A. v. The United Kingdom*, 17 December 2002, *Application no. 35373/97*, par. 77 and supra note 6, p. 43.

<sup>136</sup> Supra note 98, p. 113.

<sup>137</sup> ECtHR, *A. v. The United Kingdom*, 17 December 2002, *Application no. 35373/97*, par. 77.

<sup>138</sup> Supra note 137.

<sup>139</sup> See Article 58 of the Rules of Procedure of the Second Chamber of the States General and Article 94 of the Rules of Procedure of the First Chamber of the States General.

<sup>140</sup> Supra note 98, p. 113.

<sup>141</sup> Supra note 98, p. 113.

<sup>142</sup> H. Gerards and others (ed), *EVRM Rechtspraak en Commentaar*, The Hague, Sdu Uitgevers, 2006 and supra note 137, par. 79.

exist within Parliament and not outside Parliament. Within Parliament, the immunity is most of the time absolute even when rights of others are violated, such as the situation in the case of A.<sup>143</sup> The negative comments and allegation about this family included a violation of the right to privacy and their reputation. The fact that the politician made this comment in Parliament, could not make him liable because his immunity protected him. Due to the immunity, the family did not have a right to go to court. Normally this would breach Article 6 ECHR, but the Court reasoned that Article 6 ECHR is not absolute; exceptions are possible such as the existence of parliamentary immunity.<sup>144</sup> Criticism has been given on this judgment of the Court. According to some scholars, the immunity was given a too broad interpretation. Because of the broad interpretation there was not a proper balance between freedom of political speech and the protection of the reputation of others. This view was also pointed out by Judge Loucaides in his Dissenting Opinion.<sup>145</sup> According to Henrard, the Court's conclusion is problematic because it is not proportionate towards the attacked family. Henrard states that the duties and responsibilities of the speaker in this case should have been taken into account. Moreover, she mentions that the politician had violated the right to privacy of the family.<sup>146</sup> By concluding that the family had no right to of access to a judge, there was no possibility at all for the family to investigate whether this violation breached English – and European – law.

Simon Wigley has written an article on parliamentary immunity which can also be applied to this case. As Wigley puts it forward, the parliamentary immunity is not there to protect the politician himself, but to protect the ability of the politician to act on behalf of those that he or she represents.<sup>147</sup> If thus presumption of Wigley would be applied to the A. case, then I would also criticise the conclusion of the Court. In my view, this criticism did not serve any purpose of the politician to act on behalf of those that he represents. It rather seems that this is a personal opinion of the politician in which his function as a politician protects him, but for the wrong reasons. According to Wigley, there are two kind of parliamentary immunities. The first one is called 'parliamentarian non-accountability' and is only used in Britain and its –

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<sup>143</sup> Supra note 137 and supra note 6, p. 43.

<sup>144</sup> Supra note 137, par. 83.

<sup>145</sup> Supra note 137, Dissenting Opinion Judge Loucaides, K. Henrard, 'Botsende grondrechten en het EHRM. Een pleidooi voor meer zorgvuldige argumentatie en minder 'margin of appreciation'', in E. Brems, K. Henrard and R. De Lange, *Botsing van grondrechten*, The Hague: Boom Juridische Uitgevers 2008, p. 49 and supra note 98, p. 115.

<sup>146</sup> K. Henrard, 'Botsende grondrechten en het EHRM. Een pleidooi voor meer zorgvuldige argumentatie en minder 'margin of appreciation'', in E. Brems, K. Henrard and R. De Lange, *Botsing van grondrechten*, The Hague: Boom Juridische Uitgevers 2008, p. 49.

<sup>147</sup> S. Wigley, 'Parliamentary Immunity in Democratizing Countries: The Case of Turkey', *Human Rights Quarterly*, 2009, vol. 31, p. 567.

former – colonies. Parliamentary non-accountability means that the immunity is unconditional in Parliament.<sup>148</sup> Applying this on the *A.* case, it seems that the Court has accepted this kind of immunity. For the other form of immunity it is possible to lift the immunity during a political debate. However, authorization of the assembly is in such circumstances required. This kind of immunity is used by all other countries of the Council of Europe.<sup>149</sup>

The Court's conclusion in the *A.* case expands parliamentary immunity too far in my opinion, because the remark of the politician was not suited in the public debate. Additionally the decision of the Court was not proportionate since no access to a national court was given.<sup>150</sup> Therefore, I agree with the criticism that some scholars have given on the conclusion of the Court in this case.

Even though a politician cannot be prosecuted in Parliament because of the parliamentary immunity that protects him, there are some rules that should be taken into account. First of all, the immunity may not be explained extensively.<sup>151</sup> Secondly, in some circumstances, misleading comments may not be made by a politician in Parliament.<sup>152</sup> Therefore, negative or offensive remarks of a senator during a political quarrel fall outside the scope of the immunity, since this is not a part of the political mandate.<sup>153</sup> An example of offensive remarks that fall outside this scope, are insulting remarks during an election.<sup>154</sup>

In examining parliamentary immunity, one also needs to examine who has given the immunity. If this is done by the members of Parliament themselves, this immunity may be biased.<sup>155</sup>

In *Cordova (no. 2)* case, the Court concluded that absolute immunity for all statements of politicians would breach Article 6 ECHR.<sup>156</sup> The immunity would be disproportionate towards the right of access to the court. From *Cordova (no. 2)*, it seems that the Court has changed its line of argumentation of the *A.* case, since it has explained parliamentary

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<sup>148</sup> Supra note 147, p. 569.

<sup>149</sup> Supra note 147, p. 569.

<sup>150</sup> Although the Court emphasises that there were other means available for the family, none of them included the right of access to a Court: supra note 137 par. 86.

<sup>151</sup> Supra note 6, p. 44.

<sup>152</sup> Supra note 137, par. 86.

<sup>153</sup> Supra note 16, p. 824.

<sup>154</sup> ECtHR, *Cordova v. Italy (No. 1)*, 30 January 2003, *Application no. 40877/98*, par. 62.

<sup>155</sup> Supra note 98, p. 113.

<sup>156</sup> ECtHR, *Cordova v. Italy (No. 2)*, 30 January 2003, *Application no. 45649/99*, par. 63.

immunity in a less broad way. Both cases concerned Article 6 ECHR. The reasoning however has been used by the Court in cases about Article 10 ECHR. This is necessary for defining the scope of parliamentary immunity.

The fact that parliamentary immunity is not absolute leads to the situation that, most of the time, politicians are not protected outside Parliament. That does not mean that politicians outside Parliament do not have a special position. Outside Parliament, freedom of speech is also important for elected representatives.<sup>157</sup> Since no immunity exists outside Parliament, the restrictions call for the closest scrutiny of the Court.<sup>158</sup> In order to examine whether the interference or restriction was lawful, the Court looks at the role of the politician: was he, when making the statement, acting as a politician. If the answer is negative the margin of appreciation will be wider because the immunity is not applicable.<sup>159</sup> Politicians are only protected when they were acting in their parliamentary function. This function must be interpreted very strictly.<sup>160</sup>

The conclusion can be made that parliamentary immunity depends on where the politician makes his speech or statement: outside Parliament the immunity is not – always – applicable and therefore restrictions are possible. The question is whether this will not lead to an asymmetrical situation where the politician will think in advance where he will make some statements. On the one hand, when he makes a statement outside Parliament, there is always the risk that the judge will overrule him.<sup>161</sup> Moreover, Sadurski argues that the most important statements made by the politician are often made outside Parliament, since they can reach more people by, for example television or the internet.<sup>162</sup> For him, this is an argument not to limit the parliamentary immunity to political debates in Parliament. On the other hand, absolute immunity is not proportionate towards the citizens. In my view, the last argument is more powerful, especially when taken into account the right to equality. Additionally, when the immunity would extend to debates outside Parliament, there is the chance that rights of others are violated by politicians such as the right to privacy in the A. case. Even though

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<sup>157</sup> ECtHR, *Castells v. Spain*, 23 April 1992, *Application no. 11798/85*, par. 43, ECtHR, *Incal v. Turkey*, 9 June 1998, *Application no. 22678/93*, par. 46 and *supra* note 84, par. 40.

<sup>158</sup> *Supra* note 97, par. 36.

<sup>159</sup> *Supra* note 6, p. 43 and *supra* note 16, p. 824.

<sup>160</sup> ECtHR, *Tsalkitzis v. Greece*, 16 November 2006, *Application no. 11801/04*, par. 45 and ECtHR, *Kart v. Turkey*, 3 December 2009, *Application no. 8917/05*, par. 80.

<sup>161</sup> *Supra* note 98, p. 114.

<sup>162</sup> *Supra* note 98, p. 115 and ECtHR, *Castells v. Spain*, 23 April 1992, *Application no. 11798/85*, par. 43.

politicians cannot be compared with ordinary citizens, some principles and rules should still be applicable to them.

*c. The Wilders case*

Wilders has made speeches and statements inside Parliament that could be considered as gratuitously offensive towards religious persons. However, he has never been charged for any of the statements made during a parliamentary debate. Still, an example of one of his statements will be given.

During a debate about the State's Budget, Wilders suggested that people wearing a headscarf should pay taxes for this.<sup>163</sup> However, he did not use the word headscarf, but 'kopvoddentax' which can be translated as 'taxes for rags'. Although there is absolute immunity in Parliament, it is not possible, as previously mentioned in the case law, that negative comments are always allowed.<sup>164</sup> On the other hand, although the statement could be regarded as gratuitously offensive, the statements did contribute to a public debate. By that, the statement did not fulfil the *Otto-Preminger-Institut* condition and should be allowed.

Outside Parliament Wilders has compared the Koran with Mein Kampf in an interview with a Dutch newspaper.<sup>165</sup> This statement must be carefully examined, because Wilders was interviewed as a politician and made statements which did fall within his electorate programme. Moreover, the parliamentary immunity is not applicable. Whether this statement is allowed according to the Court's case law, is therefore hard to say at this moment. In the next chapter, this will be examined more thoroughly.

*d. Conclusion*

What is the role of parliamentary immunity in protecting political speech? Parliamentary immunity is important for the protection of political speech. Inside Parliament most politicians have immunity. Outside Parliament the politician often does not have immunity, but is protected by the Court's close scrutiny when examining the restrictions. Politicians have thereby a special position and their speeches are also better protected than that of other

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<sup>163</sup> Debate State's budget on 16<sup>th</sup> of September 2009.

<sup>164</sup> Supra note 137.

<sup>165</sup> Supra note 130.

parties. Parliamentary immunity therefore protects political speech better, because it protects the politicians. However, that is only when the immunity is applicable.

Making restrictions on statements of Wilders that were made in Parliament, is again difficult because of the parliamentary immunity is applicable.

Now that the role of parliamentary immunity is clear, the question what the consequences of the protection of political speech is can be continued.

## 5. Duties and responsibilities of politicians

The last piece of the puzzle of the main question of this chapter will now be given by examining the duties and responsibilities of politicians. These duties and responsibilities are important for the question what the consequences are of protecting political speech, because it can determine which – part of the – political speeches will be better protected and which ones will not. If a politician does not take into account his duties and responsibilities, the chance that he exceeds the limits of protection of Article 10 ECHR is larger than when he does take this into account. The special duties and responsibilities of politicians and the Wilders care are discussed in this paragraph.

### *a. Special duties and responsibilities for politicians*

Politicians have special duties and responsibilities that are not, or to a lesser extent, applicable to other persons. The leading case of the Court is the *Erbakan* case.<sup>166</sup> The Court came to the conclusion that politicians have a special duty to avoid statements which could lead to intolerance.<sup>167</sup> The argumentation of the Court was that especially from politicians one could expect that they have an indication of the effect of their words and that their words could easier lead to intolerance than the words of a citizen.<sup>168</sup> That politicians should be more aware of the boundaries of their political speech does not only have consequences for their words, but also for the way that they bring forward the speech. If a speech, which could lead to intolerance, has been broadcast on television instead of a local newspaper, the politician has a

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<sup>166</sup> Supra note 88.

<sup>167</sup> Supra note 88, par. 64.

<sup>168</sup> Supra note 6, p. 44.

larger responsibility because the impact of his words have a bigger effect. That politicians have a special position, is not a mitigated circumstance.<sup>169</sup>

Moreover, politicians are examples for the public. They should 'behave' themselves by avoiding statements that could be considered gratuitously offensive. Behave in this context means that politicians should avoid statements that the public can easily take over and which are gratuitously offensive. The fact that politicians are examples for the public and therefore have a special responsibility, is not acknowledged in law. However, one could see this as a form of informal rules that politicians should respect.<sup>170</sup> Amongst these informal rules one could place rules of morality and decency.

Another special duty is that politicians may change laws and the constitution, but they may not achieve this by using force.<sup>171</sup> Using force in order to change laws violates democracy. The duty of a politician is to protect democracy. In such a situation his right to freedom of speech must deviate for the protection of democracy.

This leads to a special situation for a politician. On the one hand, his freedom of expression is wider, since no – limited – restrictions are possible. On the other hand, he does have special duties and responsibilities that are specially applicable for politicians.<sup>172</sup> When politicians do not take into account these duties and responsibilities, the States have a wider margin of appreciation in which more restrictions are possible to pass Article 10(2) ECHR. A balance must be made between these duties and responsibilities on the one hand and the importance of political speech on the other hand. It depends on the circumstances which one is more important. The Court must find a balance which is not always easy to make and which could satisfy everyone. An example of a rather unsatisfactory decision of the Court is the *A.* case. This case generated a lot of criticism, because the parliamentary immunity was considered more important than the duties and responsibilities of the politician. As mentioned in the previous paragraph, some scholars thought that this could create a dis-balance between the two objectives.<sup>173</sup>

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<sup>169</sup> ECtHR, *Féret v. Belgium*, 16 July 2009, *Application no. 15615/07*, par. 77.

<sup>170</sup> *Supra* note 112, p. 65.

<sup>171</sup> ECtHR, *S.P. v. Turkey*, 25 May 1998, *Application no. 21237/93*, par. 45-47.

<sup>172</sup> *Supra* note 42, p. 473.

<sup>173</sup> *Supra* note 146, p. 49.

*b. The Wilders case*

In The Netherlands it is especially Lawson who thinks that a larger responsibility should exist for politicians and especially for Wilders. In an article that he wrote in 2008, he disagreed with the Dutch authorities not to prosecute Wilders.<sup>174</sup> Civil actions were brought against Wilders in 2008. The Dutch judge concluded that the Court in Strasbourg did not leave any room for restricting the speeches of Wilders. In fact, Wilders was protected by the case law of the Court.<sup>175</sup> Lawson argued that indeed, Article 10 ECHR gives more protection to politicians than other people, but he also argued that we should not use this as an argument not to prosecute at all.<sup>176</sup> Article 10 ECHR is the only Article that speaks of duties and responsibilities and which is also applicable to politicians. Moreover, when examining the statements of Wilders, one has to take into account the rights of others which can be violated by Wilders. The rights of others is mentioned in Article 10(2) ECHR and therefore constitutes a duty and responsibility for politicians to take into account. Therefore, a gratuitously offensive attack on someone's religion is not allowed.<sup>177</sup> As previously discussed in the chapter I of this thesis, there is a heavy debate going on by scholars whether the protection of religious feelings should fall under Article 9 ECHR and whether the gratuitously offensive test should still be applied by the Court. However, this discussion only referred to religious feelings: gratuitously offensive statements that would violate other rights, such as the rights that are protected under Article 9 ECHR, did not fall under that discussion/category. This means that Article 9 ECHR should be taken into account. Gratuitously offensive statements must be avoided also by politicians.<sup>178</sup>

From the arguments above, I have to agree with Lawson. The statements of Wilders are more than gratuitously offensive – such as the his statement that when Muhammad was still alive, he would do anything to hunt him out of the country.<sup>179</sup> The fact that a gratuitously offensive statement could contribute to a discussion of general public interest does not give that much weight when one considers the special duties and responsibilities for a politician. Wilders as a politician has the special duty and responsibility to make sure that he will not feed intolerance in this State. But Wilders has a reputation of making provocative statements. There is no

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<sup>174</sup> Supra note 42.

<sup>175</sup> Court of The Hague, 7 April 2008, *LJN BC8732*, par. 4.9. The Court followed in this case the reasoning of the *Giniewski* case.

<sup>176</sup> Supra note 42, p. 484.

<sup>177</sup> Supra note 58, par. 29 and 30.

<sup>178</sup> Supra note 42, p. 474 and supra note 46, par. 49.

<sup>179</sup> See the indictment of Wilders, p. 14 under the heading of incitement to discrimination.

indication that Wilders over the years had tried to avoid speeches of statements that could lead to intolerance in The Netherlands. In my view, the prosecution was wrong for not bringing charges against Wilders, because there is a chance that his speeches will not be protected by the Strasbourg's Court.

### *c. Conclusion*

The Court made it clear in the *Erbakan* case that politicians have a special duty and responsibility. Therefore the scope of the freedom of political speech and its protection has become smaller. This is an argument to restrict the speeches and statements given by Wilders, because he does not take into account his duty to avoid statements that could lead to intolerance in society.

The answer to the question what the consequences of the protection of political speeches are is now complete. To show where the boundaries of the protection of political speech are, some remarks will be made on hate speech.

## 6. Hate speech

As in the previous chapter, this chapter will also end by giving some views on hate speech. Again it is important to know where hate speech begins in order to find out where the protection of political speech ends.

The conclusion of the former paragraph was that on the one hand politicians have more freedom and protection for their political speeches, but that on the other hand there are special duties and responsibilities.

These duties and responsibilities extend towards hate speech. Politicians should avoid statements that could lead to intolerance in society. In this line, politicians are not allowed to incite to racial hatred or other forms of hate speech. The Council of Ministers made this very clear in their recommendations on hate speech.<sup>180</sup>

For citizens the Court came to the same conclusion in the *Jersild* case.<sup>181</sup> Hate speech could harm minority groups. Moreover, due to hate speeches minority groups might lose their willingness to participate in society which in itself could lead to more intolerance. This will

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<sup>180</sup> Supra note 73: 'freedom of political debate does not exclude freedom to express racist opinion or opinions which are an incitement to hatred, xenophobia, anti-Semitism and all forms of intolerance'.

<sup>181</sup> Supra note 84.

end in a vicious circle that is hard to break. In order to avoid this, restrictions are needed to forbid hate speeches including those speeches of politicians.<sup>182</sup> The reason for that is that politicians should take into account their role in society. The duty therefore exists of two components: to avoid intolerance in society and to take into account the effect of their speeches in society.

The importance of knowing whether a speech can be regarded as hate speech has also consequences for the sanctions imposed. According to the Venice Commission criminal sanctions are justified when they are imposed on a speaker whose speech can be regarded as hate speech.<sup>183</sup> Although I agree with the Commission that hate speech justifies such restrictions, I do not believe that criminal sanctions can only be imposed on hate speeches. Support for this can be found in the *Zana* case, where a politician was sentenced to twelve months imprisonment because he supported a terrorist organisation.<sup>184</sup> I do agree however, that criminal sanctions can only be imposed for the most extreme speeches such as hate speech and speeches that support terrorist organisations.

#### *The Wilders case*

One of the charges in the Wilders case was incitement to hatred and discrimination. It is hard to say whether Wilders speeches can be regarded as hate speeches. He uses strong terms in which especially the Islam is attacked. One has to take into account, that Wilders remarks attacks the religion Islam and not the believers of the Islam. In The Netherlands, it has become common practice to prosecute someone only – in the most extreme situations – for insulting remarks on persons and hate speech.<sup>185</sup> However, it is not impossible to prosecute Wilders for insulting a religion, since this is also punishable under Dutch Law.<sup>186</sup> Nevertheless, insulting a religion is almost never used in Dutch criminal law, let alone for the prosecution of a Dutch politician.

In my view, the aim of Wilders' speeches is that he wants that the Islam will disappear. That does not mean that the believers should leave, but that they should adjust themselves to the customs of the Dutch people. The best goal that Wilders could achieve, is that all Muslims

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<sup>182</sup> Supra note 92, p. 120.

<sup>183</sup> Supra note 41, par. 57.

<sup>184</sup> Supra note 128.

<sup>185</sup> Article 137c and Article 137d of the Dutch Criminal Code.

<sup>186</sup> See Article 147 of the Dutch Criminal Code.

would divert themselves from this religion. As the Venice Commission has made it clear, hate speech includes hate about religion.<sup>187</sup> It seems that Wilders is heading towards such kind of hate speech. A more thorough examination on these kind of hate speeches will be given in chapter IV.

## 7. Interim conclusion

Chapter II has examined the scope of political speech in general. It has done that by imposing three questions which have been examined throughout the chapter.

The first question was why political speech is more protected than other kind of speeches. The answer can be provided by looking at the reasons for protecting political speech, such as the protection of democracy.

The second question was what role parliamentary immunity plays for political speech. Parliamentary immunity gives more protection to politicians and thus to political speech. Prosecuting politicians is not possible, but only when parliamentary immunity is applicable.

What the consequences of protecting political speeches from the case law of the Court are was the third question for this chapter. In order to answer that question, three subjects have been examined. First, the role of politicians was discussed. Because of the protection of political speeches, politicians themselves are better protected than other people. It leads to an inequality with other citizens. This inequality has however a justification, since politicians represent their electorate. Paragraph three has examined political speech itself. The scope of political speech is broader than other speeches. Not only political speech itself has a broader scope; the same is applicable for matters of general public interest. The consequences are that restrictions on political speech are hard to make, because the Court uses a stricter test under Article 10(2) ECHR and the margin of appreciation is smaller. In the fifth paragraph the duties and responsibilities of politicians was the subject of the debate. From this point of view the scope of freedom of political speeches actually becomes smaller: politicians should take into account their special duties and responsibilities. When politicians do not take this into account, the Court has a reason for allowing restrictions which it would otherwise not allow.

One of the duties of a politician is to avoid speeches that could lead to intolerance. Therefore, the last paragraph has made some remarks on hate speech with the same goal as it had in the first chapter: to discover where freedom of political speech ends and hate speech begins.

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<sup>187</sup> Supra note 41, par. 56, 60 and 61.

Throughout the chapter, the Wilders case has been tested against the question whether Wilders has exceeded the limits of protection of Article 10 ECHR. First a reference was made in the paragraph concerning political speech. Because Wilders is a politician, his statements are better protected than those of others. The circumstances that were described in that paragraph made the conclusion possible that Wilders did not exceed the limits of protection of Article 10 ECHR, because those circumstances – situation of conflict – did not exist. The fourth paragraph examined parliamentary immunity. Wilders has parliamentary immunity in Parliament. He was therefore not prosecuted for any of his statements made in Parliament. Paragraph five dealt with the duties and responsibilities of politicians. Wilders has not taken into account his specific duty to avoid intolerance in society. From that perspective, Wilders has exceeded the limits of protection of political speech. Finally, under the hate speech paragraph some remarks were made. The conclusion was that it seems that Wilders is headed to exceed the limits of protection of Article 10 ECHR by making remarks on religion which could constitute as hate speech on religion. It will be more thoroughly examined in chapter IV.

## PART B: POLITICAL SPEECH IN PRACTICE: A COMPARISON OF THE DECISIVE ELEMENTS AND CRITICISM OF POLITICIANS

Part A of this thesis has given an overview of the scope of Article 10 ECHR in general. It also has emphasized the importance of political speech and given reasons why especially these kind of speeches are more protected by the Court than other speeches.

Part B will continue by examining more thoroughly political speech. In chapter III the decisive elements of political speech will be examined. Throughout this chapter, an answer will be provided to the question which elements are decisive to determine the scope of the political speech. In order to frame the scope of the freedom of political speech, these elements will be compared with cases before the Court that did not concern a political speech. Some of these elements have already passed in chapter I. By making this comparison the differences and similarities are shown between freedom of speech in general and political speech in particular.

Chapter IV will thereafter proceed by examining the case law of the Court concerning criticism on people and religion and hate speech. In this chapter two questions will be answered which are how far a politician can go in giving criticism on people, religion and minorities and whether the boundaries of hate speech for politicians are the same as they are for citizens. To make the distinction possible – again – a comparison will be made between case law concerning political speech and case law concerning freedom of speech in general.

Like part A, this part will also make references to the Wilders case where this is necessary for determining the answer to the question if Wilders falls within the scope of protection of Article 10 ECHR.

### Chapter III: Decisive elements of political speech

Article 10(2) ECHR makes it possible for State authorities to make restrictions on the freedom of – political – speech. The paragraph contains certain conditions which the authorities should take into account before it can make such a restriction. One of them is the

necessity test: the restriction must be necessary in a democratic society for one or more of the reasons described in Article 10(2) ECHR. Necessary in a democratic society can be interpreted in different ways. The different interpretations are possible because of the existence of the margin of appreciation. The scope of the margin of appreciation can however differ: sometimes there is a small margin of appreciation, which means that there is little room for interpretation for State authorities, while in other circumstances the margin of appreciation may be wider and will lead to more room for interpretation. The margin of appreciation depends on the circumstances of the case.<sup>188</sup> Since the margin of appreciation depends on the circumstances of the case, the necessity test will also depend on these circumstances.<sup>189</sup>

It is established case law that the circumstances of the case should be examined as a whole.<sup>190</sup> From the case law, the Court has stated that there are several elements which should be taken into account. Examples of these elements are the content and context of the statement and the penalty or sanction that have been imposed on the applicant. These elements or factors are the same as the ones that have been discussed in chapter I on freedom of speech in general. The interpretation of the Court on these elements will be the subject of this chapter. The difference with the first chapter is that this chapter will focus on political speech. Therefore, the research question throughout the whole chapter is what the decisive elements are for determining the scope of freedom of political speech. In order to provide an answer, first the content of the speech will there be examined. Not only political speech as a content but also the subject-matter will be discussed. The subject matter is important because for some of them there exists a common ground on the European level in which the margin of appreciation will be smaller, such as the importance of general public interest, while on other subjects, such as morals, there is often not a common ground in Europe.<sup>191</sup>

After discussing the content of political speech, the context of the statements will be researched. The context contains a lot of circumstances, such as the medium that was used for the speech, the position of the victim and the background of the region where the speech was held. All of these elements will be described in the second paragraph.

The third paragraph will continue by examining the penalties or sanctions imposed on the speaker. The sanction can be a decisive factor for the necessity-test.

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<sup>188</sup> Supra note 4, par. 48 and 49.

<sup>189</sup> Supra note 90, p. 159.

<sup>190</sup> ECtHR, *Oberschlick v. Austria* (No. 2), 1 July 1997, *Application no. 20834/92*, par. 31 and 39, ECtHR, *Andreas Wabl v. Austria*, 21 March 2000, *Application no. 24773/94*, par. 39, supra note 88, par. 58 and supra note 169 par. 66.

<sup>191</sup> Supra note 90, p. 159. Sometimes a common ground on morals can exist, such as the acceptance of homosexuality.

Through all of these paragraphs, the differences of political speech and freedom of speech in general will be examined. The purpose of this comparison, is to emphasize any differences that exist between the two kind of speeches.

In all of the paragraphs the Wilders case will be discussed. The decisive elements shall thereby be applied to the Wilders case so that a comparison can be made. The comparison makes it easier to answer the question whether Wilders has exceeded the limits of protection of Article 10 ECHR.

The chapter will end by giving a small conclusion in which the research questions will be answered.

## 1. The content of the speech: political speech

The content of political speech is one of the decisive elements for determining the scope of political speech, since they are also the elements or factors that determine the scope of freedom of speech in general. This paragraph will only give some comments on the content of the speech since most of this topic has already been discussed in chapter II. After that, the paragraph will continue by examining at the differences between fact statements and value-judgments in political speeches and freedom of speeches in general. Where necessary, references to the Wilders case shall be made.

### *a. Political speech and matters of general public interest*

This paragraph exists of two components of the the content of political speech. The first is political speech itself. The second one is the type of statement that is used. This subparagraph will discuss the first component.

As previously mentioned, the Court has held that all circumstances of the case should be taken into account before the Court can determine whether a breach of Article 10 ECHR exists or not.

One of these circumstances is according to the *Feldek* case the content of the speech.<sup>192</sup> The *Feldek* case concerned an author who made a poem about members of the SS. It contained harsh words. The suggestion was made that it referred to the complainant by comparing him to members of the SS. In order to determine whether Feldeks poem exceeded the scope of

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<sup>192</sup> ECtHR, *Feldek v. Slovakia*, 12 July 2001, *Application no 29032/95*, par. 77.

Article 10 ECHR, the Court examined the content of the speech. Since the complainant was a Minister and the subject matter concerned a political debate on matters of general and public interest, Feldek did not exceed the limits of Article 10 ECHR.<sup>193</sup> In those circumstances the scope of acceptable criticism is wider.

Identifying the subject matter is very important in order to know the scope of protection of Article 10 ECHR. As stated in chapter II, the boundaries of freedom of speech are wider with regard to political speech than other kind of speeches.<sup>194</sup>

The Court relatively quick comes to the conclusion that a matter concerns a political speech or a subject of general and public interest. Political controversy is one of the subjects that is included in this category.<sup>195</sup> According to Flauss, it seems that over the years the Court has broadened this concept. It therefore includes now subject matters that should in Flauss' eyes not be considered as a matter of general and public interest or political speech.<sup>196</sup> When examining whether the protected category of speeches is applicable, it is true that the Court emphasises on the impact of the topic on the public or whether the public at large has an interest or problem in the matter. If this impact, interest or problem exists, the Court will fairly quickly come to the conclusion that the subject matter belongs to the protected group of speeches.<sup>197</sup> Because the group of protected speeches has enlarged, Flauss has divided these speeches in three categories. The first category consists of 'true general interest debates' in stricto sensu. Examples are speeches made in Parliament by politicians, speeches of union leaders and interviews of people who hold a public function position.

Secondly there are the 'general interest debates' which have been developed over the years by the Court. Flauss calls them 'lato sensu debates'. These concern debates that in theory do fall under the first category, but in the end fall out of the scope of it because the subject matter is of less importance than the first category of speeches. For example if the debate is about the costs of medical care and one makes remarks about sports which should also be covered as a form of medical care, the subject matter does concern a public interest debate, but it is of less importance, because the main subject matter is about medical care.

Lastly, Flauss suggests that there is a 'quasi general interest debate'. The Court has recognized in the *Karhuvaara* case that, although the subject matter did not concern a

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<sup>193</sup> Supra note 192, par. 81 and 83.

<sup>194</sup> Supra note 92, p. 113.

<sup>195</sup> Supra note 16, p. 815.

<sup>196</sup> Supra note 16, p. 815-816.

<sup>197</sup> See for instance ECtHR, *Tongsbergs Blad As and Haukom. v. Norway*, 1 March 2003, *Application no. 510/94*.

political issue or a matter of general public interest, the public has a right to be informed, which is a basic element for democracy.<sup>198</sup> The case concerned an article in a newspaper about the man of a parliamentarian who was drunk and who assaulted a police officer. Although this did not concern a public interest debate, but was more a subject in the private sphere, the public had a right to be informed about this and therefore, the contested statements were protected by Article 10 ECHR.

I have to agree with Flauss that the Court has expanded the notion of political speech and general interest debate. In the *Schwabe* case there is support for this assumption. Schwabe was a politician in Austria who would have offended another politician in the press. The subject matter was about the resignation of a mayor who was criminally convicted and who was a party member of Schwabe. After a politician of an other political party made some comments on these events, Schwabe responded by referring to the criminal conviction of the politician of the other political party. When looking at the subject matter, it seems that this does not concern a public matter of general interest or a political speech. However, the Court concludes that even though the subject matter at the time of the response did not belong to the protected group of speeches, it later became one. This has to do with the public's right to know the backgrounds of politicians in order to assess whether or not he will be fit for exercising political tasks.<sup>199</sup>

### *Conclusion*

The Court has expanded the concept of political speech and matters of general public interest. Not only political debate and general interest debates are more protected, but also speeches and comments which at the time that they were contested did not belong to this protected category of speeches. The protected category also includes subjects which are important enough for the public to be informed about.

#### *b. Fact statements and value-judgments*

In order to examine properly the content of the speech, it is important not only to examine the

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<sup>198</sup> ECtHR, *Karhuvaara and Iltalehti v. Finland*, 16 November 2004, *Application no. 53678/00*, par. 45.

<sup>199</sup> ECtHR, *Schwabe v. Austria*, 28 August 1992, *Application no. 13704/88*, par. 31 and 32.

subject matter itself, but also to test whether it concerns a fact statement or a value-judgment. This is the second component of the content of political speech which will now be discussed.

*i. The effect of the distinction between statements of fact and value-judgments*

In *Lingens*, the Court argued that the content of the speech includes examining the statement itself: was it a statement of fact or a value-judgment?<sup>200</sup>

As mentioned in chapter I, it is not easy to distinguish a statement of fact and a value-judgment. Sometimes there are statements in a political debate that can be considered as value-judgments, although the speech was more structural or based on facts.<sup>201</sup> For example, in the *Feldek* case the words ‘fascist past’ were used for the poem about the SS. The Court considered that this was a value-judgment. Although it seems that fascist past has a clear meaning, the Court concluded that in the context of the case itself, fascist past could have different meanings.<sup>202</sup> Another example can be derived from the *Brasilier* case. The applicant of this case used stated that the candidate for office had ‘broken ballot boxes’. Again the Court argued that this was not a factual statement, but a value-judgment.<sup>203</sup>

From these examples it appears that the distinction between the two is not easy to make. Sadurski states that there are scholars who are of the opinion that factual statements are more about giving information to the public while value-judgments are more about giving an opinion.<sup>204</sup> Sadurski does not agree with this distinction and neither do I. Looking at the just given examples, this rule cannot be applied as a standard. Opinions themselves can also contribute to a factual statement; it does not have to be a value-judgment.<sup>205</sup>

Statements of facts are more controllable for judges than value-judgments. An example of such controllable facts are clearly established historical facts. When one questions such historical facts, the Court rejects immediately the argument that it is a value-judgment. That was the situation in the *Garaudy* case. Garaudy questioned the existence of the Holocaust. It is a standard of the Court that whoever tries to question the existence of the Holocaust will not be protected by Article 10 ECHR.<sup>206</sup> The reasoning the Court uses is that there are some

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<sup>200</sup> Supra note 24, par. 45 and 46.

<sup>201</sup> Supra note 5, p. 275.

<sup>202</sup> Supra note 192, par. 85 and 86.

<sup>203</sup> ECtHR, *Brasilier v. France*, 11 April 2006, Application no. 71343/01, par. 14 and 37.

<sup>204</sup> Supra note 98, p. 106.

<sup>205</sup> Supra note 98, p. 106.

<sup>206</sup> ECtHR, *Garaudy v. France*, 24 June 2003, Application no. 65831/01, par. 1.

historical facts that cannot be questioned. If they are questioned, they do not enjoy the protection of Article 10 ECHR but would fall under Article 17 ECHR. The purpose of Article 17 ECHR is to prevent that individuals will use rights and freedoms of the Convention in such a way that it would destroy other rights and freedoms of the Convention.<sup>207</sup> However, there are other facts of the Second World War which can be interpreted in different ways and therefore cannot be considered as clearly established historical facts. In *Lehideux*, the question was what the role of Philippe Pétain in the Second World War was. It was a subject of an ongoing debate amongst historians and therefore did not exceed the protection of Article 10 ECHR.<sup>208</sup> Another example is the *Giniewski* case, in which it was supposed that Catholicism was the cause for the existence of the Holocaust. The Court ruled that this statement fell within the scope of protection of Article 10 ECHR. The argumentation of the Court was that not only the topic was a part of a public debate, but also that the statement did not deny the existence of the Holocaust itself. Only the reason for the existence of the Holocaust was questioned.<sup>209</sup>

When politicians are speaking about facts, they have the obligation to guarantee the truth of their statements. Without such a guarantee a democracy could not exist.<sup>210</sup> Especially for members of the administration it is important to tell the truth; it is an obligation towards the members of Parliament and to the public as well. It could be considered as an extra duty and responsibility in the political sphere. Although it can be argued that the same duty is applicable to citizens and the media, the obligation for politicians is a heavier one because of their position in society. The obligation might be the same, but the reasons for such an obligation are thus different.

More interesting is examining the scope of value-judgments. For value-judgments there is more room for exaggeration and provocation.<sup>211</sup> Still, there are also rules and boundaries for these kind of judgments. First of all, the judgment must be made in good faith. Good faith means that the speaker or writer must have done some effort to check the facts on which his

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<sup>207</sup> Supra note 206.

<sup>208</sup> ECtHR, *Lehideux and Isorni v. France*, 23 September 1998, Application no. 24662/94, par. 47.

<sup>209</sup> Supra note 66, par. 50 and 51.

<sup>210</sup> Supra note 98, p. 107.

<sup>211</sup> Supra note 49, par. 38 and supra note 58, par. 67.

statements were based.<sup>212</sup> If there is no factual basis at all for value-judgments, the statements can exceed the limits of protection of Article 10 ECHR.<sup>213</sup>

The reason that a factual basis is necessary, is that the audience has a right to get the right information, even when it is just a value-judgment.<sup>214</sup> Again, this is especially applicable to politicians. Although exaggeration and provocation is also an inherent component of political discourse, a value-judgment of a politician must always be traced back to some accurate information.<sup>215</sup>

On the other hand, a value-judgment in a political debate seems to be less important than value-judgments in other circumstances.<sup>216</sup> Even extreme language is in a political context sometimes protected.<sup>217</sup> If in a similar situation it does not concern a political debate the boundaries of protection of Article 10 ECHR would have been exceeded.<sup>218</sup>

Three cases will now be examined in which a politician has made a value-judgment.

According to the Court in the *Jerusalem* case there was sufficient factual basis for the value-judgment. Jerusalem, a member of the Vienna Municipal Council, made a comment that a private body, the so called IPM, could be considered as a sect. She could base this by documentary evidence and four witnesses. The problem was that the domestic courts did not allow Jerusalem to prove her statement. The Court considered that in the instance case Jerusalem made a value-judgment and that there was sufficient factual basis for it.<sup>219</sup> Article 10 ECHR was therefore violated twice by the State authorities: not only because there was sufficient factual basis for the value-judgment, but also because the domestic courts did not give the applicant the opportunity to prove her statements as well. That in itself is a separate violation of Article 10 ECHR.

The *Castells* case concerned a similar matter. Castells was an elected politician who made some critical comments on the government. The basis of this comments were facts on which he drew his own opinion. Castells did not get the chance before the national courts to prove

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<sup>212</sup> ECtHR, *De Haes and Gijssels v. Belgium*, 24 Februari 1997, *Application no. 19983/92*, par. 47, ECtHR, *Oberschlick v. Austria* (No. 2), 1 July 1997, *Application no. 20834/92*, par. 33 and supra note 69, par. 67-71.

<sup>213</sup> See chapter I, paragraph 5.

<sup>214</sup> Supra note 98, p. 106.

<sup>215</sup> ECtHR, *Lopes Gomes Da Silva v. Portugal*, 28 September 2000, *Application no. 37698/97*, par. 34.

<sup>216</sup> Supra note 16, p. 817.

<sup>217</sup> See for example ECtHR, *Dabrowski v. Poland*, 19 December 2006, *Application no. 18235/02* and ECtHR, *Desjardin v. France*, 22 November 2007, *Application No. 22567/03*.

<sup>218</sup> Supra note 16, p. 819.

<sup>219</sup> Supra note 97, par. 44-46.

his statement. The Court protected the applicant by stating that the Spanish authorities had violated Article 10 ECHR.<sup>220</sup>

An insufficient factual basis and insufficient information was available for the statements of Le Pen concerning Muslims. In an interview with the French newspaper *Le Monde*, Le Pen stated that when there were not 5 million but 25 million Muslims in France, the Muslims would rule. The French people should be warned if such a situation would ever occur. Thereby Le Pen had made a distinction between Muslims and French people. The Court did not accept such a distinction. Although Le Pen made it clear that he could prove his statements, the Court concluded that the evidence brought forward by Le Pen – which consisted of various facts that would allegedly support his statement – could not be considered as providing a sufficient basis for the value-judgment.<sup>221</sup> The fact that a politician made the statement did not make any difference.

#### *ii. The Wilders case*

Comparing the three cases with each other, the *Le Pen* case seems a bit out of discourse with the other two cases. In a political context, extreme language is often protected, but in *Le Pen* the Court stopped this trend. Stating that if there would be 25 million Muslims in France which would rule the country, seems to have the same effects as statements given by Wilders. In an article written by Wilders in the Dutch newspaper *Parool* of 2004, Wilders stated that The Netherlands should be protected against the import of the Islamic culture which would destroy the Dutch tolerance and democracy.<sup>222</sup> It is a value-judgment that can be compared with the judgment made by Le Pen. Both statements were given in the same kind of circumstances – a newspaper –, concerned the topic immigration and both were made by the same kind of speaker: a politician.

Concluding from the case law, it seems that the Court has adjusted its course. This might have to do with the fact that politicians in several States in Europe make tougher statements about minorities and immigrants. Not only in The Netherlands politicians use ‘harder’ language and words than five or ten years ago, it is also noticeable – for example – in Belgium with the

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<sup>220</sup> ECtHR, *Castells v. Spain*, 23 April 1992, *Application no. 11798/85*, par. 46.

<sup>221</sup> ECtHR, *Le Pen v. France*, 20 April 2010, *Application no. 118788/09*, par. 2.

<sup>222</sup> G. Wilders, ‘Islam bedreigt de rechtsstaat’, *Parool*, 22 October 2004. This statement was not mentioned in the indictment of Wilders. An other example that was included in the indictment – concerning discrimination – and that can be compared with the Le Pen statements, is that Wilders has made the argument that an Islamic invasion is coming up and that the number of Islamic people in Europe is alarming. See <http://www.geenstijl.nl>, Muhammad (part II): the Islamic invasion of the 6rh of February 2007.

extreme right party ‘Vlaams Belang’ and in Austria with the late-Jörg Haider and his party FPÖ.

If the case of Wilders would be brought before the Court, I would argue that the Court would probably come to the conclusion that some of Wilders’ statements, such as the just given example, would exceed the limits of acceptable value-judgments and therefore do not deserve the protection of Article 10 ECHR. This conclusion can be based on three arguments. First of all, it would exceed the limits of extreme language since the Le Pen remark did not deserve the protection of Article 10. The circumstances in which the statements were made by Le Pen were the roughly the same as the circumstances were Wilders made his statements. Wilders statements however are – in my view – extremer than Le Pens statements because Wilders even talks about the consequences of intolerance in The Netherlands when the import of the Islamic culture would not stop. Secondly, the statement of Wilders is hard to prove: there is no factual basis that would provide a sufficient basis in the eyes of the Court. And thirdly, it can be questioned whether the statements of Wilders can be protected under Article 10 ECHR or that the statements would fall under the heading of Article 17 ECHR. The purpose of this last Article is to prevent individuals to use rights of the Convention in such a way that other rights and freedoms of the Convention are destroyed. In the Wilders case, rights as equality and the prohibition of discrimination could be violated by Wilders.

### *iii. Conclusion*

This paragraph has examined the content of political speech. The content not only exists of political speech and matters of general public interest, but has expanded to other statements as well. Whether a statement belongs to the protected group of speeches depends on the development of the statement after it was made and whether it was important enough for the public to be informed about.

Statements of facts are more controllable. Especially for clearly established historical facts there is less room for politicians to say anything they want to say. More room is there for value-judgments. Three cases have been compared with each other. Also for politicians it is true that the value-judgments need to have a factual basis. It seems that some movement has taken place in the Court’s case law concerning politicians and their ability to make value-judgments. Before the *Le Pen* case, it seemed that even extreme language was protected in some circumstances. However, Le Pens statements were – in my view – not that extreme. It

leads to the conclusion that if the Court would follow this line of reasoning of the *Le Pen* case, Wilders in fact could have exceeded the limits of protection of Article 10 ECHR.

The content as a decisive element or factor has thereby been discussed and a part of the answer of the question what the decisive elements for the scope of political speech are, has been given. The following paragraph will continue by describing the context of political speech.

## 2. Context of political speech

The second paragraph will continue by discussing the question what the decisive elements or factors are that can determine the scope of political speech. Again the *Feldek* case made clear that next to the content, the context of the speech should also be examined.<sup>223</sup> The context is important because a statement cannot be looked at in isolation.<sup>224</sup> This paragraph will examine the elements that can be headed under the context of political speech. These elements can be divided in four categories. The first category is the procedural elements for which a specific context in the case law exists. Thereafter, the position of the speaker and victim will be examined. The third part of this paragraph will attend the situation or place where the speech was made. Lastly the form of the media will be examined. These four categories have been chosen to be examined because they emerged from the Court's case law.

### *a. Procedural elements: time-framework and consistency*

The procedural elements is the first category of the context of political speeches that will be examined in this paragraph.

The procedural elements are those elements which are important for deciding whether a prosecution will start and which arises during the proceedings.

Throughout the Court's case law, there are two procedural elements that are important in order to determine whether Article 10 ECHR has been breached or not. They are the time between the statement and the moment that the prosecution starts and the consistency in the States' approach of prosecuting people for breaching the law. Both elements are interconnected with each other.

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<sup>223</sup> Supra note 192, par. 77.

<sup>224</sup> Supra note 128, par. 59.

*i. Time-framework*

When it takes too long before State authorities decide to prosecute, the Court can conclude that making a restriction under Article 10 ECHR would be disproportionate. This was a decisive element in the *Erbakan* case. Erbakan was a former Turkish politician and former Prime Minister of the political party Refah Partisi. During the time that he was a politician, Erbakan made a speech during the municipal elections of 1994. The speech's subject concerned the consequences of the elections if the Refah Partisi party would rule the country. Erbakan stated that the Refah Partisi party would make sure that the Turkish people would not become a slave of the Christians.<sup>225</sup> Erbakan was prosecuted almost five years after these municipal elections. He was prosecuted for inciting hatred because of the hostility that occurred in the region in the years that followed his speech. The Court considered that waiting almost five years before starting a prosecution against a politician – for only gathering the contents of the speech – is too long. The Court came to this conclusion by taking into account the interests of the applicant, a politician. Additionally the Court looked at the consequences of a criminal procedure for a politician.<sup>226</sup> Moreover, after four years and five months, no current risk and imminent danger existed anymore in the region where the speech of Erbakan was held.<sup>227</sup> Therefore, the Court found that it was particular difficult to hold Erbakan responsible for the hostility that occurred five years after his speech was made.<sup>228</sup> The context of the situation was not the same as it was five years before.

A similar reasoning has been given in the *Éditions Plon* case although here the procedural elements are different. Éditions Plon was a publishing company that wanted to reveal a book about the health of the French President Mitterrand just a few months after his death. The French courts banned the book for further publication. The Court considered that this met a pressing social need, since the reputation of Mitterrand and his family members were at stake.<sup>229</sup> However, the French courts had uphold the ban for more than 9,5 years after. The Court therefore concludes that a pressing social need did not exist anymore, since the context

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<sup>225</sup> Supra note 88, par. 10 : ...Voilà, avec la permission d'Allah, le 27 mars, nous allons faire ça et nous serons sauvés. En votant pour le Refah, nous allons faire d'une pierre deux coups. En premier lieu, nous allons sauver ce pays des catastrophes. D'autre part, nous ne deviendrons pas les esclaves des chrétiens et nous allons instaurer l'union de l'Islam.

<sup>226</sup> Supra note 88, par. 67.

<sup>227</sup> Supra note 88, par. 67 and 68.

<sup>228</sup> Supra note 88, par. 67. Moreover, the speech was taped on video and it was not clear whether the video was authentic or not.

<sup>229</sup> ECtHR, *Éditions Plon v. France*, 18 May 2005, Application no. 58148/00, par. 50.

of the situation had changed.<sup>230</sup> Again the amount of time was a decisive effect; this time not for the decision to start the prosecution, but for upholding the ban on a book.

When comparing both judgments, it seems that time – as a procedural element –indeed can change the context and can therefore lead to another conclusion of the Court. Especially in the *Éditions Plon* case, the Court specifically argued that because a long time had passed, a pressing social need did not exist anymore. From the Court’s case law it seems that in this specific context there is no different effect for civilians or politicians. For both it is applicable that time will change the context and can change the outcome of the ruling of the Court.

## *ii. Consistency in the prosecution*

The *Erbakan* case was not only important because time had become a decisive element. What was important too, was the inconsistent attitude of the State authorities. State authorities – especially the prosecution and national courts – must use a consistent approach in their prosecution and restrictions. It seems that the Court has imposed specific duties for the Member States to have such a consistent approach.<sup>231</sup> The inconsistency in *Erbakan* was shown by the fact that it took almost five years before the prosecution started. However, also in the *Lehideux and Isorni* case there existed an inconsistency in the prosecuting. Lehideux and Isorni were both prosecuted by the French authorities for questioning the role of Philippe Pétain during the Second World War in a publication of *Le Monde*. They were both members of the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association. The statements which were delivered by Lehideux and Isorni were consistent with the Association’s objectives. Still, the French authorities decided not to prosecute the Association, although the possibility under French law did exist.<sup>232</sup> Because of the inconsistent approach of the State authorities the context of the case was changed. It was one of the elements that lead to the conclusion that a violation of Article 10 ECHR had taken place by the French authorities.

It seems that the scholars have not yet discussed these procedural elements from the perspective of freedom of expression. It is true that a trial should proceed within a reasonable

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<sup>230</sup> Supra note 229, par. 53.

<sup>231</sup> Supra note 83, p. 45 and 46.

<sup>232</sup> Supra note 208, par. 56.

time since this is mentioned in Article 6 ECHR, but using such an argument for a decision in Article 10 ECHR has not happened very often in the Court's case law. Weber only briefly mentions that the Court imposes a duty on States not to wait too long for a prosecution and that there must be consistency in the State authorities attitudes to prosecute, but she does not enter into the discussion. In my view however, a line of argumentation can be followed of the Court, since more than one judgment on these subject matter have been delivered by the Court without deviating from its earlier conclusions.

### *iii. The Wilders case*

Wilders was not the first politician in The Netherlands that was prosecuted; in the 1990s the Dutch politician Janmaat was prosecuted for making racial statements. It is an indication that a consistent approach exists of the State authorities for prosecuting politicians.<sup>233</sup> Moreover, the time between the speeches of Wilders and his prosecution did not take that long. Although it is true that some time has passed before the initial proceedings started at the court in Amsterdam, it cannot be stated that the situation in The Netherlands has changed over the time, such as in the *Erbakan* case. Besides, considering the procedural issues between the initial charges and proceedings, there exists no situation in which the Public Prosecution has waited too long before taking any steps.<sup>234</sup> The procedure therefore was quite fast considering everything that had happened.

This means that the procedural elements will have no effect on the Wilders case.

### *iv. Conclusion*

Procedural elements can change the context of the case. These elements exists of the amount

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<sup>233</sup> Although looking back at the history of the case, there can be questions about the wish of the Dutch Prosecution to charge Wilders. However, the Dutch Prosecution did start an investigation about Wilders – and there was initially thus an intention to prosecute Wilders. The Dutch Prosecution did not prosecute Wilders, because it came to the decision that not enough evidence was there for a conviction.

<sup>234</sup> After the initial charges, the Public Prosecutor decided in June 2008 not to prosecute Wilders. Thereafter, some acclaimed victims started the so called Article 12 procedure, a procedure in which the terminating decision of the Public Prosecutor was examined by a Dutch Court of Appeal. This court decided on the 21<sup>st</sup> of January 2009 that the Public Prosecutor should start a criminal procedure against Wilders because there was enough evidence that could question whether Wilders had violated Dutch law or not. The first substantive session began at the 4<sup>th</sup> of October 2010. At the end of the process, Wilders' lawyer made a successful objection about the objectivity of the judges. The procedure had to start over again by other judges. These proceedings have started at the 7<sup>th</sup> of February 2011.

of time between the specific statement and the prosecution and the inconsistent policy of State authorities. Both were not elements that could effect the Wilders case.

The procedural element is just one part of the context. The context can also change because of the position of the speaker or of the victim.

*b. Position of the speaker/victim*

The position of a politician as a speaker has already been discussed in chapter II. There is only one element of the position of the speaker that I would like to emphasize, because this can change the context of the case. Thereafter, some comments will be placed on the position of the victim which could be important for deciding an Article 10 ECHR case.

*i. Position of the speaker*

According to the Court in the *Gündüz* case, the intention of the speaker should also be examined in order to make a conclusion.<sup>235</sup> The aim of the speaker is especially important in defining hate speech: was the speaker aiming at spreading racist ideas or was he aiming at informing the public?<sup>236</sup> When the first aim arises, hate speech could exist – which leads to a wider margin of appreciation for State authorities<sup>237</sup> – while the second aim is an indication that no hate speech existed.

For example, in the *Jersild* and *Lehideux and Isorni* cases the question was whether the remarks of the applicants could constitute as hate speech. In both cases the Court concluded negative, since the applicants did not have the aim to spread racist ideas.<sup>238</sup> The Court concluded otherwise in the *Garaudy* case, where such an intention did exist.<sup>239</sup> It is true that account should be taken of the intention of the speaker. However, in my view, it is difficult to prove whether such an intention existed. Therefore, the aim of the speaker should be taken into account, but it should not be the sole factor on which a conviction was based. Other substantial evidence is necessary.

This notion finds support in the doctrine. According to Jeremy, it is difficult to discover the intention of the speaker. To find this out, he suggests to look at the evidence that exists along

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<sup>235</sup> Supra note 74, par. 44.

<sup>236</sup> Supra note 83, p. 33.

<sup>237</sup> Supra note 74, par. 61.

<sup>238</sup> Supra note 84, par. 33 and supra note 208, par. 34.

<sup>239</sup> Supra note 206, par. 2.

with the consequences of the speech and the circumstances of the case.<sup>240</sup> Thus, substantial evidence is necessary. Concerning the consequences of the speech, it is not too difficult to discover the intention when the consequences were reasonable foreseeable. The intention of the speaker is then easier to find out. That is of course different when such consequences are not foreseeable. Again, Jeremy suggests to find indications in the evidence that exists.

Other scholars, such as Cheung and Kapai argue that the intention of the speaker is not important to find out whether unacceptable criticism or hate speech existed. The intention is only important for the sanction that a national court will impose.<sup>241</sup> One could argue this, but I am not convinced that the role of the intention in these kind of cases is just to determine the sanction or restriction that will be imposed. The intention itself can be an indication of hate speech and therefore could be considered as a piece of evidence for determining that such speeches exists.

#### ii. *Position of the victim*

Another context is the position of the victim during the speech or statement.<sup>242</sup> Different consequences for the victim arise that will depend on whether the victim is a politician or a civilian. It also depends on the involvement of the victim in the discussion. If, for example, a politician provokes a statement during a political debate, he should take into account that the response might also be provocative. This was the situation in the *Unabhängige Initiative Informationsvielfalt* case. The leader of the political party FPÖ, Jörg Haider, was in a magazine accused of being a racist. The statement part of a political debate in which Haider himself made statements that were provocative. The statement in the magazine did not exceed the limits of freedom of expression.<sup>243</sup> This is also applicable to debates that constitute a matter of general public interest.<sup>244</sup> Vice versa it is also possible: the way in which a politician reacts in a political discussion could be considered as ‘particular offensive’. According to the Court in the *Andreas Wabl* case, the response of a politician should be taken into account.<sup>245</sup> Andreas Wabl was an Austrian politician who, after a newspaper article was written about

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<sup>240</sup> A. Jeremy, ‘Practical Implications of the Enactment of Racial and Religious Hatred Act 2006’, *The Ecclesiastical Law Association*, 2007, p. 194 and 197.

<sup>241</sup> P. Kapai and A.S.Y. Cheung, ‘Hanging in a Balance: Freedom of Expression and Religion’, available at <http://www.works.bepress.com>, 2008, p. 46.

<sup>242</sup> Supra note 97, par. 35.

<sup>243</sup> ECtHR, *Unabhängige Initiative Informationsvielfalt v. Austria*, 26 Februari 2002, *Application no. 28525/95*, par. 41 and 43.

<sup>244</sup> Supra note 70, par. 52.

<sup>245</sup> ECtHR, *Andreas Wabl v. Austria*, 21 March 2000, *Application no. 24773/94*, par. 40.

him, replied that those who wrote this story were Nazi-journalists. The Court did take into account the fact that it was a response of the applicant to a newspaper article about himself. However, in the end the Court did not conclude in favour of Wabl: the reaction of Wabl came a few days after the article was published. By stating that this was Nazi-journalism, the response was too offensive.<sup>246</sup>

The intention of the speaker is as important for a politician as it is for an ordinary citizen. Still, the duty for a politician to avoid intentions that could lead to hate speech, is more pressing on him than it is for a citizen.<sup>247</sup> This has to do with the role of a politician in society which is much more influential and who represents the electorate.

It is also possible that a politician becomes the victim of some statements. It is established case law that acceptable criticism is wider when it regards a politician than when it concerns a civilian.<sup>248</sup> However, a politician also deserves some protection, especially when it regards his personal life.<sup>249</sup> But the way a politician behaves himself could lead to a stronger counter reaction. Such a counter reaction might be offensive, but if the politician was provocative, the limits of acceptable criticism are again wider. The *Unabhängige Initiative Informationsvielfalt* case is in those circumstances applicable.

### *iii. The Wilders case*

The aim of Wilders speeches is that the Islam will disappear in the Western world, or at least that the influence of the Islam will decrease. The aim is important, because it can give an indication whether Wilders' speeches are hate speeches or not. Chapter IV will more thoroughly examine whether the speeches of Wilders constitute hate speech. As that chapter will show, hate speech does not have to be about people, but could also constitute of unacceptable criticism on religion.

### *iv. Conclusion*

The aim or intention of the speaker is of great importance for the context of a case since it is

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<sup>246</sup> Supra note 245, par. 42.

<sup>247</sup> See principle 1 of the Council of Europe Committee of Ministers, Recommendation No. R (09) 20 of the Committee of Ministers to Member States on 'hate speech'.

<sup>248</sup> Supra note 24, par. 42.

<sup>249</sup> Supra note 199, par. 32 and supra note 229, par. 47 and 48.

one of the elements that can decide whether the speech will be protected under Article 10 ECHR or not. Also the position and behaviour of the victim can determine whether the restriction was necessary or not. The intention of Wilders will be discussed in chapter IV.

Two elements have passed this paragraph for determining the scope of political speech. There are still two other elements left. The discussion of these elements will continue with the national backgrounds and tensions in a conflict situation.

*c. Context: national backgrounds and tensions in a conflict situation*

Procedural elements and the position of the speaker and victim are not the only elements that are important for determining the context. Specific national backgrounds could as well be a decisive context.<sup>250</sup>

Especially regarding the situation in Turkey the Court has produced a line of case law. In south-east Turkey several terrorist attacks have occurred during the 1990s by members of the PKK, a terrorist organisation. The PKK is an illegal organisation in Turkey that fight for an independent Kurdish State in the south-east of Turkey. On the 8<sup>th</sup> of July 1999, the Court produced twelve judgments in twelve cases.<sup>251</sup> Most of these cases concerned the reports made by journalists about the situation in south-east Turkey. Some of these reports were published in weekly reviews. Amongst others, the reports consisted of an interview with a PKK leader – *Sürek and Özdemir* case – or information about the officials that are fighting against terrorism – *Sürek (no. 2)* case. The journalists, shareholders and editors-in-chief of these newspapers and weekly reviews were prosecuted for publishing these interviews and information. The Turkish courts convicted them for endangered the national security and territorial integrity, for the prevention of disorder and crime or for the protection of the rights

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<sup>250</sup> Supra note 46, par. 56, supra note 83, p. 43 and ECtHR, *Murphy v. Ireland*, 3 December 2003, *Application no. 44179/98*, par. 73.

<sup>251</sup> ECtHR, *Ceylan v. Turkey*, 8 July 1999, *Application no. 23556/94*, ECtHR, *Arslan v. Turkey*, 8 July 1999, *Application no. 23462/94*, ECtHR, *Gerger v. Turkey*, 8 July 1999, *Application no. 24919/94*, ECtHR, *Polat v. Turkey*, 8 July 1999, *Application no. 23500/94*, ECtHR, *Karatas v. Turkey*, 8 July 1999, *Application no. 23168/94*, ECtHR, *Erdogdu and Ince v. Turkey*, 8 July 1999, *Application nos. 25067/94 ; 25068/94*, ECtHR, *Okcuoglu v. Turkey*, 8 July 1999, *Application no. 24246/94*, ECtHR, *Sürek and Özdemir v. Turkey*, 8 July 1999, *Application nos. 23927/94 ; 24277/94*, ECtHR, *Sürek v. Turkey (no. 1)*, 8 July 1999, *Application no. 26682/95*, ECtHR, *Sürek v. Turkey (no. 2)*, 8 July 1999, *Application no. 24122/94*, ECtHR, *Sürek v. Turkey (no. 3)*, 8 July 1999, *Application no. 23657/94* and *Sürek v. Turkey (no. 4)*, 8 July 1999, *Application no. 24762/94*.

of others. The Court concluded that these were all legitimate aims.<sup>252</sup> The question was however whether the restrictions were necessary in a democratic society.

Compelling reasons must exist in order to make restrictions on the media because of their special role in a democracy.<sup>253</sup> However, journalists also have a duty and responsibility in regions where a tension or conflicting situation exists.<sup>254</sup> The Court made established case law by arguing that the situation in a region where there was such a tension should be taken into account by journalists.<sup>255</sup> Their reports could lead to a deterioration of the situation in the State. It leads to a specific context which is different from that of other situations and in which a different conclusion can be made by the Court.

Although it leads to a specific situation in which journalists should be careful in deciding what they should publish, only in two of the twelve cases the Court concluded that the interference of the State authorities were legitimate.<sup>256</sup> Sometimes the information published was already known to the public – *Sürek (no. 2.)* – or the interview with a PKK leader did not incite to violence – *Erdoğan and Ince* case.<sup>257</sup> Moreover, it is not possible for State authorities to make restrictions for the only reason of protecting the national security or the prevention of terrorism; something more is needed.<sup>258</sup>

Thus, the national background or the background of a region should be taken into account by journalists. It is a special duty and responsibility for the media. The same duty and responsibility is applicable for politicians because they need to avoid statements that could worsen the situation or lead to more intolerance.<sup>259</sup> Again the important cases concern the situation in Turkey. In *Zana*, a former mayor was prosecuted for press offences because of an interview in which he stated that he understood the actions of the PKK. The case could only be decided by looking at the situation in south-east Turkey at the time that the interview was made.<sup>260</sup> The words that Zana used could have been interpreted in several ways and were therefore ambiguous. However, when looking at the extreme situation in south-east Turkey at that time, the statement made by the former mayor could lead to an ‘explosion’ of the

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<sup>252</sup> See for example ECtHR, *Sürek v. Turkey (no. 2)*, 8 July 1999, *Application no. 24122/94*, par. 32, supra note 35, par. 46 and supra note 44, par. 56.

<sup>253</sup> ECtHR, *Sürek v. Turkey (no. 2)*, 8 July 1999, *Application no. 24122/94*, par. 35.

<sup>254</sup> Supra note 253, par. 36.

<sup>255</sup> Supra note 35, par. 51, supra note 44, par. 61-63 and supra note 253, par. 37.

<sup>256</sup> ECtHR, *Sürek v. Turkey (no. 1)*, 8 July 1999, *Application no. 26682/95* and ECtHR, *Sürek v. Turkey (no. 4)*, 8 July 1999, *Application no. 24762/94*.

<sup>257</sup> Supra note 253, par. 40 and supra note 35, par. 52.

<sup>258</sup> Supra note 44, par. 63 and supra note 35, par. 54.

<sup>259</sup> Supra note 88, par. 64.

<sup>260</sup> Supra note 128, par. 56.

situation in the region. The interference of the State authorities were therefore in accordance with Article 10(2) ECHR.<sup>261</sup>

The Turkish authorities used the same reasons in the *Incal* case. Incal, a member of the executive committee of the People's Labour Party, distributed a leaflet which criticised the local authorities. To prevent disorder, Incal was prosecuted and convicted by the Turkish courts. The Turkish authorities claimed that the same situation prevailed as in the *Zana* case. The Court did not follow this argumentation. Incal could not be held responsible for the problems of terrorism in Turkey as was the situation of *Zana*.<sup>262</sup> A violation of Article 10 ECHR existed on the part of the Turkish State.

When there is a situation of conflict, there are special duties and responsibilities for journalists and politicians, since the context in which the statement was made is different than situations where such a tension does not exist. Concluding from the case law of the Court, journalists as well as politicians are treated more or less the same way by the Court. Protecting national security cannot however be the sole reason for interfering with the right of freedom of speech. The consequences of the statement should also be taken into account; it can make a difference in the conclusion of the Court whether the statement worsened the situation or not. In the *Zana* case, the statement deteriorated the already bad situation in south-east Turkey, while in other cases nothing happened after publication.

The background or tensions in a conflict situation is not an element that is applicable to the *Wilders* case, because a situation as in Turkey does not exist in The Netherlands.

### *Conclusion*

The question which context elements can decide the scope of political speech has almost been answered. Three of the four elements have passed this paragraph. It is time to complete the answer of the decisive context elements by examining the mediums that are used by politicians.

#### *d. Medium*

The final element that is considered by the doctrine and the Court as an element in the context

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<sup>261</sup> Supra note 128, par. 59 and 60.

<sup>262</sup> ECtHR, *Incal v. Turkey*, 9 June 1998, *Application no. 22678/93*, par. 58.

situation is the medium used by the speaker.<sup>263</sup> First the effects of the different kind of mediums will be examined. Thereafter, these effects will be applied on the Wilders case.

*i. The effects of the different kind of mediums used*

In the *Jersild* case the Court emphasised the importance of the medium used and the manner in which it was used.<sup>264</sup> There is a choice of the medium that a politician would use. The audiovisual medium has a different effect and consequences than that the written media would have. This has to do with the fact that audiovisual media is more immediate – meaning live – and has a more powerful effect.<sup>265</sup>

When a politician debates or is interviewed in a live television programme, there is no chance for a politician to reformulate his statements. Therefore, the scope of the freedom of expression is wider than when a politician could rethink his statements over, for example in an interview that he gives for a newspaper.<sup>266</sup> This is not only applicable to politicians, but also to other officials and civilians.<sup>267</sup>

It is not enough to examine only whether the programme was live or not. The Court will as well investigate in what kind of programme the speaker was performing. In the *Jersild* case, the television programme was a serious programme for an audience that was well informed about the topic. When in such circumstances gratuitously offensive remarks or hate speeches are made, the effect is different than for a less informed audience. While in the *Jersild* case the audience was well informed about the subject of the programme, the same cannot be said in the *Féret* case. Féret, a Belgium politician and former front man of the political party Front National, was prosecuted and convicted for incitement to hatred, discrimination and violence because of race, colour or national or ethnic origin. His party made leaflets in which immigrants were presented as criminals who only benefitted from their stay in Belgium. Such leaflets went too far for the Court, because the audience was not well informed about these leaflets. Since the leaflets were spread around to all citizens, without them knowing the context of the discussion, the public was not well informed. In my view, one can also argue

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<sup>263</sup> Supra note 92, p. 114 and supra note 118, p. 341.

<sup>264</sup> See also B. Hepply, 'Freedom of Expression and the Problem of Harassment', in J. Beatson and Y. Cripps (eds), *Freedom of Expression and Freedom of Information, Essays in Honour of sir David Williams*, Oxford: Oxford University Press 2000, p. 189.

<sup>265</sup> Supra note 84, par. 31. See also the ECtHR, *Tatlav v. Russia*, 2 May 2006, *Application no. 50692/99*. One of the reasons for the Court to conclude that a violation of Article 10 ECHR took place, was the fact that the book was published only in a small amount and therefore the effect of the insulting tone of the book was smaller.

<sup>266</sup> Supra note 245, par. 42.

<sup>267</sup> Supra note 74, par. 49.

that using leaflets means that beforehand the politician rethinks over what he would post on such leaflets. It would limit the scope of acceptable criticism. The Court however has not used this argument in its decision. The public could have a misleading image of the leaflets. It could lead to contempt and rejection of immigrants and even to hatred against foreigners.<sup>268</sup> The Court ruled in favour of the Belgium authorities.

The new media – meaning the internet – should also be taken into account. Internet gives a possibility to contact people all around the world. The internet therefore has the most powerful effect: it reaches more people than a television programme or a newspaper article. Several questions arise when discussing the freedom of speech on the internet. First of all, should existent regulation be applied on the internet or should new legislation in States take place. According to the Court, the second situation is applicable: restrictions should be prescribed by law. This means that the law needs to be changed and updated or that new law should be developed. Otherwise the Court will not accept a restriction on freedom of speech.<sup>269</sup>

When there is regulation on spreading information and ideas on the internet, the Court has argued that different rules are applicable than for other media, especially because of its ability to ‘store and transmit information’. Moreover, the information can reach billions of people.<sup>270</sup> Because of the long reach that the information can have, the risk will also increase that this information contains ideas that could harm people and their rights. For politicians this means that they should take into account the effect that their ideas can have over the internet; everyone has access to it and the people could take over these ideas or could give their own interpretation on it. As the Court made clear, different rules are applicable because of the effect of the internet. These different rules are also applicable on politicians and their speeches.

Another accountability issue arises with the internet. This issue raises a lot of questions such who is responsible for the publication of a speech or statement on the internet. Is it only the speaker or writer of the speech or could the provider also be held accountable? It is a topic of discussion because the author of the speech has less control over the reach of the speech.<sup>271</sup> A

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<sup>268</sup> Supra note 169, par. 69.

<sup>269</sup> ECtHR, *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, 5 May 2011, *Application no. 33014/05*, par. 64-66.

<sup>270</sup> Supra note 269, par. 63.

<sup>271</sup> Supra note 51, p. 71.

final word has not been said about this issue. Nevertheless, a further discussion of the topic would go beyond the scope of this thesis.

### *ii. The Wilders case*

As previously mentioned, Wilders is known for the interview he gave in a Dutch newspaper, *The Volkskrant*. He also wrote his own article in the *Parool*, another Dutch newspaper. Newspaper articles are not live and therefore Wilders had time to reformulate his statements, but he did not. In my view, the statements were gratuitously offensive and did exceed the limits of permissible criticism, since Wilders did not try to reformulate his remarks.

Another example is when Wilders used the word ‘kopvoddentax’ in a live debate in Parliament which could be followed live on television. In here, the context is different: Wilders did have the right to make these remarks since his statement was live, in a political debate in Parliament where he enjoys parliamentary immunity.

Wilders has also used the new media for spreading his ideas. Most famously is his film *Fitna*, which has been spread only around the internet. Moreover, he has used his own and other websites in order to let the people know his opinion. On the website of ‘*Geen Stijl*’ Wilders has a column, in which he warns the readers for the third Islamic invasion in Europe and The Netherlands. Wilders and his party would do anything to avoid this invasion.<sup>272</sup>

By using the internet, Wilders will reach people that, unlike a television programme, are not always well informed. Especially by using a website such as the one of ‘*Geen Stijl*’ which is regarded as a sort of news site, people are not known or informed about all of the ideas of Wilders and thereby do not know whether Wilders statements has any kind of truth in it. A politician should be careful by putting ideas on the internet because of the effect that it can have on less informed individual. Therefore, the way that Wilders uses the internet such as for his film *Fitna*, is not responsible enough in my eyes. It is an element that should be taken into account by the Court if they were ever in the possibility to examine the question whether Wilders has exceeded the limits of protection of the right to freedom of expression.

### *iii. Conclusion*

The context of the medium used by politicians and other civilians can have several

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<sup>272</sup> Website <http://www.geenstijl.nl>, column ‘Mohammed (deel II) : de islamitische invasie’, of 6th of February 2007.

consequences. In some media the scope of freedom of expression is wider than in other ones. The most contrast we can see in a live television debate or the internet and an interview in a written newspaper. For both politicians and civilians the consequences of stepping over the limits of protection of Article 10 ECHR are the same. Wilders has used several mediums. It is clear that the mediums used can have different consequences for examining the question whether Wilders deserves the protection of freedom of political speech. In my eyes, Wilders went too far with the film *Fitna* on the internet: he did not take into account the effect that the film could have in society and thus did not take into account his responsibility.

Paragraph two has examined the context of political speech. This context was divided in four categories. Each of these categories can in itself change the opinion or conclusion of the Court. The scope of political speech is therefore partly determined by the context; on the one hand the context alone can determine this scope, but it could also do this together with other elements that are applicable in the case.

The final element that can determine the scope of political speech is the restriction which is imposed by State authorities.

### 3. Restrictions: sanctions

The severity of the penalty imposed by the national authorities is a factor which should be taken into account in order to determine whether the interference was necessary in a democratic society.<sup>273</sup> However, the nature of the penalty itself is most of the time not an element that can be decisive solely. Support for this argument can be found in the case law of the Court: although it has been argued that the sanctions are important for determining whether the interference was necessary, it sometimes does not examine the sanctions in the case. In the *Jersild* and *Lopes Gomes da Silva* cases, the Court mentions that the only thing that was important was the fact that the journalists were convicted at all, while in *Gündüz* it was unnecessary to examine the sanction.<sup>274</sup>

Sanctions are a factor of influence for determining whether the state authorities fulfilled the demands of Article 10(2) ECHR. Sanctions are possible but the legislator should be careful

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<sup>273</sup> ECtHR, *Sürek v. Turkey* (no. 1.), 8 July 1999, *Application no. 26682/95*, par. 64 and supra note 169, par. 79

<sup>274</sup> Supra note 74, par. 54, supra note 84, par. 35 and supra note 215, par. 36.

and avoid sanctions that could lead to a chilling effect.<sup>275</sup> A chilling effect will sooner arise when sanctions, such as high fines, are imposed on politicians for criticising the government.<sup>276</sup> Not only fines can lead to a chilling effect for politicians, a ban on wearing a particular symbol during a demonstration can have the same effect as well.<sup>277</sup>

The fear of a chilling effect can certainly arise when it concerns criminal proceedings and penalties. Although it seems difficult to reconcile criminal penalties with the necessity test of Article 10(2) ECHR, the Court has not concluded that such penalties are not allowed.<sup>278</sup> State authorities should however use criminal penalties only as an *ultimum remedium*.<sup>279</sup> This means that the State authorities should examine whether there are other means available that are more suitable and proportionate.<sup>280</sup>

When criminal sanctions are used – such as a sentence that imposes imprisonment – the Court uses a stricter scrutiny test than when the sanction concerns civil liability.<sup>281</sup> Especially when the sanction has been imposed on a politician, very compelling reasons should exist before the Court will accept such a sentence. From the Court's case law, it can be concluded that it is unacceptable for the Court that a politician will be sentenced to imprisonment when he made statements during a political debate.<sup>282</sup> When it concerns criticism of a politician on the government, it is also difficult for state authorities to uphold a sentence containing imprisonment.<sup>283</sup>

Sometimes more than one penalty is imposed on politicians. In the *Erbakan* case, the politician was sentenced to one year imprisonment, a fine and a ban from civil and political rights. These were severe penalties for a well-known politician.<sup>284</sup> The sanctions were therefore disproportionate. However, this consideration of the Court was not a decisive factor: the fact that criminal proceedings started after five years was the main reason for the Court to conclude that a violation of Article 10 ECHR had taken place. Thus, the sanction had a secondary effect.

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<sup>275</sup> Supra note 90, p. 175, supra note 197, par. 88 and ECtHR, *Lyashko v. Ukraine*, 10 August 2006, *Application no. 21040/02*, par. 57.

<sup>276</sup> ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000, *Application no. 23144/93*, par. 60.

<sup>277</sup> ECtHR, *Vajnai v. Hungary*, 8 July 2008, *Application no. 33629/06*, par. 54.

<sup>278</sup> ECtHR, *Azevedo v. Portugal*, 23 October 1990, *Application no. 11296/84*, par. 33.

<sup>279</sup> Supra note 146, p. 57 and supra note 51, p. 66.

<sup>280</sup> Supra note 83, p. 45.

<sup>281</sup> Supra note 24, par. 44 and supra note 92, p. 115.

<sup>282</sup> Supra note 4, supra note 42, p. 472 and supra note 220.

<sup>283</sup> Supra note 276, par. 60.

<sup>284</sup> Supra note 88, par. 69.

A similar sanction was imposed on another Turkish politician: Incal was sentenced to six months imprisonment and a bar on civil services. Again, the Court concluded that the penalty was hard to reconcile with Article 10 ECHR and therefore disproportionate.<sup>285</sup>

Although it seems from these cases that the Court will not accept imprisonment as a sanction for politicians, that is not entirely true. It is true that the Court does not accept imprisonment as a sanction for statements made during a political debate or when it concerns criticism on a government. It does not however ban such sanctions at all. For example in the *Zana* case, the politician Zana was sentenced to twelve months imprisonment for press offences since the statements were not made during a political debate. According to the Court, the penalty was, considering the circumstances of the case, reasonable and answered the pressing social need.<sup>286</sup> Not all judges agreed with this judgment: from the partly dissenting opinion of several judges it becomes clear that the twelve months imprisonment was not proportionate. The judges argued that a less intensive sentence should have been available and imposed.<sup>287</sup> That only a part of the sentence was served did not make their conclusion different.

There is not much of a discussion going on between scholars about the way that the Court deals with sanctions that are imposed on citizens and politicians. Scholars follow the line of the Court, without making much comments. Although one might presume that a discussion would exist around the *Zana* case because of the imprisonment of a politician, it did not. However, the case of *Zana* is special, since it concerns the support of terrorist organisations. In my view, this means that imprisonment for politicians is only acceptable for the Court when a politician makes statements that could violate the values of democracy. Support for such a presumption can also be found in the report of the Venice Commission, which states that criminal sanctions on hate speech are justified. The speech of Zana did not consist of hate speech. Nevertheless supporting a terrorist organisation is – like hate speech – an extreme speech which must be avoided.<sup>288</sup> Since terrorist organisations use force to ‘attack’ democracy, it is not striking that the Court would uphold the imprisonment of a politician who supports such views. The Court takes into account the values of the Convention which is – amongst others – the promotion of democracy.

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<sup>285</sup> Supra note 262, par. 56 and 59.

<sup>286</sup> Supra note 128, par. 61.

<sup>287</sup> Supra note 128, Dissenting opinion of Judges Van Dijk, Palm, Loizou, Mifsud Monnici, Jambrek, Küris and Levits.

<sup>288</sup> Supra note 41, par. 57.

## *Conclusion*

When comparing the sanctions that can be imposed on politicians and on other civilians, one could argue that imposing criminal sanctions on politicians is less acceptable than imposing them on other actors. The Court has never made this distinction, but this argument is supported by the fact that the Court states that *especially* criminal sanctions on politicians should be examined with the closest scrutiny.<sup>289</sup> In most circumstances, sentencing a politician to imprisonment is not accepted by the Court. Only in the most extreme circumstances the Court has upheld a sentence of twelve months imprisonment for a politician.<sup>290</sup>

The restrictions and sanctions as an element are not applicable to the Wilders case now that Wilders was found not guilty of any of the charges by the Dutch court.

The reaction of State authorities by imposing sanctions can determine whether the protection of Article 10 ECHR is applicable and violated by the national authorities. With this last topic on penalties, all relevant elements that could influence the scope of political speech have been discussed. This means that a conclusion can be drawn in which the research questions will be answered.

### 4. Interim conclusion

This chapter has tried to give an answer to the question which factors or elements can decide the scope of political speech. Throughout the chapter differences have tried to be identified between freedom of speech in general and political speech or between citizens and politicians. The first paragraph has emphasised the importance of the content of the speech. If the content concerns a political speech or a matter of general public interest, the margin of appreciation is smaller as will the room for restrictions be. Here there is thus a difference between freedom of speech in general and political speech.

The statements of facts and value-judgments were also examined in the first paragraph. For statements of fact, there is the duty to tell the truth. The duty weights heavier for politicians than for citizens, because of their role in a democratic society. Again, this makes a difference

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<sup>289</sup> Supra note 24 and supra note 92, p. 115.

<sup>290</sup> Especially when looking at the party dissenting opinion in the Zana case, where the sentence of Zana was heavily discussed by nine judges.

between political speech and freedom of speech in general. Regarding the value-judgments, it seems that the Court gave more room for such value-judgments in a political context. However, since the *Le Pen* case it seems that this has changed: the same rules are now applicable for politicians as they are for citizens.

In the second paragraph the context elements have been discussed. They were divided in four categories. First, the procedural elements were examined, such as the inconsistent policy of prosecutions. This can make a difference in the necessity test. Secondly, the aim of the speaker will make the context different: a smaller margin of appreciation will exist when the aim is to spread hate. The position or behaviour of the victim should also be taken into account: a stronger counter reaction is possible depending on the behaviour of the victim. Here, there is a difference between politicians and civilians, because the duty to avoid aims that constitute hate speech weights heavier on politicians than on citizens. Moreover, the scope of acceptable criticism about a politician is wider than about a civilian. Thirdly, the background of the nation or region where the speech was held can deliver extra duties and responsibilities for both journalists and politicians. Finally, the chosen medium can determine the context; a different context exists depending on whether the speech or statement was held during a live television debate, the internet or in a newspaper interview.

In the last paragraph the sanctions imposed on the applicants were discussed. Heavy sanctions, such as criminal ones, do not always pass the necessity test of the Court. Especially for politicians it is hard to imagine a sanction as imprisonment, although it is not totally impossible. Again, a difference appears between citizens and politicians; for both of them the Court will not easily accept a criminal sanction, but a closer scrutiny test is used by the Court when such a sanction is imposed on politicians.

Throughout the chapter, references have been made to the Wilders case. First of all, there is no doubt that the contested statements of Wilders can be defined as political speeches or topics of general public interest. These statements are most of the time value-judgments. The newsarticle in the Parool in 2004 can be compared with the statements of Le Pen. Le Pen exceeded the limits of protection of Article 10 ECHR. Since there are similarities between the two cases, it may well be that the Court will reach the same conclusion in the Wilders case as in the *Le Pen* case.

When looking at the context of political speech, the conclusion was made that the procedural elements, national backgrounds/conflict situations and sanctions were not applicable to the Wilders case because these elements or situations have not occurred. For the position of the

speaker, it is important to look at the aim of Wilders speeches. The aim is important because it is a factor that can determine whether Wilders wants to spread hatred or not. This will be more examined in the next chapter. Finally, the way that Wilders uses the medium makes him vulnerable for a conviction: the expressions that he made were well thought over and were not in a live debate in which there is no change of reformulation. Moreover, Wilders has used the internet for his film *Fitna*. A greater responsibility is applicable because of the reach of the internet and the accessibility of it for less informed viewers.

Taking all these elements and factors into account, it can be a sufficient basis for concluding that Wilders has exceeded the limits of protection of Article 10 ECHR because of the content and context of his speeches.

## Chapter IV: Criticism of politicians on people, religion and hate speech

This last chapter will more specifically discuss the scope of acceptable criticism. Again a comparison will be made between political speech and freedom of expression in general. There are two questions that will be examined in this chapter. The first one is how far politician can go in giving criticism on people and religion. These two topics have been chosen, because it has produced a lot of case law of the Court and appears to become a contentious issue all around Europe. The question will be discussed in the first and second paragraph. The second research question is whether the boundaries of hate speech are the same for politicians and for citizens. Acceptable criticism stops when there is hate speech. This question will be answered in paragraph three.

Both questions will be compared with the Wilders case. The comparison is needed to get an answer whether Wilders' speeches and statements fall within the protection of Article 10 ECHR.

At the end of the chapter, a conclusion will be given where these final research questions will be answered.

### 1. Criticism on politicians and civilians

The emphasis in this thesis lies on the boundaries of acceptable criticism given by politicians. This criticism can be about a person or other issue such as religion. In this paragraph, the scope of acceptable criticism on politicians and civilians will be examined in two separate subparagraphs.

#### *a. Criticism on civilians*

Limits exist when the criticism concerns politicians and civilians. The reason for the existence of such a limitation is the protection of the reputation and rights of others: Article 10(2) ECHR. The basic rule for criticism on politicians and civilians is that the limits of acceptable criticism are wider with regard to a politician than a private individual.<sup>291</sup> This means that

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<sup>291</sup> Supra note 24, par. 42.

politicians are treated differently than private individuals. That has to do with their role in society: a politician serves a public role while a private citizen usually does not perform such a role.

Because politicians serve a public role, they also have different means to their availability to respond to criticism. These means can be superior to those available for the individual.<sup>292</sup> For example, when a politician is criticised, it is easier for him to respond to this criticism by using a television programme than it is for a citizen: he does not have the power or status to ask to respond in such a television programme. The chance that private persons will be more damaged than politicians is larger since citizens do not have the same ‘defence mechanisms’ as politicians have. Therefore, they should be more protected by the law.

Although politicians perform a public role in society, that does not mean that all kinds of criticism is allowed. A distinction should be made between criticism on a politician as a public figure and criticism on a politician as a private person.<sup>293</sup> However, such a distinction also leads to a tension: a politician has a public role that sometimes extends to his private life. Whether this extends to his private life depends on the precise role of the politician: if he is a representative in Parliament for family life and states that family is the cornerstone of society, this could have consequences for the way he lives his private life. If one of the values of a political party is that a man may never cheat on his wife and a politician of this party actually cheats on his wife – which becomes the subject of criticism – the criticism could extend to his private life, meaning that the criticism would become acceptable. The public interest of society has shifted towards his private life, because the behaviour of the politician could affect the voting decision of the people.<sup>294</sup>

Thus, although a distinction should be made between the private life of politicians and their public role, it seems that a politician is less protected when criticism is made on his private life than when such criticism concerns a private individual.<sup>295</sup> However, no protection at all for the private life of a politician will not suffice.<sup>296</sup> Some protection must exist. That

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<sup>292</sup> Supra note 5, p. 268.

<sup>293</sup> A.J. Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting: theorie, rechtsvergelijking, discriminatie, pornografie*, Nijmegen: Ars Aequi Libri 2006, p. 317.

<sup>294</sup> Supra note 175, par. 45.

<sup>295</sup> Supra note 5, p. 268.

<sup>296</sup> C. Forsyth, ‘The Protection of Political Discourse: Pragmatism or Incoherence?’, in: J. Beatson and Y. Cripps (eds), *Freedom of Expression and Freedom of Information, Essays in Honour of sir David Williams*, Oxford: Oxford University Press 2000, p. 87 and 88.

protection depends on the exact public role the politician has. Otherwise it is difficult to make a well distinction between his private life and his public function.<sup>297</sup>

Another distinction that should be made, is the aim of the criticism and the words that are used by the criticiser. If the aim is to damage the reputation of the other person, which cannot contribute to a public or a political debate, the limits of acceptable criticism are smaller than when such criticism does has another aim and does contribute to the public or political debate.<sup>298</sup>

Regarding the words that are used, there is a difference whether the words come from a politician in a public debate or whether a politician uses these words against a citizen. In the former case a politician may use harsh words as a counter reaction, although using the words Nazi-journalism against journalists in a matter of public interest goes too far.<sup>299</sup> Thus, when harsh words are used to criminalize someone, it seems that this exceeds the limits of acceptable criticism. But when the criticism concerns a private party, a politician should rethink whether less harsh words are suitable in the situation. In the *Constantinescu* case the applicant was an elected leader of the General Assembly of School Teachers Union in Romania. He accused two former employees of theft and instigated criminal proceedings against them. In a newspaper article he referred to the two employees as ‘delapaditori’ which could be translated as persons who are found guilty of fraud. This was unacceptable criticism for the Court: less harsh words would have been better suited in the situation, especially since the criticism was about two private persons.<sup>300</sup>

Even when harsh words are accepted, like in a political debate in Parliament, than a politician who uses such words should bear in mind that a similar counter reaction could follow. Such a politician cannot complain afterwards that these harsh words would have damage his reputation. The *Unabhängige Initiative Informationsvielfalt* case is then applicable, in which harsh criticism was given by a journalist after the Austrian politician Jörg Haider made provocative statements on the issue.<sup>301</sup>

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<sup>297</sup> A contrario: in ECtHR, *Von Hannover v. Germany*, 24 June 2004, *Application no. 59320/00*, it was argued by the Court that since Carolina von Hannover, princess of Monaco, has no public function at all, pictures of her private life may not be published: par. 72.

<sup>298</sup> Supra note 105, par. 66.

<sup>299</sup> Supra note 245, par. 42.

<sup>300</sup> ECtHR, *Constantinescu v. Romania*, 27 June 2000, *Application no. 28871/95*, par. 74.

<sup>301</sup> Supra note 243, par. 41 and 43.

Although it seems that citizens are always more protected since they cannot defend themselves as well as politicians can and the fact that they do not have a public function, such a standard is not always applicable. For politicians one has to look at the exact function he or she has in order to determine the line between acceptable criticism and unacceptable criticism. For citizens the same criteria is applicable: when citizens enter into a public debate or have a public function, the limits of acceptable criticism are wider. The *Bladet Tromsø and Stensaas* case made it clear that in such a situation private persons should be treated the same way as public figures.<sup>302</sup> *Bladet Tromsø* was a company in which Stensaas was the editor-in-chief. As part of the media, the company and Stensaas did not exceed the limits of acceptable criticism. The same is applicable when a politician criticises a private body. In the *Jerusalem* case, it was a politician who accused a private body of being a sect. Since these bodies were active in the public field and it concerned a matter of general interest, this criticism also fell within the scope of acceptable criticism.<sup>303</sup>

*b. Criticism on politicians*

As previously mentioned, the general rule for criticism on persons, is that the limits of acceptable criticism are wider when it regards a politician than a private individual. However, the line to make this distinction is not always clear. First of all, criticism on a politician could extend to his private life as well. It depends on the politician's exact public role where this line of acceptable criticism is drawn. Therefore politicians are not as well protected as citizens when it concerns their private life. In the *Wabl* case, not all judges agreed with the conclusion that *Wabl* exceeded the limits of acceptable criticism: *Wabl* was attacked on a personal level by the press. Because he could not defend himself in the way he did, he was in a more disadvantage position than other citizens would have been.<sup>304</sup> That does not mean that citizens will always be more protected in their private lives than politicians: for them as well, it depends on the role they fulfil in society: if they take part in a debate of public concern or fulfil a public role in society, the room for acceptable criticism is wider for them.

To conclude, it is possible to argue that politicians may use harder words to others, even in some circumstances to private citizens, because of their role in the democratic society, but

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<sup>302</sup> Supra note 69, par. 68 and 71.

<sup>303</sup> Supra note 97, par. 39 and 40.

<sup>304</sup> Supra note 245, dissenting opinion Judge Greve.

they should be aware of the same counter reaction of the public. They are treated differently than citizens.

*c. The Wilders case*

For Wilders this form of criticism is not decisive. Wilders criticises the Islam but is clever to avoid the word Muslim, since this would lead to criticism on people and could hold him accountable under the Dutch Criminal Code. However, in the indictment for the allegation of violation of Article 137d of the Dutch Criminal Code, some examples are also upheld in which Wilders criticises Moroccans. In a newspaper article he has stated that young Moroccan man are violent to those who are homosexual.<sup>305</sup> Still, it is doubtful to me whether such criticism really exceeds the limits of acceptable criticism. In my view, it will not, since the criticism cannot be regarded as gratuitously offensive. Moreover, the speech was made in the context of a public discussion.

*d. Conclusion*

The limits of acceptable criticism on people was the topic of his paragraph. A part of the first research question has been answered.

Criticism on human beings is however not the only form of criticism that exist. There are also other forms such as criticism on religion which is the most important one. By criticising religion, there is the possibility that a tension will exist between the right of freedom of religion and freedom of expression.<sup>306</sup> What the consequences of such tension are, is one of the topics of the next paragraph.

## 2. Criticism on religion

Article 10 ECHR not only extends to criticism on people, but also to criticism on religion. What the boundaries of acceptable criticism on religion are, shall be discussed in this paragraph. Believers must accept the idea that there are other people who do not believe in

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<sup>305</sup> Supra note 130.

<sup>306</sup> Supra note 146, p. 29. However, not all scholars agree on this, because freedom of religion means freedom to practice religion. By criticising religion, it does not mean that Article 9 ECHR is violated because one cannot practice his or her religion anymore.

their faith and who have a different opinion about it. However, Article 10(2) ECHR contains the protection of the rights of others, such as freedom of religion – Article 9 ECHR. Therefore, criticism on religion has its boundaries. Some general remarks on the interaction or clash between Articles 9 and 10 ECHR will be made. After that, the main question of the scope of acceptable criticism on religion will be discussed in the subparagraphs on gratuitously offensive criticism and of religious symbols. The rules that are developed will thereafter be applied to the Wilders case.

*a. The interaction between Articles 9 and 10 ECHR*

It has become established case law that freedom of expression constitutes one of the essential foundations of a democratic society.<sup>307</sup> However, not only freedom of expression constitutes as such an essential foundation of a democratic society. In the *Kokkinakis* case the Court gave the same status to freedom of religion.<sup>308</sup> The reasoning of the Court is that freedom of religion will stimulate pluralism in a society. This means that two fundamental rights clash in to each other. The Court has to decide from case to case which right prevails. Because both rights clash into each other, it is not possible that one of the two rights will become absolute and in which no restrictions are possible at all.

Although the existence of such a clash seems pretty obvious, there are scholars who think that such an assumption needs to be refined. According to Clarke, both rights are interconnected with each other. This comes especially forward when a believer wants to criticise other religious ideas.<sup>309</sup> Indeed the argument can be made that criticism on religion will benefit the discussion. Such discussion should be encouraged because it will lead to more tolerance in society. However, and Clarke also puts this forward, the problem exists when the criticism is provocative, insensitive and ridicule.<sup>310</sup> Then the discussion could get ‘out of control’ and will not benefit the tolerance between different groups and opinions. When such a situation occurs, then a clash could exist. The boundaries of acceptable criticism are from that moment in sight.

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<sup>307</sup> Supra note 4, par. 49, supra note 24, par. 41 and supra note 49, par. 57.

<sup>308</sup> ECtHR, *Kokkinakis v. Greece*, 25 May 1993, *Application no. 14307/88*, par. 31. See also supra note 293, p. 308.

<sup>309</sup> B. Clarke, ‘Freedom of Speech and Criticism of Religion: What are the Limits?’, *Murdoch University E Law Journal*, 2007, vol. 14, no. 2, p. 96

<sup>310</sup> Supra note 309, p. 114.

b. *Gratuitously offensive criticism*

Under the protection of the rights of others of Article 10(2) ECHR it is possible to restrict the right to freedom of speech. Since there is no uniform concept on the subject of religion, there is a wider margin of appreciation in which there are more possibilities to restrict freedom of expression than on other subjects.<sup>311</sup> The Court also encourages this. As Janis formulates it, the Court actually ‘sympathises’ with States that try to restrict too far reaching criticism on religion and blasphemy.<sup>312</sup> The *Otto-Preminger-Institut* case is a good example of this. Objective criticism is acceptable since this is criticism on religion in general.<sup>313</sup> This should be distinguished from criticism that is ‘gratuitously offensive’.

Although the Court stated that freedom of expressions extends to those ideas that shock or offend people,<sup>314</sup> the boundaries for acceptable criticism regarding religion, is that such criticism may not be gratuitously offensive.<sup>315</sup> The Court has continued this line of argumentation in its case law.<sup>316</sup> Gratuitously offensive could be explained as such criticism on religion that would ‘substantially offend’ believers or other people in society.<sup>317</sup> In the *Otto-Preminger-Institut* case, the Court stated that there is a duty and responsibility to avoid as much as possible statements that could be considered as gratuitously offensive.<sup>318</sup> Whether or not the criteria regarded religious feelings does not matter here; it is about the criteria the Court has formulated in general. This criteria is applicable for politicians as well as for ordinary citizens. However, it is difficult to make a standard on which expressions can constitute as gratuitously offensive and which not. A lot depend on the circumstances of the case. What is regarded in the private sphere as gratuitously offensive does not have to have the same character in a public debate.<sup>319</sup> Not only follows this from the Court’s case law that public debate and political speech should be more protected. It is also shown from the Resolutions that are made by the Committee of Ministers of the Council of Europe. According to Resolution 1805 on Blasphemy, Religious insults and Hate Speech against Persons on

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<sup>311</sup> ECtHR, *Murphy v. Ireland*, 3 December 2003, *Application no. 44179/98*, par. 81.

<sup>312</sup> *Supra* note 5, p. 288 and 289.

<sup>313</sup> *Supra* note 66, par. 50.

<sup>314</sup> *Supra* note 4, par. 49.

<sup>315</sup> *Supra* note 46, par. 49.

<sup>316</sup> See *supra* note 34, par. 37, *supra* note 66, par. 43 and *supra* note 311, par. 65.

<sup>317</sup> *Supra* note 52, p. 57.

<sup>318</sup> *Supra* note 46, par. 49.

<sup>319</sup> *Supra* note 293, p. 334.

Grounds of their Religion, restrictions may only be applicable when there was the intention to hurt believers and which severely disturbed public order.<sup>320</sup>

Thus, whether something is gratuitously offensive depends on whether such expressions were made during a public debate or political speech, on the intention of the speaker and the consequences it has in society. Such criticism is directed or has a direct influence on the believers of a religion. It means that such criticism not only depends on the words that are spoken, but will also depend on the way those words were used.<sup>321</sup> All of these elements together determines whether criticism can be called gratuitously offensive or not.

### *c. Religious symbols*

Not only the *Otto-Preminger-Institut* case was important for the development of acceptable criticism on religion. The *Wingrove* judgment was significant too, because it followed the line of *Otto-Preminger-Institut*. Moreover, the Court concluded that insulting religion includes insulting religious symbols.<sup>322</sup> The *Tatlav* judgment and the *I.A.* case as well were of great importance.

The *Tatlav* case concerned a journalist who published a book in which he, amongst other, suggested that God did not exist.<sup>323</sup> He was sentenced by the Turkish courts to one year imprisonment and a fine. The decision is important, because the Court makes rules for the boundaries of insulting believers and religious symbols. Unacceptable criticism should be directed directly at the believers or symbols. Otherwise the criticism lies within the lines of acceptable criticism. The criticism of *Tatlav* was not directly directed at the believers or symbols and was therefore objective criticism on the Islam in general.

*Tatlav* is also important because it confirms the judgment of *Wingrove* that it is possible to insult religious symbols. The *I.A.* case is a clear example in which criticism on religious symbols went too far. I.A. was the director of a publishing house. He published a novel called 'The Forbidden Phrases'. In this book, he insulting the Prophet Mohammad and the Koran. The Court considered that an abusive attack occurred on the Prophet Mohammad. The book

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<sup>320</sup> Council of Europe, Committee of Ministers, Recommendation 1805 on Blasphemy, Religious Insults and Hate Speech against persons on Grounds of their Religion, 2007.

<sup>321</sup> M. Berger, 'Religieuze grenzen aan de vrijheid van meningsuiting. De Deense spotprenten voor de Nederlandse rechter', *NJCM-Bulletin*, 2006, vol. 31, no. 5, p. 668

<sup>322</sup> *Supra* note 34, par. 52.

<sup>323</sup> ECtHR, *Tatlav v. Turkey*, 2 May 2006, *Application no. 50692/99*.

contained the phrase that Mohammad did not forbid sexual intercourse with a dead person or an animal. It was an interpretation of the Koran. Although believers must accept certain criticism, this kind of criticism was gratuitously offensive since it was too offensive and provocative. The believers rightly could feel themselves as an object of offensive attacks.<sup>324</sup> The restriction therefore met a pressing social need of Article 10(2) ECHR.<sup>325</sup>

The ‘religious symbols’ issue leads to some debate amongst the scholars. Some of the scholars agree with the Court’s views in the *Tatlav* and *I.A.* cases, such as Lawson.<sup>326</sup> According to Lawson, it is obviously clear that the Koran, as in the *I.A.* case, belongs to religious symbols in which it is not allowed to use criticism that is gratuitously offensive.<sup>327</sup> However, there are other scholars who think that the interpretation of the Court is too wide in the sense that too much restrictions on freedom of expression are possible by the arguments of the Court. Wachsmann for example, thinks that the Court by the judgment of the *I.A.* case tries to implement morals in the notion of ‘the protection of the rights of others’ of Article 10(2) ECHR.<sup>328</sup> One could argue that the Court tries to input morals in Article 10(2) ECHR’s conception of the rights of others, but a more convincing argument is that the Court only uses its earlier conclusions of acceptable criticism – which is objective – and criticism that is directly directed at believers. It is also not likely that the Court will change its course, since it has confirmed the judgment of the *I.A.* case in others, such as the *Tatlov* case.

Thus from the Court’s case law the conclusion can be made that gratuitously offensive criticism cannot only affect believers and the religion itself, it can also be aimed at certain religious objects or symbols.<sup>329</sup>

#### *d. The Wilders case*

The subject of criticism on religious symbols is important in the Wilders case. Wilders has

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<sup>324</sup> Supra note 58, par. 29

<sup>325</sup> Supra note 58, par. 30.

<sup>326</sup> Supra note 42, p. 474.

<sup>327</sup> Supra note 42, p. 474.

<sup>328</sup> P. Wachsmann, ‘La Religion contre la liberté d’expression : sur un arrêt regrettable de la Cour européenne des droits de l’homme’, *Revue Universelle De droits de L’homme*, 1994, p. 441.

<sup>329</sup> One could however disagree on this point with the Court: one of the factors that was taken into account by the Court in the *I.A.* case was that the writer could have foreseen that an overwhelming majority would feel themselves the object of an offensive attack. But the question then arises if the Court would use the same argument for a minority group or a religious group; here the majority will not feel themselves object of an offensive attack.

compared the Koran with Mein Kampf in a newspaper article. In the indictment these statements of Wilders are phrased under insulting Muslims. When referring to Hitler's book Mein Kampf, people associate this with the Second World War and the ideas behind the Holocaust. In my view, this comparison is gratuitously offensive. Of course the Koran contains passages which calls for a war against all non-believers. Not only the Koran contains such passages, but the Sharia, the Islamic law, does so too. However, such a comparison cannot be seen as the same as national-socialism in Germany during the Second World War. If Wilders thinks that such a comparison can be made, why does he not make the same comparison with the Bible? It does not contain the sharia, but there are also passages in which death was called upon by the Christian God.<sup>330</sup> Wilders does not make the same comparison with the Bible as he does with the Koran. Besides, less harsh words were available to use if he thinks that the Koran only calls for violence.

Moreover, Wilders has used the book the Koran in his film *Fitna* of 2008. At the end of the film, the Koran appears and slowly disappears. When the image is black, you can hear a page that is ripped of. Although Wilders mentions that it was only a page of the phonebook that was ripped of, the watcher is presuming that it is a page that is ripped of the Koran – especially since the phonebook was not shown. An image like that could lead to the same reasoning that the Court had in the *I.A.* case: believers could rightly feel themselves as objects of an offensive attack. Not only should this fragment of the picture be taken into account, but the whole film – which took about fifteen minutes. In this film, Wilders shows one of the Danish cartoons in which Mohammad's turban is pictured as a bomb. Certain images appear in which only the fundamental side of the Islam is shown. Considering the film as a whole, it is a provocative film. Politicians should avoid criticism that is gratuitously offensive because of their role in the democratic state.<sup>331</sup> It is a duty applicable to them. But Wilders does not obey this duty, but breaks it. Wilders can also not use his parliamentary immunity because this is a film that was shown on the internet and not in Parliament where the immunity is applicable.

A final example is that Wilders has called the Prophet Mohammed a sick paedophile in a parliamentary debate of august 2009. The question arises whether the parliamentary immunity protects Wilders for making this statement or whether he can be hold accountable for it. The statement is obviously gratuitously offensive since less harsh words were available and

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<sup>330</sup> See for example Numeri 31:17, Ezechiël 9:6 and Deuteronomy 20:14.

<sup>331</sup> Supra note 88, par. 64.

believers could feel themselves attacked by these statements.<sup>332</sup> It can be compared with the phrases of the book in the *I.A.* case in which it was suggested that Mohammed did not forbid sexual intercourse with a dead person or an animal. Wilders immunity is not applicable in this case. According to the *A.* case immunity does not always cover negative or offensive remarks made during a political debate.<sup>333</sup> The phrase that Mohammed is a paedophile is certainly a negative or offensive comment. Wilders immunity is therefore not applicable and he could be held responsible for this remark for the national courts. However, I would like to emphasise that this example was not mentioned in the indictment. Only in the most extreme circumstances, it is possible to restrict political speech when this was made during a political debate in Parliament.

The Dutch Public Prosecutor decided not to prosecute Wilders. The problem in Dutch law is not that there is no possibility for prosecuting someone for blasphemy. However, it has not been used in many years and has become common practice not to prosecute people for blasphemy. This means that only insulting people and spreading hate speeches are left over for the Dutch Prosecutor. But Wilders does not use the term Muslims and only refers to the religion. Therefore, the Prosecutor decided not to prosecute Wilders.<sup>334</sup> Still, the Dutch court of appeal decided that a prosecution was possible. It based its decision on the Court's jurisprudence. Especially the fact that criticism is not only possible on believers but also on religion and religious symbols was the decisive factor for the court to make this decision.<sup>335</sup> After this decision, the trial against Wilders started in Amsterdam at the beginning of this year.

#### *e. Conclusion*

Criticism on religion is thus not the same as criticism on people/believers. The criticism also contains criticism on religious symbols. The boundaries of acceptable criticism is that the criticism may not be gratuitously offensive. However, whether something is gratuitously offensive depends on the circumstances of the case: what was the intention of the speaker, the consequences in society and when was the criticism made. When it was made during a

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<sup>332</sup> However, if it was a statement of fact, than sufficient evidence was needed. Supposedly that such evidence existed, than Wilders remark would not have been gratuitously offensive, because there is supported by a sufficient factual background.

<sup>333</sup> Supra note 46.

<sup>334</sup> Decision Public Prosecutor of 30 June 2008.

<sup>335</sup> Dutch Appeal Court, 21 January 2009, LJN: BH0496.

political speech or public debate, the scope of acceptable criticism is wider. This means that expressions will not soon be regarded as gratuitously offensive. It also means that politicians in their political speeches are in a position to use more offending words than a civilian could do. But there are still limits: the *Tatlav* case and the *I.A.* case are examples. Although these cases did not concern politicians, it is expected that the reasoning is also applicable for politicians, since this immunity does not cover all offending statements. This is supported by the fact that politicians have a duty in society to avoid speeches that could lead to intolerance; gratuitously offensive remarks can lead to intolerance.

The first research question of this chapter was how far politicians can go in their criticism on people and religion. To answer this question, the boundaries of acceptable criticism have been examined in paragraphs one en two.

Also a part of the question whether Wilders has exceeded the limits of protection of Article 10 ECHR has been discussed in both paragraphs. The criticism on people cannot in my view exceed these limits. A different conclusion can be drawn on criticism on religion. This includes criticism on religious symbols. Some examples have been given of statements of Wilders in which the conclusion was that the criticism went beyond the boundaries of acceptable criticism. Wilders will not be protected for such statements.

The last research question concerns hate speech and is the topic of the next paragraph.

### 3. Hate speech

Criticism on people and on religion could also lead to hate speech, a more serious form of criticism. The Court has made it very clear in its case law that it condemns hate speech since it is incompatible with the values of the Convention.<sup>336</sup> This also includes hate speech on other religious groups.<sup>337</sup> Restrictions are therefore sooner accepted than in other circumstances. The question of this paragraph is whether the boundaries for hate speech are the same for politicians as they are for civilians. With boundaries of hate speech I mean where hate speech begins. Since hate speech is not protected by the Court, the boundaries of hate speech is where acceptable criticism ends. To answer this question, a comparison will be made of the case law of the Court concerning hate speech of politicians and of civilians.

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<sup>336</sup> Supra note 74, supra note 74 and supra note 88.

<sup>337</sup> Supra note 41, par. 56.

a. *Hate speech v. political speech*

As stated, restrictions on hate speech will protect other rights such as equality – Article 14 ECHR –, private life – Article 8 ECHR – and degrading treatment – Article 3 ECHR.<sup>338</sup> Especially the protection and respect of the right to equality has been used quite frequently by the Court.<sup>339</sup> The aim of these restrictions is to avoid intolerance in society.<sup>340</sup> Intolerance in itself could lead to a different treatment of certain groups. The different treatment can have psychological effects and could disturb the public order.<sup>341</sup>

The possibility for restrictions by State authorities on hate speech are wider than on other kind of speeches. But what will happen when a political speech contains a form of hate speech. A tension will exist between the most protected speech by the Court – political speech – and the less protected speeches of hate speech. Political speech will probably not be as well protected when it contains hate speech elements as political speeches that does not contain such elements. As was mentioned in the *Erbakan* case, politicians have a special duty and responsibility to avoid intolerance in society.<sup>342</sup> There is a difference in this for politicians compared to citizens: for both there is a duty to avoid hate speech, but the duty for politicians weights heavier because of their role in a democratic society.<sup>343</sup> The political speech is therefore only protected when it does not effect the conditions of a democratic society. One of the elements of a democratic society is that it contains pluralism in ideas, people and other forms. Hate speech does not fit in this picture. Political speech that contains hate speech elements can effect the conditions for a democratic society. Political speech will therefore not be protected in the same way as it is protected when it constitutes other subjects.<sup>344</sup>

It might seem that all forms of hate speech are not accepted by the Court. But there is a degree of margin of appreciation to come to the conclusion that hate speech exists. This degree depends on the topic of the hate speech. When a speech incites hatred to a specific race, the

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<sup>338</sup> Supra note 264, p. 188. See also O. Bakircioglu, ‘Freedom of Expression and Hate Speech’, *Tulane Journal of Comparative and international Law*, 2008-2009, vo. 16, no. 1, p. 8.

<sup>339</sup> Supra note 74, par. 40, supra note 88, par. 56, supra note 169, par. 64 and supra note 253, par. 62.

<sup>340</sup> Supra note 169, par. 64, 75 and 77.

<sup>341</sup> Supra note 90, p. 173 and 174.

<sup>342</sup> Supra note 88, par. 64.

<sup>343</sup> The Venice Commission has also confirmed that the context changes when a politician speaks, because he has a special duty to avoid intolerance in society: supra note 41, par. 69.

<sup>344</sup> Supra note 293, p. 336.

Court is very strict in rejecting such speeches.<sup>345</sup> However, there is more margin of appreciation when the speech concerns a personal conviction in the religious or moral sphere.<sup>346</sup> This corresponds with the former paragraph, in which religious people must accept criticism on their religion; only when the criticism can be regarded as gratuitously offensive, the criticism is not accepted. Such criticism could even lead to a form of hate speech. Finally, the Court has recognized in the case of *Le Pen* that there will be more margin of appreciation for matters regarding immigration.<sup>347</sup> The reason for this wider margin of appreciation is that the immigration and integration problems relate to the specific historical and cultural problems of a State.<sup>348</sup> It means that there is no consensus on the European level for the problems of immigration and integration.

Thus, hate speech is condemned by the Court, but there is not a consensus of all forms of hate speech.<sup>349</sup> Therefore there is more interpretation room for examining whether hate speech exists or not. Whether a politician or a citizen makes such a speech, does not make a difference in this perspective.

#### *b. Subjects of hate speech*

The subject of hate speech determines whether more margin of appreciation is available for States or not. Almost no margin of appreciation exists when clearly established historical facts are questioned.<sup>350</sup> Most of these clearly established historical facts relate to the Second World War, such as the existence of the Holocaust and crimes against humanity during the Second World War.<sup>351</sup> Not only historical facts that relate to the Second World War are a sensitive subject for the Court. Also criticism that refers to Nazis is a touchy subject.<sup>352</sup> However, only using the word Nazi or neo-fascism is not enough for a conviction, since most of the time this is a value-judgment.<sup>353</sup> Still, the Austrian politician *Wabl* was convicted by the Austrian courts for using the term Nazi-journalism. The Court upheld this judgment since this response

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<sup>345</sup> Supra note 83, p. 32.

<sup>346</sup> Supra note 34, par. 58.

<sup>347</sup> Supra note 221, par. 2.

<sup>348</sup> Supra note 293, p. 331. See also the ECtHR, *Soulas v. France* case, 10 July 2008, *Application no. 15948/03*, par. 48

<sup>349</sup> Supra note 264, p. 188.

<sup>350</sup> See for example supra note 208, par. 47.

<sup>351</sup> Supra note 16, p. 837.

<sup>352</sup> Supra note 42, p. 476.

<sup>353</sup> Supra note 39, par. 43 and ECtHR, *Karman v. Russia*, 14 December 2006, *Application no. 29372/02*, par. 39-43.

was considered too offensive.<sup>354</sup> Moreover, the response had no connection with a public debate or political speech. Although it concerned a politician, Wabl was not acting as a politician at the time that he made the response. Using terminology that refers to the Second World War in this context does depend on the role of a politician: when Wabl would have used these words during a political speech or a matter of general public interest, the Court's decision would probably turn out differently.

When the hate speech does not refer to the Second World War, but – for example – hate speech on religious groups, the test that the Court applies is the clear and present danger test. This was for the first time mentioned in the *Sürek (no. 1)* case.<sup>355</sup> The same test, although in other words, was used in the *Erbakan* case: there must be a present risk and danger imminent for society before a politician can be prosecuted for hate speech.<sup>356</sup> Since Erbakan was prosecuted five years after the speech was held, the Court concluded that this criteria was not met.

Of course the words that are used in hate speeches are of great importance. However, the context is as well important.<sup>357</sup> First of all, a speech regarding a general public interest will not easily be accepted as hate speech as a speech that does not concern a matter of general interest.<sup>358</sup> Secondly, the *Norwood* case made it clear that also the intention of the speaker and the consequences of the speeches are factors that should be taken into account.<sup>359</sup>

Because not only the words that are used are important factors, it is not necessary for the words to actually call for violence or discrimination.<sup>360</sup> This was recognised by the Court in the *Féret* case. According to the Court, a particular act of violence or other criminal acts are not necessary in order to make a restriction under Article 10 ECHR. Moreover, the Court argues that political speech can be a danger for social peace and political stability when a politician makes negative comments on religious groups for a not well informed audience.<sup>361</sup>

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<sup>354</sup> Supra note 245, par. 40.

<sup>355</sup> ECtHR, *Sürek* (no. 1), 8 July 1999, Application no. 26682/95, Partly Dissenting Opinion of Judge Bonello

<sup>356</sup> Supra note 88, par. 68.

<sup>357</sup> Supra note 5, p. 286.

<sup>358</sup> Supra note 206, par. 1

<sup>359</sup> ECtHR *Norwood v. United Kingdom*, 16 November 2004, *Application no. 23131/03*.

<sup>360</sup> Supra note 293, p. 337.

<sup>361</sup> Supra note 169, par. 72.

c. *Hate speech by politicians and citizens: a comparison of four cases*

There are four cases which are interesting for determining the boundaries of hate speech. One concerns hate speech of citizens while the other three concern hate speech of politicians.

The most important lesson that can be learned from the *Gündüz* case, is that the mere defending of the Sharia without the call for violence cannot be regarded as hate speech.<sup>362</sup> This judgment is important because the Sharia is an Islamic law that does not protect all the rights which fall under the Convention.

However, there are doubts whether the Court has followed the line of reasoning of *Gündüz* afterwards because of the *Féret* case. In *Féret*, the Court concluded that the call for violence or discrimination is not necessary in order to speak of hate speech.<sup>363</sup> This is a different conclusion than in the *Gündüz* case where defending the Sharia without the call for violence was accepted. It is not easy to distinguish whether the Court has changed its argumentation or whether different rules are applicable for politicians. Taking into account the arguments mentioned above, it seems in my view that politicians are treated differently, since they have a special duty to avoid speeches that could lead to intolerance. It means that different standards are applicable for citizens such as in the *Gündüz* case, than politicians.

From the *Féret* case the conclusion can be made that for politicians a restriction is possible when their speeches will influence the society in a negative way.<sup>364</sup> The negative harmony will aggravate for a less informed audience. A less informed audience could interpret the speeches of politicians differently than a well informed audience. Because they are not well informed, the messages given by a politician such as *Féret* could constitute to hate to other minority groups.<sup>365</sup>

The *Norwood* case concerned a regional organiser for an extreme right wing political party in Britain. One of the posters that was created by Norwood for this political party pictured the Twin Towers in flames and contained the words 'Islam out of Britain Protecting the British People'. Such a poster was incompatible with the values of the Convention, since a whole religion was identified with terrorist attacks.<sup>366</sup> The *Norwood* case is important for several reasons. First, the Court concluded that the messages used in this case were not protected

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<sup>362</sup> Supra note 74, 49.

<sup>363</sup> Supra note 169.

<sup>364</sup> Supra note 293, p. 337.

<sup>365</sup> Supra note 293, p. 332.

<sup>366</sup> Supra note 359.

under Article 10 ECHR. Article 17 ECHR was applicable. It was for the first time that the Court applied Article 17 ECHR in connection with the Islam and the terrorist attacks of 9/11. Before, Article 17 was most of the time only used when it concerned speeches about the Second World War, such as the denial of the Holocaust. Secondly, it is important because these posters were posters of a political party. Although expressions of political parties are also protected at a higher level than other expressions, these posters contained an image that could have had devastating effects on society.<sup>367</sup> Finally, in the *Norwood* case, the Court has made it clear that hate speech on religion should be treated the same way as hate speech on the basis of ethnicity or race. Scholars such as Bakircioglu have also confirmed this last point of view.<sup>368</sup> In my view it is very important that the Court has recognized that hate speech on religion is treated the same as other forms of hate speech. The reasoning makes it clear that unacceptable criticism does not fall between acceptable criticism on religion and hate speech, but that it is actually in itself a form of hate speech. However, as the Venice Commission has put it forward, it can be argued that hate speech on religion is not the same as hate speech on race, because the first one is changeable while the second one is not.<sup>369</sup> Such argumentation leads to a wider area of acceptable criticism on religion than on race. Rightfully the Venice Commission counter argues that race and religion are on ‘an equal footing as forbidden grounds for discrimination and intolerance’.<sup>370</sup> Although the presumption that this happened in practice, the *Norwood* case has confirmed this point of view.

Last year, the Court made an interesting judgment in the *Le Pen* case. Le Pen made the statement that the French people should be careful when there were not 5 million but 25 million Muslims in France, since that would be the moment that the Muslims would rule over France. It gave a disturbing image of the Muslims as a whole and Le Pen made a distinction between the French people and Muslims which was not accepted by the Court.<sup>371</sup> Although the margin of appreciation is wider when the topic concerns immigration, the comments of the applicant were considered to ‘arouse a feeling of rejection and hostility towards the target community, considering the meaning and scope as he gave his message to be the notion of

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<sup>367</sup> Supra note 42, p. 477.

<sup>368</sup> O. Bakircioglu, ‘Freedom of Expression and Hate Speech’, *Tulane Journal of Comparative and International Law*, 2008-2009, vo. 16, no. 1, p. 41.

<sup>369</sup> Supra note 41, par. 60.

<sup>370</sup> Supra note 41, par. 61.

<sup>371</sup> Supra note 221, par. 2

people he use'.<sup>372</sup> The comments of Le Pen did therefore not deserve the protection of Article 10 ECHR. The conclusion of these cases will now be applied to the Wilders case.

*d. The Wilders case*

As stated in chapter II, it is difficult to state whether Wilders speeches can be regarded as hate speeches, because he did not incite to violence. By the Dutch court, Wilders was also found not guilty for inciting hatred and discrimination. However, the Dutch judges made it clear that Wilders for some statements was on the boundaries of hate speech.<sup>373</sup>

From *Le Pen* and *Féret* it is now clearer that inciting to violence is not needed in order to rule that hate speech was involved. Although this might seem easier to come to the conclusion that hate speech existed, it is more difficult to detect whether the speaker also has an aim to spread hatred. I still do not know whether Wilders really has an aim to spread hatred. If I would make a conclusion about this, it would more be a guess than that it can be based on facts. Still, the aim of the speaker is only one component in which hate speech can be discovered. Inciting to hatred is thus not necessary, but there still exists the problem that Wilders never talks about Muslims but about the Islam. For this problem, we can use the *Norwood* case: the posters in this case referred to the Islam. The posters and political expressions were not protected by Article 10 ECHR and were even considered to fall within the meaning of Article 17 ECHR. The aim of Article 17 ECHR is to prevent that the rights and freedoms of the Convention are used in a way that they could destroy other rights and freedoms of the Convention. Therefore, Article 10 ECHR may not be used in this kind of a way. Because the posters fell within the scope of Article 17 ECHR, the protection of Article 10 ECHR is not applicable. The *Norwood* case is not only important for the Wilders case because Article 17 ECHR was applicable for offensive criticism on the Islam and Muslims, but also because the case considered images of posters. For the Wilders case this is relevant for his film *Fitna*. An example of an image used by Wilders in this film, is where homosexual men are shown which are hanged up, presumably by Muslims in the name of the Koran. By using such an image, the presumption is made that the Islam and all Muslims want to hang up homosexual men, while in practice this is not the case. Thus Wilders coincide the violent side of the Islam with all Muslims. A similarity can be made with the *Norwood* case. And although Wilders is a politician, he did

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<sup>372</sup> Supra note 221, par. 2.

<sup>373</sup> Court of Amsterdam, 23 June 2011, *LJN: BG9001*, par. 4.3.2. The Dutch court used this argumentation for a statement of Wilders about defending ourselves for the battle that is going on in The Netherlands against the Islam. This was on the line where criminal actions would be possible, according to the court.

not make this film during a parliamentary debate. Therefore, I think that there is a chance that Wilders exceeded the limits of protection of political speech.

Le Pen en F ret were both politicians in France and Belgium and both convicted by the national authorities. The Court has upheld these judgments. When If the Wilders case will ever be brought before the Court, I think that the Court could come to the same conclusion as the conclusion in the two other cases of the politicians – meaning that no protection for their statements and speeches existed. There are four reasons for such an assumption. First of all, it is not necessary to incite to violence in order to speak of hate speech. Secondly, there is a special duty for politicians to avoid intolerance and speeches that could lead to it. Thirdly, Wilders does not speak of Muslims, but the Islam. However, that does not matter according to the *Norwood* case. And finally, Wilders gives a negative image of the Islam, especially for people that are less informed. The speech itself may not incite to hatred, but less informed people could interpret his speeches in the wrong way.

#### *e. Conclusion*

Paragraph three has examined the boundaries of hate speech for politicians and citizens. The conclusion can be made that these boundaries are not always the same. Although it is true that political speeches will not be more protected than other kind of speeches – and therefore are treated the same way as speeches of civilians –, the difference is that politicians have a special duty to avoid intolerance in society because of their role in a democratic State. The same duty is applicable for citizens, but the duty is more pressing for politicians because of the effect that their words can have in society.

Whether hate speech exists depends on the subject of hate speech, the intention of the speaker and the words that are used. Inciting to violence is however not necessary. Sometimes even images can be enough to conclude that hate speech exists. Hate speech moreover does not have to be about a people or race; it can also constitute of hate speech against religion.

The answer to the question whether the boundaries of hate speech are the same for politicians as they are for citizens is that these boundaries are not the same. Politicians should be extra careful in stating their criticism on people and religion because of the effect that it could have in society.

Finally, the paragraph has examined whether Wilders speeches could be regarded as hate speeches. The conclusion was that indeed, for some of the statements of Wilders, there is the

possibility that the Court would reason that Wilders has exceeded the limits of acceptable criticism since some statements or speeches are hate speeches.

#### 4. Interim conclusion

This chapter contained two research questions. The first question was how far politicians could go in giving criticism on people and religion. This question was discussed in the first two paragraphs. The second question was whether the boundaries of hate speech are the same for politicians as they are for civilians. The answer to the question was provided in the third paragraph. In all three of the paragraphs, the Wilders case has been compared with the conclusions that have arisen from the Court's case law.

The chapter began by examining the scope of acceptable criticism on people. The main rule is that the limits of acceptable criticism are wider when it regards a politician than on a civilian. An example of this is the private life of a politician: sometimes this falls within the scope of acceptable criticism. That is a difference which is to a lesser extent applicable to citizens. For civilians as well, it depends on their part in a discussion what the limits of acceptable criticism means, but it almost never extends to their private lives.

Moreover, acceptable criticism depends on the aim of the speaker and the words that are used. When the aim of the speaker does not contribute to a public or political debate and harsh words are used, then this form of criticism will fall outside the scope of acceptable criticism.

In the second paragraph the criticism on religion was the subject. This kind of criticism has its boundaries because one needs to respect the rights of others according to Article 10(2) ECHR. Gratuitously offensive speeches are not accepted. Whether a statement is gratuitously offensive depends on the context: where was the statement made, by whom, what was the intention of the speaker and what are the consequences of the remarks in society.

The boundaries of acceptable criticism also extend to religious symbols such as the Koran and the Prophet Mohammad.

There is a difference between the limits of acceptable criticism of citizens and politicians. Politicians have more room for giving such criticism. But the parliamentary immunity of politicians does not always protect them for making offending speeches during a political

debate. Therefore, some of Wilders' statements and speeches could exceed the limits of protection of Article 10 ECHR.

In the last paragraph the subject hate speech was examined. The Court strongly rejects hate speech. However, there still exists a certain margin of appreciation which depends on the subject of the debate or speech. Still, especially politicians have a duty to avoid intolerance in society. They should avoid danger for the peace in their State and should secure political stability according to the Court in the *Féret* case.

Although Wilders does not refer to a minority group but to a religion, his speeches also contain elements of hate speech. From the *Norwood* case we can conclude that hate speech could also refer to a religion. Since the Court has approved the convictions of Le Pen and Féret, there is a chance that the Court will do the same thing when Wilders will appear before their bench.

## CONCLUSION

This thesis has examined the scope of the right to freedom of expression for politicians. With the word ‘scope’ I mean what the boundaries of this specific right are. The topic of the thesis has however been reduced to the scope of criticism given by politicians. In order to make a conclusion, a comparison has been made throughout this thesis with the general scope of the right to freedom of expression with political speech.

In this conclusion, I will answer the research questions which have been posted in the introduction of this thesis. The main research question was *what the scope of the right to freedom of expression for politicians is before the European Court of Human Rights when the expression concerns criticism*. Throughout the thesis an answer has tried to be given for this question. However, this scope depends most of the time on the circumstances of the case. A short and clear answer to this question cannot be provided. The main research question can therefore only be given by answering the sub-questions which were also posted in the introduction.

These questions have been divided in three categories, which are the freedom of expressions in general, political speech and criticism. Per category and question an answer will no be formulated.

### **Freedom of speech in general**

*Why is freedom of expression treated so specially by the Court?*

Article 10 ECHR is one of the human rights Articles of the Convention. However, it is treated as a right which is more important than the other rights of the Convention. This has to do with the goals that this right serves. Although it is true that goals such as the promotion of truth, knowledge, other rights and tolerance in society are important, the most important goal is the promotion and protection of democracy. In the *Handyside* case, the Court has concluded that freedom of expression is ‘one of the essential foundations of a democratic society’.<sup>374</sup> Without freedom of expression, it would not be possible for democracy to exist. And since the

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<sup>374</sup> Supra note 4, par. 49.

promotion of democracy is one of the fundamental values of the Convention – see preamble – it is therefore that freedom of speech is treated as a special right in the Convention.<sup>375</sup>

*What is the scope of the right to freedom of expression in general when it constitutes criticism?*

The scope of the right to freedom of expression will always depend on the circumstances of the case. However, some general lines can be drawn. An emphasis has been placed on the factors which are important for determining the boundaries of giving acceptable criticism. The following rules can be derived from the case law and secondary literature.

First of all, freedom of expression extends to information and expressions that could shock, disturb or offend people since ‘these are the demands of pluralism, tolerance and broadmindedness’.<sup>376</sup> However, criticism also has its boundaries: the criticism may not be gratuitously offensive towards others.<sup>377</sup> This last criteria has been derived from the *Otto-Preminger-Institut* case. Heavy criticism has been given by scholars because the criteria of gratuitously offensive was applicable to religious feelings. Questions as why only religious feelings are better protected than other feelings, whether religious feelings actually fall under Article 9 ECHR and what the consequences are of this protection have been raised by these scholars. However, the Court has adjusted its line of argumentation in the I.A. case, where the Court did restrict the right to freedom of expression but not for the protection of religious feelings.<sup>378</sup>

Secondly, the scope of acceptable criticism depends on the speaker and the victim: a politician may say more offensive things than an individual may do, because of its role in society. The same is applicable for the media, since they are regarded as the ‘watchdog’ of the society. When politicians or the media make statements, it is not easy to make restrictions that pass the test of Article 10(2) ECHR. Contrary, the acceptable criticism on a politician is wider than on an individual.<sup>379</sup>

Thirdly, other rules are applicable when it concerns a political debate or a matter of public concern. When this situation is applicable, more expressions will be protected by Article 10

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<sup>375</sup> See Mission Statement Council of Europe at the Warsaw, Summit 2005.

<sup>376</sup> Supra note 4, par. 49.

<sup>377</sup> Supra note 46, par. 49

<sup>378</sup> Supra note 58, par. 29 and 30.

<sup>379</sup> Supra note 24, par. 42, supra note 49, par. 59 and supra note 35, par. 37.

ECHR than subjects which cannot be regarded as a political debate or a matter of public concern.

Fourthly, the duties and responsibilities are a factor which should be taken into account in determining the scope of freedom of expression. They depend on the position of the person in society and the subjects' debate. Thus again, it depends on the circumstances of the case. However, there are two particular strong duties and responsibilities which have arisen throughout the case law. First of all, when there is a situation of conflict, there is a special duty and responsibility for politicians and the media to avoid expressions that could worsen the situation.<sup>380</sup> Secondly, there is a special position for religion: there is the duty to avoid as much as possible those expressions that are gratuitously offensive for believers.

The fifth factor is that criticism depends on whether the expression was a statement of fact, which needs to be proven, or a value-judgment, in which there is more room for the opinion of the speaker. However, even for a value-judgment, some factual basis is necessary; otherwise the expression might exceed the limits of protection of Article 10 ECHR.<sup>381</sup>

Finally, the Court has made it clear throughout its case law that when the subject debate concerns hate speech, the Court will not protect this kind of speech. It is important to know where hate speech begins, because it gives an indication where the boundaries of freedom of expression ends. Some forms of hate speech fall under Article 17 ECHR, which means that these expressions may not be admissible for an examination under Article 10 ECHR, such as clearly established historical facts as the Holocaust. That is one way the Court deals with hate speech. The other way is that the Court will examine the expressions under Article 10 ECHR. However, the question is whether the expressions will have the protection that is served under this Article.<sup>382</sup> According to the doctrine, this last manner is preferable because it will protect human rights such as the right to freedom of expression better. Restrictions will sooner pass the test of Article 10(2) ECHR when it concerns hate speech than when it concerns other expressions.

All of these factors determine the scope of the right to freedom of expression and especially expressions that constitutes criticism.

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<sup>380</sup> Supra note 253, par. 36.

<sup>381</sup> Supra note 97, par. 43 and ECtHR, *De Haes and Gijssels v. Belgium*, 24 February 1997. *Application no. 19983/92*, par. 47.

<sup>382</sup> ECtHR, *Sürek v. Turkey (No. 1)*, 8 July 1999, *Application no. 26682/95*, par. 43 and 62.

## Political speech

*Why is political speech more protected than other kind of speeches?*

According to the *Lingens* judgment, political speech lies at the core of the democratic state.<sup>383</sup> This is the cause for two reasons that political speech is protected more often than other forms of speeches. The first reason, is that protecting political speech is necessary in order to have a separation of powers in a State. A politician will have no fear for a prosecution for what he is stating. This leads to the second reason, namely that it is especially important to protect political speech for the political parties and politicians. Otherwise it is hard for them to exist and have different opinions. They represent the electorate and defend the interest of the people in the society.<sup>384</sup>

It does not mean that only political speeches are treated more specially, but also those topics that concern a general public matter.<sup>385</sup> Both of them are treated in a similar way. However, it seems that the Court still protects political speech a little bit better than topics of a public concern.<sup>386</sup>

*What role does parliamentary immunity play?*

Most Member States of the Convention have a form of parliamentary immunity for their politicians. The reasons for applying such an immunity are in fact the same as protecting political speech.<sup>387</sup> The Court has accepted that this kind of immunity is possible. However, absolute immunity is not accepted by the Court.<sup>388</sup> Most States also do not provide an absolute immunity for their politicians, especially not outside Parliament. Still, inside Parliament, the immunity is most of the time absolute. Although this does not mean that not at all restrictions are possible. For example, misleading comments are not allowed in parliament.<sup>389</sup>

The role of parliamentary immunity is that the politicians are better protected because the immunity prevents a prosecution.

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<sup>383</sup> Supra note 24, par. 42.

<sup>384</sup> Supra note 262, par. 46 and supra note 97, par. 36.

<sup>385</sup> Supra note 105, par. 64.

<sup>386</sup> Supra note 98, p. 85.

<sup>387</sup> Supra note 137, par. 77.

<sup>388</sup> Supra note 137, par. 86.

<sup>389</sup> Supra note 137, par. 86.

*What are the consequences of the protection of political speech that follow from the ECtHR's case law?*

The consequences of the protection of political speech has been examined on three subjects. First, the politicians are better protected because of political speech. This is obvious since political speech itself is more protected than other forms of speeches. This leads to the second subject of this question that has been examined, namely political speech itself. The better protection of this kind of speech means that a smaller margin of appreciation exists under Article 10 ECHR. The Court has made it clear that restrictions on political speeches call for the closest scrutiny of the Court.<sup>390</sup> Still, restrictions are possible, but they depend on the topic of the debate and where the speech was held. Concerning the topic of the debate, there can be specific duties and responsibilities for politicians, which was the third subject for examination. For example, politicians have a special duty to avoid speeches that could lead to intolerance in society.<sup>391</sup> Although everyone has such a duty, it is more pressing for a politician, since he represents the electorate, his words have more effect in the society and he is regarded as an example for the public. Intolerance could lead to hate speech. When extending the duties to hate speech, a politician also has a specific duty to avoid hate speech. Where the speech was held also determines the legal consequences. If it was held in Parliament, it is difficult to accept limitations on political speech. However, as stated above, it is not impossible. Secondly, when the speech was held in a situation of conflict, there is again the duty to avoid expressions that could worsen the situation.

This leads to the situation that politicians are on the one hand in a position where they can say more than other citizens, especially in Parliament, while on the other hand, they are more restricted, because of the duties and responsibilities that are specifically applicable to them.

*Which elements or factors determine the scope of freedom of political speech?*

Three kind of elements have been examined.

First, the content of the speech was discussed. There is a difference between the political speech en freedom of speech in general. The difficulty is, to be short, that a smaller margin of appreciation exist when the first kind of speech attends. To the content of the speech also

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<sup>390</sup> Supra note 97, par. 36.

<sup>391</sup> Supra note 88, par. 64.

belongs the distinction between fact statements and value-judgments. Fact statements need to be proven. This is applicable to both politicians and citizens. While it seemed for a long time ago that politicians had more room of giving value-judgments than citizens have, this room has been decreased after the *Le Pen* judgment.

Secondly, the context of the political speech was examined. This consisted of four factors. The procedural elements exist of the consistency of the prosecution and the amount of time between the statement and a prosecution. Both can change the context of the situation which can lead to a different conclusion of the Court. These elements have the same effects for politicians and citizens.

What the position of the speaker or victim is, can also influence the decision of the Court. When there is an intention of the speaker to spread hatred, than there is more possibility for the State authorities to impose restrictions on the speaker. Such a duty – to avoid hate speech – is applicable to both politicians and citizens, but the duty weights heavier for politicians because of their role in society. The victims' role in the discussion is also important: when a politician is provocative, he can expect that the response will have the same kind of effect. Moreover, it has been stated that the scope of acceptable criticism on a politician is wider than that for a citizen. Thus, there is again a difference between politicians and citizens. This difference is especially noticed when comparing the *Erbakan* and *Éditions Plon* cases – which concerned provocative remarks.<sup>392</sup>

The national background or the situation in a region where there is a conflict, imposes duties on civilians and politicians for what they want to say. What is permissible to say depends on the consequences that the words can have in a region.

The medium is also a decisive element in the Court's conclusion. Depending on the medium that a politician uses, it can have different consequences. Using a television interview will reach more people than a newspaper article. What is also important, is whether an interview was live or not; when it is live, there is no possibility for the speaker to reformulate its statement. With the arrival of the new media – especially the internet – there is a specific duty for politicians. Because of the enormous reach of the internet, politicians have to be careful in what they are stating on the internet, since the audience can be very different; it can be well informed or not. Again, such rules are both applicable for politicians and citizens, only the duty to avoid expressions that could lead to intolerance weights heavier for the politician.

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<sup>392</sup> Supra note 88, par. 67 and supra note 229, par. 53.

Finally, some research has been done on the sanctions imposed by the national authorities. This is the element that might lead to the widest distinction between citizens and politicians: it is almost impossible to impose a criminal sanction on a politician for statements made during a parliamentary debate.<sup>393</sup> That does not mean that the Court does not allow it, since the Court has allowed a twelve months imprisonment sentence on a politician in the *Zana* case.

## **Criticism**

### *How far can politicians go in giving criticism on politicians and religion?*

Criticism on people depend on a lot of circumstances, such as the role of the person in society, the words that are used – stronger words can lead to a stronger counter reaction – and the aim of the criticism – did it contribute to a public debate or not? If citizens have a public function, then the same kind of criticism is applicable on them as it is on politicians.<sup>394</sup> When a politician expresses criticism on another politician, then this criticism may exceed towards that politicians' private life, since it could influence the voting decision of the public.<sup>395</sup> It is therefore difficult to give rules or lines of the jurisprudence of the Court since it depends on the circumstances of the case.

Although believers must accept that other people will criticise their belief, there are boundaries to such criticism. Criticism may not be gratuitously offensive. At first sight, it seems that this is applicable for both citizens and politicians in the same way. However, whether something is gratuitously offensive or not depends on the circumstances of the case, such as the intention of the speaker, the consequences of the criticism in society and how the words were used. Another circumstance is whether the criticism contributed to a political speech or public concern. When it does, more criticism is allowed. Still, that does not mean that a politician can give all kinds of criticism, because he has a duty to avoid intolerance in society. Therefore, the conclusion might be that when a politician criticises a religion, it will not soon be regarded as gratuitously offensive, but that this is still possible that such a conclusion will arise. When the Court comes to such a conclusion, the criticism will not fall under the protection of Article 10 ECHR.

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<sup>393</sup> Supra note 4.

<sup>394</sup> Supra note 69, par. 68 and 71 and supra note 97, par. 39 and 40.

<sup>395</sup> Supra note 5, p. 268.

Moreover, the boundaries of criticism on religion also extend to criticism on religious symbols. It does not matter whether a politician or a citizen criticises a religious symbol, such as mentioning that Mohammad allows sex with dead animals and persons; for both kinds of persons this criticism is gratuitously offensive.<sup>396</sup> Some scholars have criticised the argumentation of the Court, but there are no indications that the Court will change its course of reasoning.

*Are the boundaries of hate speech for politicians and citizens the same?*

Both politicians and citizens should avoid statements that can be considered as hate speech.<sup>397</sup> Hate speech also includes hate on religion. Political speech that contains hate speech will not be protected in the same way as it will when it regards other subjects. However, it is true that the Court has difficulty in restricting political speech, even when it touches upon elements of hate speech.<sup>398</sup>

Still, it is not as black and white as it seems. Whether something can be called hate speech, depends on the topic of the debate, the intention and consequences for the speech in society. Besides, not only words are necessary in order to come to the conclusion that hate speech exists.<sup>399</sup> One can also take into account images that are used, such as in the *Norwood* case, where the Islam as a whole religion was identified with the terrorist attacks of 9/11, something that the Court did not approve of.

Whether the boundaries for hate speech are the same for politicians and citizens is a hard question to answer, because the Court's case law is not clear. On the one hand, it is true when it concerns a political debate, the Court will not come soon to the conclusion that hate speech exists in which restrictions are made possible.<sup>400</sup> But on the other hand, the conclusion can be made from the *Féret* case, that hate speech of politicians exists when they influence the society in a negative way.<sup>401</sup> Still, the *Erbakan* case has made it clear that especially politicians should avoid speeches that could lead to intolerance in society.<sup>402</sup> Therefore, it seems that the boundaries are not entirely the same for politicians than for citizens because this has to do with the pressing duties of politicians.

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<sup>396</sup> Supra note 58, par. 30.

<sup>397</sup> Supra note 88, par. 64.

<sup>398</sup> Supra note 206, par. 1.

<sup>399</sup> Supra note 169, par. 72.

<sup>400</sup> Supra note 206, par. 1.

<sup>401</sup> Supra note 293, p. 337.

<sup>402</sup> Supra note 88, par. 64.

One question is left over. This is the question that concerns Geert Wilders. Throughout the thesis an answer has tried to be provided for the next question:

*Has Geert Wilders exceeded the limits of protection of Article 10 ECHR?*

The Wilders case has been examined throughout this thesis on all the elements, questions and factors that have been discussed. For each part, a small conclusion was drawn whether Wilders had exceeded his limits of protection under Article 10 ECHR. Wilders has been prosecuted for insulting people, for incitement of hatred and discrimination. In the judgment of the 23<sup>rd</sup> of June of this year, the court of Amsterdam found Wilders not guilty of any of the charges. In the thesis the situation was created as if the Wilders case would be brought before the Court. There is however the question whether this is possible, because it is not likely that one of the parties of the trial will appeal the decision. However, there are Muslim organisations that are intended to bring the case before the Court. The question then arises whether these Muslim organisations have standing before the Court. However, such a question went beyond the scope of this thesis. It is probably an admissibility question. Moreover, there is always the possibility for such organisations to go to the Human Rights Committee where there is more possibility that their case will be examined.

On the one hand, it is difficult to prosecute Wilders, because he is a politician. Therefore, he should be allowed to say anything he wants, since he represents his electorate. Especially in parliament this is important. In The Netherlands, Wilders has immunity in Parliament. But the immunity in Parliament is not always absolute.

I will now give some examples in which, in my view, there is a possibility that Wilders has exceeded the limits of protection of Article 10 ECHR.

First of all, Wilders has made some statements in newspaper articles. He has compared Mein Kampf with the Koran and has stated that the import of the Islamic culture would destroy the tolerance in The Netherlands. This has exceeded the limits of acceptable criticism, since Wilders has not only violated his duty to avoid gratuitously offensive remarks and intolerance, but he can also not give a factual basis for these statements. The statement that the Islam will destroy the tolerance in The Netherlands can be compared with the statement of Le Pen that when 25 million Muslims would live in France, these Muslims would rule over France. In the *Le Pen* case, the Court decided that this statement did not deserve the

protection of Article 10 ECHR. Since both statements have been made under the same kind of circumstances, the same conclusion can be made on the statements of Wilders in the newspaper articles. Moreover, because the medium which has been used – a newspaper – Wilders had the chance of reformulating his statements, which he did not.

Secondly, Wilders has made statements in the Parliament, in which he has immunity. He has asked for a tax on headscarfs, which he called ‘kopvoddentax’. He has also stated that Mohammed is a ‘sick paedophile’. Both remarks are gratuitously offensive. Gratuitously offensive remarks could lead to intolerance in society. Politicians have a special duty to avoid intolerance remarks. That is what makes Wilders liable in this situation: although he has immunity in Parliament, he also has a duty to avoid such expressions. I must say, that in this example, it is really difficult how the Court would rule: it is a fifty-fifty situation in which one of the two elements – immunity or duty – will prevail.

Finally, I want to give the example of the film Fitna that Wilders has made. In Fitna Wilders uses images in which he – presumably – rips of a page of the Koran; although this is not shown and the voice over states that a page of a phone book has been ripped of, there is the assumption that it is actually the Koran. He has made the film outside Parliament, so his parliamentary immunity is not applicable. The medium that he has used was the internet. The internet is available for all sort of people and has a wide reach. This means that it will also reach those people who are less informed about certain topics. A special duty is applicable when politicians use the internet because less informed people have access to it. Less informed people can have a different – or wrong – interpretation on certain topics, which could lead to intolerance. Therefore, Wilders has exceeded his duty, because of the effect that his film could have.

Concluding from the examples, Wilders has in certain circumstances exceeded the limits of acceptable criticism under Article 10 ECHR. This means that if the Wilders case will ever be brought before the Court – in some way – there is the possibility that the Court will decide that Wilders’ speeches does not deserve the protection of Article 10 ECHR.

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