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# Freedom of Speech versus Freedom of Religion? The Case of Dutch politician Geert Wilders

## 1. Introduction

Both the right to freedom of religion and to manifest one's religion and the right to freedom of expression are fundamental human rights guaranteed in all major global and European human rights instruments. Globally, Article 18 of the United Nations Declaration on Human Rights and Article 18 of the International Covenant on Civil and Political Rights guarantee freedom of religion and religious manifestations, while Article 19 of the same instruments guarantee freedom of expression. In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees freedom of thought, conscience and religion as well as the freedom to manifest one's religion in Article 9 and freedom of expression in Article 10. The Charter of Fundamental Rights of the European Union also contains the same guarantees in Articles 10 and 11, respectively.

But these rights can sometimes appear to be in conflict with each other. Freedom of expression applies not only to expressions that are favourably received but also to those that offend, shock or disturb. The right includes criticising beliefs. Those who manifest their beliefs, although they have the right to do so under Article 9 ECHR, cannot expect to be exempt from all criticism. On the other hand, the exercise of freedom of expression under Article 10 ECHR brings with it duties and responsibilities and these appear to include an obligation to avoid, as far as possible, expressions that are gratuitously offensive to others and which do not contribute to any form of public debate.

Geert Wilders is a Dutch politician who has made – according to some quite outrageous – comments about Islam, always invoking his right to free speech and defending himself by arguing that he is criticising the belief and not insulting the believers. He has already been prosecuted once for incitement to hatred and discrimination and group defamation, but was acquitted. He now faces a new prosecution for remarks made during the local elections in March 2014. The question can be asked whether his comments contribute to any form of public debate. The right to free speech is seen as especially important for politicians, and even more so for opposition politicians, but does this mean that they also have special duties and responsibilities? This article addresses these questions and examines whether guidance can be found in human rights law. As Wilders is a Dutch politician, I will concentrate on the rights as they are guaranteed under the ECHR and on the case law of the European Court of Human Rights. Wilders was prosecuted for incitement to hatred and discrimination and for intentionally insulting a group based on racial or ethnic origin or religion, but was acquitted on all counts. The pending prosecution is for the same offences but concerns different expressions. In this article, I first discuss both the first *Wilders* case and the pending prosecution. The expressions for which Wilders was and is prosecuted will then be assessed using the ECHR and the case law of the European Court of Human Rights in relation to the rights to freedom of expression and to freedom of religion.

## 2. The case of Geert Wilders

Geert Wilders is the leader of the Dutch right wing Party for Freedom (PVV) which he founded himself. He is strongly against Islam and what he calls the islamisation of the Netherlands. Islam is, in his view, a religion with extreme views which wants to destroy Western civilisation, is violent and wants to

subjugate and convert non-believers. He has likened the Quran to Hitler's *Mein Kampf* and has linked Islam with criminality. Wilders advocates that the Dutch borders are closed to Muslims and the loss of Dutch nationality for Muslim criminals. Wilders has talked about this in many interviews and online. In 2008, Wilders made a short film ('Fitna') in which negative views about Islam were expressed as well. A number of organisations and individuals reported Wilders' expressions to the authorities. However, the Public Prosecutor decided not to bring a prosecution because they did not think that this would lead to a conviction. They considered that the expressions were part of the political debate and were directed against Islam, not against Muslims.

Under Dutch criminal law, a complaint can be made to the Court of Appeal about the refusal by the Public Prosecutor not to take a case further. This happened in the Wilders case and, in January 2009, the Amsterdam Court of Appeal ordered the Public Prosecutor to prosecute Wilders for intentionally offending a group of people based on their race (non-Western immigrants and/or Moroccans) or religion (Muslims) (Article 137c Sr (Dutch Penal Code)) and incitement to hatred, discrimination or violence on the grounds of race and religion (Article 137d Sr). The Amsterdam Court of Appeal supported this with three arguments. First, Wilders' expressions are radical in scope and keep being repeated with increasing vehemence, which shows incitement to hatred and these expressions are also insulting because they harm the religious dignity of Muslims. Moreover, by insulting the symbols of the Muslim religion Wilders has also insulted the Muslim believers. Second, the Court of Appeal is of the opinion that prosecution is compatible with the ECHR because, under the Convention case law, politicians have a special responsibility not to incite hatred. Third, Wilders should be prosecuted because a clear boundary should be drawn for incitement to hatred in public debate in a democratic society. The Court of Appeal mentioned that traditionally, public debate in the Netherlands is based on tolerance for different opinions and that one can expect Muslim immigrants to understand the sentiments about their religion which, in some parts, might clash with Dutch and European values.<sup>1</sup> The judgment 'gave many people the idea that he [Wilders] had already been convicted'.<sup>2</sup>

So Wilders was prosecuted for incitement to hatred and discrimination on racial and religious grounds and for defaming groups based on race or religion. At the end of the trial, the Public Prosecutor argued for an acquittal on all counts based on the same reasons they had given for their earlier decision not to prosecute Wilders. The Amsterdam District Court followed many of these arguments and acquitted Wilders on all counts.<sup>3</sup> The Court referred to case law of the (Dutch) Supreme Court<sup>4</sup> that hurtful expressions about a religion might insult or offend the believers in that religion, but that this was not enough to consider the expressions to be insulting of the religious group. The Court thus ruled that Wilders' expressions did not breach Article 137c Sr on group defamation because

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<sup>1</sup> See: *Gerechthof Amsterdam* (Amsterdam Court of Appeal), 21 January 2009, ECLI:NL:GHAMS:2009:BH0496, < [uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2009:BH0496](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2009:BH0496) (in Dutch, translation by author) [last accessed 15 June 2016].

<sup>2</sup> Van Noorloos, 'The Politicisation of Hate Speech Bans in the Twenty First Century Netherlands: Law in a Changing Context' (2014) 40, 2 *Journal of Ethnic and Migration Studies* 249 at 257.

<sup>3</sup> See: *Rechtbank Amsterdam* (Amsterdam District Court), 23 June 2011, ECLI:NL:RBAMS:2011:BQ9001, < [uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2011:BQ9001](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2011:BQ9001) (in Dutch, translation by author) [last accessed 15 June 2016].

<sup>4</sup> See: the so-called *Gezweel Arrest* (Tumor Case), *Hoge Raad* (Supreme Court), 10 March 2009, ECLI:NL:PHR:BF0655, < [uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2009:BF0655](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2009:BF0655) (in Dutch) [last accessed 15 June 2016]. This concerned a poster with the text: *stop het gezweel that Islam heet* (stop the tumor that is Islam).

criticism, even strong criticism, of a group's opinions or behaviour fell outside the ambit of Article 137c.<sup>5</sup> The Amsterdam District Court also stated that the legislator had specifically intended to make incitement to hatred or discrimination a criminal offence, but that he had wanted to keep expressions about religion outside the scope of Article 137d Sr.<sup>6</sup> The Amsterdam District Court considered the case law of the European Court of Human Rights and came to the conclusion that there was no incitement to hatred in this case.<sup>7</sup> In relation to incitement to discrimination, the Court considered that, although the expressions might be discriminatory as such, there must be room for a politician to voice his ideas which he hopes to realise when he comes to power in a democratic manner. These expressions are political proposals within the public debate or criticism on government and other parties' policies and thus they do not constitute incitement to discrimination.<sup>8</sup>

In relation to the film 'Fitna', the Amsterdam District Court found that the main message was, as Wilders himself stressed, to point out the dangers of Islam. The Court placed this in context: the film was made at a time when multicultural society and immigration played a big role in public debate. As a politician, Wilders contributed to this debate. Taken as a whole and within this context, the Court held that the film did not incite to hatred or discrimination.<sup>9</sup> The Amsterdam District Court thus acquitted Wilders on all counts against him. However, as Temperman observes, the Court 'did not shy away from observing that Wilders did get dangerously close to that fine line between legal and illegal speech'.<sup>10</sup>

But this was not quite the end of the case. Three of the victims of the alleged hate speech incidents have brought a case against the Netherlands to the UN Human Rights Committee under Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR). This Article obliges states to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. The three allege that the Netherlands, by not convicting Wilders, has not protected them enough against incitement to hatred and discrimination. The case is pending.<sup>11</sup>

A new prosecution of Wilders is also coming up. This concerns the remarks made by Wilders during a post-vote meeting with supporters at the time of the local elections in March 2014 in The Hague. At this meeting, Wilders asked the crowd 'and do you want more or fewer Moroccans in your city and in the Netherlands?' To which the crowd chanted 'fewer, fewer, fewer'. 'We'll arrange that,' Wilders said, smiling, when the chanting died down.<sup>12</sup> The chanting and similar comments made several days earlier, led to over 6,400 complaints to the Public Prosecutor's office. Some MPs, MEPs and local and provincial councillors also broke their ties with the PVV.<sup>13</sup> The Public Prosecutor decided

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<sup>5</sup> Amsterdam District Court, supra n 3 at para 4.2.

<sup>6</sup> Ibid. para 4.3.1.

<sup>7</sup> Ibid. para 4.3.2.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Temperman, 'A Right to be Free from Religious Hatred? The *Wilders* Case in the Netherlands and Beyond' in Molnar (ed.) *Free Speech and Censorship around the Globe* (Central European University Press, 2015) 509 at 510. In the same vein, Van Noorloos, supra n 2 at 258.

<sup>11</sup> *M.R., A.B.S. and N.A. v The Netherlands*, CCPR Communication 15 November 2011, < [www.prakkendoliveira.nl/user/file/complaint-ep-geanonimiseerde-s60bw-11111712190.pdf](http://www.prakkendoliveira.nl/user/file/complaint-ep-geanonimiseerde-s60bw-11111712190.pdf) [last accessed 15 June 2016].

<sup>12</sup> See on this: *PVV Leader Geert Wilders will be Prosecuted for Inciting Hatred (update)* < [www.dutchnews.nl/news/archives/2014/12/pvv-leader-geert-wilders-will-be-prosecuted-for-inciting-hatred-and-discrimination/](http://www.dutchnews.nl/news/archives/2014/12/pvv-leader-geert-wilders-will-be-prosecuted-for-inciting-hatred-and-discrimination/) [last accessed 15 June 2016].

<sup>13</sup> Ibid.

to prosecute Wilders on suspicion of insulting a population group based on race and inciting hatred and discrimination. The Prosecutor considered that ‘freedom of speech means that politicians should not feel limited in saying what they want, but this freedom has its boundaries, especially when it comes to discrimination’.<sup>14</sup> There will be some preliminary issues but the considerations of the facts and contents of the case will start on 31 October 2016.<sup>15</sup> Some argue that this new case against Wilders has more chance of success, as Article 137d Sr requires the presence of a group and the expressions are clearly aimed at a group based on ethnic and national origin (Moroccans) while the previous expressions were aimed at Islam rather than at Muslims.<sup>16</sup> The Netherlands Institute for Human Rights has also expressed its opinion that the ‘fewer Moroccans’ remarks constitute discrimination, because they aim to treat a group of Dutch people differently from others purely because of their ethnic origin. The Institute also considers that the remarks incite hatred against all Dutch-Moroccan people. Both are, according to the Institute, violations of Dutch law and international human rights law.<sup>17</sup>

In the following sections, the expressions of Wilders, both those that led to his first prosecution and the ‘fewer Moroccans’ remarks, will be assessed using the case law of the European Court of Human Rights under the ECHR. Before this, the two Convention rights that appear most directly involved: the freedom of expression of Wilders and the freedom to manifest one’s religion of Muslim people in the Netherlands, will be analysed. However, one more point needs to be noted. Unless Wilders is convicted for his ‘fewer Moroccans’ remarks, the case is unlikely to reach the European Court of Human Rights.<sup>18</sup> If Wilders is convicted, he will, very likely, after exhausting all domestic remedies, apply to that Court alleging a violation of his right to freedom of expression under Article 10 ECHR. But even if this does not happen, the assessment of his case against human rights principles as laid down in the Convention and in the case law of the European Court of Human Rights is not just a theoretical exercise with little practical use. It is clear from the description of the case above that the Dutch courts also use these human rights principles in their assessment and thus these principles are very relevant in the *Wilders* cases. But the human rights principles are also relevant beyond these cases, in a time when politicians all over Europe use more and more anti-Islam, anti-immigrant and/or anti-foreigner rhetoric. Cases against politicians using such rhetoric have reached the European Court of Human Rights already, as will be seen in the following.<sup>19</sup>

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<sup>14</sup> See: *OM to Prosecute Geert Wilders on Charges of Discrimination*, 18 December 2014, < [www.om.nl/onderwerpen/zaak-wilders/@90740/to-prosecute-geert/](http://www.om.nl/onderwerpen/zaak-wilders/@90740/to-prosecute-geert/) [last accessed 15 June 2016].

<sup>15</sup> See: [nos.nl/artikel/2089344-rechtszaak-tegen-wilders-over-minder-marokkanen-na-de-zomer.html](http://nos.nl/artikel/2089344-rechtszaak-tegen-wilders-over-minder-marokkanen-na-de-zomer.html) (in Dutch) [last accessed 15 June 2016].

<sup>16</sup> See: *Zaak tegen Geert Wilders is Kansrijk* (Case against Wilders has Good Chance of Success), 18 December 2014, [www.ad.nl/ad/nl/30561/Geert-Wilders/article/detail/3814036/2014/12/18/Zaak-tegen-Geert-Wilders-is-kansrijk.dhtml](http://www.ad.nl/ad/nl/30561/Geert-Wilders/article/detail/3814036/2014/12/18/Zaak-tegen-Geert-Wilders-is-kansrijk.dhtml) (in Dutch) [last accessed 15 June 2016].

<sup>17</sup> *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights), *Uitlatingen Geert Wilders over ‘Marokkanen’* (Expressions Geert Wilders about ‘Moroccans’), < [www.mensenrechten.nl/toegelicht/uitlatingen-geert-wilders-over-%E2%80%99marokkanen%E2%80%99](http://www.mensenrechten.nl/toegelicht/uitlatingen-geert-wilders-over-%E2%80%99marokkanen%E2%80%99) (in Dutch, translation by author) [last accessed 15 June 2016].

<sup>18</sup> For an explanation of the reason why the three Moroccans in *M.R., A.B.S. and N.A. v The Netherlands*, supra n 11, applied to the Human Rights Committee rather than the European Court of Human Rights, see Temperman, supra n 10 at 526-7.

<sup>19</sup> See, for example, *Féret v Belgium*, Application No 15615/07, Merits, 16 July 2009; *Le Pen v France*, Application No 18788/09, Admissibility, 20 April 2010.

### 3. Freedom of Religion and Freedom of Expression under the ECHR

The ECHR guarantees both freedom of religion and freedom of expression. Article 9(1) ECHR states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

This article thus guarantees two different freedoms: first, the freedom of thought, conscience and religion and, second, the freedom to manifest one's religion. Article 9 is followed by Article 10(1) ECHR which reads: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

These two fundamental rights have a number of things in common. First, the European Court of Human Rights has stressed the importance of both of these rights for a democratic society. For example, in *Kokkinakis v Greece*, this Court held:

As enshrined in Article 9 ..., freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>20</sup>

And, in *Handyside v the United Kingdom*, the European Court of Human Rights mentioned the principles characterising a democratic society, and stated that 'freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'.<sup>21</sup>

Second, both rights allow, in their second paragraph, for restrictions under certain circumstances, although Article 10(2) appears wider than Article 9(2). Article 9(2) states:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

As mentioned, Article 9 contains two fundamental rights: the right to freedom of thought, conscience and religion and the right to freely manifest one's religion. It will be clear from Article 9(2) that only the latter right can be limited. In *Kokkinakis v Greece*, the European Court of Human Rights explained that Article 9(2) 'recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.<sup>22</sup>

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<sup>20</sup> *Kokkinakis v Greece*, Application No 14307/88, Merits and Just Satisfaction, 25 May 1993 at para 31.

<sup>21</sup> *Handyside v the United Kingdom*, Application No 5493/72 (1979-1980), Merits, 7 December 1976 at para 49.

<sup>22</sup> *Kokkinakis v Greece*, supra n 20 at para 33.

Article 10(2) ECHR also allows for restrictions and states that:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

So, under prescribed circumstances, both the freedom to manifest one's religion and the freedom of expression can be restricted: when this is prescribed by law and necessary in a democratic society for one or more of the aims described in the second paragraph of both these articles. The European Court of Human Rights has explained that 'necessary in a democratic society' in Article 10(2) means that there must be a 'pressing social need' and this, in turn, means that the restriction must be proportionate to the legitimate aim pursued.<sup>23</sup> And, in relation to Article 9(2), the Court has also held that 'the Court's task is to determine whether the measures taken at national level were justified in principle – that is, whether the reasons adduced to justify them appear "relevant and sufficient" and are proportionate to the legitimate aim pursued'.<sup>24</sup> Articles 9(2) and 10(2) give the legitimate aims. Establishing whether a restriction on the right to manifest one's religion and on freedom of expression is justified thus involves a proportionality test, a balancing of all the interests involved.

The European Court Human Rights has consistently held that exceptions to the right to freedom of expression in Article 10 ECHR 'must be narrowly interpreted and the necessity for any restrictions must be convincingly established'.<sup>25</sup> However, this is different for restrictions on the right to manifest one's religion under Article 9. The doctrine of the margin of appreciation plays a role here. The width of the margin of appreciation is not always the same and this is important because, if the European Court of Human Rights affords states a wide margin of appreciation, it will scrutinise restrictions less closely. The Court has held that the margin of appreciation in relation to political speech and speech on matters of public interest is narrow but that it is wider when it concerns speech on moral or religious issues.<sup>26</sup> The Court also affords a wider margin of appreciation in relation to restrictions on the freedom to manifest one's religion in Article 9(2) ECHR.<sup>27</sup> The reason for this is that

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<sup>23</sup> *Handyside v the United Kingdom*, supra n 21.

<sup>24</sup> *Dahlab v Switzerland* Application No 42393/98, Admissibility, 15 February 2001 at 12.

<sup>25</sup> See, for example, *Observer and Guardian v the United Kingdom*, Application No 13585/88, Merits and Just Satisfaction, 26 November 1991 at para 59; *Oberschlick v Austria*, No 2, Application No 20834/92, Merits and Just Satisfaction, 1 July 1997 at para 29; *Ceylan v Turkey*, Application No 23556/94, Merits and Just Satisfaction, 8 July 1999 at para 32; *Balsytė-Lideikienė v Lithuania*, Application No 72596/01, Merits and Just Satisfaction, 4 November 2008 at para 75.

<sup>26</sup> *Wingrove v the United Kingdom*, Application No 17419/90, Merits and Just Satisfaction, 25 November 1996 at para. 58. See also: *Murphy v Ireland*, Application No 44179/98, Merits, 3 December 2003 at para 67.

<sup>27</sup> See on this further: Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files 17 (Strasbourg, 2000) at 10; Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001) 143; and, Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56, 2 *International and Comparative Law Quarterly* 395 at 397-401.

'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... even within a single country such conceptions may vary'.<sup>28</sup>

Clearly, there are some differences between Articles 10(2) and 9(2). Article 10(2) stresses that the exercise of freedom of expression 'carries with it duties and responsibilities', which is not mentioned in Article 9(2). Article 10(2) also seems to be wider in that it mentions 'formalities, conditions, restrictions or penalties' and in that it contains more 'legitimate aims' than Article 9(2). On the other hand, the margin of appreciation afforded to States is wider under Article 9(2) than it is under Article 10(2) and restrictions on Article 10 will thus generally be scrutinised more closely by the European Court of Human Rights. Even so, restrictions on both rights are allowed under the circumstances described and subject to a proportionality test and both articles mention as legitimate aim the protection of the rights of others.

Freedom of expression is thus particularly protected in the political sphere but does this mean that Wilders can say anything he likes even if that offends or insults someone else, in this case Muslims and/or Moroccans, for religious or other reasons? And does criticising a religion which offends believers interfere with the right of a person to freely manifest their religion or belief, in this case, Muslims in the Netherlands? The offended people might well see this as such while Wilders will contend that this is not the case. In the following, I will discuss whether the right to freely manifest one's religion is indeed engaged and thus whether there is a conflict between the two freedoms. However, first two other issues will be discussed: discrimination and hate speech.

#### **4. Discrimination and Hate Speech**

The ECHR also guarantees the right to be free from discrimination, as Article 14 states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It will be clear from this that Article 14 only prohibits discrimination in the enjoyment of the rights and freedoms in the ECHR and that it does not provide a freestanding right to non-discrimination. This means that discrimination can only be challenged in conjunction with other rights and a victim of discrimination cannot claim a breach of Article 14 alone. Because of this, in 2000, the Council of Europe adopted Protocol 12 to the ECHR, which prohibits discrimination in 'the enjoyment of any right set forth by law' and which can thus be invoked without any other Convention right being in issue. However, although the Protocol came into force in 2005, only 19 out of the 47 Council of Europe states have signed and ratified it. The Netherlands has ratified Protocol 12, so and, therefore, a claim could possibly be made for discrimination regarding Wilders' expressions under that Protocol.

According to the European Court of Human Rights, discrimination under Article 14 can be justified: the Court has held that the equal treatment principle in Article 14 is only violated if the distinction has no objective and reasonable justification. To be justified, a difference in treatment must not only pursue a legitimate aim, but there must also be a reasonable relationship of

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<sup>28</sup> *Otto-Preminger-Institute v Austria*, Application No 13470/87, Merits and Just Satisfaction, 20 September 1994 at para 50.



proportionality between the means employed and the aim sought to be realised.<sup>29</sup> So, here, again, a proportionality test is applied and a balancing of all interests involved needs to take place. And, as the European Court of Human Rights has held that Protocol 12 should be interpreted in the same way as Article 14, the same justification test will apply to Protocol 12.<sup>30</sup>

The remarks made by Wilders could amount to discrimination on the grounds of racial or ethnic origin and/or religion or belief. For example, if the Dutch borders were closed to Muslims, this would constitute discrimination on the ground of religion and could be challenged as such under Article 14 and Protocol 12 ECHR. However, as the Amsterdam District Court said, the expressions might be discriminatory as such, but these expressions are political proposals and there must be room for a politician to voice his ideas which he hopes to realise when he comes to power in a democratic manner.<sup>31</sup> This suggests that the expressions might be held to be justified under Article 14 and Protocol 12 ECHR.

Does the ECHR prohibit hate speech or provide protection against hate speech? Hate speech covers 'all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin'.<sup>32</sup> Tulkens writes that 'hate speech has a common denominator: it is speech that intentionally attacks a person or a group based on race, ethnicity, gender, disability, sexual orientation, religion, or any other prohibited criterion'.<sup>33</sup>

As mentioned above, Article 20(2) ICCPR imposes a duty of states to prohibit hate speech. But the ECHR 'does not speak of a prohibition of hate speech, let alone any right to be safeguarded against such speech', as Temperman points out.<sup>34</sup> He also writes that 'most "hate speech" cases brought to the Court are brought by alleged *inciters*' who seek to challenge their conviction for hate speech and not by victims because 'there is not much in this treaty hate speech victims could complain about'.<sup>35</sup>

Although there does not appear to be a fundamental right to protection against hate speech in the ECHR, the European Court of Human Rights, in *Gündüz v Turkey*, stated that

it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued. ... there can be no

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<sup>29</sup> *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium*, Application Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968, Judgment, under THE LAW, B at para 10.

<sup>30</sup> *Sejdić and Finci v Bosnia and Herzegovina*, Application Nos 27996/06 and 34836/06, Merits and Just Satisfaction, 22 December 2009 at para 55.

<sup>31</sup> Amsterdam District Court, *supra* n 3 at para 4.3.2.

<sup>32</sup> Committee of Ministers, Council of Europe, Recommendation No R(97)20 on "Hate Speech".

<sup>33</sup> Tulkens, *The Hate Factor in Political Speech Where do Responsibilities Lie?* (2013), at point 11, < [rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c170e](http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c170e) [last accessed 15 June 2016]. Tulkens is a former judge of the European Court of Human Rights.

<sup>34</sup> Temperman, *supra* n 10 at 527.

<sup>35</sup> *Ibid.* Temperman argues that positive obligations under certain rights, like the right to life, or the right to private life, might be used for such claims. For more information on this see his chapter.

doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.<sup>36</sup>

Therefore, the Court is of the opinion that national laws against hate speech, against incitement to violence, hatred and discrimination, can be compatible with the right to freedom of expression.

In *Féret v Belgium*, a politician was convicted of incitement to discrimination and hatred. His party had distributed leaflets, written by him, and posters which presented non-European migrant communities in Belgium as criminally-minded and keen to exploit the Belgian benefit system. The European Court of Human Rights held that political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic states and that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The conviction was thus held not to interfere with Article 10 ECHR.<sup>37</sup> This would suggest that a conviction of Wilders for incitement to hatred and discrimination and for group defamation could be held not to violate his right to freedom of expression under Article 10(2) ECHR.

On the other hand, the Public Prosecutor in the *Wilders* case actually referred to *Féret v Belgium*, as some people had suggested that this case meant that Wilders should be convicted. The Public Prosecutor did not agree and stated that no conclusions could be drawn from that case for the *Wilders* case. There were differences between the two cases: first, the expressions made by Féret mentioned that people of dark skin, gypsies, Moroccans and Muslims were inferior to Belgian and European people and had a racist tone; second, the ECHR left a margin of appreciation to the States Parties and did not impose a duty to criminalise expressions like those of Féret; third, the *Féret* judgment was not unanimous and there were dissenting judges who did not agree with the majority judgment that the conviction was compatible with the ECHR; and, fourth, the expressions from Féret and Wilders needed to be judged, first and foremost, according to the national law in the respective countries. The Prosecutor stressed that the European Court of Human Rights allowed convictions of politicians for their expressions and that this is also allowed in the Netherlands.<sup>38</sup>

In determining whether laws against hate speech are justified restrictions on freedom of expression, the European Court of Human Rights has employed two different approaches, using either Article 17 or Article 10(2) ECHR.<sup>39</sup> Article 17 ECHR states that a person cannot invoke Article 10 (or any other article of the ECHR) to defend expressions which are 'aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention'. This is the most severe restriction, since it permits no proportionality test, no balancing between the rights of the applicant and the rights of others. Article 17 has been invoked in cases concerning racist or xenophobic expression,<sup>40</sup> and instances of Holocaust-denial that amount to

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<sup>36</sup> *Gündüz v Turkey* 35071/97 (2003) 41 EHRR 5, Merits and Just Satisfaction, 4 December 2003 at paras 40-1; see also: *Erbakan v Turkey*, Application No 59405/00, Merits and Just Satisfaction, 6 July 2006 at para 56.

<sup>37</sup> *Féret v Belgium*, supra n 19 at paras 73 and 75.

<sup>38</sup> Requisitoir Wilders, 25 May 2011, at 10-11, < [www.om.nl/vaste-onderdelen/zoeken/@24436/requisitoir-wilders/](http://www.om.nl/vaste-onderdelen/zoeken/@24436/requisitoir-wilders/) (in Dutch) [last accessed 15 June 2016]. The Requisitoir is the statement by the Public Prosecutor in a criminal process in which they give their opinion about the case.

<sup>39</sup> On this see: Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25, 4 *Netherlands Quarterly of Human Rights* 641-663; Weber, *Manual on Hate Speech* (Strasbourg, 2009).

<sup>40</sup> See, for example: *Glimmerveen and Hagenbeek v the Netherlands*, Application Nos 8348/78 and 8406/78, Admissibility, 11 October 1979; *Norwood v the United Kingdom*, Application No 23131/03, Admissibility, 6 November 2004; *Soulas and Others v France*, Application No 15948/03, Admissibility, 10 June 2008.

incitement to hatred of the Jewish community.<sup>41</sup> Article 17 ECHR is very unlikely to be applicable to the expressions by Wilders. As Buyse writes, 'hateful utterances are not often considered under Article 17: the Court addresses the majority of such instances through substantive assessments'.<sup>42</sup>

The second approach of the European Court of Human Rights in relation to hate speech laws is to examine whether these fall under the restrictions permitted under Article 10(2) ECHR. This is, according to Buyse, to be preferred from a human rights perspective, because it includes a balancing exercise and 'explicitly evaluates arguments for and against the prohibition or punishment of specific expressions'.<sup>43</sup>

In order to determine if a form of expression can be considered as constituting hate speech and thus can legitimately be restricted under Article 10(2), the European Court of Human Rights will look at the case as a whole.<sup>44</sup> The Court will examine the particular circumstances of the case, including the aim pursued by the applicant; the content of the expression; the context in which it was disseminated and the potential impact of the remarks; the status and role in society of the maker and of the target of the statement; and, the nature and seriousness of the interference, including the severity of the penalty.<sup>45</sup> All these issues are linked and interrelated and it must be kept in mind in relation to all of them that, as Weber writes: 'the Court hardly allows restrictions on the freedom of expression in the sphere of political speech on matters of general public interest'.<sup>46</sup> As all these issues play a role in any determination of the question whether a restriction is justified under Article 10(2) ECHR they will be discussed under a separate heading.

## **5. Factors playing a role in justification under Article 10(2) ECHR**

When examining the circumstances of the case, the European Court of Human Rights will consider the aim pursued by the author of the expression. According to Weber, 'the objective that is pursued is crucial: is it to disseminate racist ideas and opinions through hate speech or to inform the public on a question of public interest?'<sup>47</sup> In *Jersild v Denmark*, a journalist was convicted of aiding and abetting racist statements when he made a radio programme in which he interviewed three members of the so-called Greenjackets, who made abusive remarks about immigrants and ethnic groups in Denmark that showed a white supremacist attitude. The European Court of Human Rights took into account that the programme was introduced with a reference to the recent public discussion and press comments on racism in Denmark and with the announcement that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. The Court considered that the programme clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects

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<sup>41</sup> See, for example, *Garaudy v France*, Application No 65831/01, Admissibility, 24 June 2003; and a recent decision where the application was declared inadmissible based on Article 17: *M'Bala M'Bala v France*, Application No 25239/13, Admissibility, 24 October 2015.

<sup>42</sup> Buyse, 'Dangerous Expressions: the ECHR, Violence and Free Speech' (2014) 63, 2 *International and Comparative Law Quarterly*, 491 at 495.

<sup>43</sup> *Ibid.* at 496.

<sup>44</sup> See, for example, *Jersild v Denmark*, Application No 15890/89, Merits and Just Satisfaction, 23 September 1994 at para 31; *Ceylan v Turkey*, *supra* n 25 at para 32.

<sup>45</sup> Weber, *supra* n 39 at 33-46. See for a discussion of these factors by the European Court of Human rights: *Perinçek v Switzerland*, Application No 27510/08, Merits and Just Satisfaction, 15 October 2015.

<sup>46</sup> Weber, *supra* n 39, at 35. See also, for example: *Balsytė-Lideikienė v Lithuania*, *supra* n 25 at para 80.

<sup>47</sup> Weber, *supra* n 39 at 33.

of a matter that already then was of great public concern.<sup>48</sup> In relation to Wilders, the aim of his expressions is to highlight the dangers of Islam and the associated threat this poses to Dutch society at a time when the multicultural character of that society was and is being questioned.

The content of the expression is also taken into account. This include the language used and whether this encouraged violence or hatred. *Leroy v France* concerned the conviction of the creator of a cartoon for complicity in condoning terrorism. The cartoon, representing the attack on the twin towers of the World Trade Centre on 11 September 2001, with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it", was published in a newspaper on 13 September 2001, two days after the attack. The European Court of Human Rights took into account that the drawing was not limited to criticism of American imperialism, but supported and glorified the latter's violent destruction, a finding which the Court based on the caption which accompanied the drawing. Finding no breach of Article 10, the Court also noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims.<sup>49</sup>

In *Balsytė-Lideikienė v Lithuania*, the European Court of Human Rights considered that the words used expressed aggressive nationalism and ethnocentrism and that this incited hatred against Poles and Jews.<sup>50</sup> On the other hand, in some cases, the Court has held that the words used, although they have a hostile tone or connote hostility, do not encourage or incite violence.<sup>51</sup> The Amsterdam District Court and the Prosecutor in the *Wilders* case did examine the content of the expressions in detail, and both concluded that they were criticising Islam rather than insulting Muslim believers, as was discussed above. However, the 'fewer Moroccans' remarks might be viewed differently.

A third issue taken into account by the European Court of Human Rights is the context in which expressions are made. This include the historical background and situation in the country where the statement is made and whether the statement contributes to the public debate, the means used to make the statement and the way the statement is distributed, including whether it is available to the public at large or just a small group who choose to hear, read or attend. The latter also affects the impact of the statement. The role of political discourse of public interest is very important here. In *Zana v Turkey*, the European Court of Human Rights considered that the expressions were made 'at a time when serious disturbances were raging in South-east Turkey' and that the expressions could be regarded as 'likely to exacerbate an already explosive situation in that region'.<sup>52</sup> An example of a case where the European Court of Human Rights looked at the situation and at the contribution to the current public debate in a country was already given above when *Jersild v Denmark* was discussed.<sup>53</sup> In *Perinçek v Switzerland*, the Court said that one of the factors taken into account was 'whether the statements were made against a tense political or social background'.<sup>54</sup> Another good example of a case where the situation and the circumstances were being taken into account can be found in *Leroy v France*, where the fact that the cartoon appeared two days after the 9/11 attacks played a role in

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<sup>48</sup> *Jersild v Denmark*, supra n 44 at para 33.

<sup>49</sup> *Leroy v France*, Application No 36109/03, Merits and Just Satisfaction, 2 October 2008 at para 43.

<sup>50</sup> *Balsytė-Lideikienė v Lithuania*, supra n 25 at para 79.

<sup>51</sup> See, for example: *Polat v Turkey*, Application No 23500/94, Merits and Just Satisfaction, 8 July 1999 at para 52; *Düzgören v Turkey*, Application No 56827/00, Merits and Just Satisfaction, 9 November 2006 at para 31; and, *Gül and Others v Turkey*, Application No 4870/02, Merits and Just Satisfaction, 8 June 2010 at para 42.

<sup>52</sup> *Zana v Turkey*, Application No 18954/91, Merits and Just Satisfaction, 25 November 1997 at paras 50 and 60.

<sup>53</sup> *Jersild v Denmark*, supra n 44 at para 33.

<sup>54</sup> *Perinçek v Switzerland*, supra n 45 at para 205.

the Court's considerations.<sup>55</sup> In *Le Pen v France*, the European Court of Human Rights considered that Le Pen's comments had been made in the context of a general debate on the problems linked to the settlement and integration of immigrants in their host countries.<sup>56</sup> In relation to the expressions by Wilders this means that these must be seen in the context of a political climate where immigration and multiculturalism are very much issues of public debate, not only in the Netherlands but across many European countries.

In *Handyside v the UK*, the European Court of Human Rights stated that 'whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses'.<sup>57</sup> And, in *Jersild v Denmark*, the Court stated that

the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media. The audiovisual media have means of conveying through images meanings which the print media are not able to impart.<sup>58</sup>

In *Zana v Turkey*, the fact that the expressions were made in an interview published in a major national newspaper played a role in the European Court of Human Rights considerations.<sup>59</sup> On the other hand, in *Arslan v Turkey*, the Court considered that the applicant was a private individual who had made his views public through 'a literary work rather than through the mass media, a fact which limited their potential impact on "national security", public "order" and "territorial integrity" to a substantial degree'.<sup>60</sup> Similarly, in *Okçuoğlu v Turkey*, the Court observed that 'the applicant's comments, made during a round-table debate, were published in a periodical whose circulation was low' and thus would have limited impact.<sup>61</sup> And, in *Karataş v Turkey*, the Court considered that the expression, although aggressive in tone and seeming to call for the use of violence, was made through poetry 'which, by definition is addressed to a very small audience'.<sup>62</sup> Wilders statements are made in interviews in national newspapers and on television, on-line and at public meetings and thus they will reach, and, as Wilders is a politician who wants to get his message across are meant to reach, a large audience. That this is the case can be seen in the large number of complaints received against his 'fewer Moroccans' remarks.

The status and role played in society by the speaker plays a role as well. Weber states, 'the States margin of appreciation is significantly narrower when the applicant is a politician, because of the fundamental character of the free play of political debate in a democratic society'.<sup>63</sup> In *Castells v Spain*, the European Court of Human Rights held that

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their

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<sup>55</sup> *Leroy v France*, supra n 49 at para 43.

<sup>56</sup> *Le Pen v France*, supra n 19.

<sup>57</sup> *Handyside v the United Kingdom*, supra n 21 at para 49.

<sup>58</sup> *Jersild v Denmark*, supra n 44 at para 31. See also: *Murphy v Ireland*, supra n 26 at para 69.

<sup>59</sup> *Zana v Turkey*, supra n 52 at para 60.

<sup>60</sup> *Arslan v Turkey*, Application No 23462/94, Merits and Just Satisfaction, 8 July 1999 at para 48; see also: *Polat v Turkey*, supra n 51 at para 47.

<sup>61</sup> *Okçuoğlu v Turkey*, Application No 24246/94, Merits and Just Satisfaction, 8 July 1999 at para 48.

<sup>62</sup> *Karataş v Turkey*, Application No 23168/94, Merits and Just Satisfaction, 8 July 1999 at para 52.

<sup>63</sup> Weber, supra n 39 at 37.

preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.<sup>64</sup>

In *Incal v Turkey*, the Court stated that ‘an opponent of official ideas and positions must be able to find a place in the political arena’ and then repeated what it had said in *Castells v Spain*.<sup>65</sup> And, in *Le Pen v France*, the European Court of Human Rights considered that

anyone who engages in a debate on a matter of public interest can resort to a degree of exaggeration, or even provocation, provided that they respect the reputation and the rights of others. When the person concerned is an elected representative, like Le Pen, who represents his voters, takes up their concerns and defends their interests, the Court has to exercise the strictest supervision of this kind of interference with the freedom of expression.<sup>66</sup>

This would provide Wilders, as an opposition politician, with a very strong right to freedom of expression and the European Court of Human Rights would scrutinise any interference with Wilders’ right to freedom of expression very closely.

However, the European Court of Human Rights has also said that the freedom of political debate is not absolute.<sup>67</sup> In *Incal v Turkey*, the Court said that ‘the freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain “restrictions” or “penalties”, but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in the Convention’.<sup>68</sup> In *Erbakan v Turkey*, the European Court of Human Rights pointed out that combating all forms of intolerance was an integral part of human-rights protection because tolerance and respect for equal dignity of all human beings constitute the foundations of a democratic pluralist society.<sup>69</sup> This meant that, in principle, it may be considered necessary in democratic societies to sanction or prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, including religious intolerance, provided that the formalities, conditions, restrictions or sanctions are proportionate to the legitimate aim pursued.<sup>70</sup> The Court also stated that it was crucially important that, in their public speeches, politicians should avoid making comments likely to foster such intolerance.<sup>71</sup> It was already mentioned above that the European Court of Human Rights, in *Féret v Belgium*, also referred to this duty of politicians not to foster intolerance after stating that political speech that stirred up religious or ethnic hatred was a threat to social peace and political stability in democratic states.<sup>72</sup> Weber concludes, ‘the Court therefore submits politicians to a strict scrutiny and insists on their special responsibility in the fight against intolerance’.<sup>73</sup> So, on the one hand, politicians, especially opposition politicians, have a very strong right to freedom of expression and interferences with this right must be scrutinised very

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<sup>64</sup> *Castells v Spain*, Application No 11798/85, Merits and Just Satisfaction, 24 April 1992 at para 42.

<sup>65</sup> *Incal v Turkey*, Application No 22678/93, Merits and Just Satisfaction, 9 June 1998 at paras 45 and 46.

<sup>66</sup> *Le Pen v France*, supra n 19. See also: Voorhoof, European Court of Human Rights Jean-Marie Le Pen v France (2010) < [merlin.obs.coe.int/iris/2010/7/article1.en.html](http://merlin.obs.coe.int/iris/2010/7/article1.en.html)

<sup>67</sup> *Castells v Spain*, supra n 64 at para 46; *Incal v Turkey*, supra n 65 at para 53.

<sup>68</sup> *Incal v Turkey*, supra n 65 at 53.

<sup>69</sup> *Erbakan v Turkey*, supra n 36 at para 56.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid. at para 64.

<sup>72</sup> *Féret v Belgium*, supra n 19 at paras 73 and 75.

<sup>73</sup> Weber, supra n 39 at 37.

carefully by the Court, but, on the other hand, politicians also carry duties and responsibilities not to foster intolerance. Do Wilders' statements foster intolerance? It could be said that they contain a degree of exaggeration and provocation, but the Public Prosecutor and the Amsterdam District Court did not consider them in breach of the Dutch criminal law or the ECHR. The 'fewer Moroccans' remarks might be seen differently, as they do incite to hatred against Dutch-Moroccans, according to the Netherlands Institute of Human Rights and thus would foster intolerance within Dutch society.<sup>74</sup>

The European Court of Human Rights has also stressed the pre-eminent role of the press as public watchdog and that this role brings with it duties and responsibilities. As this is not relevant to the expressions by Wilders, this will not be discussed here.<sup>75</sup>

The status of the person targeted by the remarks will also be taken into account and both politicians<sup>76</sup> and the government<sup>77</sup> must expect to be criticised. Neither is relevant for expressions by Wilders because, although he criticises the Dutch government and its policies, he is not prosecuted for these expressions.

The nature and the severity of the penalty imposed also plays a role when the European Court of Human Rights determines whether an interference is justified under Article 10(2) ECHR. A severe penalty is more likely to lead to a finding that the interference is not justified. In a number of cases against Turkey, all heard on the same day, the Court commented on the severity of the penalty,<sup>78</sup> while in other cases it mentioned the relatively modest or insignificant nature of the fine imposed.<sup>79</sup> The European Court of Human Rights has pointed out:

The dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.<sup>80</sup>

In relation to the penalty imposed, especially when it concerns journalists or editors, the European Court of Human Rights has noted that a severe penalty imposed has 'the effect of censoring their profession, compelling them to refrain from publishing anything likely to be considered to be contrary to the interests of the State'.<sup>81</sup> The European Court of Human Rights is thus very aware that laws restricting free expression might stop the press doing their job as a public watchdog. This is sometimes

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<sup>74</sup> Netherlands Institute of Human Rights, supra note 17.

<sup>75</sup> See, for example, *Castells v Spain*, supra n 64 at para 43; *Jersild v Denmark*, supra n 44 at para 35; *Sürek v Turkey No 2*, Application No 24122/94, Merits and Just Satisfaction, 8 July 1999 para 35; *Şener v Turkey*, Application No 26680/95, Merits and Just Satisfaction, 18 July 2000 para 42.

<sup>76</sup> *Lingens v Austria*, Application No 9815/82, 8 July 1986 at para 42.

<sup>77</sup> *Castells v Spain*, supra n 64, at para 46.

<sup>78</sup> *Arslan v Turkey*, supra n 60 at para 49; *Ceylan v Turkey*, supra n 25 at para 37; *Gerger v Turkey*, Application No 24919/94, Merits and Just Satisfaction, 8 July 1999 at para 51; *Karataş v Turkey*, supra n 62 para 53; *Okçuoğlu v Turkey*, supra n 61 at para 49; *Polat v Turkey*, supra n 51 para 48.

<sup>79</sup> *Chauvy v France*, Application No 64915/01, Merits, 29 June 2004 at para 78; *I.A. v Turkey*, 42571/98, Merits and Just Satisfaction, 13 September 2005 at para 32; *Leroy v France*, supra n 49 at para 47.

<sup>80</sup> *Sürek v Turkey No 2*, supra n 75 at para 34.

<sup>81</sup> *Koç and Tambaş v Turkey*, App. No. 50934/99, Merits and Just Satisfaction, 21 March 2006 at para 39; see also: *Lingens v Austria*, supra n 76 at para 44; *Giniewski v France*, Application No 64016/00, Merits, 31 January 2006 at para 54; *Sürek v Turkey No 2*, supra n 75 at para 41

called the 'chilling effect' of, especially, criminal law measures: they can stop people from expressing themselves. This applies not only to the press, but it can go beyond that: it could stop anyone, including (opposition) politicians, from expressing criticism of the government and its policies, something that would go against the public interest in ensuring and maintaining freedom of political debate in a democratic society. If Wilders is convicted for his 'fewer Moroccans' remarks, both Article 137C Sr (for insulting a group identified by racial or ethnic origin or by religion), and Article 137d Sr (for incitement to hatred, discrimination or violence) carry a maximum penalty of 1 year or a fine of a maximum of 8,100 euros. However, these are maximum penalties and it is difficult to predict what penalty would be imposed if he was found guilty.

Because the European Court of Human Rights takes all these factors into account when deciding whether an interference is justified, the decision is 'highly content-specific' as the Court itself pointed out in *Perinçek v Switzerland*<sup>82</sup> and thus depends very much on the particular circumstances of each case. It is therefore very difficult to predict what would happen if Wilders was convicted for his 'fewer Moroccans' remarks and the case would then proceed to the European Court of Human Rights. There are a number of issues that would be favourable to Wilders, but also issues that would play against him. The European Court of Human Rights would have to balance all these issues to establish whether the interference with Wilders' freedom of expression was justified and proportionate, including possibly other fundamental rights which would clash with his freedom of expression. In the next section, I will discuss this possible clash.

## 6. Freedom of expression versus other fundamental rights?

Based on the above, if the remarks by Wilders were assessed by the European Court of Human Rights, the freedom of expression of Wilders himself might be in conflict with the freedom to manifest one's religion of the Moroccans/Muslims who are the target of his speech. These rights appear to be in conflict with each other, but are they? Is a person's right to freely manifest their religion affected by someone making offensive remarks about their religion or about the manner in which they act according to that religion? If this is so, then that would suggest that there is a right not to be offended implicitly present in Article 9 ECHR. Does such a right exist? It is submitted that a right not to be offended does not exist, although the European Court of Human Rights has not always been very clear on this.<sup>83</sup> On the one hand, the Court has stated that the right to freedom of expression applies

not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>84</sup>

As Barendt writes, 'the proscription of any type of speech on the ground of its offensiveness is, of course, very hard to reconcile with freedom of expression, for a right to express and receive only

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<sup>82</sup> *Perinçek v Switzerland*, supra n 45 at para 208.

<sup>83</sup> See for a discussion of this: Kapai and Cheung, 'Hanging in the Balance: Freedom of Expression and Religion' (2009) 15 *Buffalo Human Rights Law Review* at 41-79; Leigh, 'Damned if they do, damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' (2011) 17, 1 *Res Publica* at 55-73; Letsas, 'Is there a Right not to be offended in One's Religious Beliefs?' in Zucca and Ungureanu (eds) *Law, State and Religion in the New Europe* (Cambridge, 2012) at 239-260.

<sup>84</sup> *Handyside v the United Kingdom*, supra n 21 at para 49.



inoffensive opinions would hardly be worth having'.<sup>85</sup> Moreover, the European Court of Human Rights has also held that

those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.<sup>86</sup>

So, this would suggest that, according to the European Court of Human Rights, there is no fundamental human right not to be offended. However, as Leigh writes, the European Court of Human Rights has sometimes read a right not to be offended into Article 9 ECHR where none is present in the text.<sup>87</sup> In *Otto Preminger Institute v Austria*, the Court also stated that

the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility *to ensure the peaceful enjoyment* of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them [emphasis added].<sup>88</sup>

In the same case, the Court also mentioned that 'the *respect for the religious feelings* of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration' [emphasis added].<sup>89</sup>

In *I.A. v Turkey*, the Court considered whether a conviction for blasphemy amounted to a violation of Article 10. In this case, the applicant had published a fictional novel in which disparaging remarks were made about Islam and about the Prophet Muhammad. The Court held that there was no violation of his freedom of expression, because 'the present case concerns not only comments that offend or shock, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam' and 'believers may legitimately feel themselves to be the object of unwarranted and offensive attacks'.<sup>90</sup> The Court concluded that 'the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a "pressing social need"'.<sup>91</sup>

This would thus suggest that there is a right to peaceful enjoyment of and respect for one's religion or belief, a right not to be offended in one's religion or belief, implicit in Article 9 ECHR. But it is submitted that such a right is 'not present in the text'.<sup>92</sup> This is also supported by the opinion of the dissenting judges in *Otto Preminger Institute v Austria*, who did not agree that there was no violation of Article 10 and stated that 'the Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of

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<sup>85</sup> Barendt, 'Religious Hatred Laws: Protecting Groups or Belief?' (2011) 17, 1 *Res Publica* 41, at 44.

<sup>86</sup> *Otto Preminger Institute v Austria*, supra n 28 at para 47.

<sup>87</sup> Leigh, supra n 83 at 72.

<sup>88</sup> *Otto Preminger Institute v Austria*, supra n 28 at para 47.

<sup>89</sup> Ibid.

<sup>90</sup> *I.A. v Turkey*, supra n 79 at para 29.

<sup>91</sup> Ibid. at para 30.

<sup>92</sup> Leigh, supra n 83 at 72. In the same vein, Letsas, supra note 83 and Temperman, supra n 10 at 528.

religion, which in effect includes a right to express views critical of the religious opinions of others'.<sup>93</sup> And, the dissenters in *I.A. v Turkey*, stated that although the approach of the majority seems to be consistent with the case law in *Otto Preminger Institute v Austria* and *Wingrove v the UK*,<sup>94</sup> perhaps the time had come 'to "revisit" the case law which, they thought, seemed to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press'.<sup>95</sup>

Some later cases of the European Court of Human Rights also suggest that there is no right not to be offended in one's religious feelings. In *Giniewski v France*, the applicant was successful in challenging his conviction for publicly defaming a religious group. The Court held that the article contributed to a question of public interest and although the issues concerned a doctrine upheld by the Catholic Church and thus a religious matter, the article did not contain attacks on the belief as such.<sup>96</sup> And, although the article contained conclusions and phrases which may offend, shock or disturb some people, this did not preclude the enjoyment of freedom of expression. The article was not gratuitously offensive or insulting and did not incite to disrespect or hatred.<sup>97</sup>

In *Klein v Slovakia*, a case concerning an article by a journalist who attacked an archbishop for suggesting that a film should be banned, the European Court of Human Rights unanimously held that the conviction violated Article 10 ECHR. The Court 'was not persuaded that the applicant had discredited and disparaged a sector of the population on account of their Catholic faith' and it accepted that 'the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith'.<sup>98</sup> This is also supported by the statement of the Parliamentary Assembly of the Council of Europe that 'freedom of thought and freedom of expression in a democratic society must, however, permit open debate on matters relating to religion and beliefs.' and that 'freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups'.<sup>99</sup>

All this suggests that there is no right not to be offended under the ECHR and that, in relation to the Wilders case, it would not be enough to say that his remarks offend Muslims and Moroccans and that this is sufficient to restrict Wilders' freedom of expression. Unless Wilders remarks prevent or deter any Muslims from believing as they choose, or practising or manifesting their religious beliefs, the right to freely manifest one's religion is not engaged. As Leigh writes, 'when freedom of religion is properly understood, it is confined to tangible harm to specific victims. It follows that there is generally no clash between it and freedom of expression in most religious offence cases'.<sup>100</sup>

On the other hand, in exercising his freedom of expression, Wilders has duties and responsibilities as well. We have already seen that politicians should not foster intolerance. And, in *Otto Preminger Institute v Austria*, where the European Court of Human Rights discussed the 'duties and responsibilities' in Article 10(2) ECHR, it stated that

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<sup>93</sup> *Otto Preminger Institute v Austria*, supra n 28, dissenting opinion, at para 6.

<sup>94</sup> *Wingrove v the United Kingdom*, supra n 26.

<sup>95</sup> *I.A. v Turkey*, supra n 79, dissenting opinion, at paras 7 and 8.

<sup>96</sup> *Giniewski v France*, supra n 81 at para 51.

<sup>97</sup> *Ibid.* at para 52.

<sup>98</sup> *Klein v Slovakia*, Application No 72208/01, Merits and Just Satisfaction, 31 October 2006 at paras 51 and 52.

<sup>99</sup> Parliamentary Assembly, Council of Europe, Resolution 1510 (2006) *Freedom of Expression and Respect for Religious Beliefs*, Articles 3 and 12.

<sup>100</sup> Leigh, supra n 83 at 72.

amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>101</sup>

So, expressions should not be gratuitously offensive, but the Court here seems to suggest that any expression which is gratuitously offensive does not contribute to the public debate. This appears to somewhat contradict what the Court said in *Le Pen v France*, that 'anyone who engages in a debate on a matter of public interest can resort to a degree of exaggeration, or even provocation, provided that they respect the reputation and the rights of others'.<sup>102</sup> It is submitted that Wilders' expressions might be seen as gratuitously offensive and provocative but they do contribute to the public and political debate. Therefore, any restriction on his freedom of expression should be very strictly supervised.

Consequently, there would not be a clash between freedom of expression and freedom of religion unless the expressions prevent or deter any believers from believing as they choose, or practising or manifesting their religious beliefs. Only when they do, is the right to freely manifest one's religion engaged. Wilders remarks do not appear to do so and thus there is no clash between these two freedoms in this case.

If the case is seen by the European Court of Human Rights as one of a clash between freedom of expression and freedom of religion, the Court will have to assess whether the right balance has been struck between the different rights, as the Court stated in *Chauvy v France*.<sup>103</sup> In *Karaahmed v Bulgaria*, where the freedom of religion clashed with the freedom of assembly under Article 11 ECHR, the European Court of Human Rights explained:

The Convention does not establish any *a priori* hierarchy between these rights: as a matter of principle, they deserve equal respect. They must therefore be balanced against each other in a manner which recognises the importance of these rights in a society based on pluralism, tolerance and broad-mindedness.<sup>104</sup>

Therefore, in situations of apparently competing rights, all interests involved need to be balanced against each other and attempts should be made 'to ensure that there is a maximising of both rights in situations of tensions'.<sup>105</sup> This means that Wilders cannot simply claim that his right to freedom of expression is the most important right and trumps any other possible Convention rights involved.

## **7. Conclusion: Geert Wilders v the Netherlands**

If Geert Wilders is convicted for his 'fewer Moroccans' remarks, it is likely that he will, after exhausting domestic remedies, apply to the European Court of Human Rights claiming a violation of his right to freedom of expression under Article 10 ECHR. First of all, it is unlikely that the Court will find that the Dutch criminal law on group defamation and incitement to hatred, discrimination and violence

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<sup>101</sup> *Otto Preminger Institute v Austria*, supra n 28 at para 49.

<sup>102</sup> *Le Pen v France*, supra n 19.

<sup>103</sup> *Chauvy v France*, supra n 79 at para 70.

<sup>104</sup> *Karaahmed v Bulgaria*, Application No 30587/13, Merits and Just Satisfaction, 24 May 2015 at para 92.

<sup>105</sup> Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4, 2-3 *Religion & Human Rights* 197, at 233; see also: Boyle, 'The Danish Cartoons' (2006) 24, 2 *Netherlands Quarterly of Human Rights* 185, at 188.

violates Article 10 ECHR. As mentioned, the Court has generally held that such laws are compatible with freedom of expression. But what about Wilders' conviction? The Court will have to look at the case as a whole and apply a balancing test.

Examining the factors the Court will take into account, the aim pursued by Wilders' expressions is to highlight the pressing social problem, as he sees it, of the danger that Islam poses to Dutch society and the failure of immigrants to the Netherlands, especially Muslim immigrants, to integrate into this society and to accept Dutch values. Even if you do not agree with what Wilders says, the issues he raises are very much part of the public debate in which the problems with immigrants are high on the agenda. So this would be in Wilders' favour.

The content of the expression is also taken into account. Whereas the remarks subject to the first prosecution could be seen as criticising Islam, which, as seen above, is allowed under the ECHR, the 'fewer Moroccans' remarks cannot be seen as such. They do appear to insult a group on the ground of their racial and ethnic origin and to incite hatred and discrimination against this group, and this might work against Wilders.

In relation to the context of the remarks, the role of political discourse of public interest is very important here and Wilders' remarks can be seen as part of that discourse. The issue of immigration is high on the political agenda and the remark must thus be seen against this political and social background. On the other hand, the remarks reached a large audience and it was difficult to avoid hearing them. But it is submitted that this is the essence of a politician's speech: it is aimed to reach as big an audience as possible in order to convince people to vote for you. It is submitted that the 'fewer Moroccans' remarks must thus be seen as part of the general political discourse.

It was also clear that the European Court of Human Rights attaches special importance to the right of free speech for politicians because of the importance of free political debate in a democratic society. This is even more so for an opposition politician like Wilders. However, the Court has also emphasised the duty on politicians not to make comments that foster intolerance. Do Wilders' statements foster intolerance? The Court might compare the 'fewer Moroccans' remarks to the remarks in *Féret v Belgium*, which presented non-European migrant communities, including Moroccans and Muslims, in Belgium as criminally-minded and inferior to Belgian and European people. In that case, the Court held that political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic states. The conviction was thus held not to interfere with Article 10 ECHR.<sup>106</sup> Although the Public Prosecutor in the first Wilders case was not convinced that Wilder's expressions in that case were comparable to those made by Féret,<sup>107</sup> the 'fewer Moroccans' remarks might well be viewed differently and seen by the European Court of Human Rights as fostering intolerance and inciting hatred. In that case, the Court could follow *Féret v Belgium* and hold that there was no violation of Wilders' right to freedom of expression. However, as Buyse observes in relation to *Féret v Belgium*, 'the Court was heavily divided over the limits of freedom of expression' with three out of seven judges dissenting.<sup>108</sup> The dissenters expressed that combating mere intolerance was not, in their view, sufficient to justify infringing the freedom of expression and that real –and not potential - impact on the rights of other needed to be demonstrated.<sup>109</sup> So the Court could also follow the dissenters and find a conviction to be a violation of Wilders' freedom of expression.

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<sup>106</sup> *Féret v Belgium*, supra n 19 at paras 73 and 75.

<sup>107</sup> *Requisitoir Wilders*, supra n 38.

<sup>108</sup> Buyse, supra n 42 at 499.

<sup>109</sup> *Féret v Belgium*, supra n 19, dissenting opinion. See also: Buyse, supra n 42 at 499.

The European Court of Human Rights also takes account of the nature and the severity of the penalty imposed. It is difficult to predict what penalty would be imposed on Wilders. A conviction would not automatically mean that Wilders could no longer be a member of the Dutch parliament but, if the penalty included a declaration of ineligibility for a number of years, the European Court of Human Rights might view this penalty as too severe and thus find that the interference is not justified.

Because the decision whether an interference is justified is highly content-specific, it is very difficult to predict what would happen if Wilders was convicted for his 'fewer Moroccans' remarks and the case proceeded to the European Court of Human Rights. However, it is submitted that the crucial importance of free political debate for the functioning of a democratic society and the fact that Wilders raises important issues which worry many people in the Netherlands mean that the European Court of Human Rights would need to subject any conviction to the strictest possible scrutiny. The Court should not accept that the remarks of Wilders foster intolerance without any proof that his remarks prevent or deter others from practising or manifesting their belief, in other words, without any proof of real impact on the rights of others. Therefore, as long as the rights of others to freely manifest their religion is not factually harmed, the Court should find any criminal conviction to be a violation of Wilders' right to freedom of expression. The Court should thus follow the dissenters in *Féret v Belgium*,<sup>110</sup> rather than the majority in that case.

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<sup>110</sup> *Féret v Belgium*, supra n 19.