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Vrijheid van meningsuiting en de bestrijding van discriminatie in Nederland: een constitutioneel ontwikkelingsperspectief

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Summary in English

Freedom of speech and the suppression of discrimination in the Netherlands: a constitutional-developmental approach

'How tolerant can a multicultural society with all its new sensitivities be? Should it, with its constitution and criminal law in hand, primarily or even exclusively protect the rights of minorities and spare their deepest feelings, or can it also tolerate statements from those who want nothing to do with multiculturalism?' This question was posed in 1997 by the former editor-in-chief of the Dutch magazine Elsevier H.J. Schoo (1945-2007), as he wanted to problematize the conviction of right-wing nationalist parliamentarian Hans Janmaat for publicly stating that he wanted to "abolish multicultural society". While several courts, including the Dutch Supreme Court, had labeled this as an incitement to racial discrimination, Schoo thought it was in fact a misguided application of criminal law that merely protected certain ideological interests. Criticism on the verdict was also heard in academic circles, with particular focus on the assumption that criticism of multicultural society would be equivalent to promoting racism. Others even raised concerns about the functioning of democracy, implying that if public authorities can intervene so quickly, free and open political debate will be seriously jeopardized.

From the early 2000s onwards, the discussion about the application of the Dutch hate speech bans, articles 137c and 137d of the Criminal Code, further intensified. This happened in particular when the founder and parliamentary leader of the Dutch Freedom Party (PVV), Geert Wilders, was prosecuted twice (in 2009-2011 and 2015-2021). Many agreed that these cases, from which the second ultimately resulted in a conviction for group defamation, clearly demonstrated the tension between the application of hate speech bans and the right to free speech. Yet there was very little agreement on how this tension should be dealt with. This also applies to the case law of the Dutch Supreme Court, which seems to prioritize both minority protection and robust protection of free speech at the same time. In legal scholarship, this two-sided character has already been extensively documented and researched, where most contributions tend to focus on the most actual cases and the prevailing interpretation of legal authorities such as the Dutch Supreme Court or the European Court of Human Rights (ECHR). Meanwhile, less attention has been paid to the way in which the Dutch hate speech bans and the related case law have developed over time, and how this development can be explained from the perspective of legal doctrine and constitutional theory. It is this gap that this study tries to fill, investigating the question: how did the tension between freedom of expression and the criminalization of offensive statements or statements inciting hatred or discrimination concerning minority groups came about, what bottlenecks and problems have arisen in subsequent case law, and to what extent can legal theory offer useful insights and criteria for explaining and assessing these developments?

As the central research question suggests, the methodology of this study is rather multidisciplinary in nature. Next to a legal-historical and a legal-doctrinal method, which is employed in the first and second parts, the study also addresses constitutional, theoretical and philosophical themes, which will be discussed mainly in the third part. This order of treatment indeed differs from most legal studies with a theoretical component: Instead of starting with a pre-established theoretical framework, against which legal practice is then tested and assessed, the aim of this study is to investigate which theoretical principles can be used to explain and assess legal developments retrospectively. The intention is therefore not to consider existing practice on the basis of a pre-selected interpretation of the liberal democratic state, but first to describe that practice, identify the legal and theoretical principles underlying it, and only then to search for suitable theoretical insights that can contribute to the explanation and assessment of legal practice.

In accordance with this setup, the first part starts by tracing back the origins of the legislation to which the central topic relates, starting with the first ban on group defamation dating from the interwar period (chapter 1). This ban was adopted with the primary goal of protecting Jewish citizens against intimidation from fascists. It was formulated in such a way as to minimize the effect on freedom of speech and discussion: only speech that was offensive in its *form* was to be banned. This was not so much the result of a liberal political philosophy as a consequence of the 'pillarized' political culture at the time, dictating that any government action restricting political rights should adhere to the principle of neutrality. Yet with the advent of the International Convention on the Elimination of all forms of Racial Discrimination (CERD), this adherence to neutrality had to be abandoned. Because, by signing this treaty, the Dutch government legally committed itself to combatting discrimination, including the criminalization of propagating racial superiority and incitement to racial discrimination. Although a number of Western countries, including the Netherlands, had difficulty with this obligation because it would pose a too far reaching restriction on freedom of expression, this was ultimately not considered a deal-breaker as the treaty also contained a clause stating that "due regard" must be given to the respect for human rights (chapter 2). Moreover, the Dutch legislator thought it could prevent a possible adverse impact on free speech by putting in place some additional safeguards in the two newly designed hate speech provisions. One of these safeguards was an enumerated list of protected group characteristics: race, religion or philosophy of life (chapter 3).

From the second part of the study, which concerns the application of article 137c CC (group defamation) and 137d CC (incitement to hate, discrimination or violence), it becomes clear that these efforts were not as effective as the legislator might have expected. Most notably, in the early stage of their application it turned out that the potential scope of the two provisions was rather wide when it came to the interpretation of the concept of "race". When first explaining this concept, the Supreme Court followed the preference of the legislator that Article 1 CERD should be taken into account, which included not only "skin colour" but also "origin" and "national or ethnic descent". This, in turn, implied that not just biological or genetical properties of groups could be

qualified as "racial", but also various non-biological features such as language or culture. It took until the 1980s, though, for this broad range of group characteristics to become relevant, because it was in this period that the subjects of immigration and cultural diversity became much more prominent in Dutch political debate. The emergence of the Centrumpartij (Centre Party) and its leader Hans Janmaat is of particular relevance here, as their anti-immigration discourse was primarily focused on cultural differences (chapter 4). It took until the 1990s, though, for the Centre Party and Janmaat to be successfully convicted for criminal offenses, shortly after the legal framework was altered, reinterpreted by the legislator and given a much more strict application by the public prosecutor. Combined with more loose interpretation of the core concepts of "racial discrimination", this policy led to the conviction of Hans Janmaat for his remarks about multicultural society: a conviction that was indeed heavily criticized for its far-reaching implications with regards to free speech in the context of public debate (chapter 5).

Chapter 6, which covers the period since the turn of the century, describes how the judiciary swiftly responded to this criticism by changing its course. Important societal events such as the aftermath of the 9/11 attacks and the sudden popularity of anti-establishment politician Pim Fortuyn clearly contributed to this. Yet in legal terms, most influential has been the case law of the European Court of Human Rights (ECHR), which inspired the Dutch Supreme Court to design a contextual assessment model. Within this model, the question whether a statement "contributes to public debate" emerged as a relevant factor that should be weighed up against goals pursued with the application of the articles 137c and 137d CC. This led to a number of remarkable outcomes, such as the acquittal of an Imam for publicly making anti-homosexual statements and the acquittal of Geert Wilders for heavily criticizing Islam and Muslims. Notwithstanding this important shift in the Supreme Court's jurisprudence, a stricter stance was also developing regarding "(racist) hate speech" and, more generally, speech that "incites intolerance". First in the European case law, and from 2014 onwards also in the contextual model of the Dutch Supreme Court. As a result, robust protection of free speech in the context of public debate was now combined with a special responsibility of politicians, consisting of a duty to refrain from statements that "incite intolerance". Accordingly, in the final verdict of the second Wilders case, which led to a conviction for offensive statements about Moroccans, the Supreme Court argued that Wilders, as a politician, has a responsibility to uphold "liberal democratic principles": a consideration that was accompanied by an implicit reference to article 17 of the European Convention, which forbids the abuse of rights.

The disclosure of this normative embedding of the legal framework clearly marks the shortcomings of an exclusively legal-doctrinal and legal-historical approach. If any sense is to be made out of the different perspectives and arguments that have underpinned the application and interpretation of the articles 137c and 137d CC, and to critically assess the bottlenecks and problems that have arisen over time, there is also need for a theoretical, constitutional and philosophical approach. Accordingly, the third and final part of the thesis highlights and explains the decisive motives in the legal

development on the basis of relevant theoretical scholarship. This initially led to three different theoretical perspectives (chapter 7).

The first if these perspectives is the primacy of minority protection, which focuses on protecting minorities against the harm that allegedly arises from hate speech. In order to explain the underlying idea of this perspective, a theory developed by Jeremy Waldron is used as a point of reference. According to this theory, hate speech "harms" in that it undermines the assurance that people are regarded by others as equal citizens and can therefore count on equal treatment and a safe existence. This implies that even though hate speech does not by its own nature inflict physical harm, legislators may have good reasons to criminalize it. Opposed to this perspective is the primacy of freedom of expression, which, among other things, rejects abstract notions of harm and instead appeals to more tangible and as neutral as possible assessment criteria. A theoretically elaborated example thereof is the "imminent lawless action" criterion adopted by the United States Supreme Court, which is used to separate abstract from more concrete dangers arising from public speech. Closely connected to this criterion, is the idea that democracy cannot thrive without robust protection of free speech: a line of thought that is also present in the case law of the ECHR, yet without a clear demarcation line as provided by its American counterpart. Instead, the ECHR seems to have put more faith in a third perspective, which appears to be simply an attempt to combine the first two motives. Still, on closer inspection this third way is rather a political-philosophical formula known as the paradox of tolerance or militant democracy. It is argued that applying this formula to the proportionality test of article 10(2) ECHR, as was done in the *Wilders II* case, creates an even greater source of uncertainty than could already arise on the basis of the standard concept of "gratuitously offensive". Simply because it forces judges to interpret fundamental but also controversial constitutional values and principles. In leading scholarship on militant democracy such a broad test for the application of militant measures is therefore rejected.

At the end of chapter 7, a fourth perspective is added, which in a sense includes and transcends the first three: the theory of constitutional development. This theory, devised by the Dutch constitutional law scholar Wim Couwenberg, helps us to better understand both why the Dutch Supreme Court ultimately opted for the militant democracy approach and, at the same time, why this is also a risky path to take. This argument is inferred from Couwenberg's polar-dialectical view of the general development of modern constitutional law, in which he placed the clash between liberal and democratic principles, most notably freedom and equality, in the context of a constant interaction between the two most fundamental constitutional motives: power and emancipation. Couwenberg inferred that this interaction is problematic, because the pursuit of emancipation is principally at odds with the exercise of power while at the same time dependent on it for its very realization. Hence, any attempt to use legal instruments, which are essentially instruments of political power, for the sake of bringing about the lofty goal of emancipation, runs the risk of resulting in yet other forms of unfreedom and inequality. Meanwhile, this confusion of power and

emancipation can oftentimes be hard to notice, as the employment of state power can easily be disguised by lofty principles and seemingly neutral legal categories. It is argued that this insight can be of great value for this study, because it can both explain the rationale behind the Dutch hate speech provisions, while at the same time offer a theoretical underpinning for some of the intuitions that followed from the discussion of the other three perspectives.

Additionally, Couwenberg's theory provides a basis for the recommendation that, given the specific context and circumstances in the Netherlands, the Dutch Supreme Court should consider more carefully which aspects of European case law are appropriate when weighing up the interests involved in prosecuting 'hate speech' against the interests involved in protecting the right to freedom of expression. The margin of appreciation applied by the ECHR with regard to 'hate speech' offers the necessary scope for this and is also intended for this purpose. In turn, the legislator should, also taking into account the specific Dutch context and circumstances, critically reconsider the wording, objectives and possible (side) effects of Articles 137c and 137d CC. This will not be easy, given the various constitutional, social and political interests at stake, but it is still necessary in view of the turbulent development that, as this study shows, these criminal provisions have undergone and will undoubtedly continue to undergo.