

Hate Speech Revisited

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Hate Speech Revisited

A comparative and historical perspective on hate speech law
in the Netherlands and England & Wales

Haatuitingen heroverwogen. Een vergelijkend en historisch perspectief
op het recht over haatuitingen in Nederland en Engeland & Wales
(met een samenvatting in het Nederlands)

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te Raamsdonk

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Prof. dr. J.E. Goldschmidt

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Four years ago my attention was drawn to an advertisement for a Ph.D. researcher on “the implications of countering discrimination and radicalisation through criminal law on hate speech”, a subject matter so fascinating that I just had to apply for this position. Now, four years later, I can only say that the topic has never failed to intrigue me – and a quick look at the Dutch newspapers in the past year shows that I am not the only one intrigued by it.

Choosing to conduct Ph.D. research has been one of the best decisions I have made so far. It has given me the chance to develop as a scholar, but has also given me the freedom to develop many other skills and to get to know other academic disciplines. For this I am indebted first of all to my supervisors, Chrisje Brants and Jenny Goldschmidt. It has been a great pleasure and an honour to work with you. Chrisje, it has been fascinating to experience your passion for legal comparison and the British legal system and I have also enjoyed discussing travel destinations and many other things with you (either over a Dutch coffee or a Persian lunch). Jenny, your kindness and your vigorous work to promote human rights have been a great inspiration. Both of you have given me freedom in conducting my research and many other activities, and this work has benefited much from your inspiring comments. I owe many thanks to Henk Kummeling, Theo de Roos, Gavin Phillipson, Leonard Besselink and Arend Soeteman for taking the time to read and comment on my manuscript. Special thanks go to Theo de Roos, who has been so kind to engage me in his research on DNA-legislation and in the Meijers Committee.

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Marloes van Noorloos
Utrecht, October 2011

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CHAPTER I

INTRODUCTION

1 INTRODUCTION

In the Netherlands, there used to be a relatively strong consensus on the question when to criminalise hate speech. When far-right MP Janmaat was prosecuted for his expressions “We will abolish multicultural society as soon as we can” and “Full is Full” in 1996, Dutch media paid hardly any attention. Neither did his colleagues in Parliament protest.¹ This sort of speech was considered racist and according to most people it was only normal to use criminal law to restrict it. In 2009, when MP Geert Wilders was prosecuted for expressions including “no more Muslim immigrants into the Netherlands” and “stop the tsunami of islamisation”, the situation appeared to have changed dramatically. The newspapers produced innumerable commentaries, columns and opinions about the case – and this process was repeated when Wilders was acquitted in 2011. Many concluded that the use of criminal law to counter Wilders’ expressions was a bad idea as such ideas are better countered in public debate itself. Others argued that hate speech bans are indispensable to maintain a peaceful society.

Since populist politician Pim Fortuyn’s appearance on the political stage immediately after the terrorist attacks in New York – and his subsequent assassination for his opinions – the previous consensus on hate speech law has eroded. On the one hand, there is now fierce critique of multicultural society, particularly of Islam and its adherents. Existing hate speech legislation has come under discussion; proposals to revive it – such as the offence of blasphemy – go hand in hand with suggestions to do away with hate speech bans. Free speech in itself has become a central issue in the debate on multiculturalism and immigration with the “right to offend” being advocated next to the “right not to be offended”. It has become a pressing question whether and how Dutch public debate should accommodate hate speech in an increasingly pluralist society.

On the other hand, with the terrorist attacks in New York, London and Madrid and the assassination of film maker Theo van Gogh by radical Islamist Mohammed Bouyeri, public debate has been dominated by the problems of terrorism and radicalisation. In this regard, much attention has been paid to combating speech that is presumed to encourage terrorism, such as on extreme websites where young people are said to

¹ *NRC Handelsblad*, ‘Vervolging Wilders lokt haatmails uit; rechters wijzen op verschil met tijdperk-Janmaat’, 14 March 2009.

inspire each other to commit atrocities. Such discussions about extreme speech deal not only with incitement to terrorism, but also with utterances that may undermine social cohesion and the “common values” that are said to be necessary to sustain democracy – expressions such as the advocacy of a theocratic system. The prosecution of members of the Hofstadgroep for exchanging radical-Islamic materials is exemplary of this: they expressed animosity towards nonbelievers and advocated obedience to the laws of God alone rather than those of the state. However, in public debate the Hofstadgroep case was scarcely viewed through a freedom of speech lens, as the case against Geert Wilders was: for many people, this was simply a matter of terrorism instead of free expression. Free speech seems to be defended particularly when it is in favour of dominant majority values and not against them – a development that deserves more attention.

Meanwhile, discussions about free expression and radical Islamist groups were raging just as strongly in the United Kingdom, particularly after the London bombings in 2005 when it appeared that the bombers had learned their radical ideas in the UK. Some mosques appeared to have radical preachers in their midst who incited their audience with anti-West rhetoric, such as Finsbury Park’s famous Abu Hamza Al-Masri – ‘probably the most frequently abused and ridiculed figure in the UK’ according to his lawyer. His trial showed how criminal law became one of the means of countering this radical tide. At the same time the authorities also aimed to target hate speech against the Muslim minority: in 2010 British National Party activist Anthony Bamber was the first to be prosecuted for “stirring up religious hatred” for distributing a leaflet that blamed Muslims for heroin trade. A jury acquitted him.

2 RESEARCH GOALS AND RESEARCH QUESTION

The initial motive for initiating this research was the plan to criminalise “glorifying terrorism” in Dutch law. Though it was never officially proposed to Parliament, the ideas it encompasses are still alive and these go to the heart of the significance of the freedom of expression for a democratic society. England & Wales did adopt a criminal offence of “glorifying terrorism” in 2006. It was accompanied by much debate about the necessity of such speech bans: the *Guardian* headlined that ‘this muddled terror law limits free speech and wrecks innocent lives’.² In the same period, England & Wales also enacted a new law on “stirring up religious hatred” that was received with the same robust criticism: one columnist argued that ‘the term “politically correct” does not do justice to this sinister totalitarian project. It is against not just freedom of speech but also freedom of thought.’³ In comparison to the Dutch situation, the adoption and

2 David Edgar, “This muddled terror law limits free speech and wrecks innocent lives”, *The Guardian*, 22 July 2008.

3 Christopher Caldwell, “After Londonistan”, *New York Times magazine*, 25 June 2006, under V.

discussion of this new legislation raises many questions: why did the “glorifying terrorism” law make it in England and not in the Netherlands? Incitement to religious hatred has been on the Dutch statute books for decades – why was it adopted in England only in 2005? What have been the reasons for criminalising hate speech – or for not doing so – in both jurisdictions?

Underlying the way hate speech is dealt with are certain ideas about fundamental rights, in particular freedom of expression, freedom of religion and non-discrimination, and other interests such as public order: the scope of and relationship between those rights and interests underpin the criminalisation of hate speech. Moreover, hate speech regulations are influenced by a country’s political culture: the functioning of public debate, the media and the democratic system. For instance, when a state adopts hate speech bans with the idea that non-discrimination ranks higher than freedom of expression, this may in turn be informed by a public debate where anti-minority expressions are taboo in the light of the Second World War experiences. Those ideas differ per jurisdiction and are the product of historical development: ‘free speech is embedded in a historically evolving tradition of constitutional thought, including both political and legal arguments made over time about its proper meaning.’⁴ The aim of this research is to discover how criminal law on hate speech in the Netherlands, England and Wales and in international legal instruments has developed over time, but more importantly: *why* it has developed in that way.

This study focuses on recent developments around the criminalisation of hate speech and then attempts to explain them by reference to the historical development of hate speech law and the ideas behind it. Recent developments mainly include those after 2001, as that is a moment when the two related discussions about hate speech – around immigration debate and around terrorism/radicalisation – appeared in full force. This is not to say that it will always be possible to draw the line exactly in that year, as many developments were already ongoing or only started some years later. Relating this situation to the historical development of the hate speech laws that already exist (or have just been abolished) makes it possible to detect what the original rationales behind hate speech law were and whether these still obtain, and in the same way.

The historical analysis for the Netherlands and England and Wales largely starts in the 1930s. This period marked the coming into being of the current Dutch hate speech laws and the codification of English public order law in the light of rising fascism. If necessary for the sake of the analysis, older developments are included as well.

4 Richards 1999, p. 1.

The research question of this study is the following:

How have the ideas behind hate speech law in the Netherlands and England and Wales – including the influence of European and international law – developed since 2001 and how can this be explained by reference to their historical origins?

3 DELINEATION

Although we have used the term “hate speech” so far, we have also seen that this research deals with two related issues: first, hate speech proper and second, extreme speech in the context of radicalisation. This work takes a broad approach to both issues and does not provide fixed definitions: it includes any legislation and case law that provides relevant insights into the ideas behind hate speech and extreme speech. This may, for instance, also include general public order or sedition laws. However, for the sake of clarity a short clarification of this study’s use of the terms “hate speech” and “extreme speech” is provided here. In legal literature, hate speech commonly refers to incitement to hatred or discrimination against persons because they belong to a certain group, such as race/ethnicity, religion, sexual orientation or gender. In this work, the term will also include “group defamation” and sometimes also “blasphemy”. Extreme speech is used here to refer to the broad categories of “anti-majority”, subversive speech – often in the context of terrorism, but not necessarily so. This work will often simply use the term hate speech to refer to both issues and will separate the two when necessary.

The research is situated in the areas of criminal law and constitutional law, including the influence of international law. The focus is on criminal law on hate speech, set against the background of constitutional norms and particularly fundamental rights guarantees. It also deals with other constitutional norms that are related to the ideas behind criminalising hate speech, such as party prohibitions. The focus on criminal law is not only necessary to restrict the scope of this thesis, the role of criminal law is also a very particular one. It concerns the power of the state to authoritatively decide which expressions can or cannot be accepted, a power that can be enforced by penalties. Bringing the criminal law to bear on expressions is therefore an “official” declaration that they are out of order in society. International and European law plays an important role in this research because it has a significant impact on Dutch and now also on English law on hate speech: it sets forth rights of individuals which states must respect – and in the field of hate speech, it sometimes includes positive obligations too. This work examines the European and international law and practice relevant to hate speech and focuses on the ideas behind it.

4 METHODOLOGY

This study describes the rationales, the arguments, the ideas behind hate speech law and how these have developed over time in the Netherlands, in England and Wales and in international law. The eventual aim is to explain developments after 2001 with the help of historical analysis: to explain why things have developed the way they have. Because the research focuses on the *ideas* behind hate speech bans, it first sets out the most important underlying reasons for them that can be found in the law and literature of liberal democracies. This part delves into specific rationales such as harm to public order and mental harm but also deeper into underlying ideas of liberalism, tolerance and equality. It analyses existing theories and mutually confronts certain ideas, though the eventual merits and demerits of each are to be assessed by the reader. Subsequently, this work investigates which of these ideas can be found in Dutch, English and international law over time and why this should be so, considering the legal and political culture.

The following sub-questions need to be answered before coming to a synthesis that will answer the research question (chapter VIII):

- Which ideas/theories behind hate speech bans can be found in liberal thought? (chapter II)
- Which of these ideas can be traced in European and international (human rights) law from the 1950s-60s (inception) to today? (chapters III, IV and V)
- Which of these ideas can be traced in Dutch law from 2001 onwards and why, considering the historical development (from the 1930s)? (chapter VI)
- Which of these ideas can be traced in English/Welsh law from 2001 onwards and why, considering the historical development (from the 1930s)? (chapter VII)

The first sub-question will be answered by using sources from legal theory, philosophy and the social sciences that are relevant to hate speech. The analyses in chapters III to VII are conducted using a variety of sources: legislation/treaties, legislative history, case law, policy documents, other legal documents and legal literature. Moreover, the chapters on the Netherlands and England and Wales make use of sources from the fields of history and sociology/political science and sometimes media sources to deal with the underlying layer of political culture.

The study uses comparative legal research between the Netherlands and England and Wales to facilitate and deepen the analysis of both legal systems: comparative research elucidates what is familiar to either system. Eventually, the outcomes of the research should be relevant to the Netherlands and England and Wales. Because this thesis is meant to provide an in-depth historical analysis which includes the law as well as legal and political culture, it is limited to comparison between two jurisdictions. It deals with England and Wales and excludes Scotland and Northern Ireland. Though certain parts of the legal system are common to all parts of the United Kingdom, many parts

– including the law on hate speech – are specific for England and Wales. UK-wide developments will occasionally come up if they are relevant to an understanding of the topic.

The comparison of the Netherlands with England and Wales was chosen because nowadays both jurisdictions appear to deal with similar problems (hate speech and extreme speech in the context of multiculturalism), whereas the legal and political culture – how they deal with fundamental rights, the functioning of democracy – appear to be very different at first sight. It would be interesting to find out how this influences the way they deal with current challenges. Moreover, there is the advantage of familiarity with the language. Extensive analysis of the English/Welsh system as regards hate speech is also relatively rare in Dutch literature, when compared to the attention for the system in the United States.

5 RELEVANCE

Criminal law on hate speech has been researched extensively, both in the Netherlands, England and Wales and on an international level. In the existing literature, it is approached from various different angles: from a legal point of view,⁵ in connection with other discrimination offences and “hate crime”,⁶ on a legal-theoretical level⁷ and combined.⁸ Moreover, there is much literature on specific types of hate speech, such as hate speech and religion,⁹ extreme speech¹⁰ and defamation.¹¹ Recent developments in hate speech law have also been the subject of various analytical studies.¹² However, as yet there is no comparative legal research which analyses the ideas behind these new developments in the light of their historical coming into being. This thesis builds upon existing works but takes a step deeper to systematically place the new developments in an historical framework, focused on the rationales behind the law.

Finding an answer to the problem addressed here is both of theoretical relevance and of relevance for society. Political and scientific interest in the phenomenon of hate speech has greatly increased since 2001. On a *theoretical* level, it appears that the new

5 Weber 2009; Keane 2007; Janssens & Nieuwenhuis 2005; Dankers & Velleman 2006; Fenwick & Phillipson 2006; Feldman 2002; Thornberry 2010.

6 Brants, Kool & Ringnalda 2007; Malik (M.) 1999.

7 Rosier 1997.

8 Hare & Weinstein 2009; Barendt 2005; Coliver, Boyle & D’Souza 1992; Fariior 1996; Nieuwenhuis 2006; McGonagle 2008; Sottiaux 2003.

9 Van Stokkom, Sackers & Wils 2006; Nash 1999; Law Commission 1985.

10 Cram 2009; Ribbelink 2004.

11 Janssens 1998.

12 Brants (C.) 2007; Dommering 2005; Nieuwenhuis & Janssen 2011; Nash & Bakalis 2007; Hare 2006; Goodall 2009; Parmar 2009; Lawson 2008; Sajó 2007.

developments outlined necessitate a re-thinking of the criminalisation of hate speech. The choice of whether and how to deal with hate speech through criminal law presupposes a set of ideas about the relationship between various fundamental rights, about the weight of freedom of expression as opposed to other interests such as public order, and about the underlying demands of democracy, pluralism and neutrality. These ideas can change over time; given that a renewed discussion is taking place on the criminalisation of hate speech, it is important to discover how the new developments can be interpreted with regard to historical notions about criminalising hate speech. Knowledge of the *human rights framework* as well as *legal-comparative* knowledge is particularly necessary because the ideas behind the criminalisation of hate speech are influenced on the one hand by a nation's legal culture and history, and on the other hand by international law. This research may also be of broader relevance for criminal law, as it touches upon relevant topics in the area such as the "risk society" and changing ideas about criminal law from *ultimum remedium* to an instrument of social regulation.

The outcomes of this research are also of relevance to society. Considering the constant flow of headlines about Geert Wilders' prosecution and, in England, the new laws on religious hatred and glorifying terrorism, it needs no explanation that hate speech is high on the public agenda. The question of when to criminalise hate speech is at the centre of public discussion, but the nuances that such a complex topic requires are sometimes lost in that debate. An understanding of what criminalising hate speech is actually about, and how the ideas behind it have developed, is vital. This research may make a contribution to exposing the (de)merits of developments in hate speech law, which will hopefully lead to a better-informed debate and, perhaps eventually, better decision-making.

6 READERS' GUIDE

This study is built as a continuous "story", composed of various parts that all have different structures. This allows each part to be set up in the way that is most easy to understand and that hopefully makes for a more interesting read.

– The theoretical framework (chapter II) should be read first, because it forms the basis for the rest of the work: the ideas set out in this chapter come back in all subsequent chapters. It is structured from broad to narrow, starting with general considerations about liberalism, toleration and neutrality and ending with the particular reasons for prohibiting hate speech.

– Relevant for those interested in the European and international framework are chapters III (European Convention on Human Rights), IV (European Union and Council of Europe other than ECHR) and V (international law, in particular the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination). The way these international instruments have

influenced Dutch and English law is analysed in chapters VI and VII. The ECHR and European Union/Council of Europe chapters are structured thematically per type of speech – for instance, hate speech and extreme speech taken separately. The international law chapter is structured per treaty.

– Those merely interested in the Dutch and English/Welsh frameworks respectively should jump to chapters VI and VII. These are structured per time period in a quasi-chronological order: this makes it possible to mix the legal framework with the analysis of the rationales behind the law and the socio-political background per time period. They start with the developments after 2001, then return to the 1930s to start the historical analysis, and end up in the 21st Century for a wrap-up. Both chapters use textboxes to briefly set out the basic legal framework, so that readers who already have this basic knowledge can skip these parts.

– The synthesis/conclusion in chapter VIII is the most vital part of the study: that is where the analyses from all previous chapters come together and where the research question is answered.

Please note that all translations from Dutch texts are my own.

CHAPTER II

THEORETICAL FRAMEWORK

1 INTRODUCTION

This chapter explains the most relevant theory behind the regulation of hate speech. It is structured as a funnel that goes from the broad (liberal theory) to the specific (justifications for restricting hate speech). Part A provides the general theoretical framework. It first gives a brief explanation of liberal theory, neutrality and toleration (par. 2) and then delves into the relationship between democracy and fundamental rights and the “democratic paradox” (par. 3). Next, the relationship between equality and liberty is set out (par. 4), followed by theories on “liberty-limiting principles” in criminal law (par. 5). Part B delves further into the theory around the specific theme of this book. It deals with freedom of expression (par. 6) and the justifications behind restricting hate speech (par. 7).

Part A: General theoretical framework

2 LIBERALISM, NEUTRALITY, TOLERATION

Before explaining the ideas behind the regulation of hate speech, this part is concerned with the broader political-philosophical theory that underlies it: how do states deal with the fact of pluralism among groups in society, and what are the limits of toleration? These ideas, after all, provide the wider background to the way in which governments deal with hate speech. This study takes liberalism as a point of departure, since it charts Western democracies in which liberalism is the dominant philosophical foundation for law.

Liberalism, as its name suggests, derives from the idea of liberty as a primary political value. It entails a presumption in favour of liberty: the onus is on the state to justify limitations to the liberty of citizens, and the basic task of government is to protect the equal liberty of its citizens.¹ According to Larmore, liberalism has sought to find a solution to two basic problems. First, how to set moral limits to the powers of government; second, how the state should deal with the fact that reasonable people disagree about what constitutes a good life.² The latter – *pluralism* – forms the

1 Stanford Encyclopedia of Philosophy 2010, par. 1.1.

2 Larmore 1990, p. 339-340.

background for liberal theory, which has its roots in the development of religious toleration.³ As a result of the Wars of Religion in the 16th Century, the gradual realisation that no agreement about what constitutes a good life would likely emerge led to the notion that the state should somehow be neutral towards different “conceptions of the good” to enable different groups to live together in peace. While initially focused on religions, this idea of liberal neutrality was later extended to other conceptions about the meaning and value of human life. Conceptions of the good – or “comprehensive doctrines”, as Rawls calls them – can include many different things: ‘we can include under it not only and individual’s tastes and life-style but also his religious faith and ethical ideals (...) Any attempt to say what is important and unimportant in a human life counts as a conception of the good life; it does not matter particularly what the source of that view may be.’⁴ It can thus include religions, but also other moral beliefs and preferences: ‘there are a number of equally reasonable yet mutually incompatible philosophical, moral, and religious doctrines, each of which promotes its own distinctive vision of value, truth, obligation, human nature, and the good life.’⁵ This plurality between conceptions of the good is a permanent feature of modern democratic societies.⁶

Neutrality between different conceptions of the good can be justified on various grounds. One of these grounds is *equality*. As Dworkin holds, ‘[s]ince the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.’⁷ Each person has an equal right to decide how to shape his or her life, and ‘to attribute to some members of the community the authority to decide about what is good for others would inevitably deny equal moral sovereignty for these other people’.⁸ Moreover, *distrust of the state* is also a factor that justifies neutrality: state authorities do not own a moral truth, thus the state should not impose its own conception of the good. Also, rulers may act out of self-interest in imposing certain views against others. Finally, an important reason for neutrality is that conviction cannot be forced: imposing a belief or preference is irrational.⁹

Despite the existence of different ideas about the good life, the liberal state does need a core idea of equal justice; otherwise there cannot be a liberal state. This constitutes a paradox in liberal theory: the state must remain neutral, but cannot be neutral with

3 Kymlicka 2002, p. 230.

4 Waldron 1993, pp. 161, 163.

5 Talisse 2000, p. 443.

6 Ahdar & Leigh 2005, p. 43.

7 Dworkin 1978, p. 127.

8 Sadurski 1990, p. 93.

9 McKinnon 2006, p. 7-8.

regard to the basic principles that underpin liberalism. ‘Political neutrality cannot be neutral between those sets of values which are consistent with the fundamental ideals which provide the initial justification for neutrality (such as toleration and equal moral agency) and those which are not.’¹⁰ Liberal theory has sought to discover how states can keep up a common idea of justice while accepting that people have different conceptions of the good life. Thus ‘[l]iberalism has been the hope that, despite this tendency toward disagreement about matters of ultimate significance, we can find some way of living together that avoids the rule of force. It has been the conviction that we can agree on a core morality while continuing to disagree about what makes life worth living.’¹¹ Rawls’ influential answer to this paradox has been to distinguish between “the right” and “the good”: states should enforce the right while remaining neutral towards different conceptions of the good. Liberalism indeed has a basis in a core morality, but this idea is much less comprehensive than the conceptions of the good with which it aims to deal.¹² It is a limited neutrality which does entail certain ideas about equal respect, but is still the least exclusionary towards different conceptions.¹³ Some theorists have a more perfectionist idea of liberalism, with a thicker moral core. Galston, for instance, holds that ‘the modern liberal state is best understood as energised by a distinctive ensemble of public purposes that guide liberal public policy, shape liberal justice, require the practice of liberal virtues, and rest on a liberal public culture. Liberal purposes, so conceived, define what the members of a liberal community must have in common (...) Liberalism is committed to equality, but it needs excellence. It is committed to freedom, but it needs virtue.’¹⁴

Central to liberal theory is the principle of *toleration*: toleration is indispensable in a system which aims to enable different groups, ideas and practices to coexist despite their conflicting views.¹⁵ Liberals are in disagreement about what such toleration precisely means: does it imply that the activities of illiberal groups shall be tolerated as well?¹⁶ A related matter of discussion is how the state should deal with people who intend to impose their conception of the good upon others, or people whose conception of the good requires harming others. These debates are in turn related to a more general question that is crucial to liberalism: to what extent can a liberal state restrict liberty? We shall return to this question in paragraph II.5 on liberty-limiting principles.

Though liberalism entails a presumption in favour of people’s liberty, it does not necessarily assign a marginal role to the state. Liberal neutrality, based on “equal

10 Sadurski 1990, p. 101 and 198.

11 Larmore 1990, p. 357.

12 Larmore 1990, p. 341.

13 Wolff 2005, p. 119.

14 Galston 1995, p. 3; 11.

15 McKinnon 2006, p. 16

16 Kymlicka 2002, p. 231.

moral agency”, is a mixture libertarian and egalitarian considerations.¹⁷ The role of equality in liberal theory comes back in par. II.4.

3 DEMOCRACY AND FUNDAMENTAL RIGHTS

The previous paragraph was an attempt to set out the demands of liberal neutrality and toleration. We now turn to the demands of a liberal *democracy* in relation to the topic of this thesis. Liberalism aims to protect individuals’ equal liberty; nowadays, guarantees for preserving this liberty are found in the constitutions of liberal states in the form of fundamental rights. This leads to a discussion of how democracy relates to fundamental rights and how “militant” a democracy can be against its “enemies”: the democratic paradox.

3.1 Conceptions of democracy and the role of fundamental rights

Democracy implies a particular relationship between majority decisions on the one hand and individual rights and minority interests on the other. This relationship has two different dimensions. First, the relation majority-minority and the legitimacy of decisions – how are decisions taken by the majority accepted as legitimate by the minority that did not take them? Second, if democratic decisions are decisions taken by the majority of the people, what limit is there to these decisions – how to prevent such decisions violating the fundamental rights of individuals?

3.1.1 *Majority decision-making v. the interests of minorities*

As to the first dimension, Lijphart distinguishes between the “majoritarian model” and the “consensus model” of democracy:

Defining democracy as “government for and by the people” raises a fundamental question: who will do the governing and to whose interests should the government be responsive when the people are in disagreement and have divergent preferences? One answer to this dilemma is: the majority of the people. This is the essence of the majoritarian model of democracy. The majoritarian answer is simple and straightforward and has great appeal because government by the majority and in accordance with the majority’s wishes obviously comes closer to the democratic ideal of “government by and for the people” than government by and responsive to a minority. The alternative answer to the dilemma is: as many people as possible. This is the crux of the consensus model. It does not differ from the majoritarian model in accepting that majority rule is better than minority rule, but it accepts majority rule only as a minimum requirement: instead of being satisfied with narrow decision-making majorities, it seeks to maximise the size of these majorities.¹⁸

¹⁷ Sadurski 1990, p. 138.

¹⁸ Lijphart 1999, p. 1-2.

Whereas Lijphart initially stressed the disadvantages of the consensus model, in his later work he changed his mind and advocated the consensus model as a more attractive model.¹⁹ According to the “late” Lijphart the consensus model is better capable of representing minority interests: it is more inclusive. Other authors hold that the majoritarian model – as effectuated by a first-past-the-post electoral system (such as in the United Kingdom) – is better capable of preserving *accountability* than the consensus model (which is linked to the electoral system of proportional representation): it gives people a clear idea of which party can be identified with which policies and it allows the opposition to “throw the rascals out”.²⁰ Lijphart has argued that in reality, this distinction is not so clear-cut.

One aspect of majoritarian electoral systems is that, because they are less inclusive of minority interests, they also tend to leave less room for *extreme* minorities. In a system of proportional representation it is easier for small parties to gain access to parliament; indeed, the *share* of the votes that radical parties receive is mostly similar to that in majoritarian systems, but in the end they are twice as successful in gaining *seats* under proportional representation systems.²¹ This makes it easier for radical parties to gain ground in consensus democracies: ‘through winning even a handful of parliamentary seats, radical right parties thereby gain legitimacy and a public platform which they can use to consolidate their power and gradually expand their influence.’²²

Notwithstanding the differences between the two models, it is widely accepted that any liberal democracy demands not just majority rule but also a certain respect for minority views.²³ This is related to the idea of democracy as encompassing the “relativity of truth”: decisions taken by a democratic majority are not viewed as absolute truths, but rather as “provisional truths”. Once a minority succeeds in becoming the majority or part of the majority, the situation may change.²⁴ Therefore minority views should be given due regard in decision-making, it is thought. As Bonger stated: ‘[d]emocracy, in accordance with its liberty principles, is rather geared towards relativism, that is, acknowledging the relativity of one’s own opinions – in this regard it is fully in accordance with modern science. Tolerant towards others, a tendency to listen to other arguments, averse of imposing one’s opinion upon others, eager to convince others by argument – those are principles of democracy.’²⁵ The notion of relativity of truth also indicates why free discussion and debate are important in a democracy. However, such

19 Lijphart 1968; Lijphart 1999.

20 Andeweg 2001, p. 122.

21 Norris 2005, p. 112-114.

22 Norris 2005, p. 121.

23 Burkens, Kummeling, Vermeulen & Widdershoven 2006 p. 196.

24 Burkens, Kummeling, Vermeulen & Widdershoven 2006, p. 27.

25 Bonger 1934, p. 87.

relativity does not have to imply complete value relativism: liberal democracy is not relativistic towards the value of equal liberty itself.

3.1.2 *Democracy v. fundamental rights*

The second dimension of the majority/minority relationship has to do with democratic lawmaking versus individual liberty. In a democracy, where decisions are taken by majority vote, can a majority of citizens decide to cast away the fundamental rights of a minority of the people? John Stuart Mill already warned against the possibility of “tyranny by the majority” against dissident views. Nowadays it is widely accepted that setting limits to majority decisions is an inherent part of democratic thought itself. Dworkin, for instance, distinguishes the “majoritarian premise” from the “constitutional conception of democracy”; while the majoritarian premise supposes that it is always unfair if the political majority cannot have its way, in a constitutional conception such majority decision-making must be subject to certain democratic conditions.²⁶ Post notes that

[d]emocracy is distinct from popular sovereignty and majoritarianism because democracy is a normative idea that refers to substantive political values, whereas popular sovereignty and majoritarianism are descriptive terms that refer to particular decision-making procedures. Essential to democracy are the values that allow us to determine whether in specific circumstances particular decision-making procedures are actually democratic.²⁷

The protection of a minimum of fundamental rights in political decision-making is indispensable to liberal democratic states, even though this implies the exclusion of certain basic values from the normal democratic process. Those rights are considered to be exempted from majoritarian pressures and utilitarian arguments such as cost-benefit analyses.²⁸ Though most liberal authors agree that fundamental rights are central to a liberal conception of justice, they have different ideas about the justification for those rights: on pragmatic grounds, political grounds or for substantive moral reasons.

In Habermas’ view, human rights are not metaphysical moral norms to which democratic lawmaking is subordinated. He holds that popular sovereignty and human rights mutually presuppose each other: the relation between the two ‘consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalised (...) The substance of human rights then resides in the formal conditions for the legal institutionalisation of those discursive processes of opinion- and will-

²⁶ Dworkin 1996, p. 15-17.

²⁷ Post 2007, p. 332.

²⁸ Mahoney 2008, p. 153.

formation in which the sovereignty of the people assumes a binding character.²⁹ The importance of human rights is thus their role of guaranteeing that democratic process duly functions: whether legislation is legitimate shall be judged by the communicative process – governed by rules of rational discussion – in which it has been formed. Habermas’ conception of democracy can be characterised as procedural, because the democratic quality of decisions depends on the procedure followed.³⁰ But this procedural conception does imply that human rights are indispensable: it needs no explanation that freedom of expression is vital to Habermas’ conception of human rights (although it also includes non-political rights).

Dworkin, on the other hand, has a more substantive vision of democracy.³¹ In his constitutional conception of democracy, the defining aim of democracy is ‘that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect (...) Democracy means government subject to conditions – we might call these the “democratic” conditions – of equal status for all citizens.’³² In order to treat people as “moral members of the community”, who are bound by the decisions of that community, government must be subject to democratic conditions: citizens shall have a *part* in any collective decision, a *stake* in it, and *independence* from it.³³ Having a *part* in collective decisions means that people have the opportunity to make a difference; this requires not only universal suffrage but also freedom to participate in public opinion formation. The second condition, *stake*, implies equal concern for every member’s interests in the decision-making process including minorities. Finally, *independence* for Dworkin means that individuals can make their own moral judgments so that they can regard themselves as part of the community, even though they may not endorse the collective decisions it takes. The community cannot force what the individual should think or say, what values or ideals should guide him.³⁴ Freedom of conscience, religion and belief as well as freedom of expression are essential in this view.

3.2 The democratic paradox

Criminal offences on hate speech can be related to states’ conception of “militant democracy”. History has shown how groups can make use of the freedoms that liberal democracy offers – freedom of expression, freedom of association and other liberties – to undermine democracy and those freedoms themselves (with Nazi Germany as the

29 Habermas 1996, p. 104.

30 Sottiaux 2004, p. 49.

31 See Sottiaux 2004 for a comparison of Dworkin’s and Rawls’ conceptions of democracy.

32 Dworkin 1996, p. 17.

33 Dworkin 1996, p. 24.

34 Dworkin 1996, p. 25-26.

most well-known example). This presents liberal democracies with a dilemma: to what extent can they limit people's liberties for the sake of maintaining democracy and fundamental rights? The paradox is that those rights are in turn essential for a well-functioning democracy. The question thus comes up whether a democracy can ever withhold its democratic rights without giving up on itself.³⁵ The answer of many states to this democratic dilemma has been to adopt a militant democracy in their laws and/or Constitution: this gives democratic states the right – or even the duty – to defend themselves against the “enemies of democracy”. This idea originates from the interwar period, when many states contemplated the necessity of a militant democracy as a response to upcoming totalitarian ideologies. Most present-day liberal democracies have adopted some form of militant democracy, some less strident than others.³⁶

The extent to which democracy is militant depends on what is meant by democracy: what should be protected exactly?³⁷ Some argue that the only thing that needs to be defended is the process of majority formation: that states should only target groups that threaten to do away with democratic procedures as soon as they come into power (that would make it impossible for minorities to become a majority again).³⁸ At the other end of the spectrum is substantive militant democracy (the term “militant democracy”, as it is commonly used, mostly refers to this version), which regards democracy as a system that entails certain *values*. As democracy is unthinkable without fundamental rights, the idea is that these rights should be protected. In this model, groups that threaten to do away with fundamental rights can legitimately be restricted in their rights – even if they act in a non-violent manner. The democratic paradox is thus very apparent in this substantive model. Yet a procedural model of democracy – as proposed by Habermas – can also adopt a substantive militant democracy position which protects fundamental rights and not only the democratic “competition for power”, as Sottiaux argues.³⁹ After all, in Habermas' model a real democratic procedure cannot exist without certain human rights.

Accepting that a democracy can legitimately restrict the liberties of individuals or groups in order to preserve fundamental rights, raises the question how to identify the “enemies” of democracy. Militant democracy involves the risk of overreaction: is there a real risk to democracy or fundamental rights, or do states limit the rights of individuals or groups because they consider their views to be immoral or offensive?⁴⁰ As militant democracy is itself a response to totalitarianism, it would seem logical to focus on groups that advocate *totalitarian ideologies*. Boventer identifies fascism,

35 For a conceptual discussion about this question, see Hong 2005.

36 Boventer 1985.

37 See Sottiaux 2004.

38 Hong 2005, p. 150-155.

39 Sottiaux 2004, p. 55-56.

40 See Mouffe 2005, p. 76.

national-socialism and communism as militant ideologies that are incompatible with liberal democracy: systems with claims of exclusive truth that are used to suppress the opposition and to totally direct the lives of citizens.⁴¹ He distinguishes between totalitarian Marxism-Leninism in Eastern Europe and the non-totalitarian communist/socialist groups in Western Europe, but in practice several Western European states have been quite militant against the latter category as well. This indicates that states should be wary of automatically identifying certain movements as enemies of democracy and thus limiting their adherents' rights. Militant democracy arguments can easily be misused by the state to suppress unpopular groups or unconventional ideas. The risk of an overenthusiastic militant democracy is all the more pressing nowadays, with the threat of religiously inspired terrorism being all too easily confused with fundamentalist religious ideas.

Even if one were able to identify democracy's enemies, this still leaves the question at which stage and how to defend democracy against them. One approach is to take the risk of violence as a criterion for limiting the democratic rights of individuals or groups – a “clear and present danger” test, such as is applied in the United States. Other states, such as Germany, have a more preventive militant democracy: this emanates from the experience of extremist groups entering the democratic system in a non-violent manner, becoming repressive only afterwards.⁴² The resistance capability of a country's democratic system can play a role here:⁴³ if stability is so high that there is no great risk of democracy being overthrown, then harsh measures can be disproportionate. One might argue that this particularly lacks legitimacy where small fringe groups are concerned. However, the opposite can be argued too: that the more popular extremists become, the less legitimate it is to suppress them. As soon as there is a risk that antidemocratic powers become a majority, democratic values are apparently no longer shared within society at large.⁴⁴ In that case, defending democratic values will become the affair of a minority – which in turn seems undemocratic.

3.2.1 Terrorism, democracy and fundamental rights

The democratic paradox comes to the fore especially in the context of terrorism, a method which is sometimes called the antithesis of democracy but to which liberal democracies are particularly vulnerable because of the freedoms they seek to protect. As Sottiaux argues, ‘the dilemma evidenced in the current fight against terrorism is indeed no more than a contemporary manifestation of the traditional dilemma faced

41 Boverter 1985, p. 17

42 Boverter 1985, p. 243-246

43 AIVD 2004, p. 46.

44 Van der Woude 2009, p. 67.

by militant democracies: how can a society defend itself against its “enemies” without destroying the basis and justification of its own existence?”⁴⁵

Terrorism can be regarded as a combination of violence and propaganda: ‘violence aims to achieve behavioural change through force. Propaganda aims to do the same, through persuasion. Terrorism is a combination of both.’⁴⁶ Terrorism goes against the core democratic principle of resolving conflicts by peaceful deliberation and it can contravene the fundamental rights of citizens to live in freedom. The question, then, is how liberal states should deal with the risk of terrorism in terms of limiting essential liberties, such as freedom of expression. According to Ignatieff, a particular risk here is the natural tendency of states – as proved by historical experience – to give prevalence to the rights of the majority over the rights of individuals or minorities when confronted with terrorist threats.⁴⁷ After all, in the end people’s freedom depends on their security. Ignatieff argues that ‘when a national community is attacked, it naturally favors majority interests over minority rights, and its response to threat draws on everything – shared memory and common symbols as well as constitutional traditions that assert these majority interests.’⁴⁸ This may explain why it is tempting for states to overreact to terrorism in the context of freedom of expression and association by restricting radical expressions which go against the common values or majority interests, such as denouncing the democratic system.

Several liberal democratic states try to prevent terrorist actions by interfering in the preceding process of radicalisation of individuals. The term “radical”, however, means no more than “striving for far-reaching changes in society”, which is not violent or illegitimate *per se*. Radicalisation is commonly defined as a process leading to extremism: a growing willingness to support extremist viewpoints. Terrorism is mostly preceded by a radicalisation process, but radical ideas certainly do not necessarily lead to violence.⁴⁹ Extremism – a term often equated with radicalism – is a collection of diverging political ideologies which reject the existing democratic order and which include the conviction that violence is unavoidable to reach the eventual goal.⁵⁰ In religious *fundamentalism* there are certain radical strands, but in general fundamentalism merely means reverting to traditional religious views in order to counter erosion of one’s religion by outsiders.⁵¹

45 Sottiaux 2008, p. 6.

46 Schmidt, De Graaf, Bovenkerk, Bovenkerk-Teerink & Brunt 1982, p. 9.

47 Ignatieff 2004, p. 75.

48 Ignatieff 2004, p. 75.

49 Bovenkerk 2010, p. 6.

50 Buijs, Demant & Hamdy 2006, p. 18-19.

51 Buijs, Demant & Hamdy 2006, p. 28.

It is often assumed that individuals move to extremism through a gradual process of ascending stages in a “pyramid”, with different levels of political commitment: from the base of those who sympathise with an extreme cause, to the group that justifies radical action, to those engaging in illegal and/or violent action. This view assumes that ‘individuals who are not succeeding with legal and nonviolent political action will, if they care enough about their cause, escalate to illegal and violent political action. Thus the difference between activism and radicalism is only a difference in intensity of commitment.’⁵² Counterterrorism policies often use such “pyramid models” to assess processes of radicalisation. However, besides the risk of creating a thought police when acting against the lower part of the pyramid,⁵³ experts have questioned whether this view of ascending stages towards radicalisation is correct at all. Research suggests that radical groups in the lower part *compete* with their extremist counterparts on the top (note that the terminology used in this quote is different): ‘activism and radicalism (*sic*) can be competing responses to a perceived need for political change (...) radicals disagree with activists about how best to bring the desired change.’⁵⁴ This suggests that banning radical ideas that do not go accompanied by violent inclinations is not productive: ‘[t]he transition from activism to radicalism is often a response to perceived injustice inflicted by state security forces. Banning a group that advocates radical ideas but has not engaged in illegal political action may be seen as injustice thereby increasing group identification, and moving more individuals from activism to radicalism.’⁵⁵ A study of twenty-one Salafī youngsters in the Netherlands⁵⁶ found that supporters of the various strands of Salafism – (1) political, (2) a-political/purist and (3) *jihadi*/extremist – are in mutual conflict at an ideological level; Buijs thus suggests that the first two non-violent strands may provide a barrier against the violent *jihadi* strand, rather than a springboard towards it.⁵⁷ Others hold instead that moving from activism to extremism is not so much a question of ideology but rather a social process, in which group pressure plays a big role.⁵⁸ In any case, censorship of radical speech may still be counterproductive as it adds to repression and stigmatisation of the minority groups concerned.⁵⁹ After all, the impossibility of freely discussing their concerns has historically been an important motive for people to commit terrorist actions.

52 Moskalenko & McCauley 2009 (contesting this view), p. 255.

53 De Graaff 2008, p. 130.

54 Moskalenko & McCauley 2009, p. 255.

55 Moskalenko & McCauley 2009, p. 257.

56 Buijs, Demant & Hamdy 2006a.

57 Buijs 2009, p. 434.

58 Olsen 2009.

59 See Choudhury 2009.

3.2.2 *Extreme politics v. rational politics and public discourse*

These considerations raise the question how liberal democracy should deal with radical or even extremist opinions in public discussion. Viewed from a contract theory, in which democratic debate is regarded as a ‘discursive agreement between citizens who reciprocally recognise one another as free and equal’ (Habermas), one may argue that some opinions cannot be admitted to public debate because ‘inherent to extremist speech is (...) the very denial of such a recognition.’⁶⁰ Yet if a state refuses to allow them to speak out, the democratic majority refuses to grant mutual recognition to them and thus unilaterally terminates the “contract”.⁶¹

In this regard Rawls has postulated the idea of “public reason”: this means that in a liberal society citizens shall conduct public debate by invoking arguments and justifications that are equally accessible, and in principle, acceptable to all reasonable citizens. When citizens invoke their “comprehensive worldviews” – such as religion – to argue their case, they must accompany such views by public reasons that support the same idea; otherwise reasonable citizens who do not share the same comprehensive doctrines could not understand the arguments. Rawls’ conception, however, excludes many voices from public debate. Theorists have therefore criticised his view: ‘the hard cases are precisely those where a social group is not reasonable in the Rawlsian sense: that is, where it refuses to accept the public-private dichotomy or it wants to insist in the truth of its comprehensive doctrine in the public sphere.’⁶²

“Deliberative democrats” have sought to come to a wider sphere of public debate in which a wider degree of pluralism is allowed.⁶³ In this view, conceptions of the good are not so easily excluded from public debate as in Rawls’ conception. Many deliberative democrats base themselves on Habermas’ ideas about procedural legitimacy (see par. II.3.1.2): democracy demands that people are really *heard* in the democratic process in order to accept the legitimacy of decisions. However, since Habermas’ conception is focused on *rational* deliberation guided by rules of discourse, critics still find this conception not inclusive enough. These “difference democrats” claim that deliberative democrats still exclude minorities and marginalised groups, whose voices seem less rational to the dominant majority than the voices they are used to hearing.⁶⁴ In their view, rational public debate is influenced by power relationships, where the majority silences some voices over others. Whether deliberation can actually take into account minority voices, may depend on a state’s political culture: in a consensual democratic system, deliberative democracy may work more smoothly

60 Hong 2005, p. 71

61 Hong 2005, p. 147.

62 Malik 2009, p. 108.

63 Bovenkerk 2009.

64 Bovenkerk 2009, p. 8.

because incorporating minority interests is already an integral part of such a system.⁶⁵ Attention to power differences in public debate may thus be more warranted in a majoritarian system: ‘[i]f democracy is to help promote justice for these groups, rather than leaving them subject to the “tyranny of the majority”, then democracy will have to be more deliberative.’⁶⁶ (In this discussion, however, one needs to keep in mind the distinction between “entrance rules of public discussion” and ethical “rules of behaviour in public discussion”: the former are proscriptive, legal rules and the latter are non-enforceable suggestions that contribute to democratic deliberation.⁶⁷ Discussions about public reason and deliberative democracy tend to focus on the ethical rules of discourse instead of coercive legal rules.)

The so-called “agonists” have put forward a different kind of critique of Rawlsian liberalism. They challenge the liberal idea that the legitimacy of a political regime relies on a consensus among rational or reasonable citizens (a “shared conception of justice”, as Rawls calls it) and hold instead that there can only be real pluralism if politics is contestatory.⁶⁸ Indeed, according to agonists there is no shared conception of justice that all can agree on – there will never be a perfect solution to the dilemmas of democracy and liberties. ‘If one adopts an agonistic conception of the political as contestation, it is clear that Rawls and Habermas attempt to depoliticise – to place beyond contestation – public institutions and practices, a set of basic democratic procedures, at least with regard to the principles according to which they are judged.’⁶⁹ Agonists also assume a small set of core procedural values, but recognise no core substantive values that prescribe the content of political debate.⁷⁰

Mouffe actually challenges the very idea of rational dialogue, which is central to Habermas’ ideas: she holds that there are limits to the consensus that can be reached in a democracy, because of the large disagreements that exist. According to Mouffe, one should ‘acknowledge the dimension of power and antagonism and their ineradicable character’ in democracy and public discourse.⁷¹ The fundamental question of democratic politics is not how to arrive at a rational consensus without exclusion: this is impossible. ‘Politics aims at the creation of unity in a context of conflict and diversity; it is always concerned with the creation of an “us” by the determination of a “them”. (...) What is at stake is how to establish the us/them-discrimination in a way that is compatible with pluralist democracy.’⁷² The “other” should not be seen as an enemy to be destroyed, but as an adversary with ‘whose ideas we are going to struggle

65 Bovenkerk 2009, p. 11.

66 Kymlicka 2002, p. 292.

67 Fennema & Maussen 2000, p. 382.

68 Fossen 2008, p. 376.

69 Fossen 2008, p. 384.

70 Malik 2009, p. 111.

71 Mouffe 1999, p. 752.

72 Mouffe 1999, p. 755.

but whose right to defend those ideas we will not put into question (...) An adversary is a legitimate enemy, an enemy with whom we have in common a shared adhesion to the ethico-political principles of democracy. But our disagreement concerning their meaning and implementation is not one that could be resolved through deliberation and rational discussion, hence the antagonistic element in the relation.⁷³ According to Mouffe, '[c]onsensus is needed on the institutions constitutive of democracy and on the "ethico-political" values informing the political association – liberty and equality for all – but there will always be disagreement concerning their meaning and the way they should be implemented.'⁷⁴ Democracies should not try to suppress conflict by authoritarian orders, but instead make room for dissent and for institutions to channel dissent, she holds. This implies that extreme viewpoints should be left as much room as possible. Mouffe blames the "consensus mode of politics" in Europe for the emergency of right-wing populism: the differences between traditional democratic parties have diminished and populists have made use of the absence of agonistic debate to create new "we/they" distinctions.⁷⁵

4 FUNDAMENTAL RIGHTS: LIBERTY AND EQUALITY

In a liberal democracy, fundamental rights demonstrate the contrast between the limited character of governmental authority and the liberty of the people.⁷⁶ The government always has to justify infringements upon people's liberty, and such infringements should be specific and limited. The people, on the other hand, do not have to justify how they use their liberty, or why.

Some propose that the value of liberty conflicts with the value of equality, and one of the main tasks of a liberal democracy, is to balance those competing values against each other. As the problem of hate speech involves both values, it is important to delve into this a little further. Dworkin argues that instead of being competing values, equality is actually the *basis* for particular liberties. According to Dworkin, Mill's conception of liberty – on which many political philosophers base themselves – refers to liberty as *independence*. This means 'the status of a person as independent and equal rather than subservient' – which must be distinguished from liberty as license, which means 'the degree to which a person is free from social or legal constraint to do what he might wish to do'.⁷⁷ The latter does not distinguish between different forms of behaviour: in this model, a person's liberty is as much compromised by prohibiting murder as by prohibiting defamatory speech. Thus, laws attacking liberty are always

73 Mouffe 1999, p. 755.

74 Mouffe 2005, p. 31.

75 Mouffe 2004, p. 71.

76 Burkens, Kummeling, Vermeulen & Widdershoven 2006, p.123.

77 Dworkin 1977, p. 262.

balanced against some competing value (such as the liberty of others or equality) – arguing for liberty implies that other values are found less important. Liberty as independence, however, *is* discriminate towards the subject of legal constraint: laws against murder, for instance, may be necessary to protect the political liberty of citizens generally. Liberty as independence is thus compatible with other values. According to Dworkin, ‘Mill saw independence as a further dimension of equality; he argued that an individual’s independence is threatened, not simply by a political process that denies him equal voice, but by political decisions that deny him equal respect.’⁷⁸

Dworkin criticises the liberal idea that ‘interfering with a man’s free choice to do what he might want to do is in and of itself an insult to humanity, a wrong that may be justified but can never be wiped away by competing considerations’.⁷⁹ He also criticises the idea that there is a “right to liberty”: after all, in this sense the right to liberty is ‘something hardly worth having at all’. According to Dworkin, the idea of a right to liberty does a disservice to political thought as it creates a false sense of conflict between liberty and other values. Also, ‘the idea provides too easy an answer to the question of why we regard certain kinds of restraints, like the restraint on free speech or the exercise of religion, as especially unjust.’⁸⁰ For Dworkin, individual liberties are grounded in *equality*, not liberty: political morality requires that the government has to treat people with *equal concern and respect*. This is the “liberal conception of equality”. It means that all individuals have the right to equal concern and respect in political decisions about how goods and opportunities are to be distributed – even though in the final decision, one’s interests in certain goods may still be outweighed by other interests. Being treated with equal concern and respect by the government is essential for making use of one’s liberties, for making meaningful choices. ‘No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community – without it government is only tyranny (...).’⁸¹

This does not mean, however, that conflicts between equality and liberties – such as freedom of expression – are automatically solved. If someone had the freedom to express insulting statements against a racial group because silencing him would deny him an equal voice to express his ideas, the other side of the coin is still that members of the attacked group may feel that it interferes with *their* equality: allowing such ideas to thrive in public debate could infringe on their right to equal concern and respect. Apparently, equality is a complex concept that can lend itself to various interpretations.

78 Dworkin 1977, p. 263

79 Dworkin 1977, p. 268.

80 Dworkin 1977, p. 271

81 Dworkin 2002, p. 1.

4.1 Equality: vulnerable groups and identity politics

That equality is a complex issue comes to the fore in the debate about formal and substantive equality. Roughly speaking, formal equality requires that the government shall treat every person equally before the law; substantive equality requires in addition that the government guarantees the effective realisation of equal rights for everyone. It requires the government to actively influence social relations to end *de facto* inequality.⁸² Both aspirations are impossible to realise in an absolute sense – even when everybody is equal before the law, cases are hardly ever completely equal. In turn, differentiations are often made on the grounds of group characteristics and thus involve generalisations, because it is almost impossible to treat every person uniquely before the law.⁸³

A possible reason for restricting hate speech is to protect particular vulnerable or disadvantaged groups against discrimination, which finds its basis in a substantive equality conception:

Discrimination was originally about injurious and degrading treatment and subordination on the grounds of negative stereotypes and prejudices. The exclusion, degradation or injury that those people were – and still are – subjected to, has everything to do with the existence of such stereotypes. It is about “we” (the so-called “normal people”) versus “they” (those who are not allowed to participate, because they are allegedly different and inferior, the “minority”).⁸⁴

That protection against discrimination requires not only countering discriminatory *actions*, but also discriminatory *speech*, is not self-evident. Some groups obviously have a history of exclusion and subordination, but one may question whether laws protecting particular groups do not actually stigmatise them even more. Minow describes the dilemma involved in such “identity politics” as follows: “[u]sing policies to remedy group-based harms makes the group identities seem all the more real and entrenched, but denying the significance of group-based experiences leaves legacies of harm and stereotyping in place.”⁸⁵ Laws designed to deal with specific groups have the downside of fixing group identities, of assuming that the sociological traits of a person per definition match that person’s interests. This can stress differences and reinforce victimisation: special group-based policies make it more likely that both minorities and the majority attach increased importance to group identities and that the majority will feel its own identity to be threatened.⁸⁶ Heinze argues that hate speech bans are inherently discriminatory, as they always protect certain categories – on the

82 Holtmaat 2004, p. 68.

83 Loenen 1998, p. 12.

84 Holtmaat 2004, p. 86.

85 Minow 1997, p. 9.

86 Sniderman & Hagendoorn 2007, p. 6.

grounds of race, religion, or gender, for instance – and fail to protect other groups that may need it more – such as on the grounds of physical appearance (obesity) or class: ‘[i]t is no argument to say that racism, religious conviction, or sexism have distinctly fraught histories, since prejudices against actual or perceived mental or physical impairments are ancient, directed against small and vulnerable minorities (at least, in the numerical sense of that term), and have often laid the ground for the most brutal persecution, from freak shows to forced sterilisation to concentration camps. Insofar as those individuals do not form communities like racial, ethnic or religious ones, that difference only underscores their isolation and vulnerability.’⁸⁷

In this respect, the issue of *asymmetrical* group protection arises. Are there reasons for limiting the reach of hate speech bans to minorities – for instance, to protect only minority religious groups and not the dominant religious group? It could be argued that asymmetrical protection violates the principle of equality, especially when it occurs in the context of criminal law: it does not treat people as equal before the law. But there are reasons to justify special treatment of subordinated groups: ‘when power relations in society are unequal, and there is a history of persecution of the less powerful group by the more powerful group, then expressive attacks on the less powerful group will entrench prejudices and thereby continue a cold war of persecution.’⁸⁸ Some have argued that powerless minorities are “unable” to discriminate against the dominant group, because such utterances are without effect: a group can only effectively stigmatise another group – and enter the minds of its members – if it is in a position powerful enough to do so.⁸⁹ However, research into the effects of hate speech on victims found that negative effects – such as feeling excluded and disqualified – were felt not only by members of relatively powerless minorities, but also by members of the majority or minorities in a strong position.⁹⁰ Matsuda argues that the harm is still of a different degree, because dominant group members are ‘more likely to have access to a safe harbor of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for members of groups not historically subjugated.’⁹¹ Nevertheless, keeping in mind that constructions of “disadvantaged” versus “dominant” groups are dynamic, not static, is it not then inevitable that the law protects just those groups who do no longer need protection, or fails to protect those groups that need it most?⁹² Whether a group is a minority is determined by the context: ‘in reality it is mostly the majority that makes a minority, because it has the power to determine who is being excluded.’⁹³ Minow argues that

87 Heinze 2006, p. 566.

88 McKinnon 2006, p. 132.

89 Elias & Scotson 1976, p. 13-14.

90 Vriëlink 2010, p. 396.

91 Matsuda, Lawrence, Delgado & Williams Crenshaw 1993, p. 39.

92 Vriëlink 2003.

93 Heirbaut 2002, p. 19.

‘[b]eing assigned to categories and choosing to embrace a category involves complex interactions among people, historical settings, and events. No clear answer can be found to resolve who is in and who is out of any given category once we compare how people identify themselves, how groups identify their members, and how nonmembers attribute traits to others.’⁹⁴ Ian Buruma thus concludes that ‘because freedom of expression cannot be seen separate from all kinds of variables, it is impossible to wield exactly the same standards for everyone – and because everybody needs to be treated [as] equal before the law, legislation is seldom the best way to protect citizens’ dignity and counter discrimination.’⁹⁵

4.2 Changing modes of discrimination

With the increase in anti-Islam and anti-Muslim expressions in the past decade, much discussion has centered on the question of whether hate speech on the grounds of *religion* should be treated in the same way as hate speech on the grounds of *race* – and how to differentiate hate speech against *people* from defamation of *religions*. This is related to the changing modes of discrimination in society: several authors have noted that racism on biological grounds has made way for “new racism”,⁹⁶ “cultural racism”⁹⁷ or “culturism”,⁹⁸ where normative distinctions are made on the grounds of culture instead of physical differences. “Culture”, then, is viewed essentialistically: as a fixed entity that is the cause of all problems.⁹⁹ In fact, it may be questioned whether an “old racism”, purely on biological grounds, ever existed: indeed, “race” as such is a cultural construct.¹⁰⁰ Anti-racism movements have emerged in reaction to both Apartheid in South-Africa and anti-Semitism, which is a mixed form of racism. In all those racisms, the common feature is that ‘the population is endowed with fixed, unchanging and negative characteristics’.¹⁰¹

This may, on the one hand, be related to a *fear* of “strangers”, as was often the case with anti-Semitism: the idea that people of other “cultures” are untrustworthy and inclined to domination and violence was apparent there. This strand is also present in anti-Muslim discourse of today. On the other hand, racist attitudes are often related to the idea of *superiority*: nineteenth-century racism started with the idea of primitive uncivilised Others, while visible exterior differences gave the ideas of superiority extra force. ‘Western European nations were represented as having attained the peak of this development while “primitive” societies (...) represented a backward, unchanging,

94 Minow 1997, p. 20.

95 Buruma 2010.

96 Barker 1981.

97 Modood 1997, p. 4.

98 Schinkel 2007, p. 148.

99 Schinkel 2009.

100 Schinkel 2007, p. 311.

101 Richardson 2004, p. 294.

simple form of human existence which the West had long left behind'¹⁰² – an idea which is also apparent in current discourse about Islam.

Racism has come to couple normative differences to biological traits, but it actually consists of both “Blut” and “Boden” theory: biological and “national-territorial” ideas. While the former have lost ground, the coupling of normative differences to territory lives forth in culturalist discourse, through the idea that the dominant national culture is superior to other cultures.¹⁰³ It is based on essentialised thinking about perceived differences, whether physical or cultural: everything an individual does is explained by his or her culture, but at the same time an individual cannot change his or her culture in this view – culture is immutable.

Moreover, racism, culturism and other forms of prejudice should be viewed in the light of power relationships in society, with dominant groups trying to preserve their privileged positions by maintaining we/they relationships in which the out-group is regarded as inferior and denied access to the activities of the powerful group.¹⁰⁴ In this view, physical, cultural or other characteristics do not come prior to the forming of power relationships but are rather a sign of recognition. The stereotypes that accompany these relations then become so much part of people’s common sense that they start looking for “facts” to rationalise discriminatory behaviour.

This does not, however, take away the problem that hate speech on the grounds of religion or culture is more difficult to deal with than hate speech focused on physical characteristics or ethnic descent. This is because culture and religion involve various practices, ideas, ways of life and powerful institutions, thus a wide range of issues that are rightly open to criticism in a democratic society – and that have indeed increasingly become grounds for disagreement. While “Islamophobia” was commonly used in the 1980s and 1990s to refer to a new form of racism against Muslims, it is now increasingly criticised as being focused on religion itself instead of its adherents.¹⁰⁵ Indeed, the term ‘challenges the possibility of dialogue based on universal principles. (...) It suggests (...) that the solution lies in greater dialogue, bridge-building, respect for the other community: but this inevitably runs the risk of denying the right, or possibility, of criticisms of the practices of those with whom one is having the dialogue. Not only those who, on universal human rights grounds, object to elements in Islamic or other traditions and current rhetoric, but also those who challenge conservative readings from within, can more easily be classed as Islamophobes.’¹⁰⁶

102 Pickering 2001, p. 54.

103 Schinkel 2007, p. 316-318.

104 See Elias & Scotson 1976; Richardson 2004.

105 See Meer & Modood 2009, p. 340.

106 Halliday 1999, p. 899.

At the same time criticism of religion or culture can easily be used as a pretext to express hatred against *individuals* and/or have the effect of inciting to violence or discrimination against them. The essentialistic way of thinking about culture and religion causes certain negative characteristics – “discriminatory towards women”, “criminal”, “terrorists” – to be ascribed to everyone who is thought to belong to a certain group (“Muslims”, “allochtonen”¹⁰⁷). Indeed, an EUMC report on Islamophobia in Europe made clear that ‘prejudice and distrust appeared to extend to all individuals who somehow looked like Muslims, irrespective of whether or not they were indeed Muslim.’¹⁰⁸ The argument is often made that hate speech on the grounds of race is worse than hate speech on the grounds of religion, because race is an immutable characteristic. The idea behind this is that discrimination on the grounds of facts that one cannot change or escape is particularly unfair.¹⁰⁹ However, if individuals are looked upon in an essentialistic manner on the grounds of an inflexible view of their presumed culture or religion, then it becomes almost as difficult to escape from these views. Moreover, one may question ‘whether it is fair for society to impose a penalty upon members of a group who do not renounce their particular conduct, values, or set of beliefs.’¹¹⁰ Accordingly, the distinction commonly made between hate speech on the grounds of colour/descent and hate speech on the grounds of culture/religion is more diffuse than it seems at first sight.

5 LIMITATIONS TO LIBERTY

To what extent can a liberal state set limits to the liberties of its citizens, considering the presumption in favour of liberty? As was explained earlier, the character of fundamental rights is such that they cannot be overridden by utility arguments – by saying that society is better off as a whole if certain rights are infringed. As Dworkin holds, ‘a government that respects the liberal conception of equality may properly constrain liberty only on certain very limited types of justification.’¹¹¹ According to Feinberg,

[I]beralism applied to the problem of the limits of the criminal law would require commitment to the presumption in favor of liberty, but that presumption could be thought of, at one extreme, as powerful enough to be always decisive, and at the other, as weak enough to be overridden by any of a large variety of liberty-limiting principles, even when minimally applicable. If the word ‘liberal’ is to have any utility in this context, it should refer to one who has so powerful a commitment to liberty that he is motivated to limit the number of acknowledged liberty-limiting principles as narrowly as possible, and to require

107 Dutch term commonly used for ‘non-Western immigrants’.

108 Allen 2004, p. 5-6.

109 Sadurski 1999, p. 212.

110 Sadurski 1999, p. 213.

111 Dworkin 1977, p. 274.

in particular cases that in order to override the presumptive case for liberty, a valid liberty-limiting principle must exert a substantial part of its weight on the scales, considerably more than a mere token presence.¹¹²

Mill's "harm principle" still has an enormous appeal when it comes to finding a legitimate basis for restricting freedom. In his famous essay *On Liberty*, Mill explained the principle as follows:

the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right (...) The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.¹¹³

In this view, prevention of harm to others is the only legitimate constraint on the liberty of individuals; other reasons for limiting liberty – such as offence or moralism – are not valid. This approach is of course open to the criticism that the concept of harm in itself is subject to prevailing moral standards. Feinberg admits that the harm principle also enforces a certain morality, the morality of "preventing harm and respecting autonomy": sanctioning those who cause harm expresses public reprobation, and in this sense the criminal law always expresses a sort of moral judgment.¹¹⁴ However, the harm principle is still much narrower than "moralistic" principles: there is a difference between enforcing moral judgments through criminal law and deciding that certain behaviour deserves "moral certification". 'Indeed, everything about a person that the criminal law should be concerned with is included in his morals. But not everything in a person's morals should be the concern of the law, only his disposition to violate the rights of other parties.'¹¹⁵

Sadurski also holds that criteria for harm are to a much greater extent objective than criteria for "morals": it is possible to make a rather neutral concept of harm by linking it to peoples' equal moral agency. As such, harm can be understood as 'an intrusion into another person's autonomy, which hinders this other person's pursuit of her goals that are related to her own conception of the good'.¹¹⁶ Thus in the "rights-based account" (liberal conception of rights), harm is exhaustively constituted by violations of rights, rights which are the same for each person. These rights could then set principled limits to toleration. McKinnon further tries to specify the harm principle by

112 Feinberg 1984-88, p. 14.

113 Mill 1859, p. 30.

114 Feinberg 1990, p. 12.

115 Feinberg 1990, p. 154.

116 Sadurski 1990, p. 99

requiring that for something to be qualified as relevant harm, one must be able to present something as harm to other reasonable people as well.¹¹⁷ A critical view is necessary in judging what can qualify as harm, because it can be interpreted very broadly. Disquiet in society or sensitivities of majorities are not sufficient to count as harm in a liberal view; there must be a minimal rational motivation for the harm that does not include prejudice, emotional aversion or inconsistencies.¹¹⁸

Feinberg has given an elaborate account of various so-called “liberty-limiting principles” in the context of criminal law: these include, besides the *harm to others* principle, the *offence principle*, *legal paternalism* and *legal moralism*. He has acknowledged that the *offence principle*, to some extent, can also be a valid reason for criminalisation; however, paternalistic and moralistic limitations (outside the context of minors) are illiberal.

What distinguishes harm from offence? Feinberg identified *harm* as (1) a setback of one’s interests that (2) is a *wrong*: it violates a person’s rights. The setback of interest is the resultant state, the wrong is a previous wrongful act. *Offence*, on the other hand, does not violate a person’s interests: it is an uncomfortable mental state, a temporary experience (caused by the wrongful conduct of others) that is unpleasant, shocking, sometimes disgusting; but it does not *harm* – it does not impede interests.¹¹⁹ As an example, Feinberg mentions religious profanities such as blasphemous words. When offence becomes so serious that it does impede interests, it can then qualify as harm: particularly if the offended state of mind is a symptom or consequence of prior or concurrent harm, or is the cause of subsequent harm.¹²⁰

The harm principle can be specified by looking at the *risk* of the harm occurring as a result of an action: what is the probability that harm will result, and what would be the magnitude of the resulting harm? ‘In general, the greater the social utility of the act or activity in question, the greater must be the risk of harm for its prohibition to be justified.’¹²¹ It becomes clear that conflicting interests can be involved, and thus harm can occur on both sides: on the one hand, a person can be harmed by an act (such as hate speech), while on the other hand, the *prohibition* of an act can harm those who have an interest in engaging in it. In such cases, the relative importance of both interests must be compared, as well as the question to what extent interests are harmed and whether they are certain to be harmed.¹²²

117 McKinnon 2006, p. 79.

118 De Roos 1987, p. 48.

119 Feinberg 1984-88, p. 47-48

120 Feinberg 1984-88, p. 49

121 Feinberg 1984-88, p. 191

122 Feinberg 1984-88, p. 203

When it comes to offence, Feinberg has argued that a balancing of interests should take place between the seriousness of offence and the reasonableness of the offending party's conduct. However, the law should not take offence as seriously as harm: when less invasive means than criminal law are available, these should be considered first.¹²³ In the balancing process, the *seriousness of offence* is measured by the "extent standard" (intensity, durability), the "reasonable avoidability standard" and the "volenti standard" (has one willingly taken the risk of being offended?).¹²⁴ It does not automatically follow that the more people are offended, the more compelling the case for prohibition: some innocent actions cause offence to many people but should still be allowed in a liberal state – for instance, a homosexual couple walking hand in hand down the street. Yet some actions cause offence "only" to minorities but are still very serious. In such cases, the other factors, such as the intensity of offence, are more important and lead to a different outcome of the balancing process. Sometimes people are offended because of mere knowledge of certain activities taking place – for instance the knowledge of a blasphemous film being shown, without having to watch it oneself. It would go too far for the law to protect against such offence. The other side of the balancing process, the reasonableness of the offending party's conduct, depends on the personal importance of the conduct to the offending party, the social utility of the conduct, availability of alternative opportunities and the extent to which purely malicious motives played a role. The criterion of social utility implies that prohibiting offensive public *expressions* generally requires strict scrutiny.

Feinberg has identified some types of offence which are more profound than others, including racist demonstrations. They constitute more profound offence because (a) the offended feelings cannot be wholly escaped by withdrawing one's attention: the offended state of mind is to some degree independent of what is directly perceived, (b) there is an element of direct personal danger and threat, and (c) they are affronts to something the offended parties hold dear and even sacred.¹²⁵ The very idea of the conduct happening, independent of whether someone actually sees or hears it, is the problem here: offence from mere knowledge. The offence is not necessarily a wrong to a particular person, but is also considered a wrong in itself. 'The offended party experiences moral shock, revulsion, and indignation, not on his own behalf of course, but on behalf of his moral principles (...)'¹²⁶

When offensive speech is not also a wrong to particular individuals, prohibition is problematic from a liberal perspective: prohibiting an "impersonal" offence because it is a wrong in itself, comes very close to *legal moralism* – and this is a ground for criminalisation that liberals do not allow. However, the difference between legal

123 Feinberg 1984-88(a), p. 3.

124 Feinberg 1984-88(a), p. 26

125 Feinberg 1984-88(a), p. 52

126 Feinberg 1984-88(a), p. 68

moralism and offence is not always easy to make. Legal moralism in the strict sense means prohibiting conduct on the ground that it is “inherently immoral”, even though it constitutes neither harm nor offence to the actor or others.¹²⁷ For liberals, criminal law should not be concerned with enforcing morality as such, but only with protecting the rights of others, with “grievance morality”.¹²⁸ Prohibiting “harmless immoralities” because immorality is a wrong in itself, without harm to others, is illiberal. Besides strict legal moralism, Feinberg also identified “legal moralism in the broad sense”: prohibitions on the grounds that actions constitute or cause evils of other kinds than harm or offence: these grounds include preserving a traditional way of life (moral conservatism) and elevating human character (legal perfectionism).¹²⁹ Moral conservatism is a form of legal moralism that aims to prevent drastic social change in a group’s way of life. Adherents of this view regard change as an evil in itself, regardless of its effect on personal interests or sensibilities (harm and offence) and independent of the inherent immorality of the conduct.¹³⁰ The moral conservative ‘insists that deviant conduct changes “his” society in essential ways and makes him an alien in his own community.’¹³¹ Moral conservatism is often linked to a type of majoritarianism: cultural changes are seen as unfair because they are said to violate the interests of the majority that does not consent to the changes. However, majority rule is only legitimate if minorities are left free to become majorities, are left free to persuade other citizens. Using legal coercion to prevent certain social changes is to make an unfair contest between moral beliefs and ways of life.¹³² Legal perfectionism refers to using the criminal law to make citizens “better people”: to improve public virtues, civility and character. This too is an illiberal restriction: though many liberals would allow the state to promote public virtue and raise excellence through education, subsidies etcetera, they deny that criminal law has a role to play in restricting imperfect ways of life.¹³³

Part B: Freedom of expression and the restriction of hate speech

This part deals with the justifications that are given for restrictions of free speech and how they relate to the reasons for having freedom of expression. As Sadurski argues, ‘even if much offensive or extremist speech is without any social value, restrictions are often demanded for the wrong reasons (...) Hence, arguments about the level of scrutiny should not rest upon the nature of speech, but rather upon the *motives* for a

127 Feinberg 1990, p. 4

128 Feinberg 1990, p. 154

129 Feinberg 1990, p. 3

130 Feinberg 1990, p. 39

131 Feinberg 1990, p. 48

132 Feinberg 1990, p. 53

133 Raz 1994, p. 21.

governmental restriction.¹³⁴ A sceptical attitude against governmental interference with speech is present, in particular, in much U.S. First Amendment literature. In Europe, states are generally entrusted with a larger role in regulating freedom of expression on the grounds that the government should actively shape the possibilities for individuals to make use of their rights:

Free speech theory (...) should be a means of protecting speech against interference by intolerant groups (majorities and influential minorities), individuals and corporations within society, as much as against regulation by intolerant governments. Indeed, it should be recognised that the government may play a positive role in helping to maintain the conditions for civil co-existence. Those conditions include mutual respect, or at least forbearance, between those who adhere to divergent cultural traditions.¹³⁵

There are two further important issues to be noted about freedom of expression here. Firstly, defending the freedom to express certain opinions does not necessarily say anything about the *worth* of the opinions defended. It merely relates to identifying the boundaries of the law. ‘He [who defends freedom of expression, MvN] neither expresses moral respect for those opinions, nor moral respect for the expression of those opinions; but he holds that the law (...) should tolerate such expressions (...)’¹³⁶ Secondly, appealing to freedom of expression should mean that one also acknowledges the same right for others: ‘otherwise one is claiming a privilege, not a right.’¹³⁷

6 FREEDOM OF EXPRESSION: JUSTIFICATIONS

Freedom of speech is an essential right in a liberal democratic state. Governmental restrictions of this liberty therefore require strict scrutiny. Even more than other fundamental rights, freedom of speech goes beyond the ordinary functioning of the harm principle: the social value of speech often overrides its potential harm.¹³⁸ Freedom of expression is of benefit to all members of society, even if they have no direct personal interest in it.¹³⁹ However, *restrictions* on free speech are often motivated also by some public good.

6.1 The marketplace of ideas

Freedom of speech is linked to the idea of a “marketplace of ideas”: an open exchange of ideas is the best way to find the truth. Even if one does not accept the premise that

¹³⁴ Sadurski 1999, p. 33

¹³⁵ Feldman 1998, p. 145.

¹³⁶ Raes 1995, p. 57-58.

¹³⁷ Raes 1995, p. 59.

¹³⁸ Sadurski 1999, p. 38

¹³⁹ Raz 1994, p. 3.

“the truth” exists, the marketplace of ideas metaphor is useful; an open exchange of ideas is then viewed as the best way to advance knowledge.¹⁴⁰ Ideas which are judged as false in popular opinion may later come to be regarded as true, it is thought: ‘the risk is that censorship or restrictions imposed on the expression of opinions held by the majority today to be intolerable may in reality catch only marginal ideas that might be legitimate tomorrow: no one knows in advance what social, moral or intellectual evolution may become desirable or possible for the future of mankind.’¹⁴¹ Mill argued that everyone must be able to freely assess whether an idea is true or false, because

the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.¹⁴²

The problem with this view is that one can arguably be certain of some propositions, such as mathematical truths. A completely sceptical attitude could lead to the position that the criminal law should be abolished at all, because one can never be sure that anything is bad or harmful.¹⁴³ After all, if we could be wrong about mathematical truths, why could we not be wrong about the evil, or the harm caused by conduct such as violence? Mill refuted this argument by pointing to the difference between ‘presuming an opinion to be true after having had the possibility of contesting it’ and ‘assuming its truth for the purpose of not permitting its refutation’: ‘complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action.’¹⁴⁴ In Mill’s view, free expression was important not because it would help us find the truth, but rather would enable a collision of opinions, which sharpens the mind. Though Mill also thought that some “truths”, like in mathematics, have ‘all the argument on one side’ and that ‘the number of doctrines which are no longer disputed or doubted will be constantly on the increase’, he did not view this development as merely positive: leaving “living truths” undisputed would change them into into “dead dogmas”. It may still be questioned, though, whether the constant challenging of truths by falsities is really of added value, or whether it actually impedes progress: ‘what is the value in having our belief that $2 + 2 = 4$ constantly challenged by mathematically incompetent people who believe that $2 + 2 = 5$?’¹⁴⁵

140 Schauer 1982, p. 17.

141 Türk & Joinet 1992, p. 50.

142 Mill 1859, p. 37.

143 Sadurski 1999, p. 14.

144 Mill 1859, p. 39.

145 McKinnon 2006, p. 161.

An argument related to Mill's is that the *government* should not be entrusted with deciding what is true or false.¹⁴⁶ Not only are state representatives fallible in their judgments just as other citizens are, the danger lies particularly in the fact that governments have certain *interests* – or *bias* – in regulating certain types of speech, combined with the *power* to regulate it. 'Experience arguably shows that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct.'¹⁴⁷ Furthermore, as Schauer points out, the desire to restrict speech that one does not like is natural: 'it has been suggested that there exists in people a desire for unanimity, an urge to suppress that with which they may disagree even if there seems no harm to that expression.'¹⁴⁸ Opponents of this view point out that the risk of governmental abuse of power is not as great as assumed; they hold that the risk of harm emanating from hate speech is much greater.¹⁴⁹ However, the risk that "well-meant" hate speech bans will, at some point, be used by governments to suppress unwelcome speech that goes against the majority is not imaginary.¹⁵⁰

An important objection against the marketplace of ideas argument is that the marketplace may not necessarily function properly to advance the best ideas or knowledge. When looking at defamatory expressions against particular individuals, for instance, 'the power of the market to make the truth prevail is extremely doubtful, since we lack sufficient incentives and resources to thoroughly investigate the truthfulness of the grounds of attacks on private reputations.'¹⁵¹ It is largely based on an overstated belief in people's rationality, as Schauer holds: '[t]he argument from truth is very much a child of the Enlightenment, and of the optimistic view of the rationality and perfectibility of humanity it embodied. But the naïveté of the Enlightenment has since been largely discredited by history and by contemporary insights of psychology.'¹⁵² The marketplace may work in some contexts, such as in the academic world; but in other contexts, ideas such as racist theories can be very resistant to persuasion.¹⁵³ Mill actually held that freedom of speech could only work properly in a civilised polity.¹⁵⁴

Moreover, 'in a marketplace of ideas, the ideas that would prevail would be popular ones, which are not necessarily the true ones'.¹⁵⁵ Indeed, the risk of market failure is

146 Barendt 2005, p. 11.

147 Schauer 1982, p. 81.

148 Schauer 1982, p. 82.

149 Bradley Wendel 2002, p. 83.

150 Malik 2009, p. 104.

151 Sadurski 1999, p. 10.

152 Schauer 1982, p. 26.

153 Bradley Wendel 2002, p. 74-75.

154 Fennema 2009.

155 Gordon 1997, p. 241.

apparent: some groups or individuals have much less opportunities to participate in public debate than others. As Karst noted, “[t]he metaphor of the marketplace is a distraction unless we remember how important it is to assure not only that every idea be heard but that everyone have a booth.”¹⁵⁶ Some groups may not yet be fully accepted as participants in public debate, and may not yet be sufficiently entrenched in relevant institutions – including the media – to exercise their influence. In this sense, unequal opportunities in the marketplace can provide arguments for a very *large* freedom of expression, in which minority groups – whose views have a larger chance of being unorthodox, and thus a larger chance of being suppressed by the majority – have sufficient opportunities to express and thereby emancipate themselves.¹⁵⁷ Mill suggested that when in doubt, one should favour the minority opinion: ‘if either of the two opinions has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority. That is the opinion which, for the time being, represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share.’¹⁵⁸

One could argue that expressions with little “propositional content” – such as name-calling in the face of individuals – can be legitimately prohibited under the marketplace theory, because it is not really possible to argue about those utterances; they are not aimed at communicating an idea. The difficulty, however, is that very few expressions fall under this heading: many general hate expressions against groups cannot be said to lack propositional content – the ideas that such expressions communicate, are exactly what is worrisome about them.¹⁵⁹

6.2 Democracy and free speech

The idea of a marketplace of ideas is particularly essential to the *democratic process*, where an exchange of opinions on matters of public policy is thought to lead to the best outcomes. This leads to a separate argument, which is one of the most important justifications for freedom of speech: democracy. In this view, a large degree of freedom of expression is in the interests of everyone, a public good. According to Habermas, the communicative process is vital for democracy. In Dworkin’s account, freedom of expression is a condition for “moral membership of the democratic community”. In order for decisions to be democratic, everyone should be enabled to participate in public discussion on those decisions, and thus to freely express their opinions.¹⁶⁰ Those opinions should be formed in a free process, without manipulation

156 Karst 1990, p. 148.

157 Karst 1990.

158 Mill 1859, p. 65; see Gordon 1997.

159 Bradley Wendel 2002, p. 70.

160 Dworkin 1996, p. 24.

by the government.¹⁶¹ Free speech aims to make sure that people are really engaged in the process of governing themselves: that they recognise decisions as their own (“authorship”).¹⁶² Moreover, freedom of expression is crucial to hold the government accountable, to continually test its legitimacy. To this end, citizens should be freely informed about issues of public policy (freedom of information), and they should be free to publicly criticise the government. Under the democratic argument, freedom of the press functions as an important channel between people and government.

The appeal of this argument is that it not only provides a justification for free speech, but that *restrictions* of speech can flow from it as well. In such a theory, limitations to speech are only allowed in so far as they go against the principles of democracy. However, this does not easily lead to an all-encompassing solution to the problem of free speech and its restrictions, for the exact interpretation of these democratic principles is open to debate. Richards thus argues that the argument from democracy unsuccessfully tries to eliminate the tension between democracy and free speech – a tension that cannot be eliminated.¹⁶³ Another downside of the democratic argument is that it is a limited defence of freedom of expression: it is only applicable to expressions in the context of a debate on issues of public policy, and not, for instance, to artistic expressions.

6.3 Free speech and autonomy of the individual

While marketplace theories and democratic theories view freedom of speech as a means to some higher goal, freedom of speech could also be justified as a good in itself.¹⁶⁴ Individual liberty and autonomy require the right to speak one’s mind freely without constraints. This is related to freedom of conscience: human dignity requires the right to make one’s own judgments about the value of ideas.¹⁶⁵ Suppression of speech can be regarded as an affront to dignity and equal respect: ‘[b]y the act of suppression, society and its government are saying his thoughts and beliefs are not as good as those of most other people.’¹⁶⁶ For Raz, an important case for freedom of expression is that the prohibition of expressions represents an official condemnation of the entire ways of life that are portrayed in such expressions, and which are essential for a sense of “belonging” and identity.¹⁶⁷ Censuring those ways of life may alienate people from society.

161 Raz 1994, p. 7.

162 Post 2007, p. 333.

163 Richards 1999, p. 6.

164 Heinze 2006, p. 553.

165 Richards 1994, p. 42.

166 Schauer 1982, p. 62.

167 Raz 1994, p. 12-15.

The autonomy argument holds that free speech is valuable in itself, not in its capacity to bring about certain consequences.¹⁶⁸ This may seem an awkward position, as Fish notes: are we not just valuing the “right to make noise”, if it does not matter what is said and for what goal?¹⁶⁹ The problem of the individual autonomy argument is indeed that it has no built-in constraints: if an individual decides to incite to violence, because that is what his autonomy requires, then there would be no limit to this in the argument itself. And why should the value of unlimited self-expression be constrained to speech alone? The importance of a sphere of self-determination counts just as much for speech as for other self-expressing conduct, hence the principles that limit our individual autonomy to engage in certain types of conduct (particularly the harm principle) also apply to speech.¹⁷⁰

The autonomy argument can also be widened to include the autonomy of the audience.¹⁷¹ The state should respect autonomy in forming judgments and weighing opinions; not only that of those individuals who express themselves, but also that of their audiences.¹⁷² Under the democratic argument, there is also a right to freedom of information on issues of public policy. Put more broadly, people have a general interest in being informed, amused, or provoked by any type of expression.¹⁷³ Such an interest can be based on freedom of conscience and freedom of choice: in order to make meaningful choices and decisions, people should be as well informed as possible.¹⁷⁴

6.4 Free speech, toleration and civic virtues

A final justification of freedom of expression can be found in its role in the development of a person’s character, mindset, or critical capacities. This argument mostly takes the form of “civic republicanism”, which reads that an open exchange of ideas is necessary to develop one’s capacities for critical thinking and response. It will thus ‘promote a citizenry that cultivates its own moral vigilance’.¹⁷⁵ Free speech allows people to learn from each other’s critical viewpoints and from discussion: it sharpens the mind – this view is apparent in Mill’s *On Liberty*, where he argues that ‘truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not

168 Sadurski 1999, p. 18.

169 Fish 1994.

170 Sadurski 1999, p. 18.

171 Scanlon 2003.

172 McKinnon 2006, p. 124-125.

173 McKinnon 2006, p. 125.

174 Schauer 1982, p. 65-74.

175 Heinze 2006, p. 554.

suffer themselves to think.¹⁷⁶ Therefore it is instrumental in creating virtuous citizens and a well-functioning pluralistic democracy.

A somewhat different version is Bollinger's tolerance argument, which points to the necessity of 'promoting the right attitude of tolerance among the audience', in order to help create 'a general intellectual character' and enhance 'the capacity for general tolerance'.¹⁷⁷

6.5 Instrumental arguments against regulating expressions

Besides arguments of principle, there are also instrumental arguments in favour of free speech. Firstly, legal prohibitions of speech can lead to a *chilling effect*: as a result of coercion against speakers, even those people not directly targeted by the prohibition will apply self-censorship. In order to avoid breaking the law, they may keep to themselves expressions which are actually allowed. Secondly, legal restrictions can force speech *underground*, outside the area of debate and deliberation. This involves the danger that hateful ideas will continue to thrive unnoticed, and will return even more forcefully. Taking it a bit further, suppression of speech may make people more inclined to resort to force to achieve their goals: it increases irrationality as opposed to calm deliberation.¹⁷⁸ Finally, many people argue that speech bans are *counter-productive* because they place speakers in a special position, which increases their popularity ("creating free speech martyrs") and shows that they are taken seriously. Moreover, people are naturally more curious of suppressed speech. It is difficult to assess whether these widely held assumptions are true.

7 JUSTIFICATIONS FOR RESTRICTIONS OF SPEECH

7.1 Harm to public order

The prohibition of harm to others is the least controversial ground for restricting liberties in general. Speech restrictions on this ground can take different forms, because there are different types of harm; one of these is harm to public order. The prohibition of expressions that potentially cause harm to public order is based on the view that the state's legitimacy depends on its capacity to maintain stability. Public order and stability are necessary to maintain people's fundamental liberties, such as the right to life. Some authors argue that this presents a conflict of rights between liberty and liberty; freedom of expression versus the liberty that comes from public

¹⁷⁶ Mill 1859, p. 52.

¹⁷⁷ Sadurski 1999, p. 32; see Bollinger 1986.

¹⁷⁸ Schauer 1982, p. 78

peace.¹⁷⁹ Others hold that calling this a “conflict of rights” ignores the character of fundamental rights: it assumes that the right of the majority is a competing right that must be balanced against the rights of individuals. According to Dworkin, this is a confusion that threatens to destroy the concept of individual rights.¹⁸⁰ Nevertheless, public order can still be regarded as an important *interest* that may overrule freedom of expression in particular instances.

In most legal systems, criminal responsibility applies not only to those who engage in violent or otherwise harmful conduct, but also to those who incite to it: even if their speech is only an *indirect* cause of violence or if no violence actually occurs, it may still be considered reprehensible.¹⁸¹ Indeed, the types of speech dealt with under this heading are not inherently harmful; they have the *potential* to cause harm in the form of violence, hatred, or disobedience to the state.¹⁸² This implies that the causal relationship, the proximity, between speech and potential consequences is important. Whereas the United States judiciary applies the strict “clear and present danger test” in such cases, in most jurisdictions more indirect forms of incitement also justify restrictions to freedom of speech. The correlation is often complex, because most expressions do not *invariably* lead to violence.

It must be noted that the relationship between speech and consequences is not the only matter that counts – the speaker’s intention is an important consideration as well. As Lawrence has argued, “[h]yperbolic expression of opinions that are unreasonably taken by others as inspiration for violence cannot be made criminal in spite of their unfortunate consequences. But those who express political views with the intent of inspiring violence cannot use this political context to escape criminal responsibility.”¹⁸³ However, it is difficult to distinguish when a speaker merely aims at causing harm – the intentions of the speaker are often related to some social goal or value as well.

A danger with the “harm to public order” argument is that states tend to interpret it very broadly and thus restrict many types of speech, including criticism of the government. Some argue pragmatically that anti-democratic ideas are best handled in a free democratic debate, and that people will eventually gain most from toleration of intolerant ideas.¹⁸⁴ We can only make good choices in a democracy if we know all of the options that are available; and we can still denounce anti-democratic views in other ways. Others argue that antidemocratic speech *can* actually do harm, that it is not as innocent as it seems. Public order arguments to prohibit speech, such as the “clear and

179 Fiss 1996, p. 16.

180 Dworkin 1977, p. 187. See also Van Kempen 2008.

181 Sadurski 1999, p. 202.

182 See Schauer 2000, p. 48.

183 Lawrence 2000, p. 32.

184 Hong 2005, p. 37-41 (referring to Sadurski and Meiklejohn).

present danger test”, are very appealing because they purport to be “content-neutral”: restrictions are not required because of the content of the speech, it is proposed, but because they may lead to violence, hatred and other “objective” harms. However, in reality such harms are not so easily separated from the ideas proposed in the speech: it is often the ideas that cause the potential for harm.¹⁸⁵ A few specific “harm to public order” arguments can be distinguished: first, harm to national security (including the risk of terrorism) and second, broader harm to public order in the sense of violence between individuals and groups.

7.1.1 Subversive speech, public order, national security

When dealing with “subversive speech” or “extreme speech” that goes against the interests of the state, such as the advocacy of a different state structure or glorifying anti-state violence, a paradox becomes apparent: on the one hand the freedom to engage in such speech is intimately linked to democracy, on the other hand the speech itself can be viewed as antidemocratic. Subversive speech involves some form of criticism of the government, the state structure and/or public affairs more generally. It is of fundamental importance to democracy that the advocacy of far-reaching legal change remains possible, also because it is often exactly the political exclusion of such groups that makes them resort to violence. However, speech that goes against the state, its organs or its core democratic principles, also presents a potential danger to public order and to the legitimacy of the state.

Richards argues that the democratic argument supports allowing subversive speech against the state, even if the principles of democracy itself are attacked. Indeed, such speech is very important as it ‘conscientiously addresses the public conscience of the community in terms of failures to respect rights and the public good (...) Precisely because of such protection, the claims (...) will be tested by the deliberative judgment of a people empowered by their freedom responsibly to assess such claims.’¹⁸⁶ Schauer also holds that in a democracy, speech advocating legal change must be protected: it is the essence of democracy that laws can be changed. However, ‘all of this presupposes peaceful change, obedience to law, change within a constitutional structure or of that constitutional structure by means “within the law”.’¹⁸⁷ The use of violent means to achieve one’s political objectives is at odds with democracy, which is based on the principle that conflicts shall be resolved peacefully through dialogue.¹⁸⁸ Political violence endangers the lives of innocent civilians as well as the public order and security on which a democracy depends for its survival. Accordingly, the most compelling reason for restricting extreme speech is the *harm* to individuals and public

185 Sadurski 1999, p. 53

186 Richards 1994, p. 42.

187 Schauer 1982, p. 190.

188 See also the ECtHR in *Karatas v. Turkey* (Grand Chamber), 8 July 1999, par. 50.

order that potentially results from it if words are turned into deeds. It is, therefore, important to critically examine the proximity between various forms of extreme speech and their potential consequences.

Expressions of “indirect incitement” – glorifying or justifying violence – pose a danger to liberal democracies, so the *militant democracy* argument goes, because there is a risk that they will eventually lead to undermining or even replacing the democratic system. Yet prohibiting the expression of such opinions in turn infringes upon democratic values; this is difficult to justify in the absence of a clear danger to the democratic system. Such expressions often support the underlying political goals of the group, and are thus a form of political expression. The speaker may approve, support or regard as a necessary evil the violence that others use to achieve this goal; but the question is whether this is enough to make the speaker a moral reproach.

It is also important to keep in mind that the *rationale* behind the prohibition of extreme or subversive speech is quite different from that in the context of hate speech against minorities. Since the protection of national security and public order are closely linked to majority interests – often translated into state interests – it is particularly important to construe those restrictions in such a manner that the right to freedom of expression of individuals and/or minorities *against* the state is respected. In the context of terrorism, it is likely that the state will try to oppress inciteful speech – but also less extreme speech – by minorities. However, it must be noted that it can be challenging to differentiate between extreme speech and hate speech: extreme speech by subversive minorities can incite to hatred against *individuals* or *groups* as well – for instance, when it expresses hatred towards a particular political or religious group.

The occurrence of extreme speech on the *internet* in particular has provoked much debate in the past decade. Several studies conclude that extreme internet sites can contribute to radicalisation: there are examples of individuals who have become radicalised via the internet.¹⁸⁹ However, whether such websites really contribute to people becoming extremists, and eventually resorting to violence, remains contested. According to Europol, ‘[a]lthough propaganda material is available in increasing quality and quantity, there is no proof that this in itself leads to increasing radicalisation of the targeted audience. The availability of great quantities of propaganda material, easily accessible through the Internet, however, does facilitate the tasks of propagandists and recruiters and may lead to a general increase in the number of Islamist terrorists in the EU.’¹⁹⁰ A study by the International Center for the Study of Radicalisation and Political Violence found that ‘the internet can play a role in radicalisation, but that so far it has not been the principal driver of the process.’¹⁹¹

189 NCTb 2006, p. 76; AIVD 2006, p. 43.

190 Europol 2008, p. 142.

191 Stevens & Neumann 2009, p. 11.

This is because social relationships remain vital to the process of radicalisation; the internet can facilitate this development, but can never replace direct human contact that is needed to create the loyalties to eventually resort to violence.¹⁹² Much of it takes place by means of private communication, in closed chat groups on the internet (such as in the Dutch *Hofstadgroep*) or with small groups meeting in private. Such private communication is not targeted by the relevant legal instruments, which only criminalise public speech.¹⁹³ When it comes to extreme expressions of a more indirect nature (glorifying terrorism, antidemocratic views), even more care is required in terms of freedom of expression. Though many argue that such expressions – such as those of radical Muslim groups that focus on grievances against democracy – contribute to the process of radicalisation and to a climate in which terrorism becomes a possibility, this is not uncontested. The process of radicalisation is very complex and unpredictable and involves several individual, social and external factors;¹⁹⁴ the large majority of people with radical views do not eventually become extremists, let alone terrorists.

Still, real threats to national security – such as the risk of war – can provide compelling reasons to restrict certain forms of speech: in particular, dealing with hate speech *during* conflict requires a special approach. In wartime, the deliberative process often does not operate as it should; the necessary conditions for the exercise of freedom of expression are not in place.¹⁹⁵ Moreover, the causal connection between speech and potential harm is more convincingly established when violent acts have already taken place. The occurrence of violent acts against groups or against state forces sets hateful expressions in a different light: from that moment on, the meaning of hate speech – both by the speaker and by the audience – changes for good.¹⁹⁶ Glorifying or justifying past or present violence is more serious during conflicts too, since its connection to future violence is closer than outside conflict. In less obvious cases, ‘evaluation of the interest in national security requires a determination of the extent of the harm should the argued effect actually occur, the probability of that effect occurring, and the immediacy of the effect.’¹⁹⁷

7.1.2 *Public order and hatred between groups*

Prohibition of hate speech against members of ethnic, cultural, religious and other groups is often related to public order arguments too.¹⁹⁸ Such expressions can harm not

192 Stevens & Neumann 2009, p. 12.

193 See Choudhury 2009.

194 Transnational Terrorism, Security & the Rule of Law 2008.

195 Schauer 1982, p. 198.

196 Benesch 2008, p. 522.

197 Schauer 1982, p. 199.

198 See Sadurski 1999, p. 196-203.

only the victims themselves; the violence, threatening situations or the atmosphere of hatred that potentially result can also be dangerous for public order at large. However, the causal link is not that direct: speech *may* lead to hatred, which *may* lead to violence or threatening situations. An even more indirect type of harm to public order is the risk that speech will lead to setting different groups in society against each other, with the result of creating unrest and undermining social cohesion. It is then argued that public order includes the requirement of “social cohesion” or “agreement on core values”, and that speech undermining these should be restricted. Indeed, the “harm to public order argument” has great appeal for governments because it can be so broadly interpreted.

A special type of the public order argument is that hate speech can lead the victims themselves – or the audience that sympathises with them – to violent behaviour: the “hostile audience”. The central issue here is whether the scope of the speaker’s right to free expression can be restricted by the likely response of the audience.¹⁹⁹ It has been argued that restricting speech for this reason comes down to a “heckler’s veto”: ‘to allow the hostility of an audience to warrant a restriction of speech would amount to making audiences the ultimate judges of constitutional rights (...). The law (...) is there to protect speakers against intolerant audiences, not to protect audiences against unpopular and even offensive speakers.’²⁰⁰ However, when hate speech is directly targeted at individuals or groups with the aim of provoking them, one may question whether they can reasonably be expected to exercise self-restraint.²⁰¹ An important consideration is thus the extent to which the speech could be avoided by the victims (captive audience). Nevertheless, the hostile audience restriction remains problematic because it can lead to the situation where victims of hate speech who are expected to be able to exercise self-restraint are *not* protected against it, while those victims who exercise violence (or other harm to public order) in reaction, *are* protected.

7.1.3 Civility and decency

The “social cohesion” argument can go accompanied by the wish to uphold the quality of public debate, or put slightly differently, to enforce civility norms in public discourse. The reasons for restriction are then related to the *manner* of expressions rather than their content. Upholding decency in public debate can be seen as a form of preventing harm to society: the idea is that keeping up respect in public debate – treating other citizens as equals – is important to maintaining good social relations among groups and thereby to holding society together.

199 Sadurski 1999, p. 196.

200 Sadurski 1999, p. 197.

201 Sadurski 1999, p. 197.

A danger of this justification is that it is easily used in favour of majority opinion in order to silence unorthodox voices: '[i]gnoring that our own perspectives *are* perspectives, "we" simply think of them as neutral and abstract Reason. The civic speech of Reason is a thin layer that has crystallized atop the vast pool of a dominant culture's "cultural unconscious" – the very condition that causes us to treat deviations from "normal discourse" as irresponsible, perverse, irrational.'²⁰² Post also notes that 'although such laws *purport* to enforce civility norms that are universally shared, they *in fact* express the mores of dominant groups.'²⁰³ Sadurski makes another fundamental objection against speech restrictions based on civility requirements: judging the form of an expression is not independent from judging its substance. We are much more easily inclined to negatively judge the "manner" of speech when we disagree with it, whereas we will not easily oppose "uncivilised" speech when we agree with it.²⁰⁴ If the government has the opportunity to enforce civility norms in public discourse, this can be abused to restrict speech that the government has an interest in prohibiting. Moreover, style is an inherent part of a speaker's expression, to restrict an expression on the basis of its style would therefore infringe upon his liberty just as much as when expressions are restricted on the basis of substance. Finally, according to Schauer, 'under the argument from democracy the right to appeal to and mobilise public opinion is important. Dirty words and shocking speech are often more likely to do this than sober reasoned argument. This is unfortunate, but acceptance of democracy and the arguments derived from it involves accepting the standard of debate that in fact exists (...)'.²⁰⁵

7.2 Negative imaging and discrimination

An important argument for restricting hate speech is that of "negative imaging" of groups in the eyes of others,²⁰⁶ because such negative imaging has the potential to lead to discriminatory behaviour or even violence against individuals or groups. Negative imaging of groups in the media can damage their reputation in the outside world, and can reinforce negative stereotypes about those groups; this can eventually lead to discrimination of group members. This rationale is related to the idea of militant democracy: hate speech that goes against democratic principles (including non-discrimination), involves a risk that such democratic values will eventually be harmed or even overthrown if the speakers gain enough power.

202 Karst 1990, p. 100.

203 Post 2007, p. 347.

204 Sadurski 1999, p. 50.

205 Schauer 1982, p. 148.

206 Sumner 2001 p. 37.

It is well documented that discourse – particularly through the mass media – plays an important role in reproducing racism.²⁰⁷ What these studies deal with is not just hate speech proper, but rather the general prejudices and stereotypes that are subtly woven through our language. This does not even need to be negative; indeed, positive stereotypes can also add to the process of exclusion. It is thought that through language, dominant groups designate the image of the “Other”, through which they reinforce inequalities.²⁰⁸ Pickering notes that ‘naming and defining the characteristics of Others as Others also has as its effect a denial of their right to name and define themselves (although this may be resisted (...)). The process begins with the derogatory terms used to refer to those groups and collectivities perceived as different (...) and then goes on to elaborate and justify the prejudicially evaluated difference and symbolic distance thus established.’²⁰⁹ Because many films, books, jokes and other expressions can be said to contribute to such processes, prohibiting this whole range of expressions would severely restrict freedom of speech.

In this regard one may question who should be held criminally responsible for hate speech. Prejudice and stereotypes work their way through discourse in a subtle manner, becoming part of people’s common sense – thus how helpful is it to target the small amount of speakers who express speech that is “obvious” enough to be recognised as hate speech? Malik argues that laws on incitement to hatred only target the most extreme forms of hate speech, while

there is prejudice and stereotyping in the mainstream media which, in many cases, will have a more widespread influence. Prejudice and stereotypes in the mainstream media may in fact be more pernicious because these views and representations are “normalised” and “presented as the ordinary truth about the world in which we live”.²¹⁰

Since it is a whole array of expressions together that permeate racist discourse – laying the groundwork for subordination – it is difficult to construct responsibility for separate messages.²¹¹ Butler argues that such common legal approaches misconstrue the speaker’s responsibility, because those expressing hate speech are not the originators of speech: they are merely “citing” speech that forms part of the “linguistic tokens of a community”, a discourse they reissue and repeat. ‘The legal effort to curb injurious speech tends to isolate the “speaker” as the culpable agent, as if the speaker were at the origin of such speech.’²¹² However, this leaves unimpeded that certain influential speakers, such as politicians, can play an important role in influencing people and thus heighten the chances of negative imaging. The extent to which it is

207 See Van Dijk 1989; Van Dijk 2000; Van Dijk 2002.

208 Pickering 2001, p. 73.

209 Pickering 2001, p. 73.

210 Malik 2009, p. 106.

211 Bradley Wendel 2004, p. 1408.

212 Butler 1997, p. 39.

fair to hold people responsible for such expressions may also depend on their intention, although that intention can also be difficult to ascertain.

The causal connection between hateful speech and discriminatory or violent behaviour is not easy to make. Though such discourse can legitimise discriminatory practices for certain listeners, whether hate speech leads to negative attitudes towards “out-groups” – and eventually to discrimination – depends on how it is perceived by those at which it is directed: does it convince people that the person/group targeted is inferior?²¹³ Social psychological research indicates that people’s attitudes towards minorities can indeed be negatively influenced by hearing others express derogatory ethnic labels against members of those groups.²¹⁴ Yet, there is still an element of persuasion between the words and the “action”, so the words in themselves cannot be said to be discriminatory *acts*.²¹⁵ Post holds that such a causal connection is not implausible but that its nature and strength is “a question of contingent, historical fact”.²¹⁶ This should not close our eyes to the fact that hate speech has appeared a destructive force in several horrendous conflicts. Still, it is not always helpful to compare current situations to past conflicts because of the particular circumstances in which they took place. Hate speech may well be far less destructive in long-standing, stable democracies with well-functioning media that provide counter-forces to hate messages.²¹⁷ When counter-forces are no longer available, the impact of hateful messages becomes even stronger.²¹⁸ Freedom of speech attains a different meaning in such situations: while traditionally a right against state power, it is instead abused by governments (or its supporters) to suppress a part of its people.²¹⁹

A large degree of freedom of expression can also enhance the emancipation of subordinated groups, as Karst argues:

freedom of expression (...) is a mixed blessing for the members of a subordinated group. On the one hand, much of their subordination has been accomplished by the speech of others; any system of domination is carried on a stream of messages that both express a group’s subordination and purport to justify it. On the other hand, precisely because an important part of a group’s subordination consists in silencing, their emancipation requires a generously defined freedom of expression (...).²²⁰

Public debate is shaped by “truth regimes” that are constantly at work: processes of exclusion and inclusion which delimit the types of representing reality that are

213 Sadurski 1999, p. 129.

214 Greenberg & Pyszczynski 1985.

215 Sadurski 1999, p. 133.

216 Post 2007, p. 349.

217 See Heinze 2006, p. 548.

218 Benesch 2008, p. 496.

219 Benesch 2008, p. 495.

220 Karst 1990, p. 109.

acceptable at a certain time in a certain place.²²¹ These processes are influenced by power relationships in society: it is often marginalised groups that are labeled as irrational.²²² The danger of hate speech bans is that they can be used in favour of majority interests, thereby excluding exactly those groups that should be enabled to emancipate themselves. The fact that the speech used by minority groups often falls outside the scope of what the majority is used to, outside “common sense”, can be employed by the majority as a reason to restrict it. Therefore

[a] strong freedom of expression is not an impediment to the integration of a multicultural nation. Rather it is essential, not just for the proper settlement of public issues, not just for the tolerance of hateful ideas, but for the day-to-day, one-to-one personal interchanges in which the sense of belonging to a national community ultimately depends. Undeniably, expression is power. But it is a mistake to think of power only as domination. Power is also capacity.²²³

Some argue that prohibiting hate speech stifles the members’ own ability to express and define their individual identity against such stereotypes.²²⁴ Laws against hate speech ascertain people’s identification with the group to which they belong: even when some individuals do not identify with their group so strongly that they would need protection against insult/defamation, they are protected against their will.²²⁵ Group vilification laws send out a signal of victimisation: a signal that the members of the protected minority groups are disadvantaged victims who need protection. This may work counterproductively as it can reinforce prejudices.

Laws of this kind are also problematic in the sense that the expressions targeted often involve criticism of the role of groups in society, which can be of importance to public debate about their emancipation.²²⁶ However, this social utility may be overridden if expressions go so far as to violate people’s equal human dignity: indeed, many authors have argued that calls for “denial of human dignity” fall outside freedom of expression.²²⁷ Rosier proposes an objective test for distinguishing legitimate criticism from group vilification: the idea is to objectively assess whether an expression “denies a person’s intrinsic worth”, expressing such contempt against a person that it presents a direct affront to their human dignity.²²⁸ An obvious example is that of comparing a category of people to animals, which “dehumanises” them. Others have sought to solve the dilemma by distinguishing between criticism and “pure emotive harm” or “fighting words”: the deliberate expression of hate or contempt with the aim of doing

221 Vendrik 1995, p. 54.

222 See the criticism of the ‘difference democrats’ to the idea of rational discourse: Bovenkerk 2009.

223 Karst 1990, p. 149.

224 Richards 1994, p. 53.

225 Sadurski 1999, p. 215.

226 Sadurski 1999, p. 217.

227 F.i. Fennema & Maussen 2000, p. 383-384; Van Stokkom, Sackers & Wils 2006, p. 30.

228 Rosier 1997, p. 288.

harm to people. Speech that does not communicate an idea but that contains pure harm, cannot be protected with an appeal to its presumed social value.²²⁹ A difficulty here is that harmful intentions can be covered in political correctness: ‘[i]t is relatively easy for a skilled polemicist to appropriate an entirely new lexicon in order to avoid legal prosecution for the dissemination of ideas deemed noxious to society (...) The platitudes of political correctness are a mere smokescreen for more sinister intent (...) The inventiveness of this verbal chameleonism cannot be matched by any legislation, as legislation, by definition, must be clear and precise.’²³⁰ As such, only the crudest messages on the surface are dealt with, whereas the real problems of hatred and xenophobia are not touched upon. However, this is perhaps inevitable – after all, attacking any expression which is remotely presumed to be xenophobic (despite its correct use of language), would present severe restrictions to the freedom of expression. Moreover, expecting hate speech laws to remove all racism and intolerance from society would probably be too optimistic.

7.2.1 The effects of hate speech bans on victims and defendants

A separate question to be addressed here is what the effects of prohibiting hate speech are. In his study of the effects of hate speech prosecutions on the victims and the defendants in Belgium, Vrielink distinguishes between two types of speech: (1) racist remarks uttered directly against the victim and (2) general hate speech uttered in the media, by politicians and others.²³¹ While par. II.7.4 deals with the first type, this part delves into the second type. Here, Vrielink concludes that prosecution does not have many “remedying effects” on the victims; prosecution even risks turning out negatively for the victims, because it creates uncertainty and fails to satisfy their high expectations.²³² As to the defendants in such cases, he distinguishes three types: (a) “incidentalists”, those who do not act out of ideology and who say that it is not their intention to do harm. For these defendants, prosecution has a clear deterrent effect – so strong that it leads to a chilling effect on their future speech, even after an acquittal.²³³ The second category (b) contains “offenders by conviction” – they consciously violate the law, so that legislation against hate speech does not deter them at all, but rather encourages them. The last category (c) refers to “instrumentalists/activists”, who consciously search for the limits of the law in order to make people think – they are often connected to political parties. Hate speech prosecutions do not lead to a change in their mentality, although it deters some of them from breaking the law again. ‘Large political parties, for instance, do indeed adjust their discourse to the legislation and its application. At the same time they say that such adjustment is

229 Bradley Wendel 2002, p. 70.

230 McGonagle 2001, p. 21.

231 Vrielink 2010.

232 Vrielink 2010, p. 668-669.

233 Vrielink 2010, p. 654.

merely cosmetic, so that this leaves the risk of concealing their real ideas.²³⁴ While such parties do welcome the media attention around hate speech prosecutions, they also want to make sure they are not deterred in their activities; indeed, one party even had a special committee that screened its communications on possible violations of hate speech offences. Norris and Van Donselaar have also noted that hate speech bans can work to deter parties from extreme expressions, and that prosecutions have contributed towards the decline of the far-right party *CP* in the Netherlands.²³⁵

Vrieling concludes that hate speech prosecutions can have several negative effects on the victims and do not usually lead to a change in mentality for defendants. A broad interpretation of the law would lead to more complaints about relatively “light” cases. This can result in increasing pressure to prosecute such cases; refusing to prosecute then has negative effects since it is regarded as arbitrary.²³⁶

7.3 Equality

Apart from the potential harm to individuals, the very fact that hate speech goes against the central value of equality – regardless of its consequences – can be regarded as problematic in itself. The inferiority and contempt expressed in hate speech is not only harmful to individuals as such; it also undermines the value of equality, which is central to liberal democratic states. As Sumner explains, hate speech ‘exposes a conflict between the two values that liberals hold most dear: freedom and equality (...) Hate groups decisively reject the liberal ideal of pluralism and equality and the public advocacy of their views arguably serves to undermine the equal social status of their favoured targets. However, as a form of political expression, that advocacy seems to call for particularly robust protection in a liberal society.’²³⁷ Under this argument, prohibiting hate speech has great symbolic value: it functions to express that society rejects such ideas, symbolically upholding the principle of equality and expresses solidarity with minority groups. The idea is that, were such equality-undermining expressions not prohibited, then the state would legitimate inequality. The fundamental value of equality requires the government to declare certain points of view – such as racism – illegitimate. Such symbolic statements can be important to victims of hate speech, it is argued: ‘a legal response to racist speech is a statement that victims of racism are valued members of our polity.’²³⁸ The same arguments are occasionally used for denial of grave historical crimes: that such bans serve as symbolic means to uphold society’s core values and that the government legitimises such viewpoints if it does not counter them.

234 Vrieling 2010, p. 570.

235 Van Donselaar 1991, p. 222; Norris 2005, p. 91-92.

236 Vrieling 2010, p. 676.

237 Sumner 2001, p. 37.

238 Matsuda, Lawrence, Delgado & Williams Crenshaw 1993, p. 18.

However, it is questionable whether the state really legitimates inequality (or denial of grave crimes) by allowing private individuals to express views that are at odds with its core values. Moreover, even though equality is arguably the most fundamental human right, it can be questioned whether *arguing* against fundamental rights should be prohibited too. The argument from equality appears difficult to use as a free-standing rationale, separate from the argument that such messages can inflict harm.

7.4 Mental harm to individuals

An important argument for hate speech bans is that such expressions can cause psychological harm to individuals: they hinder a person's functioning because they are able to directly affect that person's mental state. This can be true of individual defamation, but also of expressions that target individuals *on the grounds of their membership of a (minority) group*. These can cause a special kind of psychological harm, which is different from the harm that defamation without a group aspect inflicts. They can contain a message of inferiority or contempt, and portray people as 'not deserving respect and equal treatment' because of their membership of a certain group.²³⁹ Individuals could internalise the contemptuous messages, leading to diminished capacities for developing self-respect. Moreover, it can be threatening to experience the expression of hatred against one's group.

One should distinguish, however, between direct hate speech (addressing individuals directly, speaking *to* them) and indirect hate speech (speaking *about* individuals/groups, for instance, by politicians through the mass media). The effects of direct hate speech on the psychological state and even on physiological activity are well documented.²⁴⁰ Vrieling's research of the effects of hate speech on the victims has shown that direct hate speech had much impact on the victims: their experience was graver than mere offence – they felt degraded, disqualified and excluded, as if they were placed outside society.²⁴¹ In the long term, they experienced stress, oversensitivity, fear and avoidance effects. The experience of being insulted on the grounds of their race was more intense than in the case of "normal" insults: victims felt they were being held personally responsible for all negative characteristics ascribed to the group, and thus reduced to those characteristics. Because they carry certain historical connotations, such expressions also evoked ideas of oppression and exclusion.²⁴² In general, victims of direct hate speech found that legislation should focus not only on negative imaging in the eyes of others but rather on the insulting aspect for victims themselves, the denial of their dignity involved in such expressions.²⁴³ For complainants

239 Van Stokkom, Sackers & Wils 2006, p. 30.

240 Leets 2002; Leets & Giles 1999; McNeilly 1995; Fang & Myers 2001.

241 Vrieling 2010, p. 389.

242 Vrieling 2010, p. 394-396.

243 Vrieling 2010, p. 432-433.

in cases involving non-direct hate speech – such as political pamphlets or expressions by politicians in the media – the effects were not as profound. They reported few harmful effects, but rather felt moral indignation and irritation.²⁴⁴ This may have to do with the fact that the complainants themselves were not always members of the group targeted. Those complainants who were themselves part of the group, did experience the expressions as offensive and sometimes threatening – however, the effects were still much less profound than for victims of direct hate speech.

Critical race theorists have argued that hate speech not only *leads* to discrimination, but that it is also a form of “violence with words” which directly inflicts wounds on people in subordinated social positions.²⁴⁵ The argument is that hate speech impedes minority groups’ chances at the marketplace of ideas, because the expression of their inferiority “silences” them and beats them into submission.²⁴⁶ Thus ‘freedom of expression for some is silencing for others: racial stereotyping creates an environment in which voices raised in protest by those stereotyped cannot be heard as such.’²⁴⁷ Social psychologists have also used the term “verbal discrimination” to indicate that words not only *lead* to discrimination, but can themselves constitute discrimination.²⁴⁸ This view is criticised by Butler, who has analysed the issue through the lens of “speech act theory” as originally developed by Austin.²⁴⁹ Austin distinguishes between two types of speech acts, which are both “performative” – that is, they do not merely describe something but have the capacity to intervene in the state of affairs. “Illocutionary” speech acts are those where saying simultaneously constitutes *doing*: they are themselves the consequence that they cause – for instance, the judge who convicts a defendant. “Perlocutionary” speech acts produce certain effects as a consequence: they follow from the speech, but do not take place at the same moment.

Critical race theorists, according to Butler, view hate speech as illocutionary speech that inevitably produces the consequence of subordinating and thereby silencing people. Butler argues that this view is problematic, because there is no fixed link between such speech acts and their harmful effects: ‘not all utterances that have the form of the performative, whether illocutionary or perlocutionary, actually work. This insight has important consequences for the consideration of the putative efficacy of hate speech.’²⁵⁰ Only in certain contexts and particular power relationships does speech have these performative effects; for instance, if the speaker is in no position to influence the listener, the speech act will be infelicitous. ‘Those who seek to fix with

244 Vrieling 2010, p. 436.

245 Matsuda, Lawrence, Delgado & Williams Crenshaw 1993, p. 23-24; 90.

246 Bradley Wendel 2002, p. 64.

247 McKinnon 2006, p. 135.

248 Graumann 1998.

249 Butler 1997.

250 Butler 1997, p. 16.

certainly the link between certain speech acts and their injurious effects will surely lament the open temporality of the speech act. That no speech act *has* to perform injury as its effect means that no simple elaboration of speech acts will provide a standard by which the injuries of speech might be effectively adjudicated.²⁵¹ By leaving this relationship between hate speech and its consequences unfixed, the possibility is left open that speech acts are countered, that victims can “speak back”:

I wish to question for the moment the presumption that hate speech always works, not to minimise the pain that is suffered as a consequence of hate speech, but to leave open the possibility that its failure is the condition of a critical response. If the account of the injury of hate speech forecloses the possibility of a critical response to that injury, the account confirms the totalising effects of such an injury... Even if hate speech works to constitute a subject through discursive means, is that constitution necessarily final and effective? Is there a possibility of disrupting and subverting the effects produced by such speech...?²⁵²

Butler devises a strategy that does not focus on legal remedies for hate speech, but is an approach based on agency where those targeted by hate speech create their own critical response:

Those who argue that hate speech produces a “victim class” deny critical agency and tend to support an intervention in which agency is fully assumed by the state. In the place of state-sponsored censorship, a social and cultural struggle of language takes place in which agency is derived from injury, and injury countered through that very derivation.²⁵³

Communication researchers have also noted that whether a particular message is perceived as harmful depends on several factors: the receiver (past experiences, psychological and physical characteristics, status), the speaker, the context and who is overhearing the speech.²⁵⁴

7.5 Offence

Restrictions of the freedom of expression on the basis of *offence* aim to offer protection against unwanted and unexpected confrontations: protecting people against offence to their moral sensibilities (see par. II.5). Offence is often proposed as a ground for restricting blasphemous speech. The problem with offence is that it is very subjective: taking offence is ‘constituted by a set of judgments which only an individual can make.’²⁵⁵ Prohibition thus gives individuals or groups (whether minorities or the majority) the right to determine what the rest of the people can see or express, on the basis of their own sensibilities.

251 Butler 1997, p. 15.

252 Butler 1997, p. 19.

253 Butler 1997, p. 41.

254 Leets 2002, p. 354; Leets & Giles 1997, p. 264.

255 McKinnon 2006, p. 132.

As was shown in par. II.5, Feinberg has argued that offence is not totally immune from criminalisation under the liberal paradigm; in exceptional circumstances, profound offence can engage the criminal law. In his view, the consequences of group vilification are different from mere offence: '[i]f someone protests against unwanted exposure to pornography or indecent language, then one is more remotely and indirectly implicated in the subject matter of the offensive material than when one protests against contemptuous or hateful statements concerning one's own racial or ethnic group. It is a matter, so to speak, of having the moral standing to protest.'²⁵⁶

Prohibiting expressions that target religious *symbols or ideas* instead of *people* is difficult to reconcile with liberal principles. In Feinberg's liberal account, pure blasphemy of religious objects or ideas does not constitute harm to them. Others argue that people identify with their religion so strongly that defamation of religious objects or ideas really implicates their identity and thus constitutes harm. However, contempt for what people believe is different from the denial of human dignity.²⁵⁷ Moreover, '[w]hat every religious group finds offensive is a matter of contingent history. Some groups will be more easily offended than others – denying that God exists could already be enough to offend some people. Allowing them to set the limits to free speech would mean that 'the public sphere could shrink in ways that are incompatible with democracy'.²⁵⁸

7.6 Distinguishing truth from lie

A special kind of speech restriction is the prohibition of negation of grave crimes such as genocide. One justification behind restricting such expressions – besides arguments such as mental harm or negative imaging – is the idea that wrong allegations of historical fact should be distinguished from expressions of opinion.²⁵⁹ This argument is problematic, as it puts lawmakers and judges in a position to fix historical truth.²⁶⁰ Even though the occurrence of certain historical facts is evident, it is always possible that particular *parts* of the story are not clear or that new evidence emerges; broadly drafted laws can silence scientific criticism of common historical interpretations around grave crimes.²⁶¹ Besides the argument that it is contrary to historical science to proclaim an absolute truth on historical matters, it is particularly the role of the *state* in proclaiming such "truths" that is objectionable. Despite these objections, one could argue that some cases of negation seem intended purely to distribute hatred against groups; many Holocaust revisionists, for instance, merely wish to 'amend the historical

256 Sadurski 1999, p. 209.

257 Rosier 2000, p. 12.

258 Post 2007, p. 346.

259 Heinze 2006, p. 550.

260 McKinnon 2006, p. 163.

261 Raes 1995, p. 71.

remembrance in order to give greater legitimacy to nazi-movements of today',²⁶² accusing the victims of falsifying history. However, this is actually a different argument: what it then comes down to is whether negation of historical facts is *harmful* for the individuals or groups concerned. Indeed, a further argument for these kinds of speech bans is that of protecting the victims of grave crimes against harm: especially when the facts have taken place in relatively recent times, it can be unbearable for victims to be confronted with such hatred again. This argument becomes harder to sustain when the atrocities come to lie further in the past and direct victims become less numerous.

8 CONCLUSION

This chapter has set out the main arguments that are used for and against hate speech bans and has placed these arguments against the background of the principles of liberal democracy. It has discussed several arguments that sustain freedom of expression: the marketplace of ideas, the argument from democracy, the argument from autonomy, civic virtues & tolerance and some pragmatic arguments. It has also shown several reasons for restricting hate speech bans – as well as counterarguments: public order, negative imaging, equality, mental harm, offence and distinguishing truth from lie. Part A provided a more general background to these arguments, including considerations on liberal democracy, toleration, militant democracy, liberty versus equality and general limitations to liberty.

The aim of this chapter has not been to provide definite answers to the question to what extent hate speech should be restricted in liberal democracies – one could ask whether that is possible at all. If anything, it shows that governments will probably never achieve the perfect regulation of speech: there will always be counterarguments, depending on which values prevail. Instead of providing clear solutions, this theoretical framework serves to recognise the arguments that lie behind the regulation of hate speech and extreme speech in the Netherlands, England & Wales and in international and European law. As such, it forms the theoretical basis for the upcoming chapters.

262 Raes 1995, p. 57.

CHAPTER III

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1 INTRODUCTION

Since the inception of the European Convention on Human Rights (ECHR), several important developments have taken place in the field of hate speech and related areas. The case law of the European Court of Human Rights (ECtHR) – and, to a lesser extent, the decisions of the European Commission of Human Rights (ECommHR) – have exerted more and more influence on Dutch and English national law in this area. This chapter traces how hate speech and extreme speech have come to be interpreted under the ECHR. Based on the theoretical framework in Chapter II, it provides an analysis of the ideas behind the ECHR's stance on hate speech and whether they have changed over time. It starts by sketching the general framework which the ECtHR has developed for dealing with freedom of expression (paragraph 2). The third paragraph deals with the theoretical rationales for having freedom of expression under the ECHR, as well as with the meaning of related concepts such as democracy and pluralism. Paragraphs 4 to 7 are concerned with restrictions of specific types of speech, namely hate speech, blasphemy/religious defamation, religiously motivated hate speech and extreme speech. Paragraph 8 contains some preliminary conclusions.

2 ARTICLE 10 ECHR: GENERAL FRAMEWORK

Under the European Convention on Human Rights (ECHR), freedom of expression constitutes 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.'¹ Article 10 of the European Convention lays down the right to freedom of expression, which reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or

1 ECtHR *Lingens v. Austria*, 8 July 1986, par. 41.

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.

Freedom of expression can also engage several other fundamental rights as laid down in the Convention, including article 9 (freedom of religion), article 11 (freedom of association) and article 17 (abuse of right). This comes back in the following paragraphs that deal with different categories of speech.

The right to freedom of expression under article 10 is not absolute: as paragraph 2 indicates, it carries with it “duties and responsibilities”. Interferences with the right to freedom of expression by public authorities – which may include criminal penalties, but also prior restraint (censorship) and other formalities or conditions – should comply with the following criteria:

- the interference shall be prescribed by law.
- the interference shall pursue a legitimate aim. According to paragraph 2, legitimate aims in this regard are the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. This requirement is easily satisfied; most restrictions to freedom of expression can be included in one of the interests mentioned, and the Court is more inclined to focus on the next requirement.
- the interference shall be necessary in a democratic society. This implies that
 - there is a “pressing social need” for interference
 - the reasons given by the national authorities are “relevant and sufficient” and
 - the restriction is proportionate to the aim pursued.

In judging whether interference is necessary in a democratic society, States Parties have a certain margin of appreciation, because the Court holds that states are in principle in a better position to judge the necessity of a restriction. This concept allows for a certain degree of pluralism in the Member States of the Council of Europe. Therefore, it is especially relevant with regard to issues where there is no uniform European conception, such as morals and religion (see par. III.5). However, this margin of appreciation is not unlimited: the Court has consistently judged that it ‘goes hand in hand with European supervision’. It is important to keep in mind that the role of the ECtHR in judging hate speech and extreme speech is different from that of the national courts: its subsidiary role makes it more difficult to assess with certainty which rationales the Court itself adheres to.

The scope of article 10 is so broad as to include not only oral or written speech in the traditional sense, but also physical actions such as protests,² and the wearing of

2 ECtHR *Steel v. United Kingdom*, 23 September 1998.

symbols.³ However, it does not refer to all acts by which one can express oneself – it has to involve some form of communication, of expressing ideas or facts.⁴ The Court has often underlined the importance of article 10: ‘[w]here (...) there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question (...) The necessity for restricting them must be convincingly established.’⁵ Article 10 is applicable ‘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. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no “democratic society”.’⁶ Simultaneously, however, the Court holds 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’. When assessing the necessity of an interference with free speech, the Court looks at the interference in the light of the case as a whole, including its content and the context that surrounds it. Expressions that take place in the context of public debate – that is, political speech and debate on questions of public interest – deserve a high level of protection under article 10.⁷ This can also include artistic expressions, if they make a contribution to public debate.⁸

Freedom of expression and the “duties and responsibilities” concerned, have a specific meaning when the media are involved. As a conveyor of information and ideas in public debate, the media have a very important role to play as a ‘public watchdog’. Article 10 includes the right to freedom of information, which can only be effectively maintained if media freedom is not unduly restricted. The other side of the coin is that, according to the Court, journalists have a special responsibility to act with integrity in conducting this public debate.⁹

3 THEORETICAL RATIONALES FOR FREEDOM OF SPEECH UNDER THE ECHR

In the Court’s case law, a twofold rationale for freedom of expression can be found: free speech is essential for both the functioning of democracy and for the individual’s development and autonomy. This was already indicated in the first phrase of par. III.2, quoting the Court’s *Lingens v. Austria* judgment. The phrase originally stems from *Handyside v. UK*, where the Court found that ‘[f]reedom of expression constitutes one

3 ECtHR *Vajnai v. Hungary*, 8 July 2008.

4 *Nieuwenhuis* 2006, p. 291.

5 ECtHR *Autronic AG v. Switzerland*, 22 May 1990, par. 61.

6 ECtHR *Handyside v. United Kingdom*, 7 December 1976, par. 49.

7 *Nieuwenhuis* 2006, p. 292.

8 ECtHR *Müller and others v. Switzerland*, 24 May 1988; ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999.

9 *Brants* 2008, p. 403.

of the essential foundations of such a society [a democratic society, MvN], one of the basic conditions for its progress and for the development of every man.’¹⁰

3.1 The argument from democracy

It becomes clear from the Preamble to the Convention that democracy and human rights are intimately linked to each other in the ECHR framework.

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend...¹¹

The ECtHR has reaffirmed this: ‘[d]emocracy is without doubt a fundamental feature of the European public order.’¹² The Preamble also stresses the common heritage of political tradition, ideals, freedom and the rule of law in European countries. According to the Court, ‘in that common heritage are to be found the underlying values of the Convention. (...) the Convention was designed to maintain and promote the ideals and values of a democratic society.’¹³ Democracy is the only political model compatible with the Convention.¹⁴ The foundations of a democratic society not only include the political sphere, but are broader: civil society organisations, such as religious organisations, also form part of it.¹⁵ It needs no explanation that “democracy” under the ECHR is a particularly substantive notion and that it cannot exist without fundamental rights. The Convention’s idea of democracy is a liberal one, in which the protection of the individual’s human rights is paramount. This protection, in turn, is based on the idea of equal, individual human dignity.¹⁶

Central to the Court’s conception of democracy are “pluralism, tolerance and broadmindedness”.¹⁷ The Court has stressed that there can be no democracy without pluralism, and has linked pluralism to the rights of minorities in a democracy.¹⁸ In *Gorzelik v. Poland*, the Court found that freedom of association – and thereby a pluralist democracy – is particularly important for persons belonging to minorities: ‘forming an association in order to express and promote its identity may be

10 ECtHR *Handyside v. United Kingdom*, 7 December 1976, par. 49.

11 Preamble to the ECHR.

12 ECtHR (Grand Chamber) *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, par. 45.

13 ECtHR (Grand Chamber) *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, par. 45.

14 ECtHR (Grand Chamber) *Gorzelik and others v. Poland*, 17 February 2004, par. 89.

15 *Nieuwenhuis* 2006, p. 290; ECtHR (Grand Chamber) *Gorzelik v. Poland*, 17 February 2004, par. 92

16 *Vanden Heede* 2004, p. 213.

17 ECtHR *Handyside v. United Kingdom*, 7 December 1976, par. 49.

18 *Nieuwenhuis* 2007.

instrumental in helping a minority to preserve and uphold its rights.¹⁹ Thus the Court's idea of democracy is in principle anti-majoritarian (although it does not say anything about majoritarian political *systems*) and protective of minority voices in public debate. Pluralism is even seen as a value in itself. As the Court noted in *Chassagnou v. France*: '[a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.'²⁰ Democracy does not simply mean aggregating each individual's preferences to see what the majority opinion is; it must be based on 'dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups'.²¹

The democratic rationale behind free speech becomes visible in the Court's approach to expressions uttered in the context of public debate: these are awarded greater protection than, for instance, commercial speech. In principle, there is much room to criticise the government or individual politicians. Moreover, freedom of the press is important to ensure its role as a "public watchdog"; that is, to uphold the freedom of information to citizens about all matters of public interest. The Court apparently 'equates democracy with societies where there is a vigorous public debate about matters of public policy and constitutional arrangements conducted by the public themselves and through their representatives in the forms of political parties and elected politicians.'²²

3.2 The argument from individual autonomy

The Court's argument that freedom of speech is 'one of the basic conditions for the progress of every man' and 'for each individual's self-fulfilment' includes two related rationales for freedom of speech. First, every individual's personal autonomy requires that they are free to speak their mind (the argument from individual autonomy). This is grounded in the equal dignity and respect for all individuals. Second, a free exchange of opinions is considered indispensable for the development of individuals as critical and tolerant citizens (the argument from civic republicanism). The argument from individual autonomy can also be found in the Court's case law concerning article 9 on freedom of conscience, thought and religion, of which the freedom to manifest one's religion is an indispensable part. In *Kokkinakis v. Greece*, the Court held that '[b]earing witness in words and deeds is bound up with the existence of religious convictions.' However, according to Evans, the Court and Commission have not

19 ECtHR (Grand Chamber) *Gorzelik v. Poland*, 17 February 2004, par. 93.

20 ECtHR (Grand Chamber) *Chassagnou and others v. France*, 29 April 1999, par. 112.

21 ECtHR (Grand Chamber) *Leyla Sahin v. Turkey*, 10 November 2005, par. 108; see Wheatly 2007, p. 771.

22 Mowbray 1999, p. 705.

reflected thoroughly on the way this rationale of individual autonomy affects the interpretation and application of article 9.²³ This seems to be even more so in the case law on article 10, where the Court particularly emphasises the importance of free speech for public debate, but is much less expansive about the importance to the individual. According to Peters & De Vré, the broad democratic rationale that the Court employs – which relates to the whole public sphere, including religion, art, education, etcetera – also includes a kind of individual rationale.²⁴ After all, those areas of public life are essential to one’s development. What becomes clear, at least, is that the individual autonomy to express oneself is not absolute: the Court’s approach is not to value “speech for speech’s sake”. Freedom of speech, just as many other freedoms enshrined in the Convention, always finds its limitations in the rights of others, public order or other legitimate aims.

The Court often takes into account the *autonomy of the audience*: the argument that people shall be enabled to take note of all kinds of different opinions that exist in society, including those that “offend, shock or disturb”. Moreover, the Court often underlines the importance of the media to provide the public with information and viewpoints – even extreme ones.²⁵ In *Jersild v. Denmark* (see par. III.4.4), the Court allowed the media a greater freedom to channel racist views (of others) than it allows the original speakers.²⁶ In that case, the Court also took account of the type of audience (“well-informed”) and the fact that the journalist dissociated himself from the racist views expressed – hence the autonomy of the audience is not unlimited. The importance of the media and the public’s right to be informed also point to the argument from civic republicanism: according to the Court, freedom of speech enables an open exchange of ideas of all kinds, including ‘cultural, political and social information and ideas’.²⁷ This all belongs to the Court’s broad notion of public debate. Yet its idea of a pluralist and tolerant democracy does exclude certain ideas, such as those which are “gratuitously offensive” (see par. III.5). One of the notions behind this is that such expressions hinder the development of a democratic and tolerant spirit among citizens.²⁸ The Court does not generally adhere to the view that provocative speech must be allowed in order to develop critical capacities.

23 Evans 2001, p. 33.

24 Peters & De Vré 2005, p. 14.

25 ECtHR Gözel and Özer v. Turkey, 6 July 2010; ECtHR Hocaogulları v. Turkey, 7 March 2006; ECtHR Halis Dogan v. Turkey (no. 3), 10 October 2006

26 ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994

27 ECtHR Müller and others v. Switzerland, 24 May 1988, par. 27.

28 Joint dissenting opinion judges Palm, Pekkanen and Makarczyk in ECtHR *Otto-Preminger-Institut v. Austria*, 20 September 1994: ‘tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed.’

3.3 A special role for freedom of speech?

Does freedom of expression have an exceptional position among other fundamental rights in the Convention? Looking at article 10, this is hard to maintain: as opposed to other rights such as freedom of association and freedom of religion, the exercise of freedom of expression explicitly brings with it “duties and responsibilities”. This was an important point of discussion during the drafting process of article 10. Proponents of the clause, who eventually got their way, argued that ‘freedom of expression was a precious heritage as well as a dangerous instrument’ and that ‘in view of the powerful influence the modern media of expression exerted upon the minds of men and upon national and international affairs, the “duties and responsibilities” in the exercise of the right to freedom of expression should be specially emphasised.’²⁹ In the case law of the Court and the Commission, freedom of expression is subject to several types of restrictions. As Feldman writes, ‘[t]he emphasis on the duties and responsibilities of those exercising freedom of expression, the refusal to countenance any element of absolutism in the right, and a keen sensitivity to the political and social context of expression, are key features of the jurisprudence of the Court under ECHR Article 10. This makes collective interests weightier in Europe than in the USA in the definition of rights to free expression.’³⁰ Indeed, the ECHR reflects the continental European idea of “positive liberty”: ‘Western European states, as reflected in Council of Europe (...) have not deemed the prohibition of hate speech to be an unfortunate, necessary evil, but a positive good, expressive of the ideals of l’*état social*.’³¹ The government is not principally regarded as an adversary of citizens, always at risk of violating their freedom of expression. However, the Court’s case law does express a certain level of distrust of the government. For instance, the Court regularly warns states to exercise restraint in resorting to criminal proceedings in free speech cases: ‘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 or the media.’³² Under the Convention, a balance must always be struck between freedom of expression and other fundamental rights or interests such as public order and the prevention of crime.

4 HATE SPEECH

Hate speech in this paragraph generally refers to incitement to hatred or discrimination and group insult. Under the ECtHR’s case law, hate speech is regularly mentioned but

29 European Commission of Human Rights 1956a, p. 23.

30 Feldman 2002, p. 760.

31 Heinze 2006, p. 578.

32 ECtHR *Castells v. Spain*, 23 April 1992, par. 46

never defined or explained.³³ It is an autonomous concept: the Court does not consider itself bound by the domestic courts' classifications of hate speech.³⁴ In the case of *Gündüz v. Turkey*, the Court referred to the Council of Europe Committee of Minister's Recommendation (97)20 on "hate speech", which defines the term as follows: '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.' In this case, as well as in the subsequent *Erbakan v. Turkey* judgment, the Court considered that

[h]aving regard to the relevant international instruments and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle 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.³⁵

However, the use of this definition does not prevent the Court from deciding on a case by case basis when hate speech is at stake.³⁶ According to Weber, '[t]he common denominator in these cases is that they concern remarks which incite to hatred against human beings, because of their – sometimes perceived – belonging to a religion, a race or an ethnic group: these remarks directly target human beings, not their opinions as such.'³⁷ This makes states' margin of appreciation in such cases very small.

The previous passage from the *Gündüz* case indicates the main rationale for prohibiting hate speech under the Convention: 'respect for the equal dignity of all human beings'. This is such a fundamental value under the Convention that expressions which are clearly at odds with it – including hate speech – can be legitimately prohibited. The Court interprets article 10 in the light of international human rights law, particularly article 20 ICCPR and article 4 CERD which have a similar rationale as the ECHR approach to hate speech: protecting equal dignity.³⁸ In *Jersild v. Denmark*, the Court argued that 'the object and purpose pursued by the UN Convention [on the Elimination of all forms of Racial Discrimination, MvN] are of great weight in determining whether the applicant's conviction, which – as the Government have stressed – was based on a provision enacted in order to ensure

33 ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994; ECtHR *Erbakan v. Turkey*, 6 July 2006; ECtHR (Grand Chamber) *Sürek v. Turkey* (1), 8 July 1999.

34 Weber 2009, p. 3.

35 ECtHR *Gündüz v. Turkey*, 4 December 2003, par. 40.

36 Oetheimer 2009, p. 429.

37 Weber 2006, p. 98.

38 Feldman 2002, p. 760

Denmark's compliance with the UN Convention...' and that 'Denmark's obligations under article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention.'³⁹

4.1 Article 17 ECHR in hate speech cases

The Convention's substantive conception of democracy comes back in article 17, which reads:

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

Article 17 makes sure that a person or group cannot use the rights in the Convention – including the right to freedom of speech – to undermine democracy or fundamental rights. The Convention's view of democracy is thus militant against the "enemies of democracy". There is no "relativity of truth" perspective: it recognises that certain values, particularly democracy and fundamental rights, are to some extent absolute (though their interpretations may differ) and that viewpoints that go against those values can be prohibited. This can be explained by the history of the Convention, which came into being with memories of the Second World War and the Weimar period fresh in mind: the idea of "never again" and the clear divide between democracy and its totalitarian enemies have had a profound influence on the Convention and its case law.⁴⁰

The overall purpose of article 17 is to prevent totalitarian groups from exploiting the principles enunciated by the Convention in their own interests, as the Commission and the Court noted in *Norwood v. UK* and *Glimmerveen & Hagenbeek v. the Netherlands*. As Judge Jambrek stated, 'the requirements of article 17 also reflect concern for the defence of democratic society and its institutions. The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes (...) It could be assumed that this original aim also corresponds to the more recent dangers to the European principles of democracy and the rule of law.'⁴¹ For this purpose, some expressions are excluded in advance from the "normal" freedom of expression test.

Equal dignity is such a fundamental value under the Convention that the Court often deals with hate speech under this "abuse of right" provision, without coming to a

³⁹ ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994, par. 30.

⁴⁰ Wheatly 2007, pp. 780-781.

⁴¹ ECtHR (Grand Chamber) *Lehideux and Isorni v. France*, 23 September 1998, Concurring opinion of Judge Jambrek, par. 3.

substantive assessment under article 10. If this occurs, a case does not reach the admissibility stage and thus a full review by the Court: article 17 works to remove some speech from the protection of article 10 ‘purely on the basis of content. It eliminates the need for a “balancing process” that characterises the Court’s approach under article 10.’⁴² In several hate speech cases, the Commission and the Court ruled that expressions lacked the protection of article 10 because they were aimed at the destruction of the rights set forth in the Convention – for instance the propagation of National-Socialism,⁴³ Holocaust denial⁴⁴ (see par. III.4.2 below) and advocating the removal of ethnic minorities from the Netherlands.⁴⁵ In other cases, the Commission and the Court interpreted article 10(2) in the light of the principles set out in article 17.⁴⁶ Expressions inspired by National-Socialism always fall outside the protection of article 10, such as in *X v. Austria*,⁴⁷ *Kühnen v. Germany*⁴⁸ (which was judged under article 10 but interpreted ‘in the light of article 17’) and *Schimanek v. Austria* (where the Court combined article 10 and article 17).⁴⁹ The Court and Commission argued that ‘National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in article 17 of the Convention.’⁵⁰ In *Pavel Ivanov v. Russia*, the Court upheld the conviction of a newspaper owner for incitement to hatred against Jews because he had authored a series of articles portraying the Jews as the source of evil and accusing them of plotting a conspiracy against the Russian people. The Court did not hesitate to declare his application inadmissible under article 17, because ‘[s]uch a general and vehement attack on one ethnic group is in contradiction with the Convention’s underlying values, notably tolerance, social peace and non-discrimination.’⁵¹

4.2 Holocaust denial

The Commission and the Court deal with the denial or justification of the Holocaust in the same way as with National Socialist inspired expressions – indeed, there is a large overlap here.⁵² The real purpose of Holocaust denial, according to the Court, is

42 Keane 2007, p. 643.

43 ECommHR *X v. Austria* (inadmissible), 13 December 1963; ECommHR B.H., M.W., H.P. and G.K. v. Austria, 12 October 1989.

44 ECtHR *Garaudy v. France* (inadmissible), 24 June 2003; ECtHR *Witzsch v. Germany* (inadmissible), 13 December 2005.

45 ECommHR *Glimmerveen and Hagenbeek v. the Netherlands* (inadmissible), 11 October 1979.

46 See Keane 2007, p. 643. ECommHR *Kühnen v. FRG* (inadmissible), 12 May 1988; ECtHR *Schimanek v. Austria* (inadmissible), 1 February 2000.

47 ECommHR *X v. Austria*, 13 December 1963.

48 ECommHR *Kühnen v. FRG* (inadmissible), 12 May 1988.

49 ECtHR *Schimanek v. Austria* (inadmissible), 1 February 2000.

50 ECtHR *Schimanek v. Austria* (inadmissible), 1 February 2000; ECommHR B.H., M.W., H.P. and G.K. v. Austria, 12 October 1989.

51 ECtHR *Pavel Ivanov v. Russia* (inadmissible), 20 February 2007.

52 ECommHR *X v. FRG* (inadmissible), 16 July 1982.

not to engage in historical debate but to rehabilitate the National-Socialist regime. In *X v. Federal Republic of Germany*,⁵³ the Commission accepted that the prohibition of pamphlets in which the Holocaust was described as a “zionistic swindle or lie” was necessary in a democratic society, since ‘such a society rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe.’ Moreover, ‘[t]he protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination.’ In *Witzsch v. Germany*, a complaint concerning the denial of specific historical facts relating to the Holocaust also got stuck on article 17.⁵⁴ The Court has also suggested that expressing “nonequivocal justification” of terrorist acts and of war crimes such as torture and summary executions, may engage Article 17.⁵⁵

However, the Court does not automatically accept restrictions of “revisionist” speech. In *Lehideux and Isorni v. France*, the Grand Chamber ruled that in principle, article 17 removes from the protection of article 10 the categories of Holocaust denial and other questioning of clearly established historical facts.⁵⁶ As the expressions in this concrete case did not fall within those categories, the Court found a violation of article 10. The French courts had convicted the applicant for publishing an advertisement in *Le Monde* which set the life and actions of Philippe Pétain – chief of state in the Vichy régime – in a positive light. According to the French courts, the advertisement justified Pétain’s actions by giving them a different meaning and it omitted certain historical facts which were ‘essential for any objective account of the policy concerned’. The ECtHR found that ‘since the text presented Philippe Pétain in an entirely favourable light and did not mention any of the offences he had been accused of, and for which he had been sentenced to death by the High Court of Justice, it could without any doubt be regarded as polemical. In that connection, however, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.’⁵⁷ Moreover, the applicants explicitly stated their disapproval of Nazi atrocities and ‘were not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain’s conviction.’ Three dissenting judges noted that the advertisement could not be regarded as ‘a contribution to genuine historical debate, given its wholly one-sided and promotional character’.⁵⁸ The ECtHR, however, considered that ‘it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly

53 ECommHR *X v. FRG* (inadmissible), 16 July 1982.

54 ECtHR *Witzsch v. Germany* (inadmissible), 13 December 2005.

55 ECtHR *Leroy v. France*, 2 October 2008, par. 27; ECtHR *Orban and others v. France*, 15 January 2009, par. 35.

56 ECtHR (Grand Chamber) *Lehideux and Isorni v. France*, 23 September 1998

57 ECtHR (Grand Chamber) *Lehideux and Isorni v. France*, 23 September 1998, par. 52.

58 Joint dissenting opinion of Judges Foighel, Loizou and Sir John Freeland.

established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of article 10 by article 17.’⁵⁹

The Court repeated the “clearly established historical facts” category in its inadmissibility decision in *Garaudy v. France*, where the applicant had published a book *The founding myths of Israeli politics* which questioned the reality, extent and seriousness of the Holocaust.⁶⁰ He trivialised the Holocaust by drawing parallels to other historical events such as colonialism, presented the Holocaust as a sham used to justify atrocities by the Israeli government and he doubted whether gas chambers had really been used. The author contended that his intention had merely been to challenge political Zionism, which he regarded as a form of fundamentalism next to Roman Catholic and Islamic fundamentalism. The ECtHR considered that

the domestic courts have shown on the basis of a methodical analysis and detailed findings that, far from confining himself to political or ideological criticism of Zionism and the State of Israel's actions, or even undertaking an objective study of revisionist theories and merely calling for “a public and academic debate” on the historical event of the gas chambers, as he alleges, the applicant does actually subscribe to those theories and in fact systematically denies the crimes against humanity perpetrated by the Nazis against the Jewish community.

The Court held that denying the Holocaust is ‘one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.’⁶¹ Therefore ‘in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity.’

The rationale for prohibition of Holocaust denial, in the Court’s view, is thus a combination of militant democracy (upholding the Convention’s core values), harm/offence to the feelings of victims or survivors, and public order. Yet these rationales do not allow unlimited restrictions. Expressions that are revisionist but that do not belong to the category of clearly established historical facts cannot be restricted so easily – even though they may be provocative to victims of such events. The rationale of “distinguishing truth from lie” plays a secondary role in this case law: in *Garaudy v. France*, the Court held that ‘[t]here can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to

⁵⁹ ECtHR (Grand Chamber) *Lehideux and Isorni v. France*, 23 September 1998, par. 47.

⁶⁰ ECtHR *Garaudy v. France* (inadmissible), 24 June 2003.

⁶¹ ECtHR *Garaudy v. France* (inadmissible), 24 June 2003.

rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history.’ Distinguishing truth from lie is thus inherently tied to insult in this view: Holocaust denial is used to insult victims by accusing them of falsifying history.

The historical context behind expressions plays an important role in cases surrounding revisionism or apology of past events. In *Lehideux et Isorni*, the Court held that ‘[e]ven though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.’⁶² This was repeated in *Orban v. France*,⁶³ involving the conviction of book publishers for “glorification of war crimes”. They had published a book by former general Aussaresses about the war in Algeria, where he gave testimony of his experiences and argued that the torture and summary executions that took place in this conflict were legitimate and inevitable. The Court held that such a testimony is of importance for public discussion about a people’s collective memory, as it aims to make others understand the complexities of a past situation which continues to occupy present debate.⁶⁴ The government’s argument that the publication offended the feelings of those submitted to torture was rejected since the events had taken place more than forty years ago. These cases are particularly important because the Court has often used the specific national and historical context to argue *in favour of* restricting freedom of expression. In many cases, so the argument goes, states have a large margin of appreciation to restrict rights, because they are in a better position to assess the particular situation in their country. In *Lehideux & Isorni* and in *Orban*, national sensitivities provide an argument for strict supranational supervision: here, the argument seems to be that an outsider perspective is good for dealing with such sensitive issues. This way, a country can be encouraged to start dealing with the unresolved pieces of its past.⁶⁵ In a case about a criminal conviction for *recognising* the Armenian genocide – the applicant had linked the genocide to current state violence against the Kurds – the Court also exercised strict supervision because the discourse was intended to encourage an open political-historical debate; article 10 protects such expressions despite the fact that they can offend, shock or disturb many people.⁶⁶

62 ECtHR (Grand Chamber) *Lehideux and Isorni v. France*, 23 September 1998, par. 55.

63 ECtHR *Orban and others v. France*, 15 January 2009.

64 ECtHR *Orban and others v. France*, 15 January 2009, par. 49.

65 Annotation Gerards to ECtHR *Orban and others v. France*, 15 January 2009, *EHRC* 2009/30.

66 ECtHR *Güçlü v. Turkey*, 10 February 2009.

In *Vajnai v. Hungary*,⁶⁷ the memory of past suffering also played a role: the applicant in this case was convicted for wearing a red star – representing a symbol of the international workers’ movement – on his jacket at a lawful demonstration. The government justified its intervention by arguing that the red star symbolises totalitarian ideas and practices that are against the Convention’s values. The Court did not accept this argument under article 17, as the red star here was ‘merely the symbol of lawful left-wing political movements’ instead of totalitarian groups. On the merits, the Court noted the following:

almost two decades have elapsed from Hungary’s transition to pluralism and the country has proved to be a stable democracy (...) there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship (...) The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives (...) It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression (...).

In “revisionist” cases such as those concerning Holocaust denial, the Court does not pay attention to the real and present danger that a past conflict or dictatorship will be restored in the future. Instead, the aim of the author is generally decisive – is that to engage in a real historical debate or merely to offend persons?

4.3 Article 17 – immigration and integration

The Court and Commission have also used article 17 to deal with hate speech in the area of immigration and multiculturalism, a hotly debated issue in many European countries. In *Glimmerveen and Hagenbeek v. the Netherlands*,⁶⁸ the Commission upheld a criminal conviction of the leaders of far-right political party *Nederlandse Volksunie (NVU)* for expressing racist views, including ‘as soon as the *Nederlandse Volks Unie* will have gained political power in our country, it will put order into business and, to begin with will remove all Surinamers, Turks and other so-called guest workers from the Netherlands’. The Commission held that ‘this policy is clearly containing elements of racial discrimination which is prohibited under the Convention and other international agreements’ (referring to article 14 of the Convention), and that ‘[t]he applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are (...) contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above.’ Therefore, the case was declared inadmissible on the grounds of article 17.

67 ECtHR *Vajnai v. Hungary*, 8 July 2008.

68 ECommHR *Glimmerveen and Hagenbeek v. the Netherlands* (inadmissible), 11 October 1979.

In *Norwood v. UK*,⁶⁹ a member of the far-right British National Party had displayed in the window of his flat a large poster with a photograph of the Twin Towers in flames, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. When he was convicted under section 5 Public Order Act (see par. VII.2.6), the applicant complained before the ECHR of a violation of articles 10 and 14, contending that criticism of a religion is not to be equated with an attack upon its followers. The Court, however, referred to article 17 and held that freedom of expression may not be invoked in a sense contrary to this article. The words and images on the poster amounted to a public expression of attack on all Muslims in the UK, and ‘[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.’ This case is important as it directly touches upon the question whether hate speech against a *religion* must be equated with hate speech against *religious adherents*: the Court did not delve into this issue and easily qualified the expression as an attack against a group of *people*. The decision also makes clear that, in line with the Commission’s decision in *Glimmerveen and Hagenbeek*, the principle of non-discrimination – whether on racial or religious grounds – can set aside freedom of expression by invoking article 17. More recently, however, the Court has explicitly rejected the use of article 17 in two cases concerning racial/religious hate speech (*Soulas v. France* and *Féret v. Belgium*, see next paragraph), assessing them substantively under article 10.

4.4 Hate speech under article 10

In several cases the Court has dealt with hate speech substantively under article 10, without invoking article 17. This happened in *Jersild v. Denmark*, which involved the freedom of the *media* to convey racist views. The case concerned a television documentary on “the Greenjackets”, a group of young people with racist ideas.⁷⁰ On being asked about their opinions in an interview, the group members made various derogatory remarks about immigrants and ethnic groups. Among other things, they said that black people ‘are not human beings, they are animals, right (...)’ and ‘in the long run, it’s the white man who is better.’ The case that came before the ECtHR dealt with the conviction of the television journalist who made the programme for aiding and abetting the youths in their racist expressions. The Court considered that it is not its task ‘to substitute its own views for those of the press as to what technique of reporting should be adopted by journalists’, and that the applicant did not have as his

⁶⁹ ECtHR *Norwood v. UK* (inadmissible), 16 November 2004.

⁷⁰ ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994, par. 10.

purpose the propagation of racist ideas. Other circumstances surrounding the broadcast added to this conclusion, particularly the fact that it took place in the context of a serious news programme and was intended for a well-informed audience, and the fact that the presenter counterbalanced the youth's views and dissociated himself from them. Therefore the Danish authorities had violated article 10. However, the Court made an important distinction between this freedom of the media and the freedom of the Greenjackets themselves to utter racist remarks: '[t]here can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10.'⁷¹ A similar passage comes back in *Gündüz v. Turkey* (see par. III.6.2): 'there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.'⁷² *Jersild v. Denmark* makes clear that the *aim* of the defendant is important: '[t]he fundamental question the Court asks is whether the applicant intended to disseminate racist ideas and opinions through the use of "hate speech" or whether he was trying to inform the public on a public interest matter.'⁷³

The Court's assessment of hate speech sometimes takes into account the specific regional context. In *Balsyte-Lideikiene v. Lithuania*,⁷⁴ a "Lithuanian calendar" had been published which included nationalist and ethnocentric texts; among other things, it referred to Jews and Poles as perpetrators of genocide against the Lithuanians. When the publisher complained about his criminal conviction, the Court did not find a violation of article 10. The Court attached particular attention to the general situation in Lithuania: it took into account 'the Government's explanation (...) that after the re-establishment of the independence (...) the questions of territorial integrity and national minorities were sensitive.' The national courts had based themselves on expert evidence, which concluded that 'a biased and one-sided portrayal of relations among nations hindered the consolidation of civil society and promoted national hatred' and they had 'noted the negative reaction which the publication received from a certain part of Lithuanian society and some foreign embassies.' Considering the State's margin of appreciation, the Court could easily conclude that article 10 had not been violated.

*Soulas and others v. France*⁷⁵ concerns the author and publisher of a book entitled "The colonisation of Europe. Truthful remarks about immigration and Islam", who were convicted to 7500 euro fines for incitement to hatred and violence. In this book the author argued that European civilisation and Islamic civilisation were incompatible,

71 ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994, par. 35.

72 Par. 41. See also ECtHR *Erbakan v. Turkey*, 6 July 2006, par. 57.

73 Weber 2009, p. 33.

74 ECtHR *Balsyte-Lideikiene v. Lithuania*, 4 November 2008.

75 ECtHR *Soulas and others v. France*, 10 July 2008.

using passages such as ‘il ne s’agit pas de ghettos mais de territoires conquis et colonisés’ and ‘Les Français de souche sont expulsés des zones afro-maghrébines majoritaires’. Though the Court rejected the use of article 17 because the expressions were not sufficiently severe to warrant it, it did not see a violation of article 10. The Court first gave an elaborate sketch of the *problematique* surrounding the integration of immigrants, which it considered to be a matter of debate of public interest. This is notable because in other cases that deal with immigration debate, such as *Norwood v. UK*, the Court did not consider whether the expressions fell within the realm of a debate on matters of public interest at all. Since those expressions were immediately judged to be contrary to the values of the Convention, the element of public debate was not relevant anymore. It seems that for the Court, such expressions are simply not a legitimate part of a public sphere in a democratic, tolerant and pluralist society.⁷⁶ In *Jersild*, the Court did make mention of public debate, because the case concerned the responsibility of the media rather than of the speaker himself; in *Soulas* both the media (publisher) and the author were applicants. *Soulas* is the first case where the Court explicitly accepts that anti-immigration expressions by the speaker/author himself may fall within the ambit of public debate. This does not mean, however, that such expressions are protected *per se*: in *Soulas*, the Court also held that state authorities’ margin of appreciation is relatively large in such a field of controversial national debate.

Les problèmes auxquels les Etats doivent faire face dans la mise en œuvre de leur politique d’immigration et d’intégration varient, par la force des choses, de l’un à l’autre. Il en va de même de l’impact de cette politique tant sur la population immigrée que sur la population autochtone, ainsi que des rapports qui se créent entre ces populations et qui peuvent dépendre de plusieurs facteurs, notamment historiques, démographiques et culturels. L’ampleur de ces problèmes et la manière la plus adaptée pour remédier aux plus extrêmes d’entre eux relèvent de l’appréciation des autorités nationales, qui ont une connaissance approfondie des réalités du pays. (par. 38)

Therefore, in the end the Court did not find a violation of article 10. It referred to the importance of combating racial discrimination as set out in article 4 CERD and article 20 ICCPR (the Court specifically mentions *racial*, not *religious* discrimination!) and accepted the following reasoning by the French Court of Appeal as relevant and sufficient:

Que cette présentation globalisante, réitérée dans l’ensemble des extraits poursuivis d’éléments systématiquement négatifs a pour objet de provoquer chez les lecteurs de l’ouvrage un sentiment de rejet et d’antagonisme, accru par l’emprunt au langage militaire, vis-à-vis des communautés précitées, désignées ainsi comme l’ennemi principal selon l’expression utilisée dans l’ouvrage, et les amener à partager la solution préconisée par l’auteur, celle d’une guerre de reconquête ethnique. (par. 15)

76 ECtHR *Féret v. Belgium*, 16 July 2009, par. 64; see also Nieuwenhuis 2006, p. 312.

The aim of the book was to identify an enemy to convince persons of the necessity for a war, according to the French court. The ECtHR accepted this reasoning, having also argued that in the French immigration debate ‘il en découle des problèmes de mésentente et d’incompréhension qui, dans leur expression la plus grave, se sont déjà traduits par des affrontements violents entre les forces de l’ordre et certains éléments radicaux de cette population.’ This points to a combination between the rationales of *negative imaging* and *public order*: there is a risk that such expressions construe immigrants as “the enemy” in the eyes of others, which may lead to violence in the long run. The Court did not delve into the concrete risk of violence and accepted the domestic court’s reasoning on this point.

In *Féret v. Belgium*,⁷⁷ the chairman of the far-right political party “Front National” was prosecuted and convicted for incitement to hatred, discrimination and violence for having distributed party leaflets and posters in connection with the election campaigns. The leaflets advocated the repatriation of immigrants to their countries of origin and separation of Europeans from non-European immigrants in terms of work permits, social security and so on. Though some of the expressions were more obviously hateful than others – some of them proposed the expulsion of non-European immigrants, others merely criticised Belgian politicians for their ‘lenient’ immigration policy – the Court found that they all ‘albeit perhaps implicitly’ incited to hatred, discrimination and/or segregation of a group on the grounds of their race, colour, descent or national/ethnic origin *and* manifested the willingness of the authors to resort to such discrimination, segregation or hatred.⁷⁸ The Court did not make it clear whether all these elements are necessary to prohibit expressions. Importantly, it suggested that restrictions of hate speech are not really about the connection between speech and eventual acts of violence or discrimination, but rather about protecting people against attacks on their human dignity and preserving public peace and stability:

La Cour estime que l’incitation à la haine ne requiert pas nécessairement l’appel à tel ou tel acte de violence ni à un autre acte délictueux. Les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l’incitation à la discrimination, comme cela a été le cas en l’espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d’expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population. Les discours politiques qui incitent à la haine fondée sur les préjugés religieux, ethniques ou culturels représentent un danger pour la paix sociale et la stabilité politique dans les Etats démocratiques.⁷⁹

⁷⁷ ECtHR *Féret v. Belgium*, 16 July 2009.

⁷⁸ Par. 70.

⁷⁹ ECtHR *Féret v. Belgium*, 16 July 2009, par. 73.

According to the Court, it is of utmost importance, especially for politicians, to avoid feeding intolerance, in the light of the defense of democracy: politicians must act responsibly in public debate. The fact that racist/xenophobic expressions were uttered in the context of an electoral campaign with the aim of convincing as many people as possible was regarded as an aggravating factor, since this makes the impact of incitement to hatred even greater.⁸⁰ The rationale of *negative imaging* thus played an important role. As opposed to *Soulas v. France*, the Court did not mention the margin of appreciation here: it put its own substantive judgment – based on a strong militant democracy viewpoint – at the forefront. Still the Court explicitly rejected the application of article 17 on the grounds that a substantive assessment was necessary.⁸¹ This very articulate judgment has provoked much discussion within the Court itself: it was supported by a narrow majority of four judges and strongly criticised by the three dissenting judges.⁸² They warned against the “banalisation of racism” that would result from judging expressions such as Féret’s to be racist and concluded that a stable democracy does not need the kind of militancy the Court adheres to.

The Court’s struggle with the boundaries of public debate on immigration and multiculturalism also appears from the case of *Le Pen v. France*,⁸³ where the Court repeated many of the considerations it had made about the French immigration debate in *Soulas*, but basically ignored the judgment in *Féret*. Jean-Marie Le Pen, the leader of the French “National Front” party, was convicted for incitement to discrimination, hatred and violence for statements he had made in a newspaper interview: ‘[t]he day there are no longer 5 million but 25 million Muslims in France, they will be in charge. And the French will (...) walk on the streets with their eyes lowered. If they refuse to, they will be asked: ‘Why are you looking at me like that? Are you looking for a fight?’ And the only thing they can do is run (...).’ Referring to its judgment in *Soulas*, the Court asserted that Le Pen’s statement formed part of a public debate on immigration and integration issues, which could generate the misunderstanding and incomprehension that have already led to violent clashes. Again, the Court ruled that, since states faced their own particular problems in dealing with this, there should be a considerable margin of appreciation. It found that Le Pen’s statements could create a negative – and even disturbing – image of the Muslim community as a whole. His expressions imprinted in the minds of the public the conviction that Muslims were a threat to the French people. As such he created feelings of hostility, driving a wedge between “the French people” and an entire group of people whose religion is explicitly mentioned. Just as in *Soulas*, the rationale of negative imaging played an important role. Eventually, the Court came to the conclusion that Le Pen’s complaint was

80 ECtHR *Féret v. Belgium*, 16 July 2009, par. 76.

81 ECtHR *Féret v. Belgium*, 16 July 2009, par. 52.

82 ECtHR *Féret v. Belgium*, 16 July 2009, dissenting opinion Judge Sajó, joined by Judge Zagrebelsky and Judge Tsotsoria.

83 ECtHR *Le Pen v. France* (inadmissible), 20 April 2010.

manifestly ill-founded (though without mentioning article 17) – quite surprisingly, considering the similarity with *Soulas*, which was considered on its merits.

Where *direct* incitement to discrimination is concerned, freedom of expression appears to be rather small: in the case of *Willem v. France*,⁸⁴ the mayor of a French town had announced during a town council session that he intended to boycott Israeli products in the municipality. He thereby wished to protest against the Israeli government's actions regarding Palestine. Following complaints, the mayor was prosecuted and convicted for provoking discrimination on national, racial and religious grounds. The ECtHR found no violation of article 10, judging that the applicant had not merely expressed a political opinion but, rather, had incited to an act of discrimination. Neither had his call promoted free discussion about a subject of public interest, because he had not provided an opportunity for debate or vote during the council meeting or its internet site. Accordingly, the question whether an expression falls within the ambit of "public debate" can depend on the context: is there in fact room for debate or is it merely a one-sided statement? Judge Jungwiert criticised the majority's judgment in a dissenting opinion, arguing that this clearly concerned the expression of a political position about a matter of international interest.

4.5 Towards positive obligations in hate speech cases?

If the position of hate speech under the *negative* right to free speech is so obvious from the Court's case law, could it be that there are even *positive* obligations under article 10? That is, a positive obligation upon states to investigate and prosecute for hate speech, allowing victims of hate speech to complain before the Court about their state's refusal to prosecute? After all, article 4 CERD and article 20 ICCPR already provide for such obligations – although the latter does not necessarily require *criminal* law measures. While the Commission did not yet want to go this far in *Choudhury v. UK* (a case about blasphemy and article 9 v. article 10, see par. III.5.3), newer case law by the Court indicates that positive obligations to deal with *individual* defamation may flow from article 8 (the right to respect for private life).⁸⁵ Lawson has suggested that the Court might at some point extend this case law to hate speech cases, which could then be based on article 8 or on article 9 in cases of religious hate speech.⁸⁶ He did question whether the Court would be willing to go this far, as hate speech concerns *groups*. Perhaps the importance of combating racism pleads in favour of such a development, but in turn, the importance of the margin of appreciation pleads against it.⁸⁷

⁸⁴ ECtHR *Willem v. France*, 16 July 2009.

⁸⁵ ECtHR *Pfeifer v. Austria*, 15 November 2007; ECtHR *Petrina v. Romania*, 14 October 2008; ECtHR *Petrenco v. Moldova*, 30 March 2010.

⁸⁶ Lawson 2008.

⁸⁷ Lawson 2008, p. 479.

In 2010 this issue emerged in *Aksu v. Turkey*,⁸⁸ which dealt with the publication by the Ministry of Culture of a book “The Gypsies of Turkey” and the publication of a dictionary for pupils by an NGO. The first book referred to the biased portrayal of Roma people, giving examples of such stereotypical images; the second explained words such as “Gypsiness”, “Gypsy’s debt” by metaphorical terms, referring to their use in everyday language. The applicant, a Roma individual, had requested the authorities to stop the books’ sale and seize all copies. When the civil courts did not accept his claim, the applicant complained of a violation of article 14 in conjunction with article 8. The Court noted that racial discrimination ‘requires from the authorities special vigilance and a vigorous reaction’.⁸⁹ Therefore, the Court found that in this case article 14 in conjunction with article 8 was indeed applicable and that there may be positive obligations under article 8 to adopt measures to secure respect for private life in the sphere of relations between individuals. However, in this case the applicant had already been enabled to argue his case thoroughly before the domestic courts, which are in a better position to evaluate the facts in a case between private persons. Stressing its subsidiary role, the Court went on to conclude that there was no discrimination on account of his ethnic identity and no failure on the part of the authorities to take the necessary measures to secure respect for his private life. For the first book the Court stressed that, when examined as a whole, it cannot be concluded that the author acted with the intention to insult the Roma community; it concerned an academic study where the author only *referred* to the stereotypical portrayal of Roma. The second book was prefaced with a comment that the terms were of a metaphorical nature and thus, according to the Court did not constitute discrimination. Dissenting judges Tulkens, Tsotsoria and Pardalos argued that the intention of the author is not relevant; the first book did actually convey harmful stereotypes. As to the second book, the fact that terms were of a “metaphorical nature” did not lessen the discriminatory character in their view, but actually gave it more weight – especially since it was financed by the Ministry of Culture and intended for pupils. It seems that the Court’s assessment in this case was highly influenced by the fact that it concerned the issue of positive obligations: therefore the domestic courts are given much leeway.

4.6 Conclusion

This brings us to question which rationales can be deducted from the Court’s case law on those different types of hate speech. An important rationale appears to be the argument from *negative imaging/non-discrimination* (Soulas, Féret). This is connected to *public order*: the Court’s broad conception of public order includes the whole sphere of a democratic, tolerant and pluralist society. Pure hate speech (such as racism) does not belong in such a society – the special protection for expressions that form part

⁸⁸ ECtHR *Aksu v. Turkey*, 27 July 2010.

⁸⁹ Par. 49.

of public debate does not apply to racist utterances.⁹⁰ Yet the Court does not consider it essential that speech indeed creates a real and present danger of discrimination or violence; more important is that hateful remarks on the grounds of race, ethnicity or religion deny persons' equal worth and dignity. This is also related to the rationale of *mental harm*. In *Jersild v. Denmark* (and similarly in *Gündüz v. Turkey*) the Court held that '[t]here can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10.'⁹¹ However, whether the Court accepts infringements of speech on this ground, also depends on *intention*. In *Jersild v. Denmark* the Court made it clear that racist expressions are not protected by article 10, but that *broadcasting* such remarks may deserve the protection of article 10, depending on the circumstances. The decisive criterion here was the intention of the applicant: to inform the public about matters of public interest rather than merely to incite to hatred.⁹² Intention also plays a role in revisionist cases: is the applicant's aim to incite to discrimination or to engage in serious historical debate? Offence to victims may play an implicit role – though in *Vajnai*, the Court considered that offence alone cannot set the limits to freedom of expression.

In revisionist cases the main rationales are to protect people against negative imaging and mental harm; the rationale of *distinguishing truth from lie* plays only a secondary role and cannot be seen separately from the first rationale. An issue that may turn out problematic is that the Court engages in the task of distinguishing “clearly established historical facts”, the denial of which engages the criminal law (currently applying only to the Holocaust). While this may seem an easy task, it can certainly create inconsistencies in the future. Even though singling out Holocaust denial for prohibition is understandable in the light of the Convention's history, going down this road begs comparisons with other past atrocities – glorifying Stalin, denying the Armenian genocide, and so on. It is already very difficult to uphold consistency – at this moment a symbol related to the Communist past cannot be prohibited because of the “lapse of time” and “lack of real and present danger”, whereas the latter considerations are not applied to Holocaust denial. In cases surrounding revisionism or apology of past events (*Vajnai*, *Lehideux et Isorni*, *Orban*), the historical context behind the expressions was used to argue *in favour of* restricting freedom of expression, through strict European supervision. In other types of hate speech cases, states often have a large margin of appreciation to restrict rights, because they are in a better position to deal with such national historical arguments (see *Balsyte-Lideikiene v. Lithuania*).

All of these rationales are linked to the idea of militant democracy that the Convention entertains: expressions which harm or offend others, or which form a threat to its broad

90 Nieuwenhuis 2006, p. 312.

91 ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994, par. 35.

92 Weber 2006, p. 101.

concept of public order, contravene the values laid down in the Convention. This becomes especially clear in the use of article 17. Where the boundaries are between expressions that are at odds with the text and spirit of the Convention and other hate speech, is not always clear. According to Feldman, there is a subjective element in this test: the criterion that the *aim* must be to destroy rights and freedoms relates to the *subjective intention* to produce that effect or at least to willingly take the risk that rights will be destroyed.⁹³ However, the Court does not usually pay much attention to ascertaining whether the applicant really had the intention of destroying the rights in the Convention. Indeed, many cases do not exhibit a critical appraisal of how militant a democracy should be under article 17 – which is not surprising, as the Court exercises a different form of supervision than that of national courts. However understandable – and however important the protection of equal dignity – the prohibition of certain expressions without a substantive assessment draws the Court’s attention away from the necessity to look carefully at the grounds for prohibition and its proportionality. It is therefore promising that in more recent cases involving article 17 the Court has started to pay more attention to this issue.⁹⁴

5 BLASPHEMY AND DEFAMATION OF RELIGION

The Court’s case law on blasphemy and defamation of religion is important for the purposes of this thesis, as it provides insight into the way the Court views the relationship between majority and minority interests in the context of freedom of expression as well as the relationship between freedom of expression and freedom of religion. Moreover, it touches upon the issue of state neutrality towards different conceptions of the good.

5.1 Restrictions of article 10: Otto-Preminger-Institut, Wingrove and I.A.

One of the most striking cases in this regard is *Otto-Preminger-Institut v. Austria*.⁹⁵ Following an advertisement for the screening of a film called “*Das Liebeskonzil*”, the Austrian authorities ordered its seizure and forfeiture. The satirical film was based on an 1894 play by Oskar Panizza, which ‘portrays God the Father as old, infirm and ineffective, Jesus Christ as a “mummy’s boy” of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. Together they decide that mankind must be punished for their immorality.’⁹⁶ The film showed the performance of this play in Rome, and

93 Feldman 2002, p. 768.

94 ECtHR *Leroy v. France*, 2 October 2008; ECtHR *Féret v. Belgium*, 16 July 2009; ECtHR *Vajnai v. Hungary*, 8 July 2008.

95 ECtHR *Otto-Preminger-Institut v. Austria*, 20 September 1994.

96 Par. 21.

portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting.

The ECHR upheld the authorities' seizure of the film and found no violation of article 10. It considered that

[t]hose 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. However, 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. 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; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.⁹⁷

The idea that freedom of expression can be restricted on the grounds of "offence to religious feelings" had earlier appeared in the Commission's decision in *Gay News Ltd. and Lemon v. United Kingdom*.⁹⁸ Here the Commission followed the British courts that 'the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the right of citizens not to be offended in their religious feelings (...)'.⁹⁹ This, according to the Commission, forms part of the legitimate aim of protecting the rights of others. In turn, the Commission's considerations concerning the English law on blasphemy formed the basis for the aforementioned passage by the Court in *Otto-Preminger-Institut v. Austria*. In the latter case, the Court also explicitly mentioned article 9 in its considerations, thus suggesting that freedom of religion protects against offence to religious feelings. This approach has been subject of much criticism, and article 9 has not appeared as explicitly as this in many of the Court's subsequent blasphemy cases.¹⁰⁰ Within the Court, there has

97 Par. 47.

98 *ECommHR X Ltd. and Y v. United Kingdom* (inadmissible), 7 May 1982; see for the English court's decision par. VII.2.3.

99 Par. 11.

100 *ECrHR Wingrove v. United Kingdom* (1), 25 November 1996; *ECrHR I.A. v. Turkey*, 13 September 2005; *ECrHR Giniewski v. France*, 31 January 2006. See for criticism UN Special Rapporteurs Jahangir & Diène 2006.

been criticism too: in their dissenting opinion to the *Otto-Preminger-Institut* judgment, Judges Palm, Pekkanen and Makarczyk held that ‘[t]he 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 religion, which in effect includes a right to express views critical of the religious opinions of others.’¹⁰¹

Coming back to *Otto-Preminger-Institut*, the Court furthermore considered that in the context of religious opinions and beliefs, amongst the “duties and responsibilities” that come with the exercise of freedom of expression

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. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any “formality”, “condition”, “restriction” or “penalty” imposed be proportionate to the legitimate aim pursued.¹⁰²

As the Court has consistently held, in the case of “morals” and “religion” the State has a margin of appreciation in determining the necessity of an interference, since ‘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.’¹⁰³ Even though the film in *Otto-Preminger-Institut v. Austria* was supposed to be shown in an arthouse-cinema where access was restricted to a certain age, the Court considered that, because of its wide advertisement, ‘there was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently “public” to cause offence.’¹⁰⁴ Importantly, the Court also considered that Roman Catholicism is the religion of the overwhelming majority of Tyroleans, so that ‘in seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.’¹⁰⁵ The Court held that the authorities hereby did not overstep the limits of their margin of appreciation.

Some of the Court’s considerations in the *Otto-Preminger-Institut* judgment returned in a subsequent blasphemy case: *Wingrove v. United Kingdom*.¹⁰⁶ This case concerned

101 Par. 6.

102 Par. 49.

103 See ECtHR *Müller and others v. Switzerland*, 24 May 1988. That a larger margin of appreciation exists in cases concerning attacks on religious convictions was repeated among others in ECtHR *Wingrove v. UK* (1), 25 October 1996; ECtHR *I.A. v. Turkey*, 13 September 2005.

104 Par. 54.

105 Par. 56.

106 ECtHR *Wingrove v. United Kingdom* (1), 25 November 1996.

a film called “Visions of Ecstasy”, based on the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun who experienced powerful ecstatic visions of Jesus Christ. It depicted the ‘mingling of religious ecstasy and sexual passion’ by – among other things – presenting the wounded body of the crucified Christ as the focus of the erotic desire of St Teresa. Because of its blasphemous nature, the authorities refused to grant a classification certificate for this film – which thus amounted to a ban on the publication of the film. The ECtHR found no violation of article 10. The Court considered again that ‘the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory.’¹⁰⁷ This standard is somewhat different from the wording used in *Otto-Preminger-Institut*, where the Court spoke of ‘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’. McGonagle has noted that ‘as a result of this inconsistent use of phraseology in the Court’s approach to offensiveness in the context of religious opinions and beliefs, it is not possible to state with much confidence or precision what the official barometer actually is.’¹⁰⁸ The judgment in *Otto-Preminger-Institut* further differs from *Wingrove* in that the Court did not explicitly mention that freedom of expression had to be balanced against article 9 in blasphemy cases. In *Wingrove*, the Court also ruled that a large margin of appreciation was necessary in ‘matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion’ and that ‘[w]hat is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.’¹⁰⁹

In *I.A. v. Turkey*,¹¹⁰ a publisher was convicted to two years’ imprisonment and a fine for publishing the novel “The forbidden phrases”. The book, which dealt with philosophical and theological issues in a novelistic style, contained critical statements towards the Islamic religion and the Prophet Muhammed, including passages such as the following:

[T]his divests the imams of all thought and capacity to think and reduces them to the state of a pile of grass (...) [regarding the story of the Prophet Abraham's sacrifice] is God a sadist? (...) so the God of Abraham is just as murderous as the God of Muhammad (...) Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words,

107 Par. 52.

108 McGonagle 2010, p. 245.

109 Par. 58. See also ECtHR *Murphy v. Ireland*, 10 July 2003, par. 67; ECtHR *I.A. v. Turkey*, 13 September 2005, par. 25; ECtHR *Giniewski v. France*, 31 January 2006, par. 44.

110 ECtHR *I.A. v. Turkey*, 13 September 2005.

moreover, were inspired in a surge of exultation, in Aisha's arms. (...) God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.

In its judgment the Court repeated that ‘States have a large margin of appreciation in matters liable to offend intimate personal convictions within the sphere of morals or religion’ and once again stressed that there is ‘a duty to avoid expressions that are gratuitously offensive to others and profane’ and that ‘it may be considered necessary to punish improper attacks on objects of religious veneration’.¹¹¹ In contrast to the decisions in *Otto-Preminger-Institut*, the Court in this case did not connect the gratuitously offensive nature of the expressions to their role in public debate. In fact, it did not mention the role of public debate at all, whereas the book – even though it is a novel and thus an artistic expression – would seem to fall within the realm of a public debate about religion. The Court did not directly invoke article 9 in this case, but held that ‘the issue before the Court (...) involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand.’¹¹² Applying these principles to the case at hand, it concluded with reference to the last book passage (see above) that

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. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks... The Court therefore considers 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”.¹¹³

As such, an attack on the Prophet can also constitute an attack on believers, according to the Court. Again, the *manner* is important here: an *abusive* attack on the Prophet. Even though the Court has consistently held in other cases that the form of expressions is protected too, states may legitimately enforce decency norms when matters concerning religion are at stake. It has been noted that the Court reached this conclusion ‘by selecting the passages in the book that were deemed to be the most offensive, isolating them and examining them out of context’.¹¹⁴

111 Par. 24-25.

112 Par. 27.

113 Par. 29-30.

114 McGonagle 2010, p. 249.

5.2 Violations of article 10: *Giniewski v. France*, *Tatlav v. Turkey*

In some of the Court's later judgments on religious defamation, it started giving more weight to freedom of expression. In *Giniewski v. France*,¹¹⁵ the applicant complained of his conviction for writing a newspaper article that contained 'defamatory statements against the Christian community'. He had stated that

the Catholic Church sets itself up as the sole keeper of divine truth (...) It proclaims clearly the fulfilment of the Old Covenant in the New, and the superiority of the latter (...) Many Christians have acknowledged that anti-Judaism and the doctrine of the "fulfilment" of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed.

While the ECtHR reaffirmed its finding in *Otto-Preminger-Institut* about the duty to avoid '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', and the larger margin of appreciation in dealing with matters 'liable to offend intimate personal convictions within the sphere of morals or religion',¹¹⁶ it also considered that

the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate (see paragraph 24 above), without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought (...) By considering the detrimental effects of a particular doctrine, the article in question contributed to discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression were to be strictly construed.¹¹⁷

The Court found that the article did not contain attacks on religious beliefs as such. Even though some conclusions may offend, shock or disturb some people, the Court held that it 'is not "gratuitously offensive" or insulting, and does not incite to disrespect or hatred. Nor does it cast doubt in any way on clearly established historical facts.'¹¹⁸ Even though in this case the Court found a violation of article 10, it also proposed that expressions which are "insulting" or which "incite to disrespect or hatred" may be legitimately restricted.

¹¹⁵ ECtHR *Giniewski v. France*, 31 January 2006.

¹¹⁶ This also comes back in the subsequent case ECtHR *Aydin Tatlav v. Turkey*, 2 May 2006.

¹¹⁷ Par. 50-51.

¹¹⁸ Par. 52.

In *Aydin Tatlav v. Turkey*, the Court also found a violation of article 10.¹¹⁹ This case concerns the author of a book with an historical study and critical commentary of the Qu'ran, which contained passages such as

Avec cette structure psychique typique, pareille à celle de ses prédécesseurs, Mohamed, qui prend ses rêves pour des réalités, se présente avec ces versets absolument insensés, devant les personnes qui lui demandent de prouver sa prophétie (...). Le fondateur de l'islam, tantôt adopte une attitude tolérante, tantôt ordonne le djihad. De la violence, il fait sa politique fondamentale. Le paradis d'Allah promet aux hommes une véritable vie parasite d'aristocrate (...)

(...) car ils verront que le Coran n'est fait que de commentaires remplis de répétitions lassantes, dépourvus de toute profondeur, plus primitifs que la plupart des livres plus anciens, écrits par des hommes (...) sur le commerce, les relations entre hommes et femmes, l'esclavage, les sanctions (...).

Although the book had already been published five years before and the publication at hand concerned the fifth press-run, the author was convicted to twelve months' imprisonment and a fine for "profanity of religion". In its judgment, the Court reaffirmed some of the precedent passages from *Otto-Preminger-Institut et al.* Applying the principles to the case at hand, it concluded that article 10 had been violated:

Quant à la teneur de l'ouvrage, en l'espèce, la Cour observe que les passages cités dans l'arrêt de condamnation contiennent une dose de vive critique. Le requérant avance globalement que l'effet de la religion est de légitimer les injustices sociales en les faisant passer pour « la volonté de Dieu ». Il s'agit là du point de vue critique d'un non-croyant par rapport à la religion sur le terrain socio-politique. Toutefois, la Cour n'observe pas, dans les propos litigieux, un ton insultant visant directement la personne des croyants, ni une attaque injurieuse pour des symboles sacrés, notamment des Musulmans, même si, à la lecture du livre, ceux-là pourront certes se sentir offusqués par ce commentaire quelque peu caustique de leur religion.¹²⁰

Taking into account the heavy sentence (imprisonment) and the fact that the author was only prosecuted upon publication of the fifth edition of the book after five years of its initial release, the Court held that the applicant's conviction did not meet a "pressing social need". Yet the Court also suggested that 'an insulting tone directed against believers' can be a reason to restrict speech – which is mentioned for the first time here (though it is comparable to 'insulting expressions' as mentioned in *GINIEWSKI v. FRANCE*). Nevertheless this case shows that serious socio-political critique of religion – as opposed to gratuitous attacks on symbols held sacred by believers – still enjoys the protection of article 10.¹²¹

119 ECtHR *Aydin Tatlav v. Turkey*, 2 May 2006.

120 Par. 28.

121 See case note A.J. Nieuwenhuis, *Mediaforum* 2006/6, p. 185.

Finally, in *Klein v. Slovakia* the Court made it clear that defamation of a religious leader does not necessarily amount to offending religious adherents.¹²² The fact that some members of the Catholic Church could have been offended by the applicant's criticism of the Archbishop did not justify restrictions on freedom of speech here. Notably, in its general considerations the Court did repeat the older *Otto-Preminger* position on the relationship between articles 9 and 10: '[t]hose who exercise the freedom of expression undertake duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.'¹²³ In this particular case, 'it cannot be concluded that by its publication the applicant interfered with other persons' right to freedom of religion in a manner justifying the sanction imposed on him'¹²⁴ – however, the use of this wording indicates that the Court has not yet relinquished the idea that anti-religious expressions can infringe upon article 9.

5.3 Positive obligations in the field of article 9 v. article 10

In some older cases, the Commission has had to deal with the question of *positive obligations* under article 9 in the field of blasphemy. This happened for the first time in *Choudhury v. United Kingdom*, concerning Salman Rushdie's "The Satanic Verses", when a group of Muslims had complained of the fact that the state had not started criminal proceedings against Rushdie. The Commission found that there was "no indication" of a link between freedom from interference with the right to freedom of religion and the applicant's complaints in this particular case: article 9 did not include a right to bring 'any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals.'¹²⁵ Thus, it does not include a positive obligation on the part of the state to actively prosecute for blasphemous expressions. Moreover, the Commission did not allow the applicant's complaint that the English blasphemy law – which did not extend to other religions than the Christian faith – violated article 14 ECHR. As the applicant's complaint under article 9 was inadmissible, the same was true for the complaint under article 14. The issue of positive obligations also came back in *Dubowska v. Poland*, where the Commission held that 'the Convention does not necessarily and in all circumstances imply a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals.'¹²⁶

122 ECtHR *Klein v. Slovakia*, 31 October 2006.

123 Par. 47.

124 Par. 54.

125 ECommHR *Choudhury v. United Kingdom* (inadmissible), 5 March 1991.

126 ECommHR *Dubowska and Skup v. Poland* (inadmissible), 18 April 1997.

5.4 Conclusion

In the light of this case law, it is difficult to uphold that the Court indeed protects expressions which “shock, offend or disturb”.¹²⁷ The Court qualifies “gratuitously offensive” expressions to religious feelings – for instance, abusive attacks on religious symbols – as “an infringement of rights”. However, in liberal theory it is difficult to uphold that attacks on matters held sacred by people – as opposed to verbal attacks towards people on the grounds of their membership of a certain group – really infringe individuals’ rights and thus harm them. Moreover, one may question whether offensive expressions about religion can indeed infringe upon the right to freedom of religion. The Court’s ruling 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’, has been much criticised – including in international human rights law.¹²⁸ The Court’s arguments for accepting the above-mentioned speech restrictions seem not to be based on *harm* but rather on a combination between *offence* and *civility/decency* requirements. As to the argument from offence, it can be added that in *Otto-Preminger-Institut* the Court accepted protection from *offence from bare knowledge* as a ground for restriction, as the mere fact that the film was widely advertised was enough to justify its seizure.

In *Wingrove* the Court suggested that expressions about “matters liable to offend intimate personal convictions within the sphere of morals or religion” do not belong to the largely protected category of “debate of questions of public interest”. Similarly, in the abovementioned passage in *Otto-Preminger-Institut* the Court found that expressions that are gratuitously offensive to the feelings of believers simply fall outside the scope of public debate. This conclusion is striking, since artistic works that concern religion may well be considered important to public debate. In *Giniewski*, the Court reached the conclusion that the expression could well “offend, shock or disturb” believers but that it was not “gratuitously offensive” or “insulting”, noting among other things that the applicant had made a contribution to a wide-ranging and ongoing debate. The Court added that he had done so ‘without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought’, thus again suggesting that the question whether an expression is “gratuitous” determines whether the speech counts as a contribution to public debate. However, the question whether expressions are gratuitously offensive is a different one from the question whether they form part of a debate on matters of public interest.

This approach suggests that states can legitimately use their laws to keep public debate rational and decent, at least on matters concerning morals and religion. The Court’s

¹²⁷ See also Fenwick & Phillipson 2006, p. 490.

¹²⁸ UN Special Rapporteurs Jahangir & Diène 2006.

argument seems to relate to the *manner* in which expressions are uttered rather than the *viewpoint* expressed: in *Wingrove*, the Court held that because the English blasphemy law is focused on the *manner* in which views are expressed rather than its content, and the extent of “insult to religious feelings” must be significant under this law, it is not in itself a disproportionate infringement of freedom of expression.¹²⁹ Particularly when it concerns provocative, sexually denoted portrayals of objects of religious veneration or symbols held sacred by believers, the Court allows states much room to restrict freedom of expression. The intention of the applicant does not play an important role in such cases, as opposed to hate speech cases (*Jersild*): I.A. concerned the conviction of a book publisher.

Another issue that comes up in the Court’s judgments is the protection of the religious majority. The Court makes it explicit that offensive expressions directed towards a religious *majority* can be prohibited as well – the fact that they offend the majority even provides an argument to restrict such expressions. The Court’s point of view is connected to the protection of public order: in order to ensure religious peace in a region where the majority of the people have a particular religious denomination, the State is allowed to prohibit certain blasphemous expressions.¹³⁰ The problem is that by accepting such a broad idea of public order that includes protecting the majority from serious offence, the Court limits the freedom to express minority opinions. Indeed, ‘the outcome, in each case, has been in favour of majoritarian or orthodox or conventional religious beliefs.’¹³¹ Although the Court’s idea of democracy is geared towards protecting pluralism (see par. III.3.1), the case law on blasphemy contains majoritarian elements. This issue is apparent in the Court’s case law on article 9 as well, as Evans indicates:

the public order limitation also has the potential to be interpreted very widely to allow states to intervene in religious practices at any time that they become inconvenient or annoying to those in power. This danger is increased by interpretations of these terms that broaden their scope (...) The importance of not giving too wide an interpretation to the notion of public order is underlined by the French text. Rather than the relatively broad term *ordre public*, that could refer to a wide range of public interests and is used in a number of international instruments, the convention uses the more restrictive term *la protection de l’ordre*.¹³²

The controversy surrounding the Court’s abovementioned judgments also appears from the voting pattern of the judges (*Otto-Preminger-Institut*: six votes to three; *Wingrove*: seven votes to two; I.A.: four votes to three) and the dissenting opinions that accompany those cases. In their joint dissenting opinion to the case of *Otto-Preminger-Institut*, Judges Palm, Pekkanen and Makarczyk held that

¹²⁹ Par. 60

¹³⁰ Rosier 2000.

¹³¹ McGonagle 2010, p. 251.

¹³² Evans 2001, p. 150.

[t]here is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion (...) the State's margin of appreciation in this field cannot be a wide one. In particular, it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; such a decision cannot but be tainted by the authorities' idea of "progress".

In *I.A. v. Turkey*, the dissenting judges Costa, Cabral Barreto and Jungwiert held that the Court's credo that 'freedom of expression also extends to information or ideas that shock, offend or disturb' should 'not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court.'¹³³ The judges argued that

[c]ertainly, in a highly religious society such as Turkey there are relatively few atheists and materialist or atheist views may well offend or shock the faith of the majority of the population. But that does not appear to us to be a sufficient reason in a democratic society to impose sanctions on the publisher of a book; otherwise the above dictum from *Handyside* would be deprived of all effect.

They concluded that it is perhaps time to revisit the Court's case law in *Otto-Preminger-Institut and Wingrove*, 'which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.'

A final question that appears from this case law is the place of religious convictions versus other deeply held convictions and the principle of neutrality. In his concurring opinion to the judgment *Wingrove v. UK*, Judge Pettiti delved into the question of how to deal with serious attacks on deeply held convictions that are not of a religious nature, such as philosophical convictions. According to Judge Pettiti, '[p]rofanation and serious attacks on the deeply held feelings of others or on religious or secular ideals can be relied on under article 10 para. 2 in addition to blasphemy (...). The rights of others under article 10 para. 2 cannot be restricted solely to the protection of the rights of others in a single category of religious believers or philosophers, or a majority of them.' The fact that article 9 protects religion and other beliefs – including beliefs such as pacifism – indeed suggests that serious attacks on such beliefs could also lead to the restriction of freedom of expression. However, what would be understood as "sacred symbols" of those beliefs is questionable; and prohibiting attacks on the *convictions* themselves would probably not be accepted under article 10. Therefore, accepting that blasphemous speech can be restricted under article 10 in practice leads to a special protection of *religions* against serious offence to the matters held sacred by believers. Moreover, as appears from *Choudhury v. UK*, the Commission has not been willing to criticise the English blasphemy law *in abstracto* for protecting only

133 Par. 1.

certain religions and not others – though this may be because it was a special case about “positive obligations”.

6 RELIGIOUSLY MOTIVATED HATE SPEECH

In the context of religion and militant democracy, mention should also be made of some article 10-cases which involve religiously *motivated* hate speech. The issue of extreme religious groups also emerged during the drafting process of article 9 ECHR. Then, Turkey proposed a variation on the limitation clause that would deal with religious fundamentalism: freedom of religion would be ‘subject to reservations concerning legislative measures to prevent attempts being made once again to suppress these freedoms’.¹³⁴ The Turkish representative explained that ‘in the course of our history a number of attempts at reform and modernisation have been frustrated by stubborn resistance on the part of certain persons or groups of persons who wished to keep the population in ignorance for their own ends. In its determination to go through with those reforms (...) Turkey has therefore been obliged to start by abolishing the Moslem orders and their archaic institutions.’ In the end, States decided to adopt a general limitation clause instead of such a specific restriction.

6.1 Anti-secular political parties: Refah Partisi and others v. Turkey

The first important case in the field of religiously motivated anti-secular speech actually concerns a political party: Refah Partisi v. Turkey. The concept of militant democracy not only returns in article 17, but is also apparent in some of the Court’s cases concerning political parties under article 11 of the Convention (freedom of assembly and association). This article reads as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

In cases involving political parties and their alleged antidemocratic character, article 11 is often considered in the light of article 10; article 11 is then seen as a *lex specialis* and article 10 as *lex generalis*.¹³⁵ As the Court holds, ‘[t]he protection of opinions and

¹³⁴ Evans 2001, p. 43-44; European Commission of Human Rights 1956, p. 5.

¹³⁵ Sottiaux 2004(a), p. 586.

the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.¹³⁶ Yet the Court sets a higher threshold for prohibiting political parties than for prohibiting expressions, because of the far-reaching effect of prohibiting complete political parties – which are the “cornerstones of democracy”. Nevertheless, even political parties can be limited in their freedom if democracy itself requires so. As was indicated before, the Convention’s idea of a democracy is substantive. Even if a majority of the people so wishes, democracy and fundamental rights cannot simply be struck down. As the Court has held: “[t]here can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious.”¹³⁷

When dealing with party prohibitions, two rationales can be distinguished (though the distinction is not cast-iron): (a) prohibiting a party because its ideas go against the Convention’s core values (fundamental rights); for instance, neo-Nazi parties and (b) prohibiting a party because of its subversive ideas, which go against the interests of the State; for instance, liberation groups. In both cases, a further distinction can be made between parties that advocate or employ the use of violent *means* to achieve their goals and those that do not. Category (b) is dealt with in par. III.7.8; the current paragraph focuses on the prohibition of a party purely on the basis of the anti-democratic or “anti-human rights” content of their ideas (a).

Refah Partisi was the largest political party in the Turkish Parliament, and was about to become even larger (according to the forecasts, it could have obtained 67% of the votes in the next elections), when the Turkish Constitutional Court dissolved the party on the grounds that it was a centre of activities contrary to the principles of secularism. It justified the dissolution by pointing to several expressions by leaders and members of Refah, including the proposal that adherents of each religious movement should obey the rules of their own organisations rather than Turkish law, and the advocacy of wearing headscarves in State schools. The Constitutional Court did not rely on the party’s Articles or actions, but merely on the speeches by its members. After the ECtHR (Third Section) did not find a violation of article 11 with a narrow 4-3 majority, the case was referred to the Grand Chamber. In judging whether Refah’s dissolution was in accordance with the Convention, the Grand Chamber first referred to article 17 and the idea of militant democracy:

The Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the

136 ECtHR (Grand Chamber) *Socialist Party and others v. Turkey*, 25 May 1998.

137 ECtHR (Third Section) *Refah Partisi and others v. Turkey*, 31 July 2001, par. 43.

Convention system. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11 – a matter which the Court considers below. Only when that review is complete will the Court be in a position to decide, in the light of all the circumstances of the case, whether Article 17 of the Convention should be applied.¹³⁸

The Court went on to argue that a political party may propose changes in the law or the legal and constitutional structures of the state, provided that (1) the means used are legal and democratic and (2) the change proposed must itself be compatible with fundamental democratic principles¹³⁹ – a passage repeated in later case law.¹⁴⁰ With regard to the religious aspect, the Court held that ‘[p]rovided that it satisfies the conditions, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.’ The Court also elaborated upon the militant democracy aspect in its general considerations: ‘in view of the very clear link between the Convention and democracy (...), no one must be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society (...) In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history’.¹⁴¹

In its overall examination of the case, the Court further elaborated its idea of militant democracy by proposing a three-point-test to assess whether dissolution of a political party – on the grounds that it threatens to undermine democratic principles – meets a “pressing social need”. In this assessment one should examine (i) whether the risk to democracy was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members were imputable to the party as a whole; and (iii) whether the acts and speeches ‘formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society”’.¹⁴² Point (i) refers to the question to what extent a militant democracy can be proactive: at which stage can the state intervene? In this regard the Court noted that, with regard to Refah’s real chances of coming to absolute majority power and be able to establish their own envisaged model of society, the state cannot be criticised for not waiting ‘at the risk of putting the political regime and civil peace in jeopardy, for Refah to seize power and swing into action’.¹⁴³

138 ECtHR (Grand Chamber) *Refah Partisi and others v. Turkey*, 13 February 2003, par. 96.

139 Par. 98.

140 ECtHR *Yazar and others v. Turkey*, 9 April 2002, par. 49; ECtHR *Herri Batasuna and Batasuna v. Spain*, 30 June 2009, par. 79.

141 Par. 99.

142 ECtHR (Grand Chamber) *Refah Partisi and others v. Turkey*, 13 February 2003, par. 104.

143 Par. 110.

Under point iii, the Court divided the content of Refah's plans in three groups: (a) the alleged intention to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (b) the alleged intention to apply sharia to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (c) the references allegedly made by Refah members to the possibility of recourse to force as a political method.

(a) With regard to the plurality of legal systems, the Grand Chamber of the Court followed the Third Section's judgment which held that

Refah's proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement. The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons. Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned (...) Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy.¹⁴⁴

(b) The Court also concurred with the Third Section in arguing that sharia was incompatible with the fundamental principles of democracy. Without delving into its meaning or content, the Third Section had held that 'sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.' The Grand Chamber noted that 'when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.'¹⁴⁵ According to the Court, the remarks by Refah's leaders – taken together – gave a clear picture of a model of society organised according to religious rules. The Court considered that the creation of a model of society based on sharia is a real risk: 'in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of

144 ECtHR (Third Section) *Refah Partisi and others v. Turkey*, 31 July 2001, par. 70-71.

145 ECtHR (Third Section) *Refah Partisi and others v. Turkey*, 31 July 2001, par. 72.

society which they had in mind. (...) in accordance with the Convention's provisions, each Contracting State may oppose such political movements in the light of its historical experience.¹⁴⁶

(c) Finally, the Court considered the possibility that Refah might take recourse to force as a political method, as some of its members' speeches referred to "jihad":

whatever meaning is ascribed to the term "jihad" used in most of the speeches mentioned above (whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved (*sic*)), there was ambiguity in the terminology used to refer to the method to be employed to gain political power. In all of these speeches the possibility was mentioned of resorting "legitimately" to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.¹⁴⁷

Furthermore, Refah's leaders did not take prompt practical steps to distance themselves from those members' speeches. The Court concluded that Refah's plans were incompatible with the concept of a democratic society, and that Refah's dissolution met a pressing social need so that it did not violate article 11.

6.2 Anti-secular speech

In *Gündüz v. Turkey*, the Court subsequently dealt with anti-secular speech under article 10.¹⁴⁸ Mr. Gündüz, the leader of an Islamic sect, had participated in a television debate about democracy and secularism, during which he advocated the abandonment of democracy and secularism and the introduction of a regime based on sharia. Among other things, he contended that 'anyone calling himself a democrat or secularist has no religion (...) Democracy in Turkey is despotic, merciless and impious.' The Turkish courts convicted him for hate speech; the government asserted that '[t]hrough his comments, which ran counter to the moral principles of a very large majority of the population, the applicant had severely jeopardised social stability.' The ECtHR started by considering the applicant's remark that 'anyone calling himself a democrat or secularist has no religion (...) Democracy in Turkey is despotic, merciless and impious'. In this regard the court noted that 'such comments demonstrate an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey, such as the principle of secularism and democracy. Seen in their context, however, they cannot be construed as a call to violence or as hate speech based on religious intolerance.'¹⁴⁹ Moreover, the Court considered that the applicant

146 ECtHR (Grand Chamber) *Refah Partisi and others v. Turkey*, 13 February 2003, par. 124.

147 ECtHR (Grand Chamber) *Refah Partisi and others v. Turkey*, 13 February 2003, par. 130.

148 ECtHR *Gündüz v. Turkey*, 4 December 2003.

149 Par. 48.

had used the word *piç* – which is used as an insult in everyday language – to refer to children born out of a civil marriage:

[t]he Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner. It points out, however, that the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public.

Finally, the Court stressed the large difference between the present case and *Refah Partisi*:

[a]dmittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as “hate speech”. (par. 51)

The Court concluded that Turkey had violated article 10. The difference with the Court's conclusion in *Refah* may have to do with the fact that the *Gündüz* case is about an individual person without political ambitions, so that there was no real danger to democracy. An important factor in this case was that Mr. *Gündüz* was invited to participate in this debate to present his nonconformist views about democratic values and Islam. The matter was already much debated in the Turkish media and the views of Mr. *Gündüz* were already known to the public; it therefore concerned a matter of general interest for public debate. Moreover, the applicant's views were counter-balanced by those of other participants in a pluralistic debate.

There is an additional reason why the Court's judgment in *Gündüz v. Turkey* is important in the context of religiously motivated speech. Setting out the relevant principles, it included the following passage from the case law on blasphemy:

However, as is borne out by the wording itself of Article 10 § 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes “duties and responsibilities”. 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. (par. 37)

The fact that this passage is used here suggests that the obligation to refrain from gratuitously offensive expressions in the context of religious convictions also applies to the defamation of *nonbelievers*. The same passage also came back in a 2006 case on religiously motivated hate speech: *Erbakan v. Turkey*.¹⁵⁰ Mr. *Erbakan* – who was

150 ECtHR *Erbakan v. Turkey*, 6 July 2006.

at the time the president of the abovementioned Refah Partisi – held a public speech during his campaign for the municipal elections. This took place in southeast Turkey, where terrorist attacks are frequent. The speech included the following:

Dorénavant, il n'existe plus douze partis politiques dans ce pays. Il y en a deux : [celui du] juste (hak) et [celui de l'] injuste (batil). Les autres, qui sont les autres ? Tous à l'exception du Refah sont injustes (...) ils sont amoureux de l'infidèle (...) Ils sont tous des usuriers, tous des exploités, tous des oppresseurs et, en plus, nous allons abandonner le monde islamique, nous serons ensemble avec les chrétiens, et les infidèles feront nos lois et nous gouverneront (...)

The applicant was convicted for incitement to hatred on the grounds of religion for making derogatory remarks about nonbelievers. In its general principles, the Court then referred to the Otto-Preminger-Institut passage about “gratuitously offensive” expressions in the context of religious convictions (see above), as well as to the concept of hate speech.¹⁵¹ Applying these principles to the case at hand, the Court noted that the author reduced the diversity indispensable to a pluralistic society to the simple distinction between believers and non-believers, and expressed the wish to apply this distinction in the political sphere. According to the Court, ‘de tels propos – s’ils ont été réellement prononcés – tenus par un homme politique notoire lors d’un rassemblement public révèlent davantage une vision de la société structurée exclusivement autour des valeurs religieuses et paraissent ainsi difficilement conciliables avec le pluralisme qui caractérise les sociétés actuelles où se confrontent les groupes les plus divers.’¹⁵² This is particularly problematic because the speech took place in a sensitive region where many people had fallen victim to terrorism. The Court also stressed the particular responsibility of the speaker, as a political leader, to avoid exacerbating intolerance: ‘[s]oulignant que la lutte contre toute forme d’intolérance fait partie intégrante de la protection des droits de l’homme, il est d’une importance cruciale que les hommes politiques, dans leurs discours publics, évitent de diffuser des propos susceptibles de nourrir l’intolérance.’¹⁵³ From the case law on hate speech it appears that, on the one hand, politicians deserve particular protection under article 10 (since it concerns political speech),¹⁵⁴ but that on the other hand they have a greater responsibility to avoid inciting to hatred. Without delving into the substance of the speech, the Court eventually concluded that there was a violation of article 10. First, because the authenticity of the speech’s registration was contested; second, because Mr. Erdogan was only prosecuted more than 4 years after he gave his speech, so that his expressions could no longer be regarded as an actual risk or an imminent danger to society at that time. As such, the Court took into account whether the expressions posed a real danger to public order.

151 Par. 56-57.

152 ECtHR *Erdogan v. Turkey*, 6 July 2006, par. 62.

153 ECtHR *Erdogan v. Turkey*, 6 July 2006, par. 64.

154 ECtHR *Castells v. Spain*, 23 April 1992.

In *Mehmet Cevher Ilhan v. Turkey*,¹⁵⁵ the applicant was an author who had written several newspaper articles right after a deadly earthquake in north-east Turkey in 1999 that had caused the death of tenthsousands of persons. In these articles he suggested that the earthquake was the result of the anti-religious government measures (such as the prohibition of the headscarf at Turkish universities) and the increasingly secular lifestyle of many Turkish people. The author was convicted to two years' imprisonment. The ECtHR first noted that these expressions are part of a relevant public debate; secondly, the Court set out a distinction between (a) the author's criticism of the government measures and (b) his moral criticism of people's lifestyle. While the articles in category (a) did not justify sanctions, in category (b) the Court found one article that deserved further consideration. In this piece, 'le requérant, pendant qu'il glorifie une partie de la population féminine, à savoir les femmes qui portent le voile, insuffle une haine fondée sur l'intolérance religieuse contre l'autre partie de cette même population, à savoir les femmes qui ne portent pas le voile et qui, selon lui, « s'exhibent piteusement ».' The Court found that in this context – right after the catastrophe – the article's content and discriminatory connotation could present a threat to the peace. In principle, the Court thus found a pressing social need for interfering with the author's freedom of expression. Because his sentence was so disproportionate, however, the Court did find a violation of article 10.

6.3 Conclusion

In this case law on religiously motivated hate speech, the Court accepts that hate speech provisions also protect secular persons and nonbelievers. This is in line with the fact that freedom of religion (article 9) includes the right not to have a religion. It also came back in a passage in the Third Chamber's judgment in *Refah Partisi*, which dealt with the remarks of one of the party's MPs that 'revealed deep hatred for those he considered to be opponents of an Islamist regime.' About these remarks, the Court considered that 'where the offending conduct reaches a high level of insult and comes close to a negation of the freedom of religion of others it loses the right to society's tolerance.'¹⁵⁶ In this regard, the dissenting opinion of Judge Türmen in the *Gündüz* case must be noted too:

In the present case, it is not the religious feelings of believers but the feelings of a great majority of the Turkish population who choose to lead a secular life that were attacked. I am concerned that the present judgment may be interpreted by the outside world to mean that the Court does not grant the same degree of protection to secular values as it does to religious values. Such a distinction, intentional or unintentional, is contrary to the letter and spirit of the Convention. As Judge Pettiti rightly pointed out in his concurring opinion in *Wingrove*, "the rights of others" as mentioned in paragraph 2 of Article 10 cannot be

¹⁵⁵ ECtHR *Mehmet Cevher Ilhan v. Turkey*, 13 January 2009.

¹⁵⁶ ECtHR (Third Section) *Refah Partisi and others v. Turkey*, 31 July 2001, Par. 75

restricted solely to the rights of religious believers. The rights of secular people are also included in this expression.

These cases thus involve the same risk of “majoritarianism” that was seen in blasphemy cases: in regions where the dominant or most powerful group is secular, there can be a tendency to restrict the right to free speech of religious minorities. In *Gündüz* and *Erbakan* the Court seemed well aware of this risk: it proved sensitive to the context and circumstances surrounding expressions – although the case of *Erbakan* leaves one wondering what the Court would have decided had *Erbakan* been prosecuted directly after his speech and had there been evidence of his authentic speech. In *Mehmet Cevher Ilhan*, the Court did lean towards majoritarianism – with a remarkable reasoning based on public order arguments (“threat to the peace” immediately after the earthquake).

These cases raise important questions about the concept of state neutrality with regard to different conceptions of the good: are extremist religious convictions legitimate conceptions of the good to which the State has to remain neutral? In *Refah Partisi*, the Court considered that ‘the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs’; however, ‘in a democratic society the State may limit the freedom to manifest a religion (...) if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety’. The Court further argued that

the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.¹⁵⁷

Yet outside the context of political parties, in the case of *Gündüz v. Turkey*, the Court held that states should tolerate expressions of fundamentalist religious convictions that go against the principle of secularism – at least, as long as they do not constitute hate speech or incitement to violence (though *Mehmet Cevher Ilhan* suggests that in practice, public order considerations can rather easily provide a reason to restrict article 10.) The fact that such expressions are considered within the general framework of article 10 and not as particularly *religious* expressions under article 9, means that the Court does not have to delve into the interpretation of religion and the extent to which speech emanates from religious convictions.¹⁵⁸

The *Refah* case clearly indicates how the Court views militant democracy in the realm of political parties. In the first place, a democratic state is allowed to defend its

¹⁵⁷ Par. 93.

¹⁵⁸ See chapter VI on Dutch law, where the courts have had difficulties with this.

democratic *procedure* – that is, the system of regular elections as well as the method of resolving conflicts peacefully, which excludes the method of violence. Whether only violent methods or also non-violent illegal methods can engage a militant democracy, is not clear. In this respect the concurring opinion of Judge Ress joined by Judge Rozakis provides some notable considerations: he contemplates whether the legality of means also implies that ‘more or less minor illegalities’ committed would justify dissolution of an entire party, in the light of the principle of proportionality. Besides procedural militance, the Refah case also makes clear that a democratic state can uphold the *substance*, the basic values that underlie democracy. These basic values may include the principle of secularism, the Court makes clear; even if a majority of the people should want to introduce a theocratic regime or a regime based on sharia, the state can take measures to prevent this. In which manner a state can uphold secularism depends on its own historical context: in some states, such as Turkey, the chance that a theocratic regime will be established is more pressing.

The Court’s conclusion in Refah expresses a kind of “anti-pluralism for the sake of pluralism”. In order to safeguard a democracy that accepts a plurality of ways of life, the Court had to limit the pluralism of political parties. In Gündüz the Court did not find it necessary to restrict pluralism – after all, the speech of one sole individual did not pose a real risk to democracy. An open question remains to what extent campaigns that advocate the abolition – or that argue for a different interpretation or application – of certain basic rights set forth in the Convention, can be a reason to dissolve a political party. Judge Ress noted that ‘all depends on the specific rights and freedoms which a political party aims to change and furthermore what kind of change or modification is envisaged.’¹⁵⁹ The Court’s decision in Refah Partisi does not elaborate on this point. Whether the rights of a political party can be infringed with the purpose of upholding democratic values depends on the imminence of the risk they pose. If there is a real risk for democratic principles, a state does not have to wait until the risk actually emerges: the Court does allow for proactive measures. A final unresolved question remains, as Sottiaux states, ‘how the “imminent risk to democracy” requirement relates to the “incitement to violence” standard central to the Court’s article 10 jurisprudence, and endorsed by both the Third Section and the Grand Chamber in the context of article 11. Does a political party qualify for dissolution because its programme or statements by its leaders incite to violent conduct, even where that party does not pose and imminent threat to democracy?’¹⁶⁰

159 Concurring opinion of Judge Ress joined by Judge Rozakis, ECtHR (Grand Chamber) Refah Partisi and others v. Turkey, 13 February 2003.

160 Sottiaux 2004, p. 596-597.

7 EXTREME SPEECH

The ECtHR has dealt with a large number of cases concerning extreme speech, ranging from direct incitement to terrorist violence to separatist propaganda. The majority of those judgments are placed in the context of the situation in southeast Turkey, where an armed conflict between militants of the separatist PKK (Kurdistan Workers' Party) and the government has been raging since the 1980s. In general, the Court has stressed that, in such cases, it must 'ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.'¹⁶¹ It has also judged that '[p]luralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole'.¹⁶² The Court holds that freedom of speech cannot be too easily restricted in such cases, since there is little scope under article 10(2) to restrict political speech or debate on matters of public interest.¹⁶³

The question of when extreme expressions can be restricted under article 10 is a complex one. There are several general principles the Court usually takes into account when dealing with such speech. It holds that 'the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician; in a democracy the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion.'¹⁶⁴ The Court has also consistently argued that '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 relevant 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.'¹⁶⁵ However, 'where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation to restrict freedom of

161 ECtHR (Grand Chamber) *Zana v. Turkey*, 25 November 1997, par. 55

162 ECtHR (Grand Chamber) *Refah Partisi and others v. Turkey*, 13 February 2003, par. 99.

163 See, for instance, ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999, par. 50; ECtHR *Özer v. Turkey*, 5 May 2009.

164 ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998, par. 54; ECtHR (Grand Chamber) *Sürek v. Turkey* (1), 8 July 1999, par. 61; ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999, par. 50; ECtHR (Grand Chamber) *Öztürk v. Turkey*, 28 September 1999, par. 66.

165 ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998, par. 54; ECtHR (Grand Chamber) *Sürek v. Turkey* (1), 8 July 1999, par. 61; ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999, par. 50; ECtHR (Grand Chamber) *Öztürk v. Turkey*, 28 September 1999, par. 66.

expression'.¹⁶⁶ In its assessment, the Court takes into account the background of the cases submitted to it, particularly problems linked to the prevention of terrorism. Finally, 'though an expression may conceal objectives and intentions different from the ones it proclaims, if there is no evidence of any concrete action which might belie the sincerity of the aim the Court sees no reason to doubt it.'¹⁶⁷

7.1 *Zana, Yalçiner and Incal v. Turkey: political speech*

The landmark judgment on extreme speech is *Zana v. Turkey*, where the Court started to develop a theory on extreme speech in the context of terrorism.¹⁶⁸ In this case, a former mayor of Diyarbakir in southeast Turkey gave an interview to journalists indicating that he supported 'the PKK national liberation movement'; though he was not 'in favour of massacres', he also held that 'anyone can make mistakes, and the PKK kill women and children by mistake.' In judging whether his criminal conviction violated article 10, the Court looked in particular at the context surrounding the expression: the interview coincided with murderous attacks by the PKK on civilians in southeast Turkey where extreme tensions existed at that time. The Court concluded that 'in those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakir, the most important city in southeast Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.'¹⁶⁹ Therefore the Court did not find a violation of article 10.

This case shows that the distance between expressions and potential consequences can be quite large: there is no need for a "clear and present danger" for prohibiting inciteful speech – or at least this danger is more easily conceived when the expression is uttered by an influential person. This also returned in *Yalçiner v. Turkey*,¹⁷⁰ where a member of the administrative council of a political party was convicted for a public speech. He heavily criticised the deadly actions by the Turkish government in southeast Turkey, concluding that: '[o]n ne peut pas arriver au but uniquement par la guérilla. (...) Si les Turcs restent sans réaction pendant que les Kurdes sont tués, je vais vous dire ce qui va se passer demain: les Kurdes seront dans une situation où ils ne pourront rien faire pendant que les Turcs seront tués.' The Court noted an ambiguity in the applicant's expressions as regards the acceptability of employing violent measures against the government, and held that he had not clearly distanced himself from the use of

166 ECtHR (Grand Chamber) *Sürek v. Turkey* (1), 8 July 1999, par. 61; ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999, par. 50; ECtHR (Grand Chamber) *Öztürk v. Turkey*, 28 September 1999, par. 66.

167 ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998, par. 51; ECtHR (Grand Chamber) *Öztürk v. Turkey*, 28 September 1999, par. 68.

168 ECtHR (Grand Chamber) *Zana v. Turkey*, 25 November 1997; Sottiaux 2003, p. 669.

169 par. 60.

170 ECtHR *Yalçiner v. Turkey*, 21 February 2008.

violence. Although the degree of incitement was not obviously greater than in other expressions where the Court did find a violation (see for instance *Asli Günes v. Turkey* and *Özer v. Turkey* below), the Court's reasoning turns out differently here – probably because it concerns an influential person.¹⁷¹

In *Incal v. Turkey*,¹⁷² the Court had to deal with a leaflet by a political party, which virulently criticised measures taken by the local government and appealed to Kurdish citizens to oppose the existing political situation by setting up “neighbourhood committees”. The Court found that these expressions – regarded in their entire context – could not be taken as incitement to violence, hostility or hatred between citizens. Though the Court took into account the background of terrorism, it did not discern anything that would lead to the conclusion that Mr. Incal (a member of the party's executive committee) was in any way responsible for the problems of terrorism in the region. In contrast to many other cases, here the Court really delved into the connection between the particular speaker and the violence in the region.

7.2 *Sürek v. Turkey* (1)

Another judgment considered as a landmark is *Sürek v. Turkey* (1).¹⁷³ Here, the issue of justification and glorification of future terrorist acts was considered. The applicant owned a weekly review which had published two readers' letters harshly condemning the military actions of the authorities in southeast Turkey, and accusing them of brutally suppressing the Kurdish people. He concluded that ‘the struggle of our people for national freedom in Kurdistan has reached a point where it can no longer be thwarted by bloodshed, tanks and shells. Every attack launched by the Turkish Republic to wipe out the Kurds intensifies the struggle for freedom (...) The Kurdish people, who are being torn from their homes and their fatherland, have nothing to lose. But they have much to gain.’ In this case the Court focused on the particular words used, noting that

there is a clear intention to stigmatise the other side to the conflict by the use of labels such as “the fascist Turkish army”, “the TC murder gang” and “the hired killers of imperialism” alongside references to “massacres”, “brutalities” and “slaughter”. In the view of the Court, the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence.

Again, the Court considered the sensitive security context in southeast Turkey. Linking content and context together, the Court found that ‘the letters must be seen as capable

¹⁷¹ The Court eventually considered the government's reasons for the applicant's conviction “relevant and sufficient” but did find a violation because of the excessive sentence.

¹⁷² ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998.

¹⁷³ ECtHR (Grand Chamber) *Sürek v. Turkey* (1), 8 July 1999.

of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.’ The applicant’s criminal conviction (he was sentenced to a fine) did not violate article 10; the Court found – without further explanation – that ‘[w]hat is at issue in the instant case (...) is hate speech and the glorification of violence.’ As in *Zana v. Turkey*, the Court does not require a strong link between speech and harmful consequences: it accepts restrictions of indirect incitement and the glorification of future violence, too.

This judgment provoked much dissent within the Court: Judge Palm, in her partly dissenting opinion, held that ‘the majority has attached too much weight to the admittedly harsh and vitriolic language used in the impugned letters and insufficient attention to the general context in which the words were used and their likely impact (...) Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so?’ Judge Bonello, too, found that ‘[w]hen the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.’ As opposed to this argument for a strict consequential test, Judges Wildhaber, Pastor Ridruejo, Costa and Baka argued in *Karatas v. Turkey* that ‘unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power. It should not fall within the ambit of Article 10.’¹⁷⁴ On this view, incitement to violence – whatever the proximity and degree as to the consequences – is unacceptable in principle because the method of violence is at odds with democracy. This points to a “procedural militant democracy” argument, which is also apparent in the Court’s reasoning in *Hocaogulları v. Turkey*¹⁷⁵ where it emphasised that the expression at hand was ‘susceptible de favoriser la violence en Turquie; il ne saurait passer pour compatible avec l’esprit de tolérance et va à l’encontre des valeurs fondamentales de justice et de paix qu’exprime le Préambule à la Convention.’

In many cases that deal with propagation of the Kurdish cause, the Court did find violations of article 10;¹⁷⁶ in those cases the Court ruled that the expressions could not be characterised as “incitement to violence, armed resistance or uprising, or as hate

174 Joint partly dissenting opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka, ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999.

175 ECtHR *Hocaogulları v. Turkey*, 7 March 2006.

176 ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998; ECtHR *Kalin v. Turkey*, 10 November 2004; ECtHR *Özkaya v. Turkey*, 30 November 2004; ECtHR *Erdal Tas v. Turkey*, 19 December 2006; ECtHR *Saygili and Seyman v. Turkey*, 14 June 2007; ECtHR *Bahçeci and Turan v. Turkey*, 16 June 2009.

speech” and were thus protected by article 10, despite the violent context in the region – and even in cases where a hostile attitude towards the Turkish state was apparent. From those cases it can be concluded that subversive or “separatist” speech as such falls within the boundaries of free expression, unless it amounts to *direct or indirect incitement to violence or hate speech* against the other party to a conflict. For instance in *Asli Günes v. Turkey*, an editor in chief’s conviction for publishing an article about the “battle for the liberation of the Kurds” resulted in a violation of article 10: notwithstanding the reference to a “battle”, the ECtHR held that it did not amount to incitement to violence or armed resistance.¹⁷⁷ A violation was also found in *Özer v. Turkey*,¹⁷⁸ concerning the publication of articles about the Kurdish situation (‘L’Etat turc, dans sa répression contre la lutte pour l’indépendance’) with the conclusion ‘[l]a seule voie possible pour la fraternité des peuples est la révolution’. Besides the fact that this concerned political speech, the Court noted that the author had not justified the PKK’s deadly attacks but had merely propagated solidarity among the Kurdish people.¹⁷⁹ Seen in their context, the expressions could not be regarded as incitement to violence – according to the Court, “la lutte” refers to a battle for the recognition of Kurds’ rights rather than to “war”, while “revolution” has a Marxist connotation.

7.3 Öztürk and other glorification cases

The case of *Öztürk v. Turkey* dealt specifically with glorification of past events.¹⁸⁰ The applicant had published a biography of the founding member of an extreme left-wing organisation who had died in prison under controversial circumstances. The book had the style of an apologia, and ‘the author intended, at least implicitly, to criticise both the Turkish authorities’ actions in the repression of extreme left-wing movements and the conduct of those alleged to be responsible for I. Kaypakkaya’s death. Albeit indirectly, the book thus gave moral support to the ideology he had espoused.’ Yet according to the Court, the book could not be regarded as incitement to the use of violence or to hostility and hatred between citizens (see also *Incal*). Earlier editions of the book had already been for sale since 1991, and these had not ‘apparently aggravated the “separatist” threat’. The publisher’s conviction violated article 10, the Court ruled. Later case law is more diffuse on the issue of glorification. In *Tasdemir v. Turkey*¹⁸¹ the Court was quick to find that the complaint against a conviction for glorifying terrorism did not cause a violation of article 10. The applicant had participated in a demonstration where he and others shouted slogans such as ‘[l]ong live Apo! HPG [the armed wing of the PKK, MvN] to the front line in retaliation!’ He was sentenced to 25 days’ imprisonment (later changed to a fine). The Court argued

177 ECtHR *Asli Günes v. Turkey*, 27 September 2005.

178 ECtHR *Özer v. Turkey*, 5 May 2009.

179 ECtHR *Özer v. Turkey*, 5 May 2009, par. 42.

180 ECtHR (Grand Chamber) *Öztürk v. Turkey*, 28 September 1999.

181 ECtHR *Tasdemir v. Turkey* (inadmissible), 23 February 2010.

that ‘in the circumstances of the present case (...) the slogan shouted during the demonstration (...) amounted to an apology of terrorism. In the Court’s view, the interference in question was *therefore* [emphasis added] compatible with Article 10.’ In *Savgin v. Turkey*,¹⁸² a comparable expression led to a very different judgment. Here, a crowd present at a party were singing and shouting slogans including ‘[v]ive Apo [Öcalan, MvN], les bandes criminelles sont dans l’Assemblée, Leyla Zana est en prison’. The Court observed that ‘les slogans incriminés n’exhortaient pas à l’usage de la violence, à la résistance armée ni au soulèvement, et qu’ils n’incitaient pas non plus à la haine... Ils n’étaient pas non plus susceptibles de favoriser la violence en insufflant une haine profonde et irrationnelle envers des personnes identifiées’ and found a violation of article 10.¹⁸³

The court also found a violation of article 10 in *Gül and others v. Turkey*,¹⁸⁴ where the applicants shouted slogans during lawful non-violent demonstrations on May Day and in the commemoration of a massacre: ‘we are the public’s bullet lodged in the barrel of a gun’, ‘Guerrillas don’t die; long live the people’s war’, ‘Political power grows out of the barrel of the gun’. On the other hand, however, slogans were heard such as ‘workers and peasants hand in hand, towards democratic revolution’. The applicants were sentenced to ten months’ imprisonment (initially to three years and nine months’ imprisonment). The Court noted that, although some of the slogans – taken literally – had a violent tone, ‘having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations – which limited their potential impact on “national security” and “public order” – they cannot be interpreted as a call for violence or an uprising.’ The Court observed that, by shouting these slogans, the applicants did not advocate violence, injury or harm to any person. Furthermore, neither in the domestic court decisions nor in the observations of the Government was there any indication of a clear and imminent danger which required such a lengthy criminal prosecution. This requirement of a “clear and imminent danger” is new in the Court’s case law. The Court explicitly distinguished this case from *Tasdemir v. Turkey*, since ‘[i]n the latter case, the slogan shouted by the applicant had clearly amounted to an apology for terrorism and, furthermore, at the end of the proceedings, he was sentenced to twenty-five days’ imprisonment.’ The long prison sentence and length of the proceedings led the Court to conclude that the interference was disproportionate. The judgment was criticised by dissenting judges Sajó and Tsotsoria, who argued that the applicants shouted slogans in favour of an armed, illegal organisation; therefore, ‘in terms of clear and imminent danger, the risk of that danger materialising is significantly increased, given the ongoing terrorist activity’. Moreover, they did not see the difference with *Tasdemir v. Turkey*: ‘[i]n both cases the slogan uttered at a demonstration was in support of a terrorist group and the

182 ECtHR *Savgin v. Turkey*, 2 February 2010.

183 Par. 45.

184 ECtHR *Gül and others v. Turkey*, 8 June 2010.

language is clearly similar.’ Indeed, it is rather hard to see the difference between all three of these cases in terms of the wording used or the context.

Glorification and incitement to terrorism was also at stake in *Hocaogullari v. Turkey*¹⁸⁵ and *Halis Dogan v. Turkey (3)*,¹⁸⁶ where the Court paid particular attention to the virulent words used and where it found – comparable to *Sürek* – a clear intention to stigmatise the other side of the conflict. ‘Force est de constater que cet article en particulier était susceptible de favoriser la violence en Turquie; il ne saurait passer pour compatible avec l’esprit de tolérance et va à l’encontre des valeurs fondamentales de justice et de paix qu’exprime le Préambule à la Convention.’ In *Halis Dogan v. Turkey* the Court again stressed the ‘intention to stigmatise the other side to the conflict’ and found that because of the context – the articles were published after *Öcalan*’s arrest and might incite to violence for the Kurdish cause – they could be seen as putting the violence in southeast Turkey in a favourable light. From these last two cases it appears that the Court (it is no coincidence that it refers to the *Zana* case) attaches much importance to the use of provocative wording: it holds that such expressions do not contribute to a peaceful resolution of political problems but only intend to stigmatise the other side to the conflict. However, as compared to the abovementioned cases it still remains unclear how provocative the wording must be to justify a restriction. In assessing whether an expression can be restricted as glorification of terrorism, the academic character of the expression is also an important factor that requires stricter review of restrictions of article 10. This becomes clear from *Polat v. Turkey*¹⁸⁷ (about a Turkish history book), and *Erdogdu and Ince v. Turkey*¹⁸⁸ (an interview with a sociologist).

7.4 Hogefeld v. Germany

The acceptability of justifying terrorism may also depend on the speaker’s own history with and present views on the method of terrorism, as appears from the Court’s admissibility decision *Hogefeld v. Germany*.¹⁸⁹ This concerned a radio journalist’s dismissed requests for an interview with former Red Army Faction (RAF) member Birgit Hogefeld, who was in detention (and continues to be detained in life imprisonment) for a deadly terrorist attack. The German courts had judged it necessary to prohibit her from making public statements in order to prevent her from promoting RAF’s ideology and from influencing its supporters. The applicant’s declarations about her attitude towards the RAF were ambiguous, but although she admitted “mistakes” in the strategy of the RAF, she continued to claim ‘that our beginnings and our fight

185 ECtHR *Hocaogullari v. Turkey*, 7 March 2006.

186 ECtHR *Halis Dogan v. Turkey* (no. 3), 10 October 2006.

187 ECtHR (Grand Chamber) *Polat v. Turkey*, 8 July 1999.

188 ECtHR (Grand Chamber) *Erdogdu and Ince v. Turkey*, 8 July 1999.

189 ECtHR *Hogefeld v. Germany* (inadmissible), 20 January 2000.

for a different world were at any time well-founded and justified, and that fight has to be conducted as a confrontation'. Moreover, she held that 'the reversal of the social developments is still a matter for which one must fight'. Seen in the light of her personal history, the Court held that such statements 'could possibly be understood by supporters as an appeal to continue the activities of the RAF.' The Court apparently requires that a person's remarks are unambiguous as to the acceptability of violence as a political method – see also *Zana v. Turkey*. Declaring one's support of a political aim while not unambiguously declaring one's disapproval of violence can lead to a restriction of freedom of expression.

7.5 The media and terrorism

The Court is well aware of the media's special role as regards terrorism – which itself thrives on media attention. In *Sürek and Özdemir v. Turkey* and *Erdogdu v. Turkey*, the Court emphasised the media's duties and responsibilities in publishing terrorist statements: '[t]he Court also acknowledges that in situations of conflict and tension particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions which advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.'¹⁹⁰ Expressions through mass media can have a greater impact on national security than, for instance, literature.¹⁹¹ Yet '[w]here a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media.'¹⁹² Indeed, in *Gözel and Özer v. Turkey*¹⁹³ the Court severely criticised Turkey for almost automatically sanctioning the media in such cases: 'la répression des professionnels des médias exercée de manière mécanique à partir de la disposition précitée sans tenir compte de leur objectif (...) ou du droit pour le public d'être informé d'un autre point de vue sur une situation conflictuelle ne saurait se concilier avec la liberté de recevoir ou de communiquer des informations ou des idées.'¹⁹⁴

7.6 *Leroy v. France* and *Vajnai v. Hungary*

A particularly striking judgment on the glorification of terrorism is *Leroy v. France*.¹⁹⁵ On 13 September 2001, Denis Leroy had published a cartoon in a magazine depicting

190 ECtHR (Grand Chamber) *Sürek and Özdemir v. Turkey*, 8 July 1999; ECtHR *Erdogdu v. Turkey*, 15 June 2000, par. 62.

191 Sottiaux 2008, p. 121.

192 ECtHR (Grand Chamber) *Sürek and Özdemir v. Turkey*, 8 July 1999; ECtHR *Erdogdu v. Turkey*, 15 June 2000, par. 71; ECtHR *Demirel and Ates (No. 3) v. Turkey*, 9 December 2008.

193 ECtHR *Gözel and Özer v. Turkey*, 6 July 2010.

194 Par. 63.

195 ECtHR *Leroy v. France*, 2 October 2008.

the WTC attacks of 9/11 together with the words ‘we’ve all dreamed of it, Hamas did it’ (parodying Sony’s slogan ‘we’ve all dreamed of it, Sony did it’). The cartoonist later declared that he had wished to represent the destruction of the American empire and thereby express his anti-Americanism. Judging the admissibility of the case under article 17, the Court did not qualify this expression as abuse of right. This was because of its satirical form – a certain degree of provocation must be accepted; and because the cartoonist’s underlying idea – anti-Americanism – was not aimed at the destruction of the rights set forth in the Convention. The Court thus found a substantive assessment necessary to judge whether the cartoon offended the victims’ memory. It went on to note that the depiction of the attacks as a dream finally come true is particularly offensive and shocking for the victims and their family. Moreover, the context surrounding the cartoon played a role: it was published only two days after the attacks at a time when the world was still in shock and public opinion was very upset. Especially since the magazine was published in the Basque region, where the risk of terrorism was far from absent, such glorification could have important consequences. The Court pointed to the hostile reactions that such a cartoon can create, which could have negative consequences for public order. The Court explicitly took into account that it is a legitimate aim for democratic states to protect themselves against terrorism: ‘[e]n particulier, et comme le montrent les travaux du Conseil de l’Europe en la matière, la principale difficulté réside dans la possibilité de punir l’apologie du terrorisme sans entraver les libertés fondamentales telle que la liberté d’expression.’ The Court did judge that provocation is inherent in artistic expressions and that freedom of the press and the public’s right to be informed were at stake here; after all, the cartoon belonged to a public debate on issues of general interest. Nonetheless the Court found no violation of article 10. It held that the cartoon glorified violence and that ‘le requérant juge favorablement la violence perpétrée à l’encontre des milliers de civils et porte atteinte à la dignité des victimes (...) Elle relève à cet égard que la provocation n’a pas à être nécessairement suivie d’effet pour constituer une infraction.’

In a case involving a totally different context, *Vajnai v. Hungary*¹⁹⁶ (wearing a red star during a lawful demonstration: see III.4.2), the Court surprisingly required a strict consequential relationship between speech and potential consequences. The Court found that ‘there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship.’¹⁹⁷ When freedom of expression is exercised as political speech, ‘limitations are justified only in so far as there exists a clear, pressing and specific social need. Consequently, utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings.’¹⁹⁸ The red star cannot be interpreted as exclusively representing totalitarianism or as an identification with totalitarian ideas

196 ECtHR *Vajnai v. Hungary*, 8 July 2008.

197 Par. 49.

198 Par. 51.

and ‘a symbol which may have several meanings in the context of the present case, where it was displayed by a leader of a registered political party with no known totalitarian ambitions, cannot be equated with dangerous propaganda.’ Moreover, ‘the Government have not referred to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. In the Court’s view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a “pressing social need”.¹⁹⁹ The Court furthermore concluded that offence to feelings cannot alone set the limits of freedom of expression: the potential propagation of an offensive ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction.

Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court’s view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto. (par. 57)

It is remarkable, especially in relation to *Vajnai v. Hungary*, how the Court in *Leroy v. France* accepted a criminal conviction on the basis of a weak link between speech and its consequences for public order and national security. The two conflicts at stake in *Leroy* – Al-Qaeda’s terrorist attacks in the United States and ETA’s terrorism in the Basque region – are of a completely different nature and it is difficult to assume that the mere glorification of violence in one situation can lead to enhancing the other – especially not when a satirical cartoon is involved that does not in any real way incite to future violence. The Court’s decision to uphold the restriction is based on manifold reasons, including also the alleged offence to victims and their families. The Court furthermore referred to the troubled public debate that existed right after 9/11, and one might question whether the Court hereby accepted states’ wish to regulate the decency of public debate in the wake of the attacks. Moreover, the Court noted the hostile reactions that such a cartoon may provoke, and it thus seems to accept a restriction with the rationale of protecting a speaker against a “hostile audience”. In this respect, the *Vajnai* judgment took a very different approach as it explicitly recognised the danger of a “heckler’s veto” if free speech is restricted to satisfy the dictates of public feeling. There, the Court adopted a strict consequential test by requiring a “real and present danger” instead of a “mere speculative danger” of public disorder. The Court’s *Leroy* judgment mentions the CoE Convention on the Prevention of Terrorism,²⁰⁰ which requires that States Parties criminalise in their jurisdictions “public provocation to commit a terrorist offence”, which may include indirect forms such as glorifying

¹⁹⁹ Par. 55-56.

²⁰⁰ Article 5. The CoE’s Convention was largely followed by the EU in its Council Framework Decision amending Framework Decision 2002/475/JHA on Combating Terrorism, adopted in 2008.

terrorism. In *Herri Batasuna & Batasuna v. Spain* – on freedom of association of a political party allegedly supportive of ETA – the Court also placed the party’s dissolution in the light of the ‘international wish to condemn the public glorification of terrorism’.²⁰¹

7.7 Article 15 ECHR: derogation in times of emergency

In the light of the Court’s attention to the external context of expressions – particularly the security situation in parts of Turkey – the possibilities for *derogation from human rights obligations in times of emergency* might also be relevant. Article 15(1) ECHR provides:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The Court usually leaves States a large margin of appreciation in deciding whether such a situation exists, and which measures are required. The Court has held that a ‘public emergency threatening the life of the nation’ refers to ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’.²⁰² The Court has accepted that terrorist threats can be regarded as such and can thus justify certain derogations.²⁰³ For instance, it accepted the declaration that Turkey made under article 15 in 1990, which concerned the situation of the PKK’s separatist violence. The extent of terrorist activity had ‘undoubtedly created, in the region concerned, a “public emergency threatening the life of the nation”’.²⁰⁴ Though Turkey’s derogation in first instance extended to article 10, as of 1992 it was limited to article 5 only – thus the cases dealt with in the previous paragraphs do not fall within this special regime.

In *A. and others v. United Kingdom*, the Grand Chamber ruled that the UK’s derogation from certain human rights obligations after the attacks of 9/11 (note that the derogation took place before the London bombings, but the Court’s judgment dates from afterwards) was not in violation of the Convention.²⁰⁵ According to the Court, ‘the requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted

²⁰¹ ECtHR *Herri Batasuna and Batasuna v. Spain*, 30 June 2009, par. 90.

²⁰² ECtHR *Lawless v. Ireland* (3), 1 July 1961, par. 28.

²⁰³ ECtHR *Ireland v. United Kingdom*, 18 January 1978.

²⁰⁴ ECtHR *Aksoy v. Turkey* (1), 18 December 1996, par. 70.

²⁰⁵ ECtHR (Grand Chamber) *A. and others v. United Kingdom*, 19 February 2009.

bombings in London in July 2005 to have been very real.²⁰⁶ When a state derogates from fundamental rights in such a situation, it can only do so ‘to the extent strictly required by the exigencies of the situation’. The State’s response shall be proportional; ‘where a derogating measure encroaches upon a fundamental Convention right, (...) the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse (...)’.²⁰⁷ Though some Convention rights – such as the prohibition of torture – are explicitly excluded from the possibility of derogation (article 15(2)), this is not the case for article 10. Yet encroaching upon freedom of expression for the sake of a public emergency will not easily meet the proportionality requirement. The Parliamentary Assembly of the Council of Europe has stated in this regard that article 15 cannot be invoked in cases of terrorism to restrict freedom of expression beyond the limitations already existing under article 10(2).²⁰⁸ Indeed, the Court already accepts rather far-reaching restrictions on freedom of expression in cases where the security situation is vulnerable, so that additional restrictions on extreme speech with an appeal to article 15 seem unnecessary. Still the Court might consider reserving far-reaching restrictions of extreme speech – such as it now sometimes accepts under article 10(2) – for situations where a state has explicitly made a derogation under article 15.²⁰⁹ In situations where no derogation is at stake, the Court could then be more protective of freedom of expression.

7.8 Subversive political parties

When political parties are prohibited on the basis of their subversive or separatist goals that go against the interests of the state, the Court appears stricter in judging the necessity of a restriction than in the *Refah Partisi* judgment on “anti-fundamental rights” political parties. In the judgment *United Communist Party of Turkey and others v. Turkey*,²¹⁰ the issue was the dissolution of the party for incorporating the word “communist” in its name and for having striven for a solution to the “Kurdish problem”. The Court ruled that ‘an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State (...)’.²¹¹ The Court further noted that the expressions relied on for dissolution did not contain any incitement to violence, and that the party satisfied the requirements of democracy. As to the separatist threat that the authorities alleged, the Court held that ‘although the TBKP refers in its programme to the Kurdish “people” and “nation” and

206 ECtHR (Grand Chamber) *A. and others v. United Kingdom*, 19 February 2009, par. 177.

207 ECtHR (Grand Chamber) *A. and others v. United Kingdom*, 19 February 2009, par. 184.

208 CoE Parliamentary Assembly, Recommendation 1706(2005) on Media and Terrorism, par. 4.

209 See Heinze 2006.

210 ECtHR (Grand Chamber) *United Communist Party of Turkey and others v. Turkey*, 30 January 1998.

211 Par. 27.

Kurdish “citizens”, it neither describes them as a “minority” nor makes any claim – other than for recognition of their existence – for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population (...) there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.²¹²

The Socialist Party v. Turkey was dissolved because the party’s chairman had advocated minority rights in Turkey and the establishment of a Kurdish-Turkish federation. The ECtHR, however, found no ‘call for the use of violence, an uprising or any other form of rejection of democratic principles’ in the chairman’s statements. In the party’s programme,

reference is made to the right to self-determination of the “Kurdish nation” and its right to “secede”; however, read in their context, the statements containing these words do not encourage secession from Turkey but seek rather to stress that the proposed federal system could not come about without the Kurds’ freely given consent, which should be expressed through a referendum. In the Court’s view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.²¹³

The interests of the state to protect itself against certain constitutional or legal changes are not sufficient in themselves to warrant restrictions of the right to freedom of association. As Sottiaux states, ‘[s]ettled Article 11 jurisprudence abundantly illustrates that an association must be allowed to further and promote through peaceful means radical viewpoints that are contrary to the interests of the state without running the risk of being banned. These include the independence of a part of the state’s territory (United Macedonian Organisation Ilinden-Pirin and others v. Bulgaria), a modification of the form of government (United Communist Party), fundamental social and economic change (Partidul Comunistilor and Ungureanu v. Romania), and the promotion of minority rights (Socialist party v. Turkey, IPSD and others v. Turkey).²¹⁴ One might also ask whether organisations may be prohibited for encouraging or glorifying the acts of terrorist groups, or for lending them other moral support.²¹⁵ In this regard the judgment in Yazar and others v. Turkey should be mentioned.²¹⁶ Here, the Court held that political parties cannot be required to abstain from furthering the

212 Par. 56-57.

213 ECtHR (Grand Chamber) Socialist Party and others v. Turkey, 25 May 1998, par. 47.

214 Sottiaux 2008, p. 180.

215 Sottiaux 2008, p. 173.

216 ECtHR Yazar and others v. Turkey, 9 April 2002.

same political goals that terrorist organisations make: the principles that this party advocated, such as self-determination and language rights for Kurds, were not in themselves contrary to the Convention. According to the Court, ‘if merely by advocating those principles a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. That in turn would be strongly at variance with the spirit of Article 11 and the democratic principles on which it is based.’²¹⁷ Here the Court exercises a stricter supervision in the field of restrictions of political parties (art. 11) than in the field of restricting speech by individuals (art. 10): in *Hogefeld v. Germany*, it became clear that expressing support for a terrorist group’s political goals may lead to a restriction of free speech, if a person does not unambiguously disapprove of terrorist methods.

Yet from *Herri Batasuna & Batasuna v. Spain*²¹⁸ one can conclude that when the links between a political party and a terrorist group are too close, a restriction of article 11 is justified. Two political parties were declared illegal and dissolved because the national courts found that they were linked to terrorist group ETA, as appeared from several acts and speeches by party members. The ECtHR repeated its principles from *Refah Partisi*, including the requirement that the risk to democracy must be sufficiently imminent but that a state cannot be required to wait until the party has come to power. In the present case, according to the Court, the dissolution corresponded to a “pressing social need”. The national courts had found that the parties did not merely decline to condemn ETA’s terrorist acts, but were really instruments in ETA’s terrorist strategy. During a public manifestation organised by Batasuna, headed by its leaders, slogans such as ‘la lutte est la seule voie’ and ‘vive l’ETA militaire’ could be heard. Moreover, an MP for Batasuna had said in an interview that ‘l’ETA n’est pas pour la lutte armée par caprice, mais [qu’elle est] une organisation qui voit la nécessité d’utiliser tous les instruments pour faire face à l’Etat’. Finally, the Court mentioned that the villages under Batasuna’s power had recognised ETA terrorists as “citizens of honour” and that a counsel for Batasuna had participated in an ETA demonstration. The ECtHR thus concluded that these actions were close to an explicit support of terrorism and that the acts and speeches of members and leaders did not exclude recourse to violent methods to reach their goals.²¹⁹ The Court agreed with the national courts that the refusal to condemn violence can present a tacit support for terrorism, in the context of more than 30 years of terrorist violence that all other political parties condemn. Yet it stressed that this was not the only reason for dissolving the party; the national courts had also paid attention to the actions of Batasuna’s members and leaders, which brought them to the conclusion that the parties agreed with the terrorist actions. Therefore, the

217 Par. 57.

218 ECtHR *Herri Batasuna and Batasuna v. Spain*, 30 June 2009, par. 90.

219 Par. 86.

dissolution was in line with the Convention: in view of the terrorist attacks that had found place in Spain for many years, the parties' links with ETA 'could objectively be considered as a threat for democracy'.²²⁰

The issue of restricting a party purely on the grounds of its *name* was at stake in *Radko v. Macedonia*.²²¹ This newly formed public association was named after Ivan Mihajlov-Radko, who was the leader of the controversial Macedonian Liberation Movement from 1925-1990. According to its Articles, the current association was formed to study and defend the Macedonian Liberation Movement according to democratic norms. The Macedonian Constitutional Court declared the association's programme and Articles void: it held that the organisation's true objective was to continue Radko's ideology that 'the Macedonian ethnicity has never existed, but belongs to the Bulgarians in Macedonia'. Such a negation of the Macedonian identity amounted to 'revising the constitutional order by violent means' and to 'incitement to religious or national intolerance', according to the Constitutional Court. The ECtHR criticised this view: it considered that the association had apparently been prohibited because of the mere fact that its name was offensive to a majority of the people, considering Radko's ideology. The Constitutional Court had not proposed any facts that pointed to the use of illegal or undemocratic means by the association or its members, nor did the Articles suggest this. Moreover, it did not make clear why negation of the Macedonian ethnic identity would be synonymous to violence against the constitutional order. The ECtHR did recognise that the creation of an association named after Radko risked leading to tensions and divisions in society – indeed, its inauguration ceremony had already led to riots – but judged that

c'est là l'une des conséquences inévitables du pluralisme. Le rôle des autorités en pareilles circonstances ne consiste pas à éliminer la cause des tensions en supprimant le pluralisme, mais à veiller à ce que les groupes concurrents se tolèrent les uns les autres (par. 65)

Although the association risked causing sentiments of hostility because the majority found its name offensive, the Court found that 'the fact of naming an association after an individual regarded negatively by the majority of the population... does not constitute a present and imminent danger to public order as such.' In the absence of concrete elements to demonstrate that in naming themselves "Radko" the association had opted for a politics representing a real danger to society or the State, there was no sufficient justification for declaring their programme and Articles void. The Court concluded with a general critical observation on militant democracy:

Toutefois, des mesures radicales de nature préventive visant à supprimer la liberté de réunion et d'expression en dehors des cas d'incitation à la violence ou de rejet des principes

²²⁰ Par. 88-89.

²²¹ ECtHR *Association of Citizens Radko and Paunkovski v. the Former Yugoslav Republic of Macedonia*, 15 January 2009.

démocratiques – aussi choquants et inacceptables que peuvent sembler certains points de vue ou termes utilisés aux yeux des autorités, et aussi illégitimes les exigences en question puissent-elles être – desservent la démocratie, voire, souvent, la mettent en péril. (par. 76)

7.9 Conclusion

The Court’s sensitivity to the external context surrounding expressions explains why even indirect incitement is sometimes taken to justify a legitimate restriction of freedom of speech. Even if expressions, taken literally, do not provoke violence, they may still be restricted under some circumstances: the use of indirect, symbolic language that reinforces grievances and conceals a call for revenge can be dangerous in the wake of a conflict.

The main rationale for prohibiting extreme speech under articles 10 and 11 ECHR is, undoubtedly, the preservation of public order. This concept of public order is somewhat narrower than in the context of hate speech; it is used in the sense of upholding the security of the state against violence that threatens its existence. Yet it may also include the possibility of restrictions of freedom of speech for the sake of preventing hostility between different groups in society (Hocaogulları, Halis Dogan). The ECtHR does not tend to require a strict relationship between speech and potential consequences, though it occasionally refers to a “clear and imminent danger” or “real and present danger” in more recent case law (Vajnai, Gül and others v. Turkey).

Which restrictions are necessary and justified for the preservation of public order and the prevention of violence is a matter of debate – not at least among the judges of the ECtHR, considering their dissenting opinions. In the Zana judgment, Judge Thor Vilhjalmsson remarked that ‘I do not see how these words, published in a newspaper in Istanbul, can be taken as a danger to national security or public safety or territorial integrity, let alone that they endorse criminal activities.’ This relates to the way in which the Court takes account of the potential consequences that an expression can have in a particular context, and the – arguably too large – distance between expression and potential violence. Judge Palm, in her partly dissenting opinion to Sürek v. Turkey, held that

[i]n my opinion the majority has attached too much weight to the admittedly harsh and vitriolic language used in the impugned letters and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the words in question shock and disturb the reader with their general accusatory tone and their underlying violence. But in a democracy, as our Court has emphasised, even such “fighting” words may be protected by Article 10(...) My answer to this question is to focus less on the vehemence and outrageous tone of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The

answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case.

She concluded that ‘there was no real or genuine risk of the speech at issue inciting to hatred or to violence and that the applicant was sanctioned because of the political message of the letters rather than their inflammatory tone.’ Judge Bonello has often criticised the Court because it does not require a stricter causal link between an expression and the potential violence. He has proposed that the Court should adopt a “clear and present danger test” in such cases. In *Sürek v. Turkey*, he argued:

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create “a clear and present danger”. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail. The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action. It is a question of proximity and degree. In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action.

Judge Gölcüklü explained in his dissenting opinion in *Erdogdu v. Turkey* how the external context may warrant more proactive measures against speakers who incite to violence or hatred:

Violence, deadly hatred, danger threatening public order and national security, and separatism never appear overnight. First the groundwork is laid and then, when this has been achieved, action is taken. It is from that very moment that all sorts of misfortunes, which should have been prevented, begin to take root, like a deadly cancer: when it manifests itself, it is – alas! – too late to hope for any sort of a cure. Once violence exists, we never know how and at what price we can rid ourselves of it.

Precisely because most extreme speech cases involve the sensitive political situation in Turkey (and the Court regularly uses the margin of appreciation doctrine), one would expect the outcome of such cases to be different in more stable democracies where the link between expressions and violence is more remote. Therefore it is remarkable that in *Leroy v. France*, the link between speech and potential consequences is even looser than in many Turkish cases, though one would expect the Court to apply a stricter test in this French case.

Finally it is striking that the Court often combines the concepts of incitement to violence against the state, glorification or justification of violence, and hate speech²²² – it appears difficult to draw a sharp line between those types. Justifying terrorism may conceal a call for future violent action which makes it indirect incitement, but can also be restricted – as the Leroy judgment shows – if it deals with the past and constitutes no incitement. Indirect incitement to violence, for instance in the form of glorification, cannot be seen separately from inciting hatred between citizens: virulent speech that stirs up emotions of hatred and stigmatises the other party is close to the threat of violence, in a region where such violence has been present before. Subversive speech against the government is thus close to hate speech in those cases, since harsh criticism and appeals to rebel against the government are found able to instill a “deep-seated hatred” in the citizens appealed to, which may lead to further violence. What needs to be kept in mind, however, is that the *rationale* behind the prohibition of extreme speech in the context of terrorism is quite different from that in hate speech against minority groups. The latter is found unacceptable because of the central principle of equal respect for human dignity, which underlies the Court’s conception of democracy. In cases concerning extreme speech and the glorification of violence, the Court uses the term hate speech in situations where hatred is stirred up by an insurgent group against the *government* (and indirectly against the rest of the population). Hate speech in such situations exacerbates the risk of violence in a sensitive region. The central rationale behind prohibiting such expressions is rather the protection of national security and public order. Since these are closely linked to majority interests – often translated into state interests – it is particularly important to construe those restrictions in such a manner that the right to freedom of expression of individuals and/or minorities *against* the state is respected.

In cases about the freedom of subversive political parties (article 11), the Court is generally stricter than in cases concerning extreme expressions by individuals (article 10). A party’s willingness to use antidemocratic methods must become clear from the party’s Articles or expressions/acts by certain members – not merely from its name. The fact that a political programme is incompatible with the current *principles and structures* of a state does not make it as such incompatible with the rules of democracy. In *Socialist Party and others v. Turkey*, the Court held that “[i]t is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”²²³

222 ECtHR (Grand Chamber) *Sürek v. Turkey* (1), 8 July 1999; ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998; ECtHR (Grand Chamber) *Öztürk v. Turkey*, 28 September 1999.

223 ECtHR (Grand Chamber) *Socialist Party and others v. Turkey*, 25 May 1998, par. 47.

8 OVERALL CONCLUSION

The Court seems to struggle with how much militant democracy it is willing to take on. Just as national authorities, it has to deal with the boundaries of public debate on immigration and multiculturalism: distinguishing outright attacks to human dignity from legitimate criticism is increasingly challenging. Its current case law still bears many traces from the time when the Convention came into being and when the idea that democracy should defend itself against its enemies was particularly strong. At this moment, the questions who those “enemies” are and which measures States can take to defend themselves are very pressing. This is the case for hate speech in the field of the immigration debate, but also with regard to revisionist speech: where to draw the line between “clearly established historical facts” and other glorification or denial of atrocities? The use of this criterion puts the Court in a difficult position. The Court’s approach to using article 17 in hate speech cases is also subject to changes, though it is too early to conclude that it may no longer be relevant in that context. It must be noted that the Court’s role in relation to national courts also makes it difficult to deal with such sensitive issues in a consistent manner: sometimes it allows a large margin of appreciation and at other times it puts its own substantive judgment in the fore.

The Court has not really shifted its approach in cases surrounding immigration debate – by and large it still judges such hate speech as falling outside the protection of the Convention. The connection between speech and consequences is not an important consideration. However, there is a shift in the cases of *Soulas* and *Le Pen* in the sense that the Court now considers that anti-immigration expressions do fall within public debate (but that they can still be legitimately prohibited, because states have a large margin of appreciation in this field.) The shift in public debate in many European countries thus seems to lead to a slight change in the Court’s approach in the sense that the notion of “public debate” is broadening. Moreover, the use of article 17 seems to become less common. In older cases (such as *Norwood*), the Court did not consider the role of public debate at all: it immediately judged such expressions contrary to the values of the Convention. That the Court interpreted hate speech on the grounds of *religion* broadly in *Norwood* – the question whether speech is directed at *people* or a *religion* was rather easily passed by – does not come as a surprise, considering its case law on blasphemy.

The defence of democracy also plays a part with regard to extreme religious speech or political parties and the role of secularism in the Court’s conception of democracy. In *Refah Partisi*, the Court made it clear that militant democracy is still alive and kicking – and that it can also be used in cases concerning extreme religious groups: ‘it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.’ In this regard, it has been argued that the ECtHR’s present approach ‘aims to totally remove any evidence of the

pressing societal problems from prevailing politics’, for instance by prohibiting a party that wishes to discuss the place of Islam.²²⁴ The Court allows states quite some leeway to preserve liberal pluralism by actually limiting such pluralism. In cases about extreme speech, it is a matter of discussion – also within the Court – what should be decisive: the relationship between speech and consequences (“clear and present danger”), or rather the intention or the severity of the wording used? In most cases the Court opts for the latter. In hate speech cases, the relationship between speech and consequences is not important at all, which has to do with the different rationale (protecting equal dignity).

The Court often repeats that freedom of expression protects substance as well as form of expressions, and a certain extent of provocation is allowed; expressions that “shock, offend or disturb” are protected. In practice, one may question whether these phrases still ring true. “Gratuitously offensive” expressions are considered to fall outside public debate: such ideas, according to the Court, cannot be seen as “contributing to any form of public debate capable of furthering progress in human affairs”. Hence the “marketplace of ideas” does not extend to “gratuitously offensive” expressions, because these are considered to impede its functioning. The Court’s idea of public debate is thus a limited one, premised on a notion of rational dialogue. Therefore one may question whether the special protection for expressions in the context of public debate is helpful; states are still allowed to limit the scope of public debate in a far-reaching way.

Finally, an important question is to what extent freedom of expression for minorities is adequately preserved under the ECHR. While the Court’s case law on hate speech clearly echoes the idea of protecting minorities against discrimination, its case law in other fields (blasphemy, religiously motivated hate speech, extreme speech) attaches much importance to majority interests such as public order. While liberal theory shows that freedom of expression is particularly important for minority groups, one may ask question whether the Court always endorses this view.

224 Teitel 2007, p. 82.

CHAPTER IV

THE EUROPEAN UNION AND THE COUNCIL OF EUROPE

1 INTRODUCTION

The Council of Europe (CoE) has issued a number of specific instruments on hate speech and extreme speech, besides the European Convention on Human Rights. The European Union (EU) has also adopted two relevant Framework Decisions in this field in 2008. This chapter is structured per instrument, taking the documents on hate speech together and thereafter the instruments on extreme speech. It first considers the relevant instruments on hate speech and blasphemy (par. 2), including the CoE Council of Ministers' recommendation on hate speech (2.1), the Additional Protocol to the CoE Convention on Cybercrime (2.2), the CoE Parliamentary Assembly's resolutions and recommendations on blasphemy and religious hatred (2.3), and the EU Framework Decision on combating racism and xenophobia (2.4). Paragraph 3 deals with extreme speech in the context of terrorism and includes the CoE Convention on the Prevention of Terrorism (3.1) and the amendment to the EU Framework Decision on combating terrorism (3.2).

2 HATE SPEECH

2.1 CoE Committee of Ministers Recommendation (97)20 on “hate speech”

In 1997, the Council of Europe's Committee of Ministers adopted a recommendation to Member States on hate speech, which particularly focuses on expressions disseminated through the media. It builds upon the principles set out in the ECtHR's *Jersild v. Denmark* case.¹ The recommendation is especially relevant for being the only international document – although non-binding – that contains a definition of the term “hate speech”. The Recommendation's appendix states:

For the purposes of the application of these principles, the term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

1 ECtHR (Grand Chamber) *Jersild v. Denmark*, 23 September 1994.

This is a broad definition, with terms such as “xenophobia” and “intolerance”; moreover, the Recommendation relates not only to incitement or promotion of such attitudes but also to “justifying” them. The explanatory memorandum makes it clear that this definition must be understood against the background of the Vienna Declaration and Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance.² Therefore ‘other forms of hatred based on intolerance’ – a term which can potentially refer to many forms of intolerance – must be interpreted in the light of the problems the Declaration seeks to address: racism, xenophobia, anti-Semitism.³ The document is thus geared towards these forms. The Recommendation seeks, in line with the Vienna Declaration, to condemn such expressions ‘since they undermine democratic security, cultural cohesion and pluralism’; it also points to ‘the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression so as to avoid the risk of undermining democracy on the grounds of defending it’. Accordingly, it adheres to a militant democracy rationale.

The Recommendation states that governments should ‘establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.’ Nevertheless the Explanatory Memorandum sets forth the view that criminal law restrictions must be strictly construed. Principle 5 states:

National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect’s right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom.

According to the Explanatory Memorandum, ‘it might be advisable to concentrate efforts on strong cases where prosecution is likely to result in a conviction. In the area of hate speech, there is a real danger that suspects present themselves to the public as “martyrs” or “victims” or, in the event of an acquittal, that they present the outcome of the case as a victory for their views. It is recommended that national guidelines be established which could serve as a basis for a coordinated prosecution policy in this field.’⁴ Other international bodies, in particular the CERD Committee, take a stricter stance on prosecutorial discretion in hate speech cases.

2 Vienna Declaration and Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance, adopted at the Vienna Summit of Heads of State and Government of the Council of Europe Member States, 9 October 1993.

3 Explanatory Memorandum to Recommendation No. R (97) 20 on “hate speech”, par. 22.

4 Explanatory Memorandum to Recommendation No. R (97) 20 on “hate speech”, par. 37.

Notwithstanding the fact that this Recommendation's broad definition of hate speech is regularly used (for instance, in the ECtHR's case law), states and institutions continue to use their own definitions.⁵

2.2 Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

The Additional Protocol to the CoE Convention on Cybercrime entered into force on 1 March 2006 and has so far been ratified by 20 states (the Netherlands has ratified, while the UK has neither signed nor ratified the Protocol).⁶ The Convention on Cybercrime itself aims at enabling mutual assistance with regard to computer related crimes; its Additional Protocol was drafted to add to those crimes acts of a racist and xenophobic nature committed through computer systems. The initial plan was to adopt such crimes in the Convention itself, but States Parties could not reach agreement on that. The Protocol's purpose is to harmonise substantive criminal law in the fight against racism and xenophobia on the Internet and to improve international co-operation in this area. The drafters of the Protocol expressed the concern that 'the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas.'⁷ Harmonisation of domestic laws was thought to enhance the fight against racism, because it prevents "forum shopping" (making use of the most lenient domestic laws) and increases cooperation between states. It has been argued that international regulation of hate speech is necessary not only to prevent the harm that such speech can cause, but also to protect freedom of expression: in the face of the unlimited range of harmful expressions on the internet, states (often followed by internet actors who comply with their demands) tend towards overbroad restrictions of freedom of expression.⁸ Such instrumental arguments have also informed the Cybercrime Protocol.

The Protocol obliges States Parties to criminalise four acts, all to be committed through computer systems: the dissemination of racist and xenophobic material (art. 3); racist and xenophobic motivated threats (art. 4), racist and xenophobic motivated insult (art. 5), and denial, gross minimisation, approval or justification of genocide or crimes against humanity (art. 6). For all offences in articles 3-7 it is required that they are committed intentionally and without right. The term "without right" derives its meaning from the (domestic) context in which it is used; it can include exclusion of

5 CoE Committee of Experts for the Development of Human Rights 2007, par. 4.

6 By 10 July 2011.

7 CoE Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems: Explanatory Report, par. 3.

8 Cucereanu 2008.

criminal liability for dissemination of material for academic or research purposes.⁹ The term “intentionally” shall also be a matter of national interpretation – accordingly, *specific* intent is not necessarily required (recklessness may be sufficient).

The dissemination of “racist or xenophobic material” (article 3) is distinguished from *insult* (article 5). Racist and xenophobic material is defined as ‘any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors’ (article 2).¹⁰ Hence article 3 is not so broad as the term “racist or xenophobic material” suggests. The Protocol does not deal with the dissemination of racist ideas as such: expressions must promote, advocate or incite to hatred, discrimination or violence.

It is notable that the Protocol takes an explicit stance on the place of *religion* as a discrimination ground in an instrument that concerns *racism*: racist and xenophobic material may include advocacy of hatred, discrimination or violence on the basis of religion ‘if used as a pretext for any of these factors’. It should thus be used as a pretext for hatred on the grounds of race, colour, descent or national or ethnic origin – Chapter II has shown that religious hate speech may be used to obscure what is actually racism.

Insult under article 5 means ‘any offensive, contemptuous or invective expression which prejudices the honour or the dignity of a person.’ Moreover, ‘it should be clear from the expression itself that the insult is directly connected with the insulted person’s belonging to the group.’¹¹ Article 6 concerns a specific offence on ‘denial, gross minimisation, approval or justification of genocide or crimes against humanity’.¹² The drafters found that such behaviour ‘really aims at supporting and promoting the political motivation’ which has given rise to such acts, and that it has ‘inspired or, even, stimulated and encouraged, racist and xenophobic groups in their action’. Further motives for criminalisation are that ‘the expression of such ideas insults (the memory of) those persons who have been victims of such evil, as well as their

9 Explanatory Report, par. 24.

10 In this respect, “advocates” refers to a plea in favour of hatred, discrimination or violence, “promotes” means encouraging or advancing hatred, discrimination or violence; “incites” refers to urging others to hatred, discrimination or violence. The term “hatred” refers to intense dislike or enmity. “Discrimination” must be interpreted with regard to Article 14 ECHR and Protocol 12 and Article 1 CERD. (Explanatory Report, par. 14-15).

11 Explanatory Report, par. 36.

12 Such crimes must be defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party (Article 6).

relatives’ and that ‘it threatens the dignity of the human community.’¹³ The Explanatory Report states that ‘[t]he provision is intended to make it clear that facts of which the historical correctness has been established may not be denied, grossly minimised, approved or justified in order to support these detestable theories and ideas.’¹⁴ Accordingly, the drafters point to a combination of reasons to restrict such expressions: psychological harm to the victims, the symbolic rationale of “dignity of the human community” and protection of individuals against discrimination by racist and xenophobic groups.

The Protocol has anticipated concerns about freedom of expression in a few ways. First, article 15 requires that States establish, implement and apply the above-mentioned offences subject to conditions and safeguards in their domestic laws, including adequate protection of human rights pursuant to their obligations under the ECHR and the ICCPR, ‘and which shall incorporate the principle of proportionality’. Accordingly, the authorities must still make room for determining whether expressions are necessary with regard to a legitimate aim. Second, the Protocol expressly entitles states to make certain reservations to the Protocol. Article 3(3) (racist and xenophobic material) provides that states can decide not to criminalise conduct that advocates, promotes or incites discrimination that is not associated with hatred or violence – provided that other effective remedies are available. States may thus choose to put more emphasis on the consequences of speech. Under article 5(2) (insult), a party may (a) require that the offence has the effect that the person or group of persons is exposed to hatred, contempt or ridicule (thus focus on the rationale of negative imaging) or (b) reserve the right not to apply, in whole or in part, paragraph 1 of this article. Finally under article 6 (denial/justification), states may either (a) require that the offence is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on the characteristics mentioned in article 2; or (b) reserve the right not to apply, in whole or in part, paragraph 1 of this article.¹⁵ Again, states can choose to focus more on the consequences of speech. The fact that the drafters left so much leeway for States Parties shows how difficult it must have been to reach agreement on this delicate issue that is very much influenced by states’ legal and political traditions.

2.3 Blasphemy and religious hatred: Resolutions and Recommendations by the CoE Parliamentary Assembly

The Council of Europe’s Parliamentary Assembly has adopted several documents on the relationship between freedom of expression and freedom of religion, that deserve mentioning in this chapter. They are non-binding but can serve as guidelines for the

¹³ Explanatory Report, par. 39.

¹⁴ Explanatory Report, par. 41.

¹⁵ The Dutch government intends to make this reservation when ratifying the Protocol.

Committee of Ministers and national institutions. These documents are worth mentioning because they set forth a very different view on prohibitions of blasphemy and religious insult than the ECtHR does.

The Assembly's Resolution 1510 (2006) deals with 'Freedom of Expression and respect for religious beliefs'. It criticises blasphemy laws, stating that 'freedom of thought and freedom of expression in a democratic society must (...) permit open debate on matters relating to religion and beliefs (...) Modern democratic societies are made up of individuals of different creeds and beliefs. Attacks on individuals on grounds of their religion or race cannot be permitted but blasphemy laws should not be used to curtail freedom of expression and thought.'¹⁶ Moreover, 'the culture of critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress. Only totalitarian systems of power fear them. Critical dispute, satire, humour and artistic expression should, therefore, enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation.'¹⁷ The Assembly holds 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. It also emphasises that hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights.¹⁸

However, the Assembly actually contravenes some of the Court's case law here: the ECtHR, after all, has on some occasions accepted restrictions of article 10 to protect the sensitivities of religious groups.

Furthermore, the Assembly requested the Venice Commission (European Commission for Democracy through Law) to prepare an overview of national law and practice concerning blasphemy and related offences with a religious aspect in Europe. This report provides several insights and concrete recommendations in the field of blasphemy and religious insults. The Commission recommends abolishing the offence of blasphemy and

does not consider it necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component. Neither does the Commission consider it essential to impose *criminal sanctions* for an insult based on belonging to a particular religion. If a statement or work of art does not qualify as incitement to hatred, then it should not be the object of criminal sanctions.¹⁹

¹⁶ Resolution 1510 (2006), par. 3.

¹⁷ Resolution 1510 (2006), par. 9.

¹⁸ Resolution 1510 (2006), par. 12.

¹⁹ European Commission for Democracy through Law (Venice Commission) 2008, par. 64.

Again, the ECtHR's case law is more lenient in this field. The Commission concedes that 'it is true that the boundaries between insult to religious feelings (and even blasphemy) and hate speech are easily blurred, so that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem however should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the sanctioning of insult to religious feelings.'²⁰

After the preliminary report was issued by the Venice Commission in 2007, the Parliamentary Assembly adopted Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion; this Recommendation is directed at the Committee of Ministers which should in turn ensure that national law and practice are reviewed. "Blasphemy" in the context of this Recommendation can be defined as 'insulting or showing contempt or lack of reverence for god and, by extension, toward anything considered sacred'.²¹ This document specifically delves into different types of expression in the context of religion and uses stronger wording than the Resolution to condemn blasphemy laws: 'the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence.'²² National laws should therefore be reviewed in order to decriminalise blasphemy as an insult to a religion. Though the Assembly finds that hate speech should be penalised by law, 'for speech to qualify as hate speech in this sense, it is necessary that it be directed against a person or a specific group of persons.' Therefore the Assembly recommends that national laws should only 'penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds'; furthermore, they should prohibit (not necessarily penalise) 'acts which intentionally and severely disturb the public order and call for public violence by references to religious matters, as far as it is necessary in a democratic society in accordance with article 10, paragraph 2, of the Convention'.²³ This is a high standard, which puts much emphasis on the link between speech and consequences: not all expressions that disturb public order may be restricted – only when they go accompanied by "calls for public violence".

20 Par. 68.

21 Explanatory Memorandum to the Parliamentary Assembly's Recommendation 1805 (2007) by Mrs Sinikka Hurskainen, Rapporteur, Doc. 11296 (8 June 2007), par. 5 and 6.

22 CoE Parliamentary Assembly, Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, par. 4.

23 Par. 17.2.2 and 17.2.3.

2.4 EU: the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law

On 28 November 2008, the Council of the European Union adopted the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.²⁴ This Decision obliges states to make punishable certain crimes in the area of racism and xenophobia, including incitement to violence or hatred and genocide denial. The Decision's core provision for the purposes of this thesis is article 1, which sets out several offences that Member States shall criminalise in their jurisdictions. All shall concern intentional conduct. The following offences are included:

- (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
- (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
- (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

The Framework Decision is binding as to the result, though States are left discretion as to the form and methods of implementing it. Member States shall have complied with it by 28 November 2010. It employs no definition of "racism and xenophobia",²⁵ but deals with speech 'directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin'. As regards religion, article 1(3) provides:

For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

²⁴ Council Framework Decision 2008/913/JHA of 28 November 2008, OJ L 328/55 (6 December 2008).

²⁵ The original draft did contain a definition of racism and xenophobia: 'the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups'.

This part, which was not included in the original draft but added during the negotiations, reflects the difficulty of distinguishing between discrimination on the grounds of religion and discrimination on the grounds of race, colour, descent or national or ethnic origin; religion is easily used to obscure racist motivation.²⁶ The words “at least” do suggest that states may target religious hate speech more broadly – the Cybercrime Protocol does not include these words. The Framework Decision’s Preamble states that “religion” shall be understood as ‘broadly referring to persons defined by reference to their religious convictions or beliefs’ (par. 8). “Descent” refers mainly to persons or groups of persons who descend from persons that could be identified by certain characteristics, such as race or colour (par. 7).

The offences in (a) to (d) are limited in the sense that only incitement to violence or hatred – or dissemination thereof – is covered, while the potentially broad offence of “denial of grave crimes” in (c) and (d) is limited to expressions likely to incite to violence or hatred. Furthermore, article 1(2) makes it clear that States may choose to implement the offences of article 1(1) to punish only conduct which is either carried out in a manner *likely to disturb public order* or which is *threatening, abusive or insulting*. As to the offences under (c) and (d), states may also choose to make punishable only denial or gross trivialisation of crimes which have been *established by a final decision* of their own national court, and/or by an international court (article 1(4)). Notably, the Baltic States failed to receive support for a proposal which aimed to include publicly condoning, denying or grossly trivialising the crimes committed by Central and Eastern European totalitarian states; other states argued that these crimes were not grounded in racism or xenophobia.²⁷ The option to criminalise threatening, abusive or insulting words shows the UK’s influence on the Framework Decision: the UK had objected to earlier drafts considering their far-reaching implications for free speech.²⁸

The instrument requires rather specific criminal law measures from states: article 3 requires States to ensure that the offences in article 1 are punishable by penalties of a maximum of *at least between 1 and 3 years of imprisonment*, and generally to provide for “effective, proportionate and dissuasive penalties”. Investigation and prosecution shall not be dependent on a report or accusation by a victim, ‘at least in the most serious cases where the conduct has been committed in its territory’ (article 8).

The Framework Decision expressly refers to the principles of freedom of expression and association in article 7, which provides that the Decision ‘shall not have the effect

26 Howard 2008, p. 23-24.

27 Aanvullende geannoteerde agenda voor de bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 19 en 20 april 2007 te Luxemburg, p. 15.

28 House of Lords Committee on the European Union 2003; Timothy Garton Ash, “The freedom of historical debate is under attack by the memory police”, *The Guardian*, 16 October 2008.

of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in article 6 of the Treaty on European Union.’ This implies that Member States, although they must include the conduct mentioned in the Decision in their criminal laws, can still make room for a balancing act in determining liability in concrete cases. The Explanatory Memorandum to the first draft also recognised that respect for freedom of expression and association has to be balanced with the prevention of disorder or crime and the protection of the reputation or rights of others.²⁹ Article 7(2) deals with freedom of the press more particularly:

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Hence restrictions for the media to disseminate such expressions must be particularly strictly construed (see also ECtHR *Jersild v. Denmark*).

The Framework Decision came into being after many years of debate; in 2001 the original proposal was issued,³⁰ which underwent numerous changes and was finally agreed upon in 2007. Full harmonisation could not be reached: several offences such as *public incitement to racist or xenophobic behaviour, public insults or threats for a racist or xenophobic purpose, public dissemination or distribution of expressions of racism and xenophobia, and directing, supporting or participating in the activities of a racist or xenophobic group* were included in the first draft Framework Decision,³¹ but did not make it to the final text. Just as in the Cybercrime Protocol, the relationship between freedom of expression and non-discrimination appeared to be a very delicate issue that does not easily lead to European common standards.

The Framework Decision has replaced the Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia,³² a non-binding document regarding legal cooperation between Member States in this field. This instrument had been adopted to avoid “forum-shopping”, in connection with the fact that the EU Member States regarded the combat against racism and xenophobia as a matter of common interest. An evaluation of the Joint Action made it clear that there were still difficulties experienced with regard to such cooperation (such as in combating racism

29 Proposal for a Council Framework Decision on Combating Racism and Xenophobia, 28 November 2001, COM(2001) 664 final, p. 7.

30 COM(2001) 664 final.

31 COM(2001) 664 final.

32 Council of the European Union 1996, p. 5.

on the Internet).³³ Since the scope, content and enforcement of laws against incitement to racial hatred and racist conduct still differed considerably in Member States, better coordination was considered necessary. This was fuelled by concern over racist and xenophobic events in different parts of Europe, as evidenced by reports of the European Monitoring Centre on Racism and Xenophobia (EUMC) and the Council of Europe's European Commission against Racism and Intolerance (ECRI).³⁴ The current instrument's objective is to ensure that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties.³⁵ As the issue of racist and xenophobic speech was left out of the (then) draft Cybercrime Convention and left for an additional Protocol, it was argued that '[a] EU common approach on this issue would reinforce the EU position in the negotiation of such an instrument'.³⁶

The rationale behind the EU's efforts to combat racism and xenophobia is explained in the Explanatory Memorandum to the original draft: '[r]acism and xenophobia are a direct violation of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States as stated in article 6 of the TEU'.³⁷ The idea of negative imaging played an important role:

[R]acism is often a manifestation of the sense of belonging to a group, which is perceived as being reinforced by a negative and contemptuous attitude towards other groups. The very fact of mutual incitement and support within the group encourages emulation and produces a chain reaction. The views held by perpetrators are often shared by the wider communities to which they belong, which is seen by perpetrators as a legitimising factor of their actions. Such a trend is extremely worrying and must be vigorously fought against.³⁸

The European Parliament (EP) expressed its concern about the abuse of the right to free speech to damage the rights of others.³⁹ In its first draft, the Commission also spoke of the prevention of disorder/crime and the protection of the reputation or rights of others as aims of this instrument.

The drafters regarded criminal law measures to be essential: 'adequate criminal law measures also form an important tool for combating racism and xenophobia. Apart from their punitive aspect, criminal law measures have a significant dissuasive force'.⁴⁰ This strong focus on criminal law is striking when compared to the CoE's

33 Council Framework Decision, recital (4).

34 COM(2001) 664 final, p. 2.

35 Council Framework Decision, recital (13).

36 COM(2001) 664 final, p. 6.

37 COM(2001) 664 final, p. 2.

38 COM(2001) 664 final, p. 3.

39 European Parliament 2002, p. 22.

40 COM(2001) 664 final, p. 5.

Recommendation on hate speech (see par. IV.2.1). The current Framework Decision tones down this aspect, however: it states that ‘combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters.’ Yet the Council declined to adopt a proposal for amendment by the European Parliament, which sought to include in the Preamble the clause that ‘legislative policy should reflect the fact that in a democratic society the criminal law is always a last resort, and should take into account all the values at stake, including the right to free expression and the right of all individuals to equal consideration and respect.’⁴¹

3 EXTREME SPEECH: INCITEMENT TO TERRORISM

3.1 Council of Europe Convention on the Prevention of Terrorism

Article 5 of the Council of Europe Convention on the Prevention of Terrorism requires that States Parties adopt such measures as may be necessary to establish *public provocation to commit terrorism* as a criminal offence under their domestic laws.⁴²

The Convention on the Prevention of Terrorism is one out of many multilateral initiatives taken after 11 September to address global terrorism. It was opened for signature on 16 May 2005 and entered into force on 1 June 2007; so far, 28 states have ratified it.⁴³ The instrument aims at filling the gaps that previously existed in international law with regard to the fight against terrorism, and focuses on criminal law in the field of prevention of terrorism. The core of the Convention is formed by articles 5 to 7, which mention three criminal offences that States Parties shall adopt in their own jurisdictions: public provocation to commit a terrorist offence (article 5), recruitment for terrorism (article 6) and training for terrorism (article 7). It presents the first attempt to deal with incitement to terrorism in an international convention.

Under article 5, “public provocation to commit a terrorist offence” means

the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

Art. 5(2) states that ‘[e]ach Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic

⁴¹ European Parliament 2007, Amendment 3.

⁴² ETS No. 196.

⁴³ By 10 July 2011. The Netherlands has ratified; the UK has signed but not yet ratified the Convention.

law.’ States must make the offence punishable in their national legislation by ‘effective, proportionate and dissuasive penalties’ (article 11). A terrorist offence under the Convention means any of the offences within the scope of the twelve existing counter-terrorist treaties, which are mentioned in the Appendix (article 1). Such offences include e.g. unlawful seizure of aircraft, taking hostages, bombings, and also financing of terrorism. Thus, instead of attempting to define terrorism the Convention aligns to existing conventions targeting specific types of terrorist acts.

The Convention on the Prevention of Terrorism was adopted against the background of the increase in terrorist offences and the growing terrorist threat in the beginning of the 21st Century; the drafters wished to provide a specific instrument with measures to effectively *prevent* terrorism in order to diminish this threat. The drafters explicitly view terrorism in the light of the right to life: the purpose of the Convention is ‘to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life’ (article 2). The Preamble also draws attention to the victims of terrorism, reaffirming ‘their profound solidarity with the victims of terrorism and their families’.

Article 5 came about as a result of a study and discussions by the working group “Apologie” of CODEXTER, the Committee of Experts on Terrorism, which prepared and analysed the criminal offences of “*apologie du terrorisme*” and “incitement to terrorism” in the national legislation of CoE Member States. *Apologie* in this context was defined as ‘public expression of praise, support or justification for terrorists and/or terrorist acts’.⁴⁴ Incitement was understood as ‘persuading or encouraging another to commit a terrorist offence’. (In later documents it came to be used interchangeably with the term ‘provocation’.) Yet depending on how broad the term incitement is understood – direct or indirect, past or future acts – it may also be taken to include forms of *apologie*, so the concepts can overlap.⁴⁵ As it appeared that the majority of states did not have a specific offence on *apologie du terrorisme* or incitement to terrorism, the working group concluded that there was a lacuna in international law.⁴⁶ The Explanatory Report points out the difficulty in determining ‘where the boundary lies between indirect incitement to commit terrorist offences and the legitimate voicing of criticism (...)’.⁴⁷ It states that the right to freedom of expression under article 10 ECHR allows for restrictions in the field of incitement to terrorism, including indirect incitement, and thereby refers to the case *Hogefeld v. Germany* (see par. III.7.4). This is actually a rather unusual case in the light of the Court’s case law on extreme speech: here, the applicant’s past activities in connection with her ambiguous stance in the present made that this restriction was acceptable to the ECtHR.

44 Ribbelink 2004, p. 2.

45 Hunt 2006, p. 617.

46 Council of Europe Convention on the Prevention of Terrorism – Explanatory Report, par. 17-18.

47 Explanatory Report, par. 92.

Article 5 allows states a certain amount of discretion in the formulation and implementation of this offence: '[f]or instance, presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement.'⁴⁸ There are some factors that limit the Convention's scope: (1) there shall be an *intent to incite* the commission of a terrorist act; (2) the conduct must *cause a danger* that one or more such acts may be committed; and (3) the provocation shall be committed unlawfully and intentionally (art. 5 (2)). The word "intentionally" in article 5(2) refers to a general requirement of intent, which is included in all offences the Convention sets out. Its exact meaning is left to interpretation under national law. Article 5(1) includes a more specific clause on intent: there shall be a *specific* intent (not merely recklessness) to incite the commission of a *terrorist act*.⁴⁹ This clause seems to limit the possibilities of addressing indirect provocation through article 5: such specific intent may not be easily established when a defendant 'presents a terrorist act as justified' or 'praises the perpetrator of a terrorist attack'. The European Court of Human Rights does not explicitly consider the condition of specific intent when assessing cases involving incitement to terrorism, although it may be considered under the proportionality requirement.⁵⁰ It is not clear whether the intent to commit a terrorist act shall relate to a specific terrorist act in a specific place and at a specific time; however, considering that this would make the offence indistinguishable from *instigation*, it is likely that incitement to terrorist acts more generally can also fulfil the requirements.⁵¹ The same would then apply to the *danger caused*: this would then not have to be a danger of a specific terrorist act being committed.

This *causes a danger* clause requires that the potential consequences of speech are considered. Again, one might wonder how indirect incitement and particularly *apologie* fit this requirement, considering that such expressions are often unlikely to cause a real danger of terrorist offences being committed. In this respect the Explanatory Report refers to standards derived from the ECtHR's case law: 'whether conduct causes a danger shall be judged with regard to the nature of the author and of the addressee of the message, as well as the context in which the offence is committed'. The context can include many things, including a situation of conflict, but also the historical context. Furthermore, the Explanatory Report states that 'the significance and the credible nature of the danger should be considered when applying this provision in accordance with the requirements of domestic law.'⁵² Article 8 makes it clear that whether a terrorist offence is actually committed, is irrelevant for the purposes of the offence of provocation. Hunt has noted that the requirements set out in article 5(1) – specific intent *and* danger – indicate an absence of clarity about the

48 Explanatory Report, par. 98.

49 Explanatory Report, par. 99.

50 Hunt 2006, p. 622.

51 Hunt 2006, p. 622.

52 Explanatory Report, par. 100.

object or purpose underlying the offence: ‘[i]f the object is to criminalise certain kinds of speech because of its deleterious effects, it is arguable that the intention of the speaker ought not to be considered relevant.’⁵³

Article 12 of the Convention sets forth a fundamental rights safeguard; the Council of Europe considers this ‘a crucial aspect of the Convention’.⁵⁴ Article 12(1) reads as follows:

Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

Moreover, article 12(2) requires that the establishment, implementation and application of criminalisation under article 5 (and other articles) is subject to the principle of proportionality with respect to the legitimate aims pursued and to their necessity in a democratic society; it also prohibits discriminatory treatment. This provision relates to the principles of the ECHR and its case law, and must also be implemented in accordance with relevant principles of domestic law. Since the ECtHR has indicated that “indirect incitement” and “apology” can be legitimately prohibited under article 10 (depending on the specific circumstances), this is not likely to restrain states in implementing the offence of article 5.

3.2 EU: the Framework Decision amending Framework Decision 2002/475/JHA on Combating Terrorism

Following the CoE Convention, in 2008 a similar clause on “provocation to commit a terrorist offence” was also adopted in a European Union instrument: the Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism.⁵⁵

The initial Framework Decision from 2002⁵⁶ sought to approximate the definition of terrorist offences in Member States and to harmonise penalties and sanctions, as well as to determine when states should assume jurisdiction; this 2008 amendment deals with offences in the field of prevention of terrorism. This instrument, which is binding on states as to the result, aims to contribute to preventing terrorism through reducing the dissemination of materials which might incite persons to commit terrorist attacks.⁵⁷

53 Hunt 2006, p. 621.

54 Explanatory Report, par. 30.

55 OJ L 330/21 (9 December 2008).

56 Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

57 Recital (7).

Underlying the Decision is the changing nature of the terrorist threat, with international networks and semi-autonomous cells which increasingly rely on the internet; this is thought to create a danger that modern information and communication technologies are used to inspire and mobilise terrorist networks and individuals in Europe.⁵⁸ Even though the Convention on the Prevention of Terrorism was already in force, the Commission proposed to deal with the issue within the EU: this would bring with it the advantages of the integrated EU framework and would trigger cooperation mechanisms between Member States.⁵⁹ The Decision is part of a wider EU strategy on counterterrorism and radicalisation, and it is clear that the Council of the European Union sees the criminalisation of “provocation of terrorism” as an important part of anti-radicalisation efforts: its strategy is aimed at ‘prevent[ing] people from turning to terrorism by tackling the factors or root causes which can lead to radicalisation and recruitment’.⁶⁰ The Council holds that ‘the propagation of a particular extremist worldview brings individuals to consider and justify violence. In the context of the most recent wave of terrorism, for example, the core of the issue is propaganda which distorts conflicts around the world as a supposed proof of a clash between the West and Islam.’⁶¹ In order to counter radicalisation, it is thought to be essential to ‘put in place the right legal framework to prevent individuals from inciting and legitimising violence’; besides that, it is vital to ‘ensure that voices of mainstream opinion prevail over those of extremism’.⁶²

The instrument’s definition of “public provocation to commit a terrorist offence” is largely equal to the CoE Convention’s definition:

“public provocation to commit a terrorist offence” shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed (Article 3(1)(a)).

Article 5 of the 2002 Framework Decision – which is equally applicable to the 2008 Decision – makes it clear that states shall make sure the offence is punishable by ‘effective, proportionate and dissuasive criminal penalties’ and that investigations into or prosecution of the offence are not dependent on a report or accusation by a victim (article 10). States may only criminalise *intentional* acts of public provocation (article 3(2)), whereas article 3(1)(a) also requires the more specific ‘intent to incite’ the

58 Recital (4).

59 Commission of the European Communities, Proposal for a Council Framework Decision amending Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), 6 November 2007, COM(2007) 650 final, p.2.

60 Council of the European Union 2005, p. 3.

61 Council of the European Union 2005, p. 8.

62 Council of the European Union 2005a, p. 3-4.

commission of a terrorist act (as in the CoE Convention). It is not necessary that the terrorist offence is actually committed (article 3(3)). A difference between the CoE Convention and this Framework Decision is in the definition of terrorist offences – and this definition might prove important for the purposes of the provocation offence. While the CoE Convention’s definition of a terrorist offence refers to a list of international treaties on specific terrorist offences, the 2002 Framework Decision adopts its own definition. Article 1(1) defines as terrorism several specific acts, including attacks upon a person’s life or physical integrity, but also acts such as interfering with or disrupting the supply of water, power or any other fundamental natural resource, and causing extensive destruction to a government or public facility. These acts shall be committed with the aim of seriously intimidating a population, unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. Experts have criticised this definition of terrorist acts as overbroad and conflicting with the principle of legality.⁶³ Such a broad definition may affect the way Member States deal with public provocation to such offences, with the risk of prohibiting legitimate political critique.

The Framework Decision recognises the potential risks for freedom of expression: article 2 states – similar to the Framework Decision on Racism and Xenophobia – that

[t]his Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Yet the Decision contains no clause equivalent to the CoE Convention’s article 12, which expresses states’ international human rights obligations and requires the provision’s implementation and application to comply with the proportionality requirement as derived from the ECHR. Such a clause is only included in the Preamble, which states that ‘[t]he implementation of the criminalisation under this Framework Decision should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discrimination’ (Recital 15). Moreover, the Preamble makes it clear that the requirement of *intention* shall serve as a safeguard for freedom of expression:

Public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism are intentional crimes. Therefore, nothing in this Framework Decision may be

63 EU Network of Independent Experts on Fundamental Rights 2003, p. 11.

interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism, falls outside the scope of this Framework Decision and, in particular, of the definition of public provocation to commit terrorist offences (Recital 14).

While the European Parliament had proposed to adopt such safeguards in the text of the Decision itself, the Council did not follow this. The EP had furthermore proposed to change the offence of “public provocation to commit a terrorist offence” into “public incitement to commit a terrorist offence”, meaning

the distribution, or otherwise making available, of a message to the public clearly and intentionally advocating the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct manifestly causes a danger that one or more such offences may be committed.⁶⁴

This proposal reflected the wish to tighten up the offence, since the term “provocation” was considered too imprecise. Moreover, according to the EP’s Rapporteur the range of behaviour to be criminalised was in need of stricter delineation: ‘the behaviour in question must constitute a “genuine” danger – and not just a hypothetical one – that a terrorist offence would be committed (in other words, there must be a sufficiently close link between incitement and the possibility that a terrorist act will be perpetrated).’⁶⁵ The European Parliament thus pushed for a closer causal link between speech and consequences. The Council – in the absence of co-decision power for the EP – did not follow this proposal, but kept to the offence of public provocation as contained in the CoE Convention.

4 CONCLUSION

The analysis of CoE and EU instruments in the field of hate speech and extreme speech shows that the various institutions often hold different views about those delicate topics, and that the documents set different requirements for states. The non-binding recommendations by the CoE Parliamentary Assembly, for instance, put forward very different ideas about religious insult than the ECtHR does. As regards the EU Framework Decision on racism and xenophobia and the Cybercrime Protocol, it becomes clear that the process of drafting a binding instrument on such a delicate issue is extremely difficult and necessitates compromises. These instruments leave states quite some freedom to adopt the provisions in their own legal order without having to compromise their own ideas – for the Framework Decision, England has made sure that states may choose to punish only speech that is “likely to disturb public

⁶⁴ European Parliament 2008a.

⁶⁵ European Parliament 2008.

order” or that is “threatening, abusive or insulting”. The Framework Decision on racism and xenophobia is more limited than the Cybercrime Protocol, as it does not include insulting speech or incitement to discrimination. In turn, the Cybercrime Protocol is limited to cyberspeech only.

In the field of terrorist speech, the CoE Convention and the EU Framework Decision use largely equal wording for the “provocation” offence, though it is apparent that only the CoE Convention contains specific fundamental rights and proportionality requirements – and a different definition of terrorism. The differences as regards fundamental rights guarantees point to a further recurring theme throughout this chapter: the EU Framework Decisions – both in the field of racism and terrorism – are primarily geared towards instrumental criminal law provisions in order to fight racism and terrorism. The drafting process does not reflect much on the theoretical rationales, particularly how freedom of expression relates to other rights and interests. The European Parliament did press for fundamental rights concerns to be included in these Framework Decisions, but did not yet have the power to enforce this. Within the CoE, fundamental rights concerns seem to have been more embedded in the lawmaking process, considering its purpose to protect human rights, democracy and the rule of law.

CHAPTER V

INTERNATIONAL LAW

1 INTRODUCTION

This chapter analyses international human rights law and international criminal law in the field of hate speech and extreme speech. It deals with the Universal Declaration of Human Rights (UDHR, par. 2), the International Covenant on Civil and Political Rights (ICCPR, par. 3), the Convention on the Elimination of All Forms of Racial Discrimination (CERD, par. 4) and the crime of incitement to genocide in international criminal law (par. 5). The analysis takes the theoretical framework in Chapter II as a point of departure and investigates to what extent different theoretical concepts on hate speech and extreme speech can be found in international law.

2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Before WWII, freedom of expression hardly featured at all in international law: ‘as far as the League of Nations was concerned with the media, it mostly dealt with the dangers of spreading “false news” and war propaganda.’¹ But since Roosevelt proclaimed the Four Freedoms in 1941, freedom of expression has been the focus of much attention in the international human rights community. In 1948, the right to freedom of expression was adopted in the Universal Declaration of Human Rights.

Although not binding in a formal sense, the Declaration is often viewed as part of customary international law or as an authoritative interpretation of the UN Charter.² Article 19 UDHR states that ‘[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ Unlike other human rights instruments, the article itself does not contain a limitation clause; however, a general limitation clause is provided in article 29(2).

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

1 De Meij 1989, p. 24.

2 Steiner, Alston & Goodman 2008, p. 152.

The limitation grounds are somewhat different from those found in newer documents such as the ICCPR and the ECHR where there is no mention of “general welfare” and “morality” has become “public morals”. According to article 29(3), the rights and freedoms in the Declaration may ‘in no case be exercised contrary to the purposes and principles of the United Nations.’ Article 30 provides a specific “abuse of right” provision:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

A further relevant provision in the UDHR is article 7, which provides that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

These provisions combined indicate that freedom of expression is not unlimited under the Declaration. Firstly, it is restricted by the principle of non-discrimination, which includes protection against incitement to discrimination. The drafting history shows that this clause was adopted ‘with the understanding that it protected against propaganda of national, racial and religious hostility and hatred, as well as the understanding that although article 19 protected freedom of expression, it did not protect expression that incites discrimination.’³ Secondly, according to the drafting history of the Declaration, articles 29 and 30 can be interpreted so as to allow restrictions with regard to advocating hatred: the drafters expressed specific concern about the abuse of free speech.⁴ The idea is that the exercise of a person’s rights is limited by the free exercise by others of their rights. This includes the idea of a militant democracy (especially relevant to art. 30).

The following two treaties that I analyse (the ICCPR and CERD) have further elaborated the general provisions of the UDHR. In contrast to the Declaration, these instruments are binding upon States Parties that have ratified them.

3 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) includes several provisions relevant to hate speech and extreme speech (particularly articles 19 and 20). The Covenant dates from 1966 and entered into force in 1976; it is binding on the 167 States Parties that have acceded to it. This paragraph analyses the text of the relevant

3 Farrior 1996, p. 14-15.

4 Farrior 1996, p. 12.

provisions, in connection with the relevant literature, in order to discover their object and purpose. Moreover, it is also concerned with the interpretation of these provisions by the Human Rights Committee (HRC), which monitors states' compliance with the ICCPR and whose interpretations of the Covenant are regarded as authoritative. This analysis includes the HRC's views in individual cases, its General Comments and occasionally its concluding observations to States Parties. It also pays attention to the views of other relevant UN organs, in particular the thematic Special Rapporteurs that are mandated by the Human Rights Council. Though their documents are of a less juridical nature than that of the treaty bodies, they can generate "soft law" principles that may guide the interpretation of UN norms on hate speech. The analysis aims to make clear to which rationales the ICCPR adheres in dealing with hate speech and extreme speech.

3.1 Article 19 ICCPR

Freedom of opinion and expression are enshrined in article 19 ICCPR, which states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The rationale for the right to freedom of opinion and expression in the Covenant is a combination of different traditions of the treaty's drafters. Nowak points out that article 19 symbolises the interdependence of civil rights and political rights and unites those two types of "first generation rights", which relate to two different conceptions of freedom.⁵ On the one hand, there is the democratic freedom to participate in decision-making (Berlin's "positive liberty"), and on the other hand there is the liberal freedom "from the state" (Berlin's "negative liberty").⁶ This relates to the conflict between socialist human rights theory – which is particularly concerned with the integration of citizens' and society's interests and focuses on freedom of expression as a political right – versus "Western" human rights theory with its "marketplace of ideas" and limited zone of legitimate government intervention (although this is more true for England and the United States than for continental European countries). Nowak argues that this distinction has impacted the history and present-day

⁵ Nowak 2005, p. 438.

⁶ See Berlin 1958.

interpretation of freedom of expression in the Covenant. In article 19, the “negative liberty” view prevails; the Soviet draft that would guarantee the right only ‘in accordance with the principles of democracy and in the interest of strengthening international cooperation and world peace’ did not make it. However, the provision does mention the “duties and responsibilities” related to free speech and it provides for several limitation grounds; article 5 also provides an “abuse of right” clause, while article 20 expressly requires states to limit certain forms of speech.

Article 19 differentiates between freedom of opinion and freedom of expression (par. 1 and 2). Freedom of opinion concerns the private, inner right to have and form opinions; this cannot be restricted at all. An interference with freedom of opinion can exist when a person is influenced against his or her will to adopt or change an opinion by coercion or threats.⁷ Freedom of expression involves the “outer” freedom, including freedom of information; this freedom can be restricted. Freedom of expression relates to information and ideas “of all kinds”, thus a very broad range that includes opinions, facts, art, commercial advertising etcetera.

Article 19(3) sets out possible restrictions on the right to freedom of expression. Restrictions have to meet the following criteria: they shall be (1) provided by law, and (2) necessary (3) for one of the following purposes: (a) respect of the rights or reputations of others, (b) protection of national security, (c) protection of public order (ordre public), (d) protection of public health or (e) protection of public morals. Restrictions may not include prior censorship.⁸ The criteria for restriction are comparable to those found in art. 10(2) ECHR. The ECHR equally stresses the “duties and responsibilities” that freedom of expression involves, and in both covenants this element is an exception: it is not expressly mentioned in the provisions on other rights. The “necessity” criterion in the ICCPR means that a restriction shall be proportional with regard to the purpose for restriction: it must be interpreted narrowly (restriction may not become the rule). It does not require restrictions to be “necessary *in a democratic society*”, as the ECHR does (a proposal to this end failed during the drafting process). ‘Nevertheless, the Committee, when applying the proportionality test of art. 19(3) in individual cases, regularly refers to the freedom of expression and information as cornerstones in any free and democratic society.’⁹ The HRC’s draft General Comment no. 34 on freedom of expression, which is still in the process of revision,¹⁰ states that ‘freedom of opinion and freedom of expression are indispensable

7 Nowak 2005, p. 442.

8 Nowak 2005, p. 457.

9 Nowak 2005, p. 460.

10 Draft General Comment no. 34 on Article 19/Freedom of Expression is meant to replace the short GC 10. The first reading has been completed at its 100th session in 2010 (CCPR/C/GC/34/CRP.5, <www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.34.CRP.5.doc>). The second (public) reading started during its 101st session and will continue during its 102^d session from 11 to 29 July 2011.

conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society.¹¹ This shows that both the “democratic rationale” and the “individual rationale” behind freedom of expression are represented in article 19.

Limiting freedom of expression for the protection of *national security* (b) is only allowed in ‘serious cases of political or military threat to the entire nation’, such as direct calls for violence against the government.¹² The link between speech and potential consequences must be clear. In particular, restrictions of free speech may not be invoked to counter calls for democracy and human rights protection.¹³ The purpose – *public order*/*ordre public* (c) – is a broader concept, meaning ‘all universally accepted fundamental principles on which a democratic society is based’. Since this purpose is so broad, the necessity requirement should be interpreted rather strictly in order not to restrict freedom of expression too much.¹⁴ In a joint declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression have pointed out that ‘[g]overnments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech.’¹⁵ However, the HRC – which is the principal body interpreting the ICCPR provisions – has not yet taken such a clear stance towards the legitimacy of prohibiting “offensive speech”.

As to the *protection of public morals* (e), the HRC has pointed out in relation to article 18 that ‘the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.’¹⁶ This also seems to apply to article 19.¹⁷ This consideration expresses concern for the protection of minorities, as “public morals” are easily used to restrict expressions of minorities who do not adhere to dominant views. In a 1979 communication, the HRC actually allowed States Parties a great discretion to enforce the morality of a dominant group against a minority: this case concerned a Finnish

11 Draft General Comment no. 34, par. 2.

12 Nowak 2005, p. 464.

13 CCPR Mukong v. Cameroon (1994); Draft General Comment no. 34, par. 24.

14 Nowak 2005, p. 466.

15 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 20 December 2006, available at <www.osce.org/fom/23489>.

16 CCPR General Comment No. 22, par. 8.

17 Draft General Comment no. 34, par. 33.

State broadcaster which banned programmes on homosexuality.¹⁸ The HRC did not find a violation of article 19: it held that there is no universal common standard on public morals, so that States must be accorded a certain margin of discretion (see the ECHR's margin of appreciation). Three dissenting members (Opsahl, Lallah and Tamopolsky) criticised this approach: they held that freedom of expression is especially important to protect minority views, 'including those that offend, shock or disturb the majority.' This case would probably lead to a different outcome nowadays, as public morals can change over time. Still, it is remarkable that the Committee acceded to the view of the dominant majority – apparently on the basis of the rationale of *offence* and/or *legal moralism*, as the expressions were obviously not *harmful* – at a time when public morals were slowly starting to change (albeit not yet in all countries).

The aim of (a) safeguarding *respect for the rights or reputations of others* includes the protection of the individual from certain infringements of honour and reputation, as well as the protection of freedom of religion and the prohibition of discrimination. The draft General Comment states that 'the term "others" may relate to other persons individually or as members of a community. Thus, it may, for instance, refer to members of a community defined by its religious faith or ethnicity.'¹⁹ The right to be free from discrimination is set out in article 26 ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As opposed to article 14 ECHR, article 26 ICCPR contains an autonomous, independent right. Discrimination in the light of the ICCPR means 'any distinction, exclusion, restriction or preference which is based on any ground and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'²⁰

According to Nowak, protection of others' freedom of religion may imply limitations to blasphemous expressions (which can also fall under the purpose of "protection of public morals").²¹ However, this interpretation is contested. In its General Comment on art. 18, the HRC holds that 'States Parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to

18 CCPR Hertzberg et al. v. Finland (1985).

19 Par. 29.

20 CCPR General Comment No. 18, par. 7.

21 Nowak 2005, p. 462 and 466.

be punishable as blasphemous'.²² At first sight, this seems to suggest a positive attitude towards blasphemy laws; however, it must be noted that this remark stands in close proximity to the HRC's considerations on the problems associated with established state religions in connection with the rights of minorities who do not accept the official state ideology. The UN Special Rapporteur on Religious Intolerance has also stated that blasphemy laws can be abused and can foster a climate of religious intolerance and even violence.²³ Accordingly, the inclusion of these remarks in this part of the General Comment suggests that the HR Committee is suspicious of blasphemy laws, because of their potential to enforce established majority religions at the expense of minorities. Indeed, in its Concluding Observations on the United Kingdom in 2008, the Committee welcomed the abolition of the common law offence of blasphemy in England and Wales.²⁴ Draft General Comment 34 on freedom of expression provides a hint of the current ideas and future direction of the HRC on blasphemy laws: it states that

[b]lasphemy prohibitions and other prohibitions of display of disrespect to a religion or other belief system may not be applied in a manner that is incompatible with the paragraph 3 or other provisions of the Covenant, including articles 2, 5, 18 and 26 taking into account relevant general comments including general comment No. 22. Thus, for instance, they may not discriminate in a manner that prefers one or certain religions or belief systems or their adherents over another, or religious believers over non-believers. Blasphemy laws should not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith. States Parties should repeal criminal law provisions on blasphemy and regarding displays of disrespect for religion or other belief system other than in the specific context of compliance with article 20. (par. 50)

The latter sentence suggests a very limited scope for blasphemy laws, as article 20(1) only applies to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In any event, limitations to blasphemous expressions must meet the necessity/proportionality requirement of art. 19(3).

3.3.1 *Defamation of religions in the UN*

The relationship between freedom of expression and freedom of religion has become a highly topical issue in the United Nations. Since 1999, several Islamic states – through the Organisation of Islamic Conference (IOC) – have successfully issued resolutions in the highly polarised Human Rights Council (then Commission on Human Rights) and the UN General Assembly condemning the “defamation of

22 CCPR General Comment No. 22, par. 9.

23 Tahzib 1996, p. 346. In any event, the scope of blasphemy laws should not be extended to one religion only (HR Committee's 1991 report on the UK). See UN Special Rapporteurs Jahangir & Diène 2006.

24 Concluding Observations of the Human Rights Committee – United Kingdom of Great Britain and Northern Ireland, 30 July 2008, CCPR/C/GBR/CO/6, par. 4.

religions”.²⁵ The background to these resolutions, which reappeared yearly until 2010, was the experience of Muslims with regard to how their religion is treated in public debate: already in 1999, the drafters noted concern that Islam was often equated with terrorism. ‘The apparent rise in Islamophobia following the events of 9/11 and terrorist attacks since then, appears to have increased the political impetus within the UN human rights bodies to adopt further resolutions on combating defamation of religions.’²⁶ The resolutions do not define the concept of defamation of religions, but do frame it as a human rights violation – specifically of freedom of religion. They also express deep concern about the deliberate negative stereotyping of religions, their adherents and sacred persons in the media. Because of their accumulation over the years, these resolutions – although they have not led to a binding treaty – have influenced the international protection of freedom of expression: international bodies have made repeated references to them, thus giving the concept of defamation of religions a sense of legitimacy.²⁷ At the same time though, the CERD Committee, UN treaty bodies and a group of independent experts all concluded that there was no need of complementary international legal standards on defamation of religions.²⁸ The UN Special Rapporteur on freedom of religion or belief (Jahangir) took a critical stance towards the concept:

the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule (...) Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment (...) The right to freedom of religion or belief protects primarily the individual and, to some extent, the collective rights of the community concerned but it does not protect religions or beliefs per se. While the exercise of freedom of expression could in concrete cases potentially affect the right to freedom of religion of certain identified individuals, it is conceptually inaccurate to present this phenomenon in abstracto as a conflict between the right to freedom of religion or belief and the right to freedom of opinion or expression (...) Therefore, the question as to whether criticism, derogatory statements, insults or ridicule of one religion may actually negatively affect an individual’s right to freedom of religion or belief can only be determined objectively and, in particular, by examining whether the different aspects of the manifestation of one’s right to freedom of religion are accordingly negatively affected.²⁹

25 GA Res. 60/150 of December 16, 2005; GA Res 61/164 of December 19, 2006; GA Res 62/154 of December 18, 2007; GA Res 63/170 of December 18, 2008; Commission on Human Rights Res. 1999/82, 2000/84, 2001/4, 2002/9, 2003/4, 2004/6, 2005/3; Human Rights Council Res. A/HRC/4/9 (30 April 2007), A/HRC/RES/7/19 (27 March 2008); A/HRC/RES/10/22 (26 March 2009); A/HRC/13/L.1 (25 March 2010).

26 Parmar 2009, p. 355.

27 Parmar 2009, p. 373.

28 Petrova 2010, p. 136-137.

29 UN Special Rapporteurs Jahangir & Diène 2006, par. 36-39.

Yet in the same report, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Diène, concluded that there is a close link between defamation of religions and discrimination and intolerance against believers. The latter is ‘facilitated in an environment where religions and beliefs are degraded or maligned through a deliberate intellectual and/or political discourse which demonises them.’³⁰ However, in his last report to the Human Rights Council Diène also recommended ‘that the Human Rights Council encourage a shift away from the sociological concept of the defamation of religions towards the legal norm of non-incitement to national, racial or religious hatred’.³¹ The current Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Muigai, clearly distinguished between negative stereotyping of religions, religious followers or sacred persons:

these instances should be treated differently from a human rights perspective. International human rights law protects individuals and groups of individuals and therefore guarantees the freedom of individuals and groups of individuals to exercise freely their religion or belief. Religions as such however are subject to vigorous interrogation and criticism regarding their doctrines and teachings in the context of the full exercise of the freedom of expression... In cases concerning sacred persons, the fact that the latter may be fully assimilated with a religion should also be taken into consideration when assessing the case.³²

Accordingly, the legitimacy of prohibiting religious defamation and blasphemy – and the line between hatred of religious *persons* and *religions* – is a matter of much discussion within the UN itself. States have highly politicised these discussions, as became clearly visible in the Durban Review Conference in 2009, the follow-up to the UN World Conference against Racism (WCAR) in 2001. The WCAR was meant to develop initiatives towards eradicating racism worldwide, but several Arab states and NGOs used it merely to express anti-Israel sentiments – causing the United States to leave the conference. In the 2009 review conference (where the United States, the Netherlands and a couple of other Western states decided not to participate) this was complemented by attempts to call for new international legal standards on defamation of religions in the outcome document.³³ In the end, these attempts failed: the outcome document refers to ‘derogatory stereotyping and stigmatisation of persons based on their religion or belief’ instead of the proposed ‘derogatory stereotyping and stigmatisation of religions’.³⁴ Support for the defamation of religions resolutions has also started to decline; it has encountered strong criticism from a wide range of civil society organisations.³⁵ In 2011, Islamic states dropped their campaign: instead of

30 UN Special Rapporteurs Jahangir & Diène 2006, par. 15.

31 UN Special Rapporteur Diène 2008, par. 65.

32 UN Special Rapporteur Muigai 2010, par. 77 and 79.

33 See Petrova 2010.

34 Outcome Document of the Durban Review Conference, 24 April 2009, at 12.

35 Letter from Civil Society Organizations to State Representatives: “Defamation” and “Denigration” of Religions at the 16th Session of the United Nations Human Rights Council, 9 March 2011.

adopting a “defamation of religions”-resolution, the Human Rights Council adopted a widely supported resolution on ‘Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief’, shifting the focus to protection of *people*.³⁶

3.2 Article 5 ICCPR

Article 19(3) is related to article 5(1) of the Covenant. This article, which is based on article 30 UDHR and deals with the problem of “abuse of right”, stipulates:

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

The clause presents an aspect of “militant democracy” in the Covenant, as it aims to limit the activities of totalitarian, fascist, racist and National Socialist individuals or groups who misuse their rights (including freedom of expression, religion, association and assembly) to destroy democracy and the rights of others. ‘Political movements aimed at the destruction of democracy and the rule of law, which forms the basis for the rights in the Covenant, were to be prevented from exploiting these rights in order to come to power in a “quasi-legal” fashion.’³⁷ Art. 5(1) is itself limited, so that governments may not use the power to be “militant” in an excessive fashion. The provision is only applicable to those who ‘engage in any activity or perform any act’: therefore, it is less easily justified to use the provision when an expression of opinion is not accompanied by action. ‘[I]n practice, the prohibition of misuse merely bolsters in extreme cases those possibilities for intervention that have already been provided to the States Parties in the limitation clauses (...) Whereas art. 17 of the ECHR has occasionally been raised as a militant defence of the liberal-democratic philosophy of human rights in the ECHR, it does not seem appropriate to attribute such an interpretation to art. 5(1) in view of the universal character of the Covenant.’³⁸ Hence, it seems that a judgment like ECHR *Refah Partisi*, which rather militantly upholds secular liberalism, would be less easily conceivable under the UN system.

The HRC (under its powers to review individual cases of possible violations of the ICCPR, as provided for in the First Optional Protocol) has used art. 5(1) only once – in connection with art. 18 and 19. In the case of *M.A. v. Italy*,³⁹ the applicant was convicted for reorganising a dissolved fascist party. The Committee declared the

³⁶ A/HRC/16/L. 38, 21 March 2011.

³⁷ Nowak 2005, p. 115.

³⁸ Nowak 2005, p. 116.

³⁹ CCPR, *M.A. v. Italy* (1984).

application inadmissible *ratione temporis*,⁴⁰ but also noted that ‘it would appear that the acts of which M.A. was convicted (reorganising the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provision of articles 18(3), 19(3), 22(2) and 25 of the Covenant.’⁴¹ Therefore, the complaint was inadmissible *ratione materiae* too. Fascist groups seem to be removed from the protection of the Covenant automatically, without further delving into the proportionality of the restriction – comparable to the ECHR’s article 17 approach.

3.3 Article 20 ICCPR

Article 20 ICCPR enshrines specific restrictions of – inter alia – freedom of expression: it is the only right in the Covenant that not only permits, but also *requires* States Parties to prohibit certain behaviour. The article does not grant rights to individuals; it creates positive obligations for states to outlaw expressions. It reads as follows:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Sixteen states have made reservations to the provision, including the Netherlands (to art. 20(1)) and the United Kingdom. The HRC itself holds that the prohibition of advocacy of national, racial or religious hatred (article 20(2)) is part of customary international law and may therefore not be the subject of reservations by States Parties.⁴² Though article 20 is placed right after article 19, it is an independent provision which sets limits to the right to freedom of expression as well as to the rights to freedom of religion, association and assembly. The rights article 20 seeks to *protect* are the right to equality (art. 26) and the right to life (art. 6). The Human Rights Committee noted in its General Comment on article 6 that

States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.⁴³

⁴⁰ The events had taken place before the entry into force of the ICCPR and the Optional Protocol in Italy.

⁴¹ CCPR, *M.A. v. Italy* (1984).

⁴² CCPR General Comment No. 24, par. 8.

⁴³ CCPR General Comment No. 6, par. 2.

It thus appears that the article was intended to tackle the “roots of evil” by prohibiting expressions that have the potential to cause gross human rights violations: preventing “negative imaging” that may lead to violence. The provision can also be linked to article 5 (abuse of right). Article 20 ‘demonstrates more than any other provision in the Covenant the response mandated by the horrors of National Socialism.’⁴⁴ It came about after extensive debate, and the *travaux préparatoires* provide contradictory views about its content and its relationship with article 19.

3.3.1 Article 20(1): War propaganda

Article 20(1), the prohibition of propaganda for war, must be interpreted narrowly: it only includes ‘forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations (...) The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations.’⁴⁵ Thus propaganda for “liberation wars” or as a form of legitimate self-defence is not included; moreover, civil wars are excluded from this scope unless they develop into an international conflict. The prohibition of propaganda for war is meant both to protect individuals and to inhibit states, since the latter have become the main issuers of propaganda for war since WWI. When expressions are issued by powerful parties such as states, freedom of speech arguably becomes a less important consideration; after all, this freedom is particularly important for individuals *against* powerful states.⁴⁶ In this regard, it is notable that many states – especially liberal democracies – have refused to give effect to art. 20(1) with an appeal to freedom of expression: ‘in so doing, states have perpetuated the “legal vacuum” by which they remain free to engage in such propaganda without any fear of being held to account.’⁴⁷ However, article 20(1) may also apply to individuals or groups, so that freedom of expression remains important. In this regard it can be noted that some states have done exactly the opposite, enacting overbroad laws on propaganda in order to prohibit legitimate criticism by individuals. There is no uniform definition of “propaganda” in international law or in national legal systems, which increases the danger of overbroad interpretation. It appears from the context of the provision that its purpose is not to prohibit ‘academic studies of questions of defence or security policy’; rather, the article aims to prohibit ‘propagandistic incitement roughly comparable to that practiced in the Third Reich’, whereas propaganda includes ‘intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact. Also included thereunder are negative or simplistic value judgments whose intensity

44 Nowak 2005, p. 468.

45 CCPR General Comment No. 11, par. 2.

46 Kearney 2007, p. 9.

47 Kearney 2007, p. 245-246.

is at least comparable to that of provocation, instigation or incitement.⁴⁸ This interpretation is broad: well-aimed influencing of individuals by exaggerated allegations of fact is quite common in certain media. The *travaux préparatoires* also point to a broad scope: the drafters understood article 20(1) as prohibiting direct incitement to war as well as ‘speech which had as its purpose the creation of a climate of hatred and lack of understanding between the peoples of two or more countries, in order to bring them eventually to armed conflict.’⁴⁹ Yet the concept’s scope is narrowed by the fact that propaganda only covers intentional expressions, ‘whereby it is sufficient when intent merely creates or reinforces a willingness to go to war, even if there is no objective, concrete threat of war. Thus, it is not required that a war actually occurs (non-consequential). However, propaganda must be specific enough for evaluating whether it relates to a war of aggression or not.’⁵⁰ It also has to be channeled by a medium capable of reaching a large audience. It is not clear whether *criminal sanctions* are specifically required by article 20(1); in any event, prior censorship is not allowed.⁵¹

3.3.2 *Advocacy of hatred (article 20(2))*

The early drafting history of article 20(2) shows the concern of the drafters for the connection between advocacy of hatred and discrimination of groups (without causing immediate violence *per se*).⁵² Many drafters held that incitement to hatred should be prohibited together with incitement to violence. The US (represented by Eleanor Roosevelt) stressed the danger of criminalising incitement to hatred, ‘since any criticism of public or religious authorities might all too easily be described as incitement to hatred’: it is difficult to differentiate “hatred” from “ill-feeling and mere dislike”. Accordingly, from 1947 through 1953 ‘anti-hate provisions were added to the draft Covenant, then deleted upon motion by the United States, then added again, then deleted, and finally added for good.’⁵³ These discussions also concerned the militant democracy aspect: against views about “the power of democracy” expounded by the US and UK stood the views of states concerned about the defence of democracy.⁵⁴ Much debate was centered on the “power of propaganda in manipulating views” and the role of the media as a powerful tool in disseminating propaganda (at that time, article 20(2) was still taken together with article 20(1)). The eventual text of article 20(2) was a compromise between those who were against an “incitement to hatred” clause and those who did not find “incitement to violence” strong enough. As regards

48 Nowak 2005, p. 472.

49 Kearney 2007, p. 19.

50 Nowak 2005, p. 473.

51 Nowak 2005, p. 475.

52 Farrior 1996, p. 22.

53 Farrior 1996, p. 26-31.

54 Farrior 1996, p. 32.

the eventual provision, there was still disagreement over using the word “hostility” instead of “hatred”: some delegations held that outlawing hostility would restrict freedom of expression too much – how to outlaw something that is “inherent in human nature”?⁵⁵ Moreover, the UK doubted why stable countries should be compelled to make new laws outlawing hate propaganda, instead of only those countries which were still in the process of building a democracy.

As to the meaning of “discrimination” in the ICCPR, the HRC has noted that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.⁵⁶ This shall also be taken into account in determining whether an expression constitutes “incitement to discrimination”: not every call for differentiation amounts to such incitement.⁵⁷

Nowak concedes that article 20(2) should be interpreted sensibly in the light of its “responsive character” – its coming into being as a response to the Nazi hatred campaigns and subsequent genocide. The idea behind the provision is to tackle the roots of such horrors. Furthermore, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has stressed that ‘these limitations were designed in order to protect individuals against direct violations of their rights. These limitations are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements. Finally, they are not designed to protect belief systems from external or internal criticism.’⁵⁸ The Special Rapporteur on freedom of religion and belief is of the opinion that article 20 shall be interpreted narrowly: ‘expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.’⁵⁹ The question is thus how to distinguish legitimate critique of religion from advocacy of hatred. According to Eltayeb,

[t]he question of distinguishing those forms of expressions that qualify the criteria mandated by article 20 (2), and therefore constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, is a contextual and takes into account the local conditions, history, culture and political tensions.⁶⁰

Article 20 (2) does not require *criminalisation* of advocacy of hatred; whereas the original drafts required the adoption of a criminal offence, this was later changed into “prohibition by law”. This leaves open the question of what States are required to do

55 Farrior 1996, p. 38.

56 CCPR General Comment No. 18, par. 7.

57 Ghana 2008, p. 5.

58 UN Special Rapporteur Ligabo 2008, par. 85.

59 UN Special Rapporteurs Jahangir & Diène 2006, par. 47.

60 Eltayeb 2008, p. 13.

exactly: can a person complain of non-prosecution under article 20, and does the Committee have anything to say about prosecutorial discretion? The case of *Maria Vassilari v. Greece* deals with this issue, but is a rather unusual one.⁶¹ Residents living in the vicinity of a Roma settlement had sent a letter to their land owner, signed by 1200 people; the letter was published in a newspaper. They accused the Roma of specific crimes – including physical assault and an arson attack on a car – and demanded that they be evicted from the settlement; moreover, they threatened “militant action” if this did not happen. The applicants, Roma from the settlements, filed a criminal complaint under the anti-racism law and joined the proceedings as civil claimants; however, the national courts acquitted the signatories. Before the HRC, the applicants claimed that this acquittal violated article 20(2), because the requirement of the law in question to prove intent beyond reasonable doubt was an impossible burden. The Committee first considered that ‘without determining whether article 20 may be invoked under the Optional Protocol’, the authors had insufficiently substantiated the facts for the purposes of admissibility under this provision. It then went on to consider the case on the merits under article 26, judging whether the anti-racism law was adequate to protect individuals against discrimination. According to the HRC, ‘[a]n acquittal in itself does not amount to a violation of article 26 and in this regard the Committee recalls that there is no right under the Covenant to see another person prosecuted.’ Since conflicting views existed about the translation of the letter (in particular about the words “militant” and “eviction”), the Committee decided that it was not in a position to reconcile these issues; it found that the authors had failed to demonstrate that either the law or its application by the courts discriminated against them within the terms of article 26.⁶² This view makes it clear that “the rights” in the Covenant do not touch upon prosecutorial discretion, although one may question whether article 20 counts as such a “right” as well. But as regards article 20, it seems that the HRC will only consider a situation on the merits in a very obvious case of declining to act against advocacy of hatred.

3.3.3 *The relationship between articles 19 and 20*

It is obvious that article 20 has a special link to article 19, though it also relates to other rights. The specific relationship between these two articles is somewhat obscure. ‘Some international law experts view the prohibition of racist speech set forth in article 20 as merely an elaboration of article 19(3) of the ICCPR, or of article 5 (...) Others view article 20(2) as a distinct and additional basis for permissible restrictions.’⁶³

The first important issue that arises is whether speech restrictions that fall within one of the categories of article 20, should still meet the requirements of article 19(3): to be

61 CCPR *Maria Vassilari et al. v. Greece* (2009).

62 CCPR *Maria Vassilari et al. v. Greece* (2009), par. 7.2.

63 Boerefijn & Oyediran 1992, p. 30.

“necessary” with regard to one of the legitimate aims. According to the Human Rights Committee in its General Comment on article 20, the prohibitions in the article ‘are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.’⁶⁴ In its new draft general comment on freedom of expression, the Committee adds that ‘the acts that are addressed in article 20 are of such an extreme nature that they would all be subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.’⁶⁵ This is based, amongst other things, on the Committee’s view in *Malcolm Ross v. Canada*, where it noted that ‘restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19(3)’⁶⁶ – thus suggesting that the requirements of article 19(3) must still be taken into account. Nowak also contends that expressions which fall under the scope of article 20 still have to be examined in the light of the restriction clause of article 19(3). The possibility of balancing restrictions of speech under article 20 with the requirements of article 19 – specifically the proportionality requirement – can lead to more nuanced outcomes than regarding the restrictions in article 20 as absolute: an “absolutist” approach would deny that interpreting terms such as “hatred” and “incitement” can actually be rather challenging.

A second question regarding the relationship between articles 19 and 20 is whether greater restrictions of *hate speech* than those mentioned in article 20(2), such as insults, are allowed under article 19(3).⁶⁷ The text suggests an affirmative answer: the limitations to hate speech in article 20 are *required*, but States Parties are still *allowed* to limit other forms of hate speech (as long as they meet the requirements of article 19(3)). The draft General Comment also states that article 20 is only a *lex specialis* to article 19 to the extent that article 20 indicates the specific response required from the state, namely prohibition by law – and this is what distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19(3).⁶⁸ The drafters thus hold that expressions not falling under article 20 may still be legitimately restricted under article 19(3). Yet the strong coherence between the two articles – as appears from the drafting history – suggests there is little scope for further reaching restrictions to hate speech under article 19(3) than those allowed for under article 20(2).⁶⁹ In this regard the draft General Comment states:

64 CCPR General Comment No. 11, par. 2.

65 Draft General Comment no. 34, par. 52.

66 CCPR *Malcolm Ross v. Canada* (2000).

67 Article 19 / Agnes Callamard, Paper prepared for Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, UNHCHR, 2-3 October 2008, Geneva.

68 Draft General Comment no. 34, par. 53.

69 Mendel 2006, p. 32.

The Committee is concerned with the many forms of “hate speech” that, although a matter of concern, do not meet the level of seriousness set out in article 20. It also takes account of the many other forms of discriminatory, derogatory and demeaning discourse. However, it is only with regard to the specific forms of expression indicated in article 20 that States Parties are obliged to have legal prohibitions. In every other case, while the State is not precluded in general terms from having such prohibitions, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19. (par. 54)

In its views in individual cases, the Committee does not often delve into the relationship between articles 19 and 20; it mostly takes the provisions that the author of a petition puts forward as a point of departure – often basing its view on article 19(3) only. In *Maria Vassilari v. Greece*, where the author complained of a violation of article 20, the Committee quickly noted that this part of the communication was inadmissible because the facts had been insufficiently substantiated.⁷⁰ One case where the HRC did make mention of article 20(2) is *J.R.T. and the W.G. Party v. Canada*, concerning a political party and their leader, who claimed that the authorities had violated art. 19(1) and (2). The party attempted to attract membership and promote their policies through tape-recorded telephone messages (open for every member of the public to dial), which warned the callers ‘of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.’ The authorities curtailed the telephone service under a law prohibiting telecommunication ‘likely to expose a person or persons to hatred or contempt’. After the State argued that its legislation did not contravene article 19 but actually gave effect to its obligations under article 20(2) of the Covenant, the Committee held that ‘the opinions which Mr.T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Convention to prohibit.’ The Committee declared the case inadmissible as incompatible *ratione materiae* with the Covenant, because the expressions fell under art. 20(2).⁷¹ Therefore, no further considerations were made about the question of whether there was *incitement*, or about the necessity or aim of the restriction. Accordingly, when a case clearly falls within article 20(2), the Committee does not see the need to consider it on the merits.

3.3.4 Individual petitions: Holocaust denial

The HRC has dealt with a few individual cases on hate speech under article 19,⁷² including the case of *Faurisson v. France* on Holocaust denial. Mr. Faurisson, a former professor at Sorbonne University, had questioned and denied certain facts of the

⁷⁰ CCPR *Maria Vassilari v. Greece* (2009), par. 6.5.

⁷¹ CCPR, *J.R.T. and the W.G. Party v. Canada* (1984).

⁷² See also CCPR *Malcolm Ross v. Canada* (2000).

Holocaust.⁷³ In particular, he had ‘sought proof of the methods of killings, in particular by gas asphyxiation (...) he doubts the existence of gas chambers for extermination purposes (...).’ When Faurisson repeatedly made similar statements in an interview, he was convicted for negation of crimes against humanity – in 1990 France had passed the Gayssot Act, which makes it an offence to contest the existence of crimes against humanity as defined in the London Charter of 8 August 1945. The HRC noted (on the merits) that, under different conditions than the facts of the present case, the application of the Gayssot Act may lead to decisions or measures incompatible with the Covenant; however, ‘the Committee is not called upon to criticise in the abstract laws enacted by States Parties’ – it only does so in its state reporting procedure. The Committee noted that the restriction of free speech in this case related to the legitimate aim of protecting the rights of others: ‘[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.’ As regards the necessity, the Committee followed France’s argument that the Gayssot Act was ‘intended to serve the struggle against racism and anti-Semitism’ and that ‘denial of the existence of the Holocaust [is] the principle vehicle for anti-Semitism’. The Committee found no violation of article 19 (it did not consider art. 20). Though it is difficult to identify the reasoning behind the Committee’s view in these concise phrases, it seems to use a combined rationale of psychological harm (“live free from fear”) and negative imaging (“to raise or strengthen anti-Semitic feelings”); it does not employ a “distinguishing truth from lie” argument.

The concurring opinions in this case reveal important insights into the ideas of various Committee members on the topic; they appear rather critical of the Gayssot Act in abstracto. As Nisuke Ando stated: ‘[i]n my view the term “negation” (“contestation”), if loosely interpreted, could comprise various forms of expression of opinions and thus has a possibility of threatening or encroaching the right to freedom of expression.’ Elizabeth Evatt and David Kretzmer (co-signed by Eckart Klein) wrote that ‘[w]hile we entertain no doubt whatsoever that the author’s statements are highly offensive both to Holocaust survivors and to descendants of Holocaust victims (as well as to many others), the question under the Covenant is whether a restriction on freedom of expression in order to achieve this purpose may be regarded as a restriction *necessary* for the respect of the *rights* of others’. As Feinberg’s account shows, some expressions really violate rights (and thus do harm), whereas others merely offend.

Rajsoomer Lallah pointed out in an individual opinion that the offence in the Gayssot Act ‘does not link liability either to the intent of the author nor to the prejudice that it causes to respect for the rights or reputations of others as required under article 19,

73 CCPR Robert Faurisson v. France (1996).

paragraph 3 (a), or to the protection of national security or of public order or of public health or morals as required under article 19, paragraph 3 (b) (...) In its effects, the Act criminalises the bare denial of historical facts. The assumption, in the provisions of the Act, that the denial is necessarily anti-Semitic or incites anti-Semitism is a Parliamentary or legislative judgment and is not a matter left to adjudication or judgment by the Courts.’ Evatt and Kretzmer also held that the crime in the Gayssot Act does not expressly include an element of incitement and does not clearly fall within the boundaries of incitement (as meant in art. 20(2)). They admitted that

there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a *pattern* of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.

Still these members found that the Gayssot Act went too far, as it ‘is phrased in the widest language and would seem to prohibit publication of bona fide research connected with matters decided by the Nuremberg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-Semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-Semitism.’ The concurring members did conclude that in this particular case, the speech restriction was necessary: ‘[w]hile there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-Semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction.’ Again, this implies that offence must be distinguished from harm.

Even though the Committee could not criticise the Gayssot Act in abstracto in its eventual view in *Faurisson v. France*, it can criticise such laws through its General Comments – and it aims to do so in the draft General Comment on freedom of expression. Here, the Committee states that

[I]aws that penalise the promulgation of specific views about past events, so called “memory-laws”, must be reviewed to ensure they violate neither freedom of opinion nor expression. The Covenant does not permit general prohibitions on expression of historical views, nor does it prohibit a person’s entitlement to be wrong or to incorrectly interpret past events. Restrictions must never be imposed on the right of freedom of opinion and, with regard to freedom of expression they may not go beyond what is permitted in paragraph 3 or required under article 20. (par. 51)

In this view, prohibition of denial of historical facts must also amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence in order to be legitimately prohibited. As such, it becomes clear that the main rationale behind such prohibition is the protection against discrimination.

3.3.5 *Individual petitions: extreme speech and terrorism*

The Committee has also dealt with several cases involving extreme speech. In a number of cases against Uruguay, in which persons were prosecuted, arrested and even tortured for the offence of “subversive association” for their critical work and expressions against the regime, the Committee noted that arrest or conviction for this vaguely defined offence could not be justified under any of the grounds for restriction in art. 19(3).⁷⁴ In *Mukong v. Cameroon*, a journalist had publicly advocated a multi-party democracy and had attempted to establish a political party. The government had arrested him and subjected him to inhuman treatment, which it defended on grounds of national security and public order. The Committee held that ‘the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multiparty democracy, democratic tenets and human rights.’⁷⁵ Furthermore, several cases against South Korea led to violations of article 19: in *Park v. Republic of Korea*, a student was arrested for joining the activities of an organisation that was critical of the military government and argued for unification between North and South Korea. The Government alleged that the “communists” posed a threat to national security, but the Committee found that ‘the right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.’⁷⁶ These cases show that the prohibition of extreme speech must generally be constructed quite strictly, although it is difficult to reach a conclusion considering the blatant violations they are concerned with.

A very relevant case on the issue of “incitement to terrorism” is *A.K. & A.R. v. Uzbekistan* from 2009.⁷⁷ Both applicants were members of the radical pan-Islamic group *Hizb ut-Tahrir* and were tried after the group had been blamed for terrorist bombings in Uzbekistan’s capital. They were sentenced to 16 years’ imprisonment for, among other things, incitement to religious hatred: the authorities had found several publications in their homes, which the authors used to teach their students within the

74 CCPR *Ann Maria Garcia Lanza de Netto v. Uruguay* (1984); CCPR *Alberto Grille Motta v. Uruguay* (1984); CCPR *Leopoldo Buffo Carballal v. Uruguay* (1984); CCPR *Alba Pietraroia v. Uruguay* (1984). See Nowak 2005, p. 450.

75 CCPR *Mukong v. Cameroon* (1994), par. 9.7.

76 CCPR *Tae Hoon Park v. Republic of Korea* (1998) (see Nowak 2005, p. 452). See also CCPR *Hak-Chul Shin v. Republic of Korea* (2004).

77 CCPR *A.K. and A.R. v. Uzbekistan* (2009).

Hizb ut-Tahrir group. Experts testified that these publications contained calls for anti-constitutional activities to change the established order in Uzbekistan; they ‘openly called for the establishment of an Islamic State based on the ideology of religious fundamentalism and religious laws through ideological struggle. These documents advocated recourse to violence (...) [and] called upon citizens to (...) sacrifice their lives if necessary, that is to achieve the status of *shahid* (martyr).’ The applicants complained of a violation of article 19, claiming that they were prosecuted only for studying religious texts and that the words used in their conviction were standard in cases concerning religious activities. The HRC, on the basis of the expert report and judgments, held that the courts had aimed at protecting national security and the rights of others; it further noted the careful steps taken by the authorities, ‘in particular the consultation with the group of experts’.⁷⁸ The HRC also noted that one applicant had not challenged his conviction on appeal, but rather appealed for a fairer sentence – whereas the other applicant accepted his conviction. Considering these circumstances, the Committee concluded that there was no violation of article 19(3).

In this regard it is important to note the HRC’s draft General Comment, where it calls upon States Parties to ‘ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism” [referring to the Concluding Observations on the United Kingdom, MvN] and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to a disproportionate interference with freedom of expression.’⁷⁹ Apparently the Committee did not consider these boundaries to be overstepped in this particular case, considering the expert evidence and the specific circumstances on appeal. This view does leave some unanswered questions, though. Hizb ut-Tahrir’s objective is ‘to resume the Islamic way of life by establishing an Islamic State that executes the systems of Islam and carries its call to the world’ and its literature reveals strong anti-American and anti-Semitic tendencies, but the organisation officially renounces violence to establish the Caliphate. Indeed, it is not known to have used violence yet – however, ‘their vague ideological commitment to non-violence does not prohibit the use of violence in defensive wars or conflicts that are already in progress.’⁸⁰ Though the expert evidence in this case apparently included advocacy of violence, it remains an open question how the HRC would deal with cases where this was less clear. Would the Committee accept a conviction for advocating legal change that is non-violent but nonetheless in contravention of the ICCPR’s rights, because of its goal of establishing a radical Islamic state (as the ECHR did in *Refah Partisi*)? Would this still fall under the “national security” aim, or perhaps the “rights of others”? Moreover, the Committee concluded that the mere dissemination of documents posed a threat to national security and the rights of others that was great

78 Par. 7.2.

79 Draft General Comment no. 34, par. 48.

80 Keller & Sigron 2010, p. 158-160.

enough to justify long prison sentences; one may question whether this indeed meets the necessity test.⁸¹ Finally, the Committee did not get the chance to delve into the role of article 18 here, as the applicants did not rely on this provision. The HRC has said the following about the relationship between articles 18 and 20 in a General Comment: ‘[i]n accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’⁸² The Committee has also pointed out that article 20(2) provides important safeguards for religious groups against infringements of their rights. Now that the HRC has not delved into the role of article 18 in this case, it is still an unanswered question whether freedom of religion (which does not provide for limitations on the grounds of “national security”) protects radical religious publications.⁸³

3.3.5.1 UN Security Council Resolution 1624 (2005)

The UN Security Council has also dealt with incitement to terrorism. Expressing its concern that ‘incitement to terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights’, the Security Council in Resolution 1624 (2005)⁸⁴ calls upon states to ‘adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.’

The term “incitement” is not further defined, so that it is not clear whether this also concerns indirect incitement; but it should be noted that the Preamble also *repudiates* ‘attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts’. Measures taken must be in accordance with States’ international law obligations and must therefore be proportional; the Preamble refers particularly to article 19 UDHR and to the fact that restrictions on freedom of expression shall be provided by law and necessary on the grounds set out in article 19(3) ICCPR.

81 Keller & Sigron 2010, p. 161.

82 CCPR General Comment No. 22, par. 7.

83 Keller & Sigron 2010, p. 164-165

84 Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, on 14 September 2005, S/RES/1624(2005).

4 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The Convention on the Elimination of all forms of Racial Discrimination (CERD) is another relevant international instrument on hate speech, particularly its article 4. The Convention dates from 1966 and came into force in 1969; 174 States Parties have ratified it. This paragraph analyses article 4 CERD, looking at its text and the relevant literature, to discover its object and purpose and the rationales behind it. This includes an analysis of how the Committee on the Elimination of Racial Discrimination (the Committee) has interpreted article 4 in its opinions in individual cases⁸⁵ as well as in its General Recommendation and, to a lesser extent, in its concluding observations on States Parties.

The adoption of CERD can be traced back to the apartheid system in South Africa and to renewed manifestations of anti-Semitism that were taking place around 1960. These led to a chain of studies and resolutions in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN General Assembly to deal with manifestations of racial and national hatred.⁸⁶ The occurrence of hateful expressions thus provided an important impetus for adopting the Convention, which makes article 4 on racist speech a central provision. The Preamble to the Convention considers that ‘all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination, (...) Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere (...)’. Article 4 shows that CERD aims to target the *doctrine* of racial differentiation as such, including expressions derived from such doctrines; it is about the ideas themselves, not about their consequences.

4.1 Article 4 CERD

Article 4 CERD reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied

⁸⁵ The Committee can consider communications from individuals or groups claiming to be victims of a violation of the CERD provisions, if the State party has made a declaration to this end under Article 14 CERD.

⁸⁶ Schwelb 1966, p. 997-998.

in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

This covers the following six acts:⁸⁷

1. all dissemination of ideas based on racial superiority
2. all dissemination of ideas based on racial hatred
3. incitement to racial discrimination
4. all acts of violence against any race or group of persons of another colour or ethnic group
5. incitement to such acts;
6. the provision of any assistance to racist activities, including the financing thereof.

The provisions of article 4 are not self-executing: they need implementation in national legislation.⁸⁸ The article imposes positive obligations on states; in contrast to art. 20 ICCPR, it is obligatory to use *criminal law* under art. 4(a) CERD. The term *hatred* (in “ideas based on racial hatred”) shall be understood as ‘active dislike, a feeling of antipathy or enmity connected with a disposition to injure.’⁸⁹ Art. 4(b) also requires states to make it a criminal offence to participate in organisations that promote and incite racial discrimination, while those organisations themselves shall be declared illegal and prohibited.

The first part of 4(a) – dissemination of ideas based on racial superiority – shows that CERD is not only concerned with the potential consequences of speech (actual discrimination, hatred or violence); it really targets certain *ideas*, regardless of whether they express incitement or insult. Many states have entered reservations or interpretative statements to article 4, although reservations ‘incompatible with the object and purpose of the Convention shall not be permitted’ under article 20 CERD. Especially the prohibition of ‘all dissemination of ideas based on racial superiority or hatred’ has proved controversial. It has been questioned whether this part is necessary

⁸⁷ See Partsch 1992, p. 26.

⁸⁸ Nieuwenhuis 2006, p. 278.

⁸⁹ Partsch 1992, p. 26.

to protect the rights of others or public order.⁹⁰ Even international bodies such as the UN Special Rapporteur on Freedom of Opinion and Expression, have made statements that actually contravene article 4: ‘no one should be penalised for the dissemination of “hate speech” unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence’.⁹¹ Proponents of the prohibitions point to the link between propagation of racism and incitement to discrimination: the creation of an atmosphere of racial hatred would inevitably lead to discrimination.⁹²

Despite the objections, the CERD Committee finds that ‘the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression (...) The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance.’⁹³ Nevertheless freedom of expression may not be limited to such an extent as to prohibit the dissemination of scientific ideas, e.g. those which stress the cultural differences between groups.⁹⁴

Article 4 does not require *intent*; expressions and the dissemination thereof shall be prohibited regardless of a person's state of mind. Thornberry criticises this approach, as it ‘approaches the domain of strict or absolute liability, and the total absence of culpability elements beyond the act of dissemination would do violence to basic principles of criminal liability in many if not most jurisdictions (...) Whatever comment might be made concerning a causal link between “dissemination” of a racist tract and awareness of criminality, the element of striving to bring about a particular result is commonly built into the notion of incitement (...) it is not unreasonable to read the Convention to the effect that the local application of these provisions will be embedded in criminal law principles.’⁹⁵ As such, the Committee's strict approach seems to be a matter of discussion.

4.1.1 Scope of “racial discrimination”

The scope of the term “racial discrimination” is explained in article 1(1), which states:

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which

⁹⁰ Partsch 1992, p. 27.

⁹¹ Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, London, 27 February 2001.

⁹² Lerner 1980, p. 52.

⁹³ CERD General Recommendation No. 15, par. 4.

⁹⁴ Lerner 1980, p. 49.

⁹⁵ Thornberry 2010, p. 109.

has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The term “racial” is thus interpreted broadly; ‘as a general rule, a group’s consciousness of its own separate identity determines whether it is a “race” for purposes of the Convention’s protections (...) Whether the majority regards the group as different is also significant.’⁹⁶ Religion is not included – there is a specific UN instrument that covers discrimination on religious grounds, which is non-binding: the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Originally, the drafters of CERD discussed the possibility of including religious discrimination; however, ‘many delegations, particularly those from Eastern Europe, did not consider questions of religion to be as important and urgent as questions of race’.⁹⁷ The compromise was to adopt two different instruments, and eventually the instrument on “religion” became a declaration only. Moreover, this declaration does not contain a similar provision as article 4 CERD which seeks to restrict *expressions*. Yet the Committee on the Elimination of Racial Discrimination, which looks after compliance of States Parties with the Convention, makes a close link between racial and religious discrimination in its state reporting; it often inquires about alleged discrimination on the grounds of religion or belief, for instance as regards the Danish cartoons.⁹⁸ As Tahzib notes, ‘it is debatable whether the Committee has introduced the concept of religious discrimination by the back door into the ICERD.’⁹⁹ Lerner has argued that ‘[i]t is (...) reasonable to interpret article 4 as applicable, by analogy, to manifestations of incitement on grounds of religion or belief. This approach is supported by the historical link between the instruments on race and those on religion, as well as by the view expressed by the judiciaries of several countries that more important than the specific nature of a group, is the basic fact of the undisputed existence of the group, its self-perception and its perception by the surrounding world.’¹⁰⁰ However, according to Committee member Thornberry ‘the Committee searches for an “ethnic” or other connection or element of intersectionality between racial and religious discrimination before it regards its mandate as engaged (...) Thus, the Convention requires conceptualisation of *racial* discrimination in the enjoyment of *religious* freedom.’¹⁰¹ Accordingly, when the Committee makes references to religious discrimination in its reports that is because it sees an overlap with ethnicity.

96 Partsch 1992, at 22. Refers to CERD General Recommendation No. 8.

97 Schwelb 1966, p. 999.

98 Keane 2008, p. 874.

99 Tahzib 1996, p. 402. Note also the UN Declaration on Religion and Belief (1981), which follows the CERD Convention in many respects, but does not have an equivalent clause to art. 4 CERD.

100 Lerner 2010, p. 141.

101 Thornberry 2010, p. 102.

In two “opinions” on individual petitions from 2006, the Committee held that discrimination exclusively on religious grounds without any link to a discrimination ground mentioned in the Covenant (such as ethnicity) does not fall under the Convention.¹⁰² In these cases, the applicants complained that Denmark had not prosecuted for expressions involving harsh critique of Islam and Muslims, including remarks about the alleged link between rape of Danish girls and the Qu’ran. The Committee held that the statements referred to Qu’ran, to Islam and to Muslims in general, without any reference whatsoever to any race, colour, descent, or national or ethnic origin and noted that

the Muslims currently living in the State party are of heterogeneous origin. They originate from at least 15 different countries, are of diverse national and ethnic origins, and consist of non-citizens, and Danish citizens, including Danish converts. The Committee recognises the importance of the interface between race and religion and considers that it would be competent to consider a claim of “double” discrimination on the basis of religion and another ground specifically provided for in article 1 of the Convention, including national or ethnic origin. However, this is not the case in the current petition, which exclusively relates to discrimination on religious grounds (...) the Convention does not cover discrimination based on religion alone, and (...) Islam is not a religion practised solely by a particular group, which could otherwise be identified by its “race, colour, descent, or national or ethnic origin.”

Thornberry makes it clear that this decision was informed by the fact that the application itself was only based on religious discrimination, and that is what the Committee adheres to. He suggests that

in future cases likely to arise more could be made of the concepts of “discrimination in effect” or “indirect discrimination” and heavier reliance placed on the self-perception of communities. Cases can arise where the hate speech discourse is careful to avoid direct racial or ethnic insult, and may have “switched” its language from the racial/ethnic to the religious in relation to the same targeted community. The Committee is, it is submitted, eminently capable of addressing such re-phrasing of hate speech from within its present interpretative resources.¹⁰³

In principle, “defamation of religions” would not fall under article 4:

What is protected by CERD is the groups, usually a vulnerable group, rather than norms or practices. CERD recognises the distinction between the norms and the community as such (...) Nonetheless, this distinction between addressing the community and addressing its practices can be a fine one (...) Attacks on group customs and traditions expressed in vicious language can seriously damage the self-esteem of groups and represent an attempt to silence them.¹⁰⁴

¹⁰² CERD P.S.N. v. Denmark (2007); A.W.R.A.P. v. Denmark (2007).

¹⁰³ Thornberry 2010, p. 104.

¹⁰⁴ Thornberry 2010, p. 115-116.

4.2 Background

That article 4 is so “pro-active” can be explained by its rationale of dealing with ‘phenomena as the discourses of dehumanisation that are characteristic elements of genocidal processes, or, less dramatically, on the climate of oppression that can flourish if unchecked against vulnerable minorities through normalisation or banalisation of discourses of racial inferiority and superiority.’¹⁰⁵ The Committee’s General Recommendation No. 15 explains that ‘[w]hen the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organised activity likely to incite persons to racial violence, was properly regarded as crucial.’ By the 1990s the Committee still considered such early prevention to be relevant and necessary, as it regularly received ‘evidence of organised violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.’¹⁰⁶ Nowadays the Committee regularly expresses concern about hate speech by politicians.¹⁰⁷

Article 4 was the outcome of a difficult compromise and is not uncontested. An early draft of the article still left out the “dissemination of ideas based on racial superiority/racial hatred” part and focused on incitement to violence, incitement to discrimination “resulting in acts of violence” and the prohibition of organisations that promote or incite racial discrimination. An amendment then changed the draft, coming closer to the current article.¹⁰⁸ As a result, many countries became concerned about freedom of expression (including the US and Scandinavian countries) and started to enact counter-amendments, which would eventually lead to the inclusion of the “due regard” clause.

4.3 The “due regard” clause

The “due regard” clause refers to the part of article 4 that reads ‘with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention (...)’. Art. 5 CERD, to which it refers, stipulates that

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and

¹⁰⁵ Thornberry 2010, p. 116.

¹⁰⁶ CERD General Recommendation No. 15, par. 1.

¹⁰⁷ Concluding Observations Denmark CERD/C/DEN/CO/17, 19 Oct 2006, par. 11; Concluding Observations Italy CERD/C/ITA/CO/15, 16 May 2008, par. 15. Concluding Observations the Netherlands CERD/C/NLD/CO/17-18, 25 March 2010, par. 8.

¹⁰⁸ Ministerie van Buitenlandse Zaken 1966, p. 272.

to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights (...)
 (d)(viii) The right to freedom of opinion and expression;

It also incorporates a long list of other civil and political, as well as economic, social and cultural rights. The interpretation of the “due regard” clause has been subject to controversy. Many states have interpreted it so as to give more leeway to freedom of expression in exercising their obligations under art. 4, but the CERD Committee does not agree with this reading. The “due regard” clause emerged as a compromise during the negotiations, as a counterproposal from states who feared excessive restriction of freedom of expression. The clause was thus specifically intended to protect against overbroad restrictions on freedom of expression and association.¹⁰⁹ However, as the clause states that due regard should be given to the Universal Declaration as a whole (and the rights in art. 5), some commentators doubt whether freedom of expression should be given greater weight than other rights. According to Partsch, there are three different possible interpretations of the “due regard” clause:

1. States Parties are not authorized to take any action which would in any way limit or impair the relevant human rights referred to in the “with due regard” clause;
2. States Parties must strike a balance between fundamental freedoms and the duties under the Convention taking into account that the relevant guarantees are not absolute but subject to certain limitations authorized in the relevant instruments;
3. States Parties may not invoke the protection of civil rights as a reason to avoid enacting legislation to implement the Convention.¹¹⁰

Many states have adopted the second perspective and laid this down in an interpretative statement. The Committee, however, contends that States Parties’ obligations under article 4 are imperative and that the prohibitions are already compatible with the right to freedom of expression.¹¹¹ According to Partsch, ‘this perspective fails to take account (...) of article 30 of the Universal Declaration which does not permit the complete destruction of a human right through the exploitation of a limitation clause.’¹¹² Neither do States Parties have much discretion in formulating the offences: the Committee does not allow that intention be a requirement. Moreover, it does not easily accept the inclusion of other additional elements in States’ criminal offences, such as the requirement of a “breach of the peace” or the requirement that organisations have a significant size or influence.¹¹³ With regard to Austria, for instance, the Committee noted its concern about legislation that criminalised racist propaganda and incitement to racial hostility only by reference to “public peace”.¹¹⁴ Indeed, the

109 Mahalic & Mahalic 1987, p. 89.

110 Partsch 1992, p. 24-25.

111 CERD General Recommendation No. 15, par. 4.

112 Partsch 1992, p. 25.

113 Mahalic & Mahalic 1987, p. 98.

114 Concluding observations Austria, 7 April 1999, CERD/C/304/Add.64, par. 8.

Committee's reading of article 4 appears rather absolutist, lacking coherence with the requirements of article 19(3) ICCPR that limitations to free speech shall be necessary in the light of a legitimate aim.

In the Committee's opinion in the individual case of Jewish Community of Oslo et al. v. Norway, which dealt with the "due regard" clause, it emphasised that this clause relates not only to freedom of expression.¹¹⁵ A group known as the "Bootboys" had held a march near Oslo in commemoration of the Nazi leader Rudolf Hess, wearing semi-military uniforms. The leader of the march made defamatory statements against immigrants and Jews and honoured Rudolf Hess as well as Adolf Hitler: 'we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism (...)' The Supreme Court overturned the leader's conviction, because 'penalising approval of Nazism would involve prohibiting Nazi organisations, which it considered would go too far and be incompatible with the right to freedom of speech (...) The majority held that the speech contained derogatory and offensive remarks, but that no actual threats were made, nor any instructions to carry out any particular actions.' The authors complained of a violation of, inter alia, article 4. The Committee considered whether the statements fell within any of the categories of speech set out in article 4, and if so, whether they were nonetheless protected by the "due regard" provision as it relates to freedom of speech:

these statements (...) contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and "footsteps" must in the Committee's view be taken as incitement at least to racial discrimination, if not to violence (...) The Committee notes that the "due regard" clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right (...) The Committee concludes that the statements of Mr. Sjolie, given that they were of exceptionally/manifestly offensive character, are not protected by the due regard clause (...).

Since this is such an obvious case in that these activities would be prohibited under most international instruments on hate speech, it still leaves one wondering how the Committee would deal with the "due regard" clause in hard cases.

4.4 Positive obligations and prosecutorial discretion

Most of the Committee's opinions in individual cases in this field deal with the extent of States' positive obligations in relation to prosecutorial decisions. States are not only

115 CERD, *The Jewish Community of Oslo et al. v. Norway* (2005).

required to adopt the criminal offences stipulated in article 4; their failure to investigate and prosecute such cases may – under certain circumstances – also amount to a violation of article 4.

The individual case of *L.K. v. the Netherlands*¹¹⁶ dealt with a person of Moroccan origin who visited a house for which a lease had been offered to him and his family; when they arrived, a group of people had gathered outside the house shouting “No more foreigners”. Others intimidated him by saying that if he accepted the house, they would set fire to it and damage his car. Twenty-eight inhabitants drafted a petition noting that the author could not be accepted because of a presumed rule that no more than 5% of the street’s inhabitants should be foreigners. The author complained of group insult and incitement to hatred (art. 137 c and d Dutch Criminal Code) by the persons who had signed the petition and who had gathered around the house. No prosecution was initiated, however; on appeal, the author’s request for prosecution was dismissed because the petition was not of a deliberately insulting nature and not inciting to racial discrimination. The Committee noted that

the remarks and threats (...) constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, contrary to article 4 (a) (...), and that the investigation into these incidents by the police and prosecution authorities was incomplete (...) The Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States Parties under the Convention. The Committee reaffirms its view as stated in its Opinion on Communication No. 1/1984 of 10 August 1987 (*Yilmaz-Dogan v. The Netherlands*) that ‘the freedom to prosecute criminal offences – commonly known as the expediency principle – is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the *raison d’être* of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention’. When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition. In the instant case, the State party failed to do this.

However, reference to “foreigners” did not satisfy the requirements of article 4 in the case of *Kamal Quereshi v. Denmark (2)*.¹¹⁷ Here, a Danish MP complained of statements made at a meeting of the “Progressive Party” by members of that party: ‘the State has given the foreigners work. They work in our slaughterhouses where they can easily poison our food and endanger the agricultural exports. Another form of terrorism is to break into our water-works and poison the water.’ The applicant requested the prosecution of the persons making the offending statements, including a member of the Executive Board (Mr. Andreasen). The prosecutor discontinued the

¹¹⁶ CERD, *L.K. v. The Netherlands* (1993).

¹¹⁷ CERD, *Kamal Quereshi v. Denmark (2)* (2005).

cases against Mr. Andersen, which led to the applicant's complaint. The Committee considered that

Mr. Andreasen made offensive statements about "foreigners" at the party conference. The Committee notes that (...) a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin. The Committee is thus unable to conclude that the State party's authorities reached an inappropriate conclusion (...).

The difference with *L.K. v. Netherlands* – where as reference to "foreigners" was also made – can possibly be explained by the fact that in *L.K. v. Netherlands*, the reference to "foreigners" was more threatening and directly made towards a Moroccan individual.

In *Gelle v. Denmark*,¹¹⁸ a daily newspaper had published a letter to the editor by a Danish MP, entitled "A crime against humanity", stating:

How many small girls will be mutilated before [the Minister of Justice] prohibits the crime? (...) What does a prohibition against mutilation and maltreatment have to do with racial discrimination? And why should the Danish-Somali Association have any influence on legislation concerning a crime mainly committed by Somalis? And is it the intention that the Somalis are to assess whether the prohibition against female mutilation violates their rights or infringes their culture? To me, this corresponds to asking the association of paedophiles whether they have any objections to a prohibition against child sex or asking rapists whether they have any objections to an increase in the sentence for rape.

The petitioner considered that this comparison equated persons of Somali origin with paedophiles and rapists, thereby directly offending them. He complained of a violation of the Criminal Code, but the police refused to open an investigation – a decision which was upheld by the prosecutor.

The Committee considered the following:

the Regional Public Prosecutor dismissed the petitioner's complaint on the ground that Ms. Kjærsgaard's letter to the editor did not refer to all Somalis as criminals or otherwise as equal to paedophiles or rapists, but only argued against the fact that a Somali association is to be consulted about a bill criminalizing offences committed particularly in the country of origin of Somalis. While this is a possible interpretation of Ms. Kjærsgaard's statements, they could however also be understood as degrading or insulting to an entire group of people, i.e. persons of Somali descent, on account of their national or ethnic origin and not because of their views, opinions or actions regarding the offending practice of female genital mutilation. While strongly condemning the practice of female genital mutilation, the Committee recalls that Ms. Kjærsgaard's choice of "paedophiles" and "rapists" as examples for her comparison were perceived as offensive not only by the petitioner, but also were

¹¹⁸ CERD, *Gelle v. Denmark* (2006).

acknowledged to be offensive in character in the letter of 26 September 2003 from the Copenhagen police (...) Ms. Kjærsgaard's remarks can be understood to generalize negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation (...) Similarly, the Committee considers that the fact that Ms. Kjærsgaard's statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination.

The Committee found a violation of article 4 because of failure to carry out an effective investigation. This decision shows how wide the scope of article 4 is: the Committee submits its own interpretation of the author's statements and holds that expressions 'generalising negatively about an entire group of people based solely on their ethnic or national origin' can fall under article 4. This is particularly striking because it concerns criticism of the *practices* of a group, practices that form human rights violations. Moreover, under CERD, there is no such special protection for political speech or speech in public debate as provided by the ECHR.

The Committee's opinion in *Zentralrat Deutscher Sinti und Roma et al. v. Germany* deals with harsh socio-political criticism of a group, just as in the Gelle case; however, it puts forward a very different view.¹¹⁹ In this case, a high-ranking police officer published a reply to an article by a Sinti member in the police journal "The Criminalist", which read as follows:

As an officer handling offences against property I have dealt repeatedly with the culture, the separate and partly conspirative way of living as well as the criminality of the Sinti and Roma. We were told by Sinti that one feels like a "maggot in bacon" ("Made im Speck") in the welfare system of the Federal Republic of Germany. One should use the rationalisation for theft, fraud and social parasitism without any bad conscience because of the persecution during the Third Reich... it is sure that this group of people, even if only about 100,000, occupies the authorities disproportionately by comparison. Who for example commits nationwide thefts largely to the disadvantage of old people? Is it really a prejudice when citizens complain about the fact that Sinti drive up with a Mercedes in front of the social welfare office? Is it not true that hardly any Roma works regularly and pays social insurance?

The authorities did not initiate criminal proceedings; the Supreme Court of Brandenburg upheld this decision. The complainants claimed that the letter contained numerous discriminatory statements against Sinti and Roma and used racist and degrading stereotypes. In particular, they noted that the terms "maggot" and "parasitism" were used in the Nazi propaganda against Jews and Sinti and Roma. According to the Committee, the materials before it did not 'reveal that the decisions

119 CERD, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Comm.No. 38/2006, U.N. Doc.CERD/C/72/D/38/2006 (2008).

of the District Attorney and General Prosecutor, as well as that of the Brandenburg Supreme Court, were manifestly arbitrary or amounted to denial of justice.’ Moreover, the Committee noted that ‘the article in “The Criminalist” has carried consequences for its author, as disciplinary measures were taken against him.’ Therefore it found no violation of art. 4(a).

As to prosecutorial discretion, in *Zentralrat Deutscher Sinti und Roma v. Germany* the Committee weakened the points made in *Gelle v. Denmark* by introducing the criterion that prosecutorial decisions may not be “manifestly arbitrary or amount to denial of justice”. Thus it seems that national authorities are given more leeway here. Yet what this criterion means exactly, and how it can be reconciled with the decision in *Gelle v. Denmark*, remain open questions.

A few years after *Gelle v. Denmark*, the Committee again had to deal with the MP Kjærsgaard’s alleged discrimination of Somali people. The case of *Jama v. Denmark*¹²⁰ was concerned with her remarks during a newspaper interview, in which she spoke of an incident in Copenhagen where she was attacked by a group of people. According to the MP, ‘[s]uddenly they came out in large numbers from the Somali clubs. There she is, they cried, and forced the door to the taxi open and then beat me (...) I could have been killed (...)’ A Somali man complained to the police, who examined the claim but concluded that it did not constitute racial insult. The public prosecution followed this decision. The petitioner claimed before the Committee that Ms. Kjærsgaard had made a false accusation against Somalis living in Denmark; the Committee, however, found that

[t]he statement concerned, despite its ambiguity, cannot necessarily be interpreted as expressly claiming that persons of Somali origin were responsible for the attack in question. Consequently, (...) the Committee cannot conclude that her statement falls within the scope of (...) article 4 of the Convention (...)¹²¹

Accordingly, there seems to be a limit to the obligations of states to prosecute where expressions are not clearly directed against a particular group.

5 THE 1948 GENOCIDE CONVENTION AND THE INTERNATIONAL CRIME OF “INCITEMENT TO GENOCIDE”

Incitement to genocide presents a very special case, since it has developed as an *international crime*; it therefore entails individual criminal responsibility under international law. The development of this crime began already in 1946 before the

120 CERD *Jama v. Denmark* (2009).

121 Par. 7.4.

International Military Tribunal at Nuremberg, in the *Streicher* and *Fritzsche* judgments. Streicher was found guilty of crimes against humanity because of publishing the extremely anti-Semitic paper *Der Stürmer*, which contained such rabid propaganda – calling for the extermination of Jews – that even Nazi officials distanced themselves from it.¹²² Importantly, the Tribunal did not require a direct causal link between his statements and the atrocities committed. Hans Fritzsche, a radio announcer and a subordinate in Goebbels's propaganda ministry, was acquitted of crimes against humanity. The Tribunal found that his propagandistic statements were not meant to incite Germans to commit atrocities, but that his aim 'was rather to arouse popular sentiment in support of Hitler and the German war effort'¹²³ – thus distinguishing incitement to crimes against humanity from calls to support the government in times of war.¹²⁴

When the Genocide Convention of 1948 was drafted, incitement to genocide was laid down in article 3:

The following acts shall be punishable:

(c) Direct and public incitement to commit genocide; (...)

Direct and public incitement to commit genocide has also been included – in the same terms as in the Genocide Convention – as a crime within the jurisdiction of the International Criminal Tribunals for Rwanda (ICTR Statute, art. 2(3)(c)) and for the former Yugoslavia (ICTY Statute, art. 4(3)(c)), as well as the International Criminal Court (Rome Statute, art. 25(3)(e)). Its character as an international crime makes that incitement to genocide has to be interpreted narrowly, in order not to conflict with the legality principle.¹²⁵ This makes it very different from, for instance, dissemination of racist ideas under CERD: states have an obligation to criminalise this offence, but it is not an international *crime*.

The exact meaning of incitement in the Genocide Convention has been subject to controversy. In the draft text, the crime was described as 'direct public or private incitement to commit the crime of genocide whether such incitement be successful or not', but the words "or private" and "whether such incitement be successful or not" were later deleted. The ICTR delved into this issue in *Prosecutor v. Akayesu*, where it concluded that the provision also covers unsuccessful incitement: 'genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to

122 Snyder 2007, p. 655.

123 Judgment of the International Military Tribunal at Nuremberg, 30th September and 1st October, 1946, Fritzsche.

124 Snyder 2007, p. 657.

125 See Orentlicher 2006.

produce the result expected by the perpetrator.’¹²⁶ The Trial Chamber did require a close causal link between the expressions and the potential result, however. Akayesu, mayor of a Rwandan town, made a speech where he called upon the people present to unite to eliminate the enemy, also reading out a list of names. Shortly after, the crowd commenced the killing of Tutsis. He was convicted for directly inciting locals to violence; the Trial Chamber defined “incitement” as ‘directly provoking the perpetrator(s) to commit genocide’.¹²⁷ It also defined the word “direct” as more than a ‘mere vague or indirect suggestion’, whereas ‘the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as “direct” in one country, and not so in another, depending on the audience.’¹²⁸

In *Prosecutor v. Bikindi* (see below), the Trial Chamber also stated that incitement must be more than a vague or indirect suggestion – ‘[t]he principal consideration is context, specifically, the cultural and linguistic content, political and community affiliation of the author, its audience, and whether the members of the audience to whom the message was directed understood the implication of the message.’¹²⁹ As such, ‘a direct appeal may be implicit, as opposed to an explicit call for extermination, if done in a particular context.’ Advocating “the killing of serpents” – a coded reference to Tutsi – could thus be regarded as “incitement to genocide”. However, the Trial Chamber in the *Bikindi* case also attached much importance to the imminence of the threat: it acquitted the defendant for this statement because it could not be established that the violence occurred immediately after the expression.¹³⁰ In the “Media case”, which dealt amongst other things with the inciting broadcasts of radio station RTL (Radio Télévision Libre des Mille Collines), the Trial Chamber also found context to be an important consideration. Snyder identifies a four-part test for incitement to genocide in the judgment: one must look at the purpose, actual text, context, and relationship between communicator and subject.¹³¹

The Trial Chamber found that a direct connection between speech and genocide is not necessary. The Chamber also touched upon the delicate relationship between incitement to genocide and hate speech.¹³² In early drafts of the Genocide Convention a provision was included that would proscribe – besides direct incitement to genocide

126 ICTR (Trial Chamber I), *Prosecutor v. Akayesu*, 2 September 1998, par. 562. On 1 June 2001 the Appeals Chamber delivered its judgment in this case; this judgment did not delve into the interpretation of incitement to genocide.

127 Par. 559.

128 Par. 557.

129 ICTR (Trial Chamber III) *Prosecutor v. Bikindi*, 2 December 2008, par. 387; La Mort 2009, p. 53.

130 La Mort 2009, p. 54.

131 Snyder 2007, p. 666. ICTR (Trial Chamber I), *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, 3 December 2003.

132 See Timmermann 2005.

– ‘all forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act’. This provision, however, was rejected. Other attempts to include a hate speech provision in the Convention failed too, so that it can be assumed that the drafters did not intend to include the prohibition of hate speech in the Genocide Convention.¹³³ Yet the Trial Chamber in the Media Case did interpret incitement to genocide extensively, coming close to hate speech.¹³⁴ Not just clear instigation of violence is relevant; according to the ICTR, it is also important to take into account the process leading to the genocide, in which an atmosphere of ethnic hatred is created where the victim group is dehumanised. This approach has been criticised as an overbroad interpretation of the crime of incitement to genocide, which is problematic in the light of the principle of legality.¹³⁵ It was nuanced by the Appeals Chamber in the same case,¹³⁶ which held that that defendants ‘cannot be held accountable for hate speech that does not directly call for the commission of genocide’ and ‘the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide.’¹³⁷ Moreover, the Appeals Chamber required that incitement to genocide should be ‘the only reasonable interpretation’ of an expression.¹³⁸ The Appeals Chamber did concur with the Trial Chamber that expressions must be assessed in relation to their particular context.¹³⁹ Eventually, it reviewed all specific expressions and left many outside the scope of “direct and public incitement to genocide”.¹⁴⁰

The fine line between hate speech and incitement to genocide is also seen in the abovementioned ICTR judgment in *Prosecutor v. Bikindi*,¹⁴¹ where it convicted the famous musician Simon Bikindi – “the Rwandan Michael Jackson” – to 15 years’ imprisonment. His music, broadcast extensively during the genocide and sung by Hutus during the killings, called for Hutu solidarity; according to the prosecution, his songs contained coded instigations to kill Tutsis and poisoned the hearts and minds of the listeners by encouraging ethnic hatred.¹⁴² The Trial Chamber found that ‘Bikindi composed *Nanga Abahutu* and *Bene Sebahinzi* with the specific intention to disseminate pro-Hutu ideology and anti-Tutsi propaganda, and thus to encourage ethnic hatred’ – however, there was not sufficient evidence to conclude that he

133 Orentlicher 2006, p. 565-569.

134 Timmermann 2005, p. 269.

135 Orentlicher 2006; Benesch 2008.

136 ICTR (Appeals Chamber), *Nahimana, Barayagwiza and Ngeze v. Prosecutor*, 28 November 2007.

137 Par. 693.

138 Par. 746.

139 Par. 701.

140 La Mort 2009, p. 53.

141 ICTR (Trial Chamber III) *Prosecutor v. Bikindi*, 2 December 2008.

142 La Mort 2009, p. 45.

composed these songs with the specific intention to incite attacks and killings.¹⁴³ Although his songs were used by radio station RTLM to incite to violence against Tutsi, Bikindi's own role in disseminating the songs during the genocide could not be proven.¹⁴⁴ The requirements for incitement to genocide thus seem to have become rather strict again. The Trial Chamber did find Bikindi guilty of explicit instigation to exterminate the Tutsi through a speech using a public address system in a convoy.

6 CONCLUSION

Though both the ICCPR and CERD have a similar background and similar rationales – militant democracy and negative imaging – the ICCPR is stricter in its requirements than article 4 CERD. Under article 4 CERD, it is immediately clear from the text that it is potentially broad as it obliges states to criminalise certain *viewpoints* without an element of incitement or intention. Though this is restricted to the area of racial discrimination, that concept is interpreted rather broadly too – including certain forms of religious discrimination. It seems that application of article 4 could perhaps contravene the strict rules of article 19 together with article 20. There must always be an element of incitement under article 20(2), whereas the relationship between article 20 and article 19 indicates that restrictions of less inciting speech must also be strictly construed. It appears from its draft General Comment and from the concurring opinions in *Faurisson v. France* that the HRC looks closely at the necessity of speech restrictions as regards laws *in abstracto* – such as Holocaust denial laws, glorifying terrorism laws and blasphemy laws. In its practice in individual cases, however, the HRC has given states more leeway (*A.K. & A.R. v. Uzbekistan*; *Faurisson v. France*).

As regards obvious expressions of fascism and racism, it seems that articles 5, 19 and 20 combined constitute a system whereby such speech is rejected outright (comparable to the ECHR approach). This can be explained by the fact that article 20(2) bears a close relationship with the Nazi hatred campaigns, having been drafted to tackle the roots of large-scale violence. In this regard, Nowak concedes that article 20(2) should be interpreted strictly because of this “responsive character”. A vital question is thus how the HRC will develop its interpretation of articles 19 and 20 as the coming into being of the Covenant comes to lie further behind us, and what the Committee will do with developments such as changing modes of discrimination and the globalisation of speech. This may also be asked with regard to CERD, which came into being in a similar vein as the ICCPR but which has a more militant attitude towards hate speech. So far the CERD Committee has continued to interpret article 4's positive obligations broadly.

143 Par. 254-255.

144 Par. 255; *La Mort* 2009, p. 54.

In this sense, it is striking how the ICTR Trial Chamber in the Media Case tried to introduce the hate speech provisions from CERD and ICCPR into the international crime of “incitement to genocide”. This development, which came to a halt in later case law, would have led to a significant broadening of this strictly construed crime.

A notable development in international human rights law is that the area of blasphemy and defamation of religions has become a battle ground over the past decade: occurrences such as the Rushdie affair and the Danish cartoon affair have put pressure on the human rights framework, bringing up the question of whether human rights provisions are capable of dealing with religious sensitivities in increasingly pluralist societies.¹⁴⁵ Such expressions have now become truly global through the internet, whereas states’ ideas about speech bans differ widely. International bodies have thus taken different views on the application of human rights provisions to blasphemy and defamation of religions. This controversy is perhaps inevitable when one tries to deal with such issues through universal human rights law, especially since it concerns two such value-laden rights as freedom of expression and (allegedly) freedom of religion. Actually, some of the European (ECrHR) case law on blasphemy is not that far from the IOC’s “defamation of religions”-resolutions and would be problematic in the light of the HRC’s focus on protecting minority religious groups.

Another pressing issue is that of positive obligations to prosecute for hate speech: in theory, the CERD Committee accepts the expediency principle of national prosecution authorities – but the positive obligations under article 4 can certainly limit prosecutorial discretion. Article 4 also potentially limits the discretion of judges in interpreting hate speech laws: in Jewish Community of Oslo it became apparent that an acquittal can lead to a violation. The ICCPR, which does not require criminal measures per se, has so far refused to take a clear stance on positive obligations. As it seems that many people in the Netherlands are now questioning the effectiveness of prosecuting for hate speech, while states already tended to attach much importance to their own particular traditions in this field, it has to be awaited how this will work out in the future.

145 See Temperman 2010.

CHAPTER VI

THE NETHERLANDS

1 INTRODUCTION

This chapter analyses the development of hate speech bans in the Netherlands after 2001 and places these in a broad historical framework. This includes an analysis of the legislation and case law itself, but it mainly focuses on the ideas behind this law: what are the rationales behind criminalisation and which ideas about fundamental rights and democracy have influenced the law? These historical developments are placed in the context of the nature of public debate and the political culture in the Netherlands.

The current chapter, as well as chapter VII on England, is clustered per time period in a quasi-chronological order: this allows for mixing the legal framework with the analysis of the rationales behind the law and the socio-political background per time period. Paragraph 2 gives an analysis of the legal developments after 2001 and makes a start with placing these developments in the wider context of public debate. The historical analysis then starts with a brief constitutional history and progresses to the 1930s, when some of the existing hate speech bans originated (par. 3). Paragraph 4 deals with the situation in the 1950s; paragraph 5 analyses the developments in the 1960s-1970s when hate speech bans were amended again. The chapter then goes on to the 1980s-1990s, a period when case law became more frequent and legislation was amended once again. To close the circle, paragraph 7 comes back to the situation after 2001; it delves deeper into the case law of that period and its socio-political context, placing the changes in their historical context that has been sketched in paragraph 3-6.

2 DEVELOPMENTS IN HATE SPEECH LAW AND RATIONALES AFTER 2001

Hate speech law in the Netherlands – current legal framework

Two of the most important criminal provisions for this chapter can be found under the “public order offences” of Title V Criminal Code: articles 137c and 137d. They deal with “group insult” and “incitement to hatred, discrimination and violence” respectively.

Article 137c provides that ‘any person who, publicly – orally, in writing or by means of portrayal – and intentionally, makes insulting expressions about a group of persons on account of their race, religion or belief, hetero- or homosexual orientation or

physical, psychological or mental handicap' shall be liable to a maximum of one year's imprisonment or a fine not exceeding €7.600.

Article 137d holds liable 'any person who publicly – orally, in writing or by means of portrayal – incites to hatred against or discrimination of persons or violence against persons or property on account of their race, religion or belief, gender, hetero- or homosexual orientation or physical, psychological or mental handicap.' It provides for the same maximum sentences.

Article 137e makes it an offence to publish the expressions criminalised in articles 137c-d – unless with the purpose of providing of factual information – or to distribute such expressions (including possession for the purpose of distribution).

Article 137c Criminal Code

Central to article 137c is the concept of “insult/defamation”,¹ which can be defined as “offence to one’s honour or good reputation”; most scholars explain it as “denying people’s intrinsic worth” or “bringing people into contempt”.² Article 137c requires that the expressions target a group of persons *on account of* their race, religion or belief, sexual orientation or handicap: they must be related to certain group features. This provision can also apply if an *individual* is targeted, as long as the insulting expressions can be interpreted as insulting the group to which the individual belongs.³ Otherwise, insult of an individual – without the group element – is a criminal offence under article 266 CC. The category “race” is interpreted broadly, following its definition in CERD: it includes national and ethnic origin (but not nationality in the sense of national citizenship), skin colour and descent.⁴ “Religion” is commonly interpreted as any religion that assumes the existence of a higher, supernatural power, whereas “belief” means a fundamental philosophy of human life in all its aspects, which is shared by the group concerned – including, for instance, atheism.⁵

The “intention” criterion of article 137c requires that the defendant has at least willingly and knowingly accepted the considerable risk that his expressions would insult a group on account of one of the characteristics mentioned.⁶ The courts judge this in an objective manner, by looking at the content and the manner in which it is expressed.⁷

1 The Dutch concept of “belediging”, when looking at its legal meaning, can be defined as a mixture of “insult” and “defamation”. For the sake of easier reading I will refer to “insult” from now on.

2 Rosier 1997, p. 36; Van Stokkom, Sackers & Wils 2006, p. 73.

3 Brants, Kool & Ringnalda 2007, p. 65.

4 Janssens & Nieuwenhuis 2005, p. 132.

5 *Kamerstukken II* 1967-68, 9724, nr. 3, p. 4; Van Stokkom, Sackers & Wils 2006, p. 74. Political views are not included in this category, *Gerechtshof 's-Gravenhage* 19 May 2003, NJ 2003, 382.

6 Dankers & Velleman 2006, p. 56. The Dutch ‘voorwaardelijk opzet’.

7 Dankers & Velleman 2006, p. 57.

The courts typically interpret article 137c through “contextual interpretation”.⁸ In this framework the courts take the following three steps: (1) defining the nature of the expression: is it insulting as such? (2) assessing the *context* of the expression, in order to judge whether it is insulting within its context; (3) judging whether the expression – considered in its context – is gratuitously offensive or grievous.⁹ The idea behind this is that expressions which seem insulting at first can “lose their insulting character” when judged in relation to their context. Regard should be had to the expression as a whole and the impression it can make on a neutral reader, as well as to its purpose and the role that the insulting words play in relation to the text or speech as a whole.¹⁰ In particular, on several occasions the courts have judged that expressions which form part of *public debate* can deserve more protection, even if they are insulting in a strict sense; here, the European Court of Human Rights’ case law has been influential. Contextual review can also include the specific context of religious motivation and the context of art or science. Although article 137c does not contain any (formal) grounds of justification, with the “contextual interpretation” method judges have significant means at their disposal to weigh various interests against each other.

Article 137d Criminal Code

“Incitement to hatred, discrimination or violence” should be understood as inducing others to hatred, discrimination or violence because of the group characteristics mentioned. Targeting an *individual* on the basis of his presumed membership of a group is also an offence under article 137d – similar to article 137c – if the individual has been targeted *because of* his membership of that group.¹¹

The meaning of incitement to *violence* does not pose too many problems – incitement to violent acts is also a criminal offence under article 131 Criminal Code (see par VI.3.5). Incitement to *hatred* and *discrimination* deserve some more explanation. In the scarce case law and in doctrine, incitement to hatred is mostly interpreted as setting groups against each other (or one group against the rest of society) by portraying the group concerned as inferior and dangerous,¹² leading to an “intrinsically conflictive dichotomy”.¹³ Incitement to *discrimination* must be interpreted in conjunction with the definition of discrimination in article 90quater Criminal Code:¹⁴ it refers to distinctions

8 Derived from the courts’ interpretation of article 266 Criminal Code (on insult of individuals).

9 See Brants, Kool & Ringnalda 2007, p. 61-64.

10 Loof 2007, p. 274.

11 Brants, Kool & Ringnalda 2007, p. 72.

12 Brants, Kool & Ringnalda 2007, p. 70.

13 HR 2 April 2002, NJ 2002, 421 m.nt. Mevis.

14 Discrimination is ‘any distinction, any exclusion, restriction or preference, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.’

that are not *objectively justifiable* (a criterion derived from general anti-discrimination law).¹⁵

Intention is considered to be contained in the word “incitement”, with the minimum requirement of ‘willingly and knowingly accepting the considerable risk that expressions incite to hatred/discrimination/violence’. Article 137d does not require that the incitement actually *results* in hatred, discrimination or violence or even that people actually feel incited by the expressions employed; it suffices to prove that the expressions as such are suitable for incitement.¹⁶

The offences of article 137c and 137d have often been taken together in debates as well as in the legal practice around hate speech. The list of grounds of discrimination in the articles is similar, except for the ground “gender” which is only included in article 137d.¹⁷ “Group insult” and “incitement to hatred/discrimination/violence” seem quite different concepts when taken literally: insult seems to refer to the effect of speech on victims themselves, whereas incitement refers to inciting *other people* to hate or discriminate against people. In Dutch law, however, legal history refers to “insult” as “harm to one’s reputation”, thus in the eyes of other people. The fact that article 137c refers to ‘insulting about’ and article 137e to ‘insulting for’ makes things even more difficult.¹⁸

Article 147 Sr: Blasphemy

In Dutch law, blasphemy is an offence under article 147 Criminal Code. This article stipulates that ‘any person who publicly – orally, in writing or by means of portrayal – expresses himself in a manner insulting for religious feelings by means of scornful blasphemy’ is liable to a maximum sentence of three months’ imprisonment or a fine not exceeding €3.800. Articles 147a and 429bis Criminal Code cover distribution and public distribution (visible from a public road) of blasphemous expressions.

Blasphemy in article 147 is concerned with expressions that defame *God or “the Supreme Being”*.¹⁹ This has several implications. First, defamation of other religious figures – such as prophets or saints – does not fall within the definition.²⁰ Second, the

15 *Kamerstukken II* 1989-90, 20239, nr. 23, p. 5.

16 Rosier 1997, p. 98.

17 See Brants, Kool & Ringnalda 2007, p. 70: the government decided not to deal with discriminatory insult on the ground of sex in article 137c because this was expected to restrict freedom of expression too much; while (incitement to) discrimination of women and violence against women were considered serious problems deserving of attention, insult of women was not considered a causal factor leading to their discrimination.

18 Nieuwenhuis & Janssen 2011, p. 97.

19 Janssens & Nieuwenhuis 2005, p. 200.

20 As regards the Christian faith, defamation of Christ or the Holy Spirit also amounts to blasphemy, because they are included in the conception of god (‘trinity’) that many Christians have. The same applies to the eucharist.

offence is only applicable to religions which assume the existence of a God or “Supreme Being” – that is, monotheistic religions. Some authors suggest that the offence was originally meant to be applicable only to the Christian faith;²¹ however, under present-day circumstances one may argue that it also covers other monotheistic religions. Legislative history is unclear on this point and the courts have never had to deal with it yet. Only *scornful* blasphemy is punishable under article 147; this word relates to (1) the gravity of the defamation and (2) the requirement of *intent*.²² Scornful blasphemy requires the intention to deeply humiliate or disparage God.²³ This high standard serves to avoid that the criminal law interferes with criticism and serious debate about religious matters. The passage ‘in a manner insulting for religious feelings’ in article 147 was included to stress that non-religious people can also commit this offence: intentional blasphemy might be taken to mean that the person who blasphemes actually has to believe in God.²⁴ Proving that an expression has resulted in actual insult to religious feelings is not necessary, because this is considered to be given with the blasphemy itself.²⁵

Since the article’s adoption, only nine persons have been convicted for violating article 147. This can partly be explained by its very high standard of proof, in particular proof of intent.²⁶ There have been no prosecutions after 1968 (see par. VI.5.5).

2.1 Legislative proposals: “glorifying terrorism”

Since 2001 much discussion about hate speech bans has appeared in the Netherlands – accordingly, there have been several legislative proposals. One of the issues under discussion has been how to deal with hate speech in the context of terrorism and radicalisation. Terrorist attacks in the US and Europe have led the Netherlands to adopt several new criminal law measures, some of which affect freedom of speech and association.²⁷ In a tense and polarised climate, where extremist internet sites proliferated, many feared that radical Muslims would incite each other to commit terrorist acts. Moreover, *indirect* expressions of support for terrorist acts – such as glorifying the WTC attacks as a “conquest over the West” – also came to be regarded as problematic. Not long after the murder of film director Theo van Gogh by extremist Mohammed Bouyeri – the Netherlands’ first “home-grown Islamic terrorist” – the

21 Plooy 1986, p. 34.

22 Janssens & Nieuwenhuis 2005, p. 200-201.

23 Van Stokkom, Sackers & Wils 2006, p. 59.

24 Janssens & Nieuwenhuis 2005, p. 201.

25 De Roo 1970, p. 101.

26 Van Stokkom, Sackers & Wils 2006, p. 60.

27 Membership of a terrorist organization was explicitly criminalized in article 140(a) CC, next to membership of a criminal organization (see Hofstadgroep in par. VI.7.1.5). The Civil Code’s regulation on proscription of organizations was amended to include automatic proscription of terrorist organizations on the EU lists.

Minister of Justice announced a plan to criminalise “glorifying terrorism”. In 2005 he proposed a bill to this end.²⁸ Prohibiting such expressions was not only necessary to preserve public order, the Minister held, but also to uphold the quality of public debate: the bill would ‘provide an instrument to counter conscious provocation of public feelings, and to contribute to improving the climate in society and to a more healthy public debate.’²⁹

The proposal to criminalise “glorifying terrorism”

The suggested provision read as follows:

Any person who publicly – orally, in writing or by means of portrayal – glorifies, extenuates, trivialises or denies an offence as defined in the International Crimes Act (“Wet Internationale Misdrijven”), an offence as defined in article 6 of the Charter for the International Military Tribunal pertaining to the Treaty of London of 8 April 1945, or a terrorist offence as meant in article 83 [Criminal code] that proscribes a life sentence, is liable (...) if he knows or shall have reason to presume that this glorification, extenuation, trivialisation or denial gravely disturbs public order or is capable of gravely disturbing public order.

The explanatory memorandum to the proposal explains that “glorifying” and “extenuating” essentially relate to expressions in which the offences concerned are highly valued, whereas “trivialising” aims to deny or tone down the gravity of the acts. “Denial” speaks for itself.³⁰ Glorifying, extenuating or trivialising can apply to the past (‘the London bombings were justified’) as well as to the future (‘you may justifiably attack the West’). The bill also included the requirement that ‘he knows or shall have reason to presume that his expression gravely disturbs public order or is capable of doing so’. Not required was that the expression actually caused public disorder.

Opposition parties,³¹ journalists and academics were highly critical of the proposal and the motives behind it; they argued that it would severely restrict freedom of expression, create legal uncertainty and target Muslims disproportionately.³² Brants argued that

28 Voorstel van Wet tot wijziging van het Wetboek van Strafrecht in verband met de strafbaarstelling van de verheerlijking, vergoelijking, bagatellisering en ontkenning van zeer ernstige misdrijven en ontzetting van de uitoefening van bepaalde beroepen, 12 juli 2005.

29 *Kamerstukken II* 2007-08, 31422 (R1953), nr. 3, p. 10.

30 Voorstel van Wet tot wijziging van het Wetboek van Strafrecht in verband met de strafbaarstelling van de verheerlijking, vergoelijking, bagatellisering en ontkenning van zeer ernstige misdrijven en ontzetting van de uitoefening van bepaalde beroepen – Memorie van toelichting, 12 juli 2005, p. 7.

31 As the Dutch political system leads to coalition governments, opposition and government parties vary. From 2002-2007 and from 2010 on the coalitions always consisted of at least the Christian Democrats (CDA) and the Conservative Liberals (VVD) with smaller parties; from 2007-2010 the Christian Democrats were in a coalition with Labour (PvdA) and the Christian Union (CU).

32 Brants 2007; Dommering 2005; Vennix 2005.

[w]hat the proposed Dutch offence of glorification appears to be about is not so much terrorism, as social unrest and antagonism in a society that feels threatened by the multicultural phenomenon it has become, and has lost the way in recovering, let alone maintaining, any sense of cohesion and inclusiveness (...) [I]t has a message for the very groups that the government would protect from radicalisation by “integrating” them into a “better”, more liberal culture: in the new “shared” framework of social norms, some things may not be said because they attack the moral fibre of society.³³

Eventually, the government never officially introduced a bill to Parliament. During the consultation process, too many doubts had been raised about the relevance of the bill, its implications for the principle of legality and its compliance with the ECHR.³⁴ In 2008 the government was again confronted with the issue of “glorifying terrorism”, when it had to incorporate the EU Framework Decision amending the Framework Decision on the Prevention of Terrorism (see chapter IV). This instrument obliges Member States to criminalise certain forms of indirect incitement to terrorism. This time the government took the position that no new legislation was necessary to comply with its international obligations: the general legal prohibition of “incitement to criminal acts” (art. 131 Criminal Code) would suffice to deal with such speech.³⁵ Though the government’s position on this particular issue has changed, the idea of banning radical or fundamentalist expressions has not disappeared. Shortly after the “glorifying terrorism” proposal, members of Mohammed Bouyeri’s group *Hofstad-groep* were prosecuted under common hate speech law (art. 137d) for their radical expressions. Parliamentarians suggested that the text of article 137d should be reconsidered in order to make it more suitable for dealing with terrorist speech and argued that the judiciary interpreted article 137c too restrictively in the field of religiously motivated speech.³⁶ In policy documents there has also been attention for legal measures against radicals who express opposition to democratic principles.³⁷ Furthermore, a debate about transmission of the Lebanese TV-station Al-Manar, which was said to express the opinions of Hezbollah, led the government to push for a change in media law to ban “hate-preaching” TV stations.³⁸ Finally, Minister of Justice Donner received much criticism for his statement that it is theoretically possible to

33 Brants 2007.

34 *Kamerstukken II* 2007-08, 31422 (R1953), nr. 3, p. 10.

35 *Kamerstukken II* 2007-08, 31422 (R1953), nr. 3.

36 *Kamerstukken II* 2006-07, 30449, nr. 1 (Alles van waarde is weerbaar; vrijheid is een verantwoordelijkheid).

37 See for instance the Nota Radicalisme en Radicalisering, *Kamerstukken II* 2005-06, 29754, nr. 30, p. 14 about the use of article 2:20 BW to counter radical organisations. See also the memorandum ‘Grondrechten in een Pluriforme Samenleving’ (Fundamental Rights in a Plural Society), where the government held that there are substantive-democratic limits to political opinion formation, referring to the ECHR: political parties that aim to achieve a theocratic system can be prohibited as soon as they form a real threat to democracy. See *Kamerstukken II* 2003-04, 29614, nr. 2, p. 8 and *Kamerstukken II*, 2004-2005, 29754, no. 5, at 2-3.

38 *Kamerstukken II* 2004-05, 29 854, nr. 7; *Handelingen II* 2004-05, nr. 22, p. 1332; changed Media Act Stb 583, 30 December 2008; Hins 2008.

enact sharia law in Dutch democracy, should a majority of the people so wish. Apparently, there is a widespread fear that radical minorities will one day overrule the democratic system.

2.2 Legislative proposals: genocide denial

The idea of tackling the trivialisation of grave crimes returned in a different form in 2006. This time the political party ChristenUnie (Christian Union, CU) proposed to criminalise *denying or grossly trivialising, approving or justifying genocide*.³⁹ The proposal originated in a request adopted by Parliament in 2004 which recognised the Armenian genocide.⁴⁰ The CU's proposal could not count on much enthusiasm with the government and other political parties at that time; genocide denial was considered already regulated by existing hate speech offences. As to denial of the Holocaust, the courts have ruled that this can already fall under article 137c, although is not an explicit criminal offence.⁴¹ When ratifying the Cybercrime Protocol, the government also argued that new criminal offences were not necessary because denying (etc.) genocide, crimes against humanity and war crimes is already a criminal offence under article 137c-d if it is directed at one of the protected groups.⁴²

The CU's proposal gained new impetus with the EU Framework Decision on Combating Racism and Xenophobia in 2008, though the party toned the bill down from criminalising denial (etc.) of *genocide and crimes against humanity* to denial (etc.) of *genocide* only.⁴³ The proposal connects with the existing hate speech offences of article 137c-d: it requires an intention to incite to hatred, discrimination or violence or to insult on account of race, religion, gender, sexual orientation or handicap. According to the drafters it is time to make genocide denial an explicit offence, as such expressions are mostly a deliberate distortion of the facts expressly intended to insult, discriminate or marginalise the victims or survivors. As such, it causes deep offence to them.⁴⁴ They furthermore argue that democracy must defend itself against such antidemocratic expressions, since they may lead to a climate that threatens fundamental rights. Genocide is often denied for the purpose of provoking discussion of extremist viewpoints, and may thus lead to a climate in which discrimination becomes normal, so the argument goes: '[e]specially at a time when the *communis opinio* is that tricky issues must be openly discussed, we should make clear that such expressions are intolerable.'⁴⁵ The Second Chamber of Parliament is planning to vote for the bill in the

39 *Kamerstukken II* 2009-10, 30579, nr. 6. Original proposal: *Kamerstukken II* 2005-06, 30579, nr. 2.

40 'Straf ontkennen van genocide', *Trouw*, 12 December 2008.

41 HR 27 October 1987, NJ 1988, 538 m.nt. Van Veen; Gerechtshof Arnhem 4 June 1982, NJ 1983, 422.

42 Brief van de Minister van Buitenlandse Zaken, 2008-09, 31838 (R1874), A en nr. 1, p. 7.

43 *Kamerstukken II* 2009-10, 30579, nr. 6.

44 *Kamerstukken II* 2005-06, 30579, nr. 2, p. 2-3.

45 *Kamerstukken II* 2005-06, 30579, nr. 2, p. 2-3.

course of 2011. Some pressing questions have been raised in Parliament, such as whether glorifying communism or slavery can also fall under the heading of the new offence and whether it covers atrocities that happened hundreds of years ago.⁴⁶

2.3 Legislative proposals: abolition of the law on blasphemy?

The offence of *blasphemy* has also attracted renewed attention from different sides. On the one hand, among some sections in Dutch society the polarising climate has led to a desire to maintain peace among different groups by strengthening legal measures against religious insults and blasphemy. On the other hand, there are many who argue that debate about religious matters should be as open as possible in order for different religious and non-religious groups to live together, and that special protection of “religious feelings” is inappropriate. Several opposition parties have thus called for abolition of article 147.⁴⁷ In 2007, after having issued a study on blasphemy and insult on the grounds of religion, the Christian Democrat/Labour government took the position that the law on blasphemy should be maintained.⁴⁸

The issue entered the debate again when, in 2008, a secret letter by the Minister of Justice was leaked in which a *broadening* of the law on blasphemy was proposed. In fact, in subsequent parliamentary debates it appeared that a majority was in favour of eliminating article 147. Therefore the Minister came up with a new proposal in which article 147 would be abolished, but article 137c would be widened to include “indirect insult”.⁴⁹ This proposal would not *change* the law, according to the Minister, but would only *elucidate* that expressions which insult a common characteristic of a group – instead of the people belonging to that group – were also criminal. This could, for instance, include expressions that target religious figures. Many were sceptical about this “compromise” proposal; it is doubtful whether it would indeed only elucidate the law or also broaden it, since case law was not clear on the question whether indirect insult fell under article 137c. In the end, the Minister’s plans were inhibited by a Supreme Court judgment in March 2009, which ruled that article 137c did not target defamation of religions (see par. VI.7.1.4).⁵⁰ The government thus decided not to proceed with the amendment of article 137c.⁵¹

46 *Kamerstukken II* 2009-10, 30579, nr. 8, p. 2.

47 *Kamerstukken II* 2009-10, 32203, nr. 2 (11 november 2009); Motie van het lid Van der Laan c.s., *Kamerstukken II* 2004-05, 29800 VI, nr. 52.

48 See Press Statement Ministry of Justice, 12 October 2007.

49 Minister van Justitie, Toegezegde brief Algemeen Overleg Godslastering, 31 October 2008.

50 HR 10 March 2009, *NJ* 2010, 19 m.nt. Mevis.

51 Brief Minister van Justitie, 29 mei 2009: Kabinetsvoornemen inzake godslastering en beantwoording kamervragen over het arrest van de Hoge Raad van 10 maart jl.

By 2010, a bill to *abolish* article 147 was about to be furthered in Parliament and there seemed to be a majority for it.⁵² However, it is questionable whether the abolition of article 147 will receive enough Parliamentary support in the years to come, considering the current semi-dependence of the minority government on fundamentalist Christian party SGP.

2.4 Legislative proposals: abolishing articles 137c-d

A few months after the Court of Appeal's ruling that Geert Wilders should be prosecuted (see par. VI.7.1.6), MPs from the liberal political party VVD proposed to abolish article 137c altogether, to remove "incitement to hatred" from article 137d and to narrow down the meaning of "incitement to discrimination".⁵³ According to these MPs, freedom of expression was under serious pressure in the Netherlands as the authorities tended to narrow down free speech in an increasingly polarised climate. Moreover, radical elements in Islam were said to lead people to self-censorship. The proposal has not been furthered yet: several political parties considered it too far-reaching, whereas many people appeared shocked to hear that such a law would also have the effect that Holocaust denial would no longer be a criminal offence.

2.5 Developments in prosecution policy

The policy of the Dutch public prosecution service on hate speech offences has come under discussion too. The prosecution service has discretion in deciding which cases to prosecute – in this process, it takes into account the feasibility of a conviction and policy considerations. Yet in the field of "discrimination offences" – a category that includes articles 137c-e – the prosecution has limited its discretion. Whereas hate speech laws were adopted in the 1970s out of the conviction that the prosecution would be very prudent in using them, in the 1980s the idea emerged that hate speech offences must be prosecuted effectively. Later, the head of public prosecution service started drafting policy instructions in the field of discrimination offences and in 1999 the first Discrimination Directive came into force.⁵⁴ This directive stated that the prosecution shall, in principle, always prosecute a suspect of hate speech offences (article 137c-e) if the case has a reasonable chance to succeed ("technically appropriate"). The prosecution could still dismiss a case, but only in exceptional situations. The underlying idea was that insufficient maintenance of the law can have a negative effect and that prosecution can set an example to others: effective use of the law can greatly contribute to marking the norm of non-discrimination.⁵⁵ The renewed

52 *Kamerstukken II* 2009-10, 32203, nr. 2.

53 Elsevier, 27 May 2009, <www.elsevier.nl/web/10235199/Artikel/Opzet-VVD-voor-wijzigingen-wet-vrijheid-van-meningsuiting.htm>.

54 Aanwijzing Discriminatie Nr. 1999A008, Str. 1999, nr. 61, p. 18 e.v.

55 Aanwijzing Discriminatie Nr. 1999A008, Str. 1999, nr. 61, p. 18 e.v., at 1.

Discrimination Directive in 2003 added that in discrimination cases ‘expediency of prosecution is, in principle, a given’.⁵⁶ Therefore dismissal of a case for policy reasons (“beleidssepot”) should be an exception. The principles set out above are largely repeated in the newest Discrimination Directive of 2007, which will stay in force until 30 November 2011.⁵⁷ Like the previous directives, it makes clear that the risk of “creating free speech martyrs” or “exploitation of one’s forum” are not valid arguments for not prosecuting. The Arnhem Court of Appeal has judged that victims or interest parties cannot derive a ‘right to have someone prosecuted’ from the Directive – it is only binding on the public prosecution service (and the police).⁵⁸ The courts have a marginal role in assessing whether the prosecution has lived up to its own directive, as it still allows for exceptions to the rule.

The drawbacks of this strict policy have come to light in a strident debate about the limits of freedom of expression, which has been raging in the Netherlands for a decade now. In 2005, Parliament still drafted a broadly supported request to the government to make sure that incitement to hatred, racism and discrimination were prosecuted and sentenced more intensively;⁵⁹ however, these ideas seemed completely changed a few years later. In 2008 cartoonist Gregorius Nekschot (a pseudonym) was arrested for publishing several harsh cartoons about Muslims and coloured people. A heated political and public debate about the necessity of his arrest followed.⁶⁰ Two years later the prosecution announced that the case would be dismissed for several reasons (the suspect had already spent a night in prison; the cartoons had long been removed from the internet), though it did consider the cartoons to be indictable as hate speech.⁶¹ There have also been discussions about prosecution policy in the Danish cartoons affair, especially with regard to the painting of the prophet Muhammad with a bomb in his turban. When Geert Wilders and the TV programme NOVA showed the cartoons on their website and on television respectively, several persons complained to the police. The public prosecutor decided not to press charges; it considered the cartoons as falling outside the scope of article 137c and 137d. According to the prosecution service ‘the cartoons are about the prophet Mohammed, but do not say anything about the group “Muslims”’.⁶² Earlier expressions by former MP Ayaan Hirsi Ali, who called Islam ‘backward, when measured against certain standards’ also led to many complaints but not to prosecution.⁶³ An even more heated debate followed when, in 2009, the prosecution declined to prosecute Geert Wilders (who had himself signed the abovementioned request to prosecute suspects of hate speech offences more

56 Aanwijzing Discriminatie Nr. 2003A005, Stcr. 27 March 2003, nr. 61, p. 8 e.v.

57 Aanwijzing Discriminatie Nr. 2007A010, Stcr. 30 November 2007, nr. 233, p. 10 e.v.

58 Gerechtshof Arnhem 19 August 2010, LJN BN4204, par. 3.1.1.2.

59 Motie van het lid Bos c.s., 9 February 2005, *Kamerstukken II* 2004-05, 29754, nr. 7.

60 Brief Minister van Justitie over Gregorius Nekschot, 29 May 2008.

61 Press statement Public Prosecution Service, www.om.nl, 21 September 2010.

62 Press statement Public Prosecution Service, www.om.nl, 18 August 2009.

63 Van Stokkom, Sackers & Wils 2006, p. 5.

expeditiously) and the Amsterdam Court of Appeal subsequently forced the prosecution to proceed with the case (see a more elaborate overview of the Wilders case in par. VI.7.1.6).

2.6 Socio-political background

The developments sketched here, which started around the turn of the century, must be placed against the socio-political background of Dutch society. Until the 1990s, decency, politeness and self-control were dominant in Dutch public debate on immigration and multiculturalism. Robust criticism of multicultural society was often regarded as racism and led to moral outrage. In the 1990s, liberal party leader Bolkestein initiated a beginning of change when he launched a national debate proclaiming that the integration of minorities should be handled “with guts”. He was highly critical of the “permissive” Dutch policies on immigration, which “hugged immigrants to death” and created a “culture of pity”.⁶⁴ This marked the beginning of a new genre of public discourse: “new realism”, as Prins has set out.⁶⁵ Here, authors present themselves as persons who dare to face formerly hidden truths and who speak for the “ordinary people”. Moreover, this discourse resounds with strong resistance to the “leftist elite”, who are accused of having covered up the debate on minorities with their “political correctness”. While Bolkestein was initially much criticised, his opinions and style of discourse recurred strongly in the years to come. The real shift in public discourse, however, started with the rise of populist politician Pim Fortuyn in 2001.

With his harsh statements about Islam and immigration of Muslims – for instance, calling Islam a “backward culture” – Fortuyn appealed to feelings that already existed among certain parts of the population but that had so far been suppressed by the taboo on critical debate about multiculturalism. After the 9/11 attacks, those taboos quickly broke down. Fortuyn was successful in combining “ordinary” resentment of the presence of immigrants with an ‘elitist appeal to the values of the Enlightenment that were perceived to be threatened by a backward, unenlightened Muslims.’⁶⁶ Thus Fortuyn’s arguments were also acceptable to – and shared by – parts of the “intelligentsia”. The argument that Islamic “ideology” threatens “our” liberal values, such as gender equality and acceptance of homosexuality, made this case very different from the traditional racist discourse of the far right that the Netherlands had seen before, adding much to its popularity. This was enhanced by the fact that anti-Islam discourse draws upon memories of fascism from World War II, which have had a huge influence in the Netherlands.⁶⁷ Today, Islam is portrayed as the new enemy

⁶⁴ Prins 2002.

⁶⁵ Prins 2002, p. 369.

⁶⁶ Van Bruinessen 2006, p. 4.

⁶⁷ Eyerman 2008, p. 137.

against which “our liberal society” has to defend itself, before “our long-cherished values” are overthrown. Moreover, after 9/11, real-life social conflicts – over the years many immigrants had come to live in urban working class neighbourhoods, which has, at times, led to conflicts with the native Dutch inhabitants – have become intermingled with fears of terrorism: this gave rise to the notion that Muslims are collectively responsible for the WTC attacks. Accordingly, “[n]ew realist” columnists and politicians (...) have persuaded ordinary, somewhat prejudiced people that their prejudices (and fears) are justified and that they can express them without fear.’⁶⁸

As a result, ‘since May 2002, multiculturalism is self-evidently taken as a hopelessly outmoded and politically disastrous ideology in the media.’⁶⁹ The new political correctness became that of national identity, “Dutch values” and resistance to the “leftist elite” who stand accused of having caused the “multiculturalist mess”. With Pim Fortuyn’s famous assertion that ‘I say what I think and I do what I say’, the “new realist” discourse turned into “hyperrealism”, in which frankness was practised for its own sake.⁷⁰ This also had its bearing on the debate on hate speech law, which greatly intensified along with the debate on multiculturalism. One of the most well-known proposals Fortuyn made was to abolish the right to non-discrimination from the Constitution; with this he meant to make clear that he found the right to freedom of expression of a higher order than the right of minorities to be protected against hate speech. After the political murder of Fortuyn in 2002 by a radical Dutch left-wing activist, it became clear that, in the view of Fortuyn’s supporters, freedom of expression was not absolute after all: they accused the traditional political parties – especially those on the left – of having demonised him as an extreme right figure, thus creating a climate in which the killing could take place. Some sympathisers went to court to complain about the hate speech directed at Fortuyn, though unsuccessfully.⁷¹

The climate in Dutch society became particularly tense when, in November 2004, the well-known film director and columnist Theo van Gogh was brutally killed by radical Islamist Mohammed Bouyeri, who left a note on his body with a death threat towards Ayaan Hirsi Ali. She was forced to go into hiding. Together with Van Gogh, Hirsi Ali had made the short film “Submission” – a film that showed Qu’ran passages written upon the bodies of abused women with the goal of drawing attention to the abuse of women within Islamic families. The film was the direct motive for Bouyeri’s act, although his radicalisation process had already been going on for longer. ‘The slaughter confronted the country with a new phenomenon: the home-grown Islamist terrorist. The country lost its collective temper and panicked.’⁷² In the months

68 Van Bruinessen 2006, p. 17.

69 Prins 2002, p. 377.

70 Prins 2002, p. 375-377.

71 Gerechtshof ’s-Gravenhage, 19 May 2003, *NJ* 2003, 382.

72 Buijs 2009, p. 422.

following the murder of Van Gogh, there was a sudden dramatic increase in violent incidents against Muslims and religious places.⁷³ Some politicians declared the country “at war” with radical Islam.

The murder was viewed as an attack not only on Van Gogh, but also on the right to freedom of expression. Theo van Gogh was well-known for his polemic columns with coarse language directed towards various groups and individuals, particularly towards religious groups – Muslims, Jews and Christians alike. Rather than in any political and/or far-right tradition, Van Gogh’s writings could be placed in the tradition of the Amsterdam art world, where the breaking of taboos and the wish to “shake up the dull Dutch society” were important features.⁷⁴ Kennedy notes that Van Gogh’s polemic was not so much borne out of a hatred of Islam or other religions, but rather was the expression of ‘a new public culture in which public insults became a legitimate expression of one’s own freedom’.⁷⁵ After the murder, the idea gained ground that freedom of speech was under threat from radical elements in Islam, who used threats and even violence to silence those who insulted their religion. Intolerant currents within minorities came to the forefront; like the Rushdie affair, the murder brought up the confrontation between radical and reformist Islam, being ‘part of a growing chain of confrontation and intimidation’.⁷⁶ One could say that the meaning of Van Gogh’s murder was partly comparable to what the Rushdie/Satanic Verses affair had meant for England – however, the consequences were probably felt even more strongly in the previously “dull” Netherlands. Eyerman views the murder as a “social drama”, an occurrence that shocked “root paradigms” in Dutch society, such as the way in which fundamental rights are dealt with.⁷⁷

After the dramatic rise and fall of Fortuyn’s party in Parliament, his anti-multiculturalism and anti-establishment role was taken over by new populist MPs Rita Verdonk and particularly Geert Wilders. Public discourse about multiculturalism radicalised even further with the rise of Wilders; after he left the liberal party in 2004 to start his own Freedom Party (PVV), he has achieved great popularity with his anti-Islam rhetoric – including expressions such as ‘no more Muslim immigrants into the Netherlands’ and comparisons of the Qu’ran with Hitler’s *Mein Kampf*. Robust discourse about immigration has thus been ‘self-perpetuating and self-accelerating at a pace where yesterday’s most outrageous taboo-breaking statement already sounds tame today.’⁷⁸ Wilders is not connected to the traditional far-right movements from the 1980s and 1990s: in line with the Fortuyn movement he condemns racism, anti-

73 Van Donselaar & Rodrigues 2004.

74 Eyerman 2008, p. 10.

75 Kennedy 2009, p. 233.

76 Eyerman 2008, p. 143.

77 Eyerman 2008, p. 29.

78 Van Bruinessen 2006, p. 16-17.

semitism and homophobia. Rather, he has coarsened the “liberal” rhetoric about preservation of long-cherished values such as gender equality and freedom of expression that are allegedly under threat from “the Islamic culture”. Wilders’ political proposals constitute severe restrictions of Muslims’ fundamental rights, including freedom of expression and religion (prohibiting the Qu’ran) and non-discrimination (a stop to immigration of Muslims). As of 2010, Wilders’ PVV supports the minority coalition government’s agreement without having ministerial representation – thus giving the party an important role in the balance of power in Dutch government.

In the “hysterical” public debate about multicultural society, some of the basic requirements of democratic debate are regularly violated, as Tillie argues.⁷⁹ Instead of conducting a democratic debate, participants on all sides tend to exclude each other before a real discussion has even started. For instance, the words “politically correct” for pro-immigrant viewpoints or the word “racist” for Wilders’ supporters are used to put aside the other party without having to engage in a serious debate. The incidence of threats has increased.⁸⁰ Especially on the internet, polarisation is extreme. A harsh style of discourse has also been taken up by certain sections of minority groups, who express in strong terms what they think is wrong with Dutch society; among them Islamic preacher El Moumni who was acquitted for his remark that homosexuality is a contagious disease that is harmful for Dutch society.⁸¹

3 HATE SPEECH AND FREEDOM OF EXPRESSION UP TO THE 1940S

The following paragraphs take a step back in time to see how hate speech bans have developed in the context of a changing discourse. The first proper hate speech bans in the Netherlands were adopted in the 1930s. Before dealing with this period, this paragraph first delves into the right to freedom of expression in the Dutch Constitution in order to get to know some of the ideas behind this right.

3.1 The Constitution: freedom of expression

Freedom of expression is incorporated in article 7 of the Constitution. The first paragraph reads as follows:

No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.

⁷⁹ Tillie 2008.

⁸⁰ Bovenkerk 2005.

⁸¹ Prins 2002, p. 375.

However, the Constitution only plays a limited role in the law on hate speech, because constitutional judicial review of Parliamentary legislation is not allowed (article 120 Constitution). Judicial review on the basis of the European Convention on Human Rights is allowed. Article 10 ECHR has therefore had more influence on Dutch case law than article 7 of the Constitution.

The right to freedom of expression as set out above was already adopted in the 1848 Constitution; it has never changed since. The text is largely equal to an even older provision: article 227 from the 1815 Constitution. This document was adopted at a time when, during its occupation of the Netherlands, the Napoleonic regime had just caused great aversion to prior censorship – something that can still be seen in the current article 7. The first rationale for freedom of expression at that time was its “formative” function: article 227 was adopted under the heading of “Education” and dealt with freedom of the press as ‘an effective means towards expansion of knowledge and progress of enlightenment’. It was doubtful whether the right was also intended to protect speech which did not lead to the “expansion of knowledge”.⁸² The proposal that led to its adoption, however, also emphasised a second rationale: the importance of free speech to democracy. ‘Freedom of the press is one of the first needs of a liberal government, which does not eschew to submit its actions to public judgment, but instead wishes to be informed about existing wrongs and abuses, which would otherwise perhaps be hidden or disguised.’⁸³ This democratic rationale was in line with the development of the right to freedom of expression in the Netherlands, coming about as a reaction to censorship of opposition against the church and later the state authorities.⁸⁴

After the adoption of the 1815 Constitution, the severe repression of dissidents through criminal law still remained common practice; there were broad prohibitions of seditious speech and stiff sentences against those violating the law. Repression of dissident expressions by the Northern Netherlands was so harsh that when the Southern states seceded to form Belgium, freedom of expression became a main theme in the “ideology of liberty” that emerged there as a result of previous Dutch suppression.⁸⁵ In 1848, the right to freedom of expression was transferred from article 227 in the chapter on “Education” to article 7 in the first chapter of the Constitution, stressing its broader function. Thereafter, repressive criminal laws were gradually abolished or used less frequently.⁸⁶ Nevertheless, the ideas that freedom of the press

82 Boukema 1969, p. 121.

83 De Meij 1989, p. 16.

84 Peters 1981, p. 3.

85 Vrieling 2010, p. 23.

86 De Meij 1989, p. 17.

is not necessarily a good thing and that society should be protected against abuse of free speech remained recurring themes among the Dutch elite.⁸⁷

Article 7 of the Constitution focuses mainly on preventive measures, but the passage ‘without prejudice to the responsibility of every person under the law’ implies that the legislature (government with Parliament) can set restrictions afterwards, including criminal law measures.⁸⁸ The literal text does not set limits to criminal law restrictions under article 7. As a consequence of the prohibition of judicial review, those limits have never been defined in case law either. Nevertheless, commentators suggest that article 7 does not give *carte blanche* to criminal law measures that curb free speech – the legislature must always be prudent in restricting expressions.⁸⁹

3.2 New speech offences in the 1930s: group insult (article 137c)

It was during the 1930s, when fascism and anti-Semitism were rising, that the offence of “group insult” (article 137c) was adopted. The first version of article 137c was drafted in 1934 with the idea of preventing both conflict between groups in society and the targeting of vulnerable minorities. Since several European countries had experienced how negative imaging of groups had led to discrimination or even persecution, the Dutch government wanted to prevent this from happening in the Netherlands.⁹⁰ The government expected public order problems, as anti-Semitic speech had already led to rioting.⁹¹

The wish to restrict insulting expressions was driven by the principle of equality and ethical concerns about the discrimination of groups, as well as by public order motives. The explanatory report states that ‘systematically offending a part of the population inevitably leads to disturbance of public order and to riots, and this has already happened at a local level.’⁹² In the end, the desire to protect public order was the most important reason for adopting the offence of group insult.⁹³ The provisions were placed under the heading of public order offences, since the government found that the offences were primarily aimed at the protection of public order and only secondarily at protecting the honour and reputation of groups. Protection of individuals was only of indirect concern.⁹⁴

87 See Diemer 1937, p. 12; 22.

88 Though literal reading would suggest that this passage only relates to ‘prior permission’, it is commonly interpreted as relating to restrictive measures afterwards as well.

89 De Meij 1989, p. 134.

90 *Kamerstukken II* 1933-34, 237, nr. 3, p. 4.

91 Brants, Kool & Ringnalda 2007, p. 59.

92 *Kamerstukken II* 1933-34, 237, nr. 3, p. 4.

93 See Janssens & Nieuwenhuis 2005, p. 130; and Rosier 1997, p. 12.

94 *Kamerstukken II* 1933-34, 237, nr. 5, p. 16.

From the 1930s to the 1970s, article 137c was limited to *formal insult*: ‘expressing oneself in an insulting manner about a group in society’. The style and form of the words used was decisive; factual criticism was still allowed. According to the government, this made sure that the scope of freedom of expression was still large. The reason for prohibiting formal insult was that the *style* of expressions might lead to sentiments of hatred and rebellion.⁹⁵ Moreover, the government found that such speech was “always unnecessary” and obscured the objective formation of opinions.⁹⁶ In contrast to the current law, former article 137c was applicable to all kinds of groups within the Netherlands: there was – in principle – no limitation to the discrimination grounds.

Article 137c was adopted simultaneously with the offence of insult of public authority and public institutions (article 137a/b), the background of which was to curb communist expressions.⁹⁷ The provision on incitement to hatred/discrimination/violence (current article 137d) was only included in the 1970s. An “incitement to hatred” provision did exist for the Netherlands East Indies colony: the “public expression of feelings of animosity, hatred or contempt” against groups of the population was a criminal offence there. In reaction to the question by MPs why a similar article was not adopted in the Netherlands, the Minister of Justice answered that such offences ‘which can be explained by the particular needs of a colonial society’, were surely not appropriate to adopt in Dutch law.⁹⁸ In fact, the offence of 137c already dealt with the problem of “negative imaging”.

Van Bemmelen commented in the 1930s that, on the one hand, the new offences would restrict freedom of expression and “healthy self-criticism”: ‘we have forgotten how much struggle it has cost in other countries in the world before a cat could be called a cat!’⁹⁹ On the other hand, he did not consider it too problematic to curb expressions with an insulting form, since the possibility of expressing criticism in a non-insulting form continued to exist. He placed the new offences in the light of the changing political/legal climate in the Netherlands: while the end of the 19th Century was characterised by liberalism, the first decades of the 20th saw a revival of restrictions of individual liberties for the sake of the collectivity.

From the 1930s to the 1960s, the offences of articles 137c/d were not often used in practice: they led to 13 convictions between 1954 and 1967.¹⁰⁰ The courts’ focus in interpreting article 137c was naturally on the *form* of expressions. According to the

95 *Handelingen II* 1933-34, 2 mei 1934, p. 1852R.

96 *Kamerstukken II* 1933-34, 237, nr. 5, p. 15.

97 Rosier 1997, p. 12.

98 *Kamerstukken II* 1933-34, 237, nr. 5, p. 16.

99 Van Bemmelen 1934.

100 Swart 1970, p. 75.

courts, 137c prohibited those expressions which ‘attack the honour and good reputation of group members in a gratuitously offensive manner’.¹⁰¹ For instance, a conviction was upheld for publishing a piece which accused international Jewry of ‘playing the eternal role of parasite to labour, even in times of unemployment’: the Court found that the word “parasite” had such a negative connotation in daily language that it amounted to group insult.¹⁰²

3.3 New speech offences in the 1930s: blasphemy (article 147)

Another offence adopted in the 1930s was article 147 CC on blasphemy, which still exists in the same form. Blasphemy was not yet included in the original Criminal Code of 1886; at that time, the liberal Minister of Justice Modderman judged that criminal law was not necessary or adequate to protect the interests of God. The issue reentered the debate in the 1930s, following the spread of anti-Christian publications by communist and atheist groups. The authorities initially appeared unwilling to adopt such an offence, since it touched upon the delicate relationship between government and religion – government should not enter the “battle of ideas”.¹⁰³ However, when anti-religious expressions became a more systematic phenomenon, the authorities reconsidered this position.

The current offence was created in 1932 and placed under “public order offences”, and the protection of public order was the first rationale for the offence. This notion was interpreted broadly: public order related to all “spheres of freedom in public life” and included the “collective tranquility of society”.¹⁰⁴ The government held that the offence only dealt with expressions uttered in a scornful *manner*; it was not intended to protect the interests of religion as such or to restrict debate on religious matters.¹⁰⁵ The second rationale for article 147 was protecting people’s religious feelings against insult. Actually, this can be regarded as a species of the “public order” rationale: the government considered it a fundamental requirement of a well-functioning society to protect the feelings of the majority of the people against injury.¹⁰⁶ Plooy points to a third rationale: protecting freedom of religion.¹⁰⁷ This is related to the other motives in the sense that protection of people’s religious feelings was regarded as a component of freedom of religion.¹⁰⁸ The protection of religion as such from offence or insult is clearly not one of the rationales behind art. 147 – only blasphemy which is scornful

101 HR 29 April 1940, NJ 1940, 831. See also HR 17 April 1939, NJ 1939, 927 (‘Indische planters’).

102 HR 19 February 1940, NJ 1940, 754.

103 Plooy 1986, p. 28.

104 Plooy 1986, p. 97; Van Stokkom, Sackers & Wils 2006, p. 55.

105 Van Stokkom, Sackers & Wils 2006, p. 55.

106 Plooy 1986, p. 97.

107 Plooy 1986, p. 33 en 98.

108 *Handelingen II* 1931-32, p. 2630.

and which gravely insults people's elementary religious feelings is punishable.¹⁰⁹ The rationale was not 'you shall honour God' but rather 'love your neighbour'.¹¹⁰ The government argued that the new offence would hardly restrict freedom of expression, considering the difference between criminalising *content* and *form/manner*. In practice, the law was actually used to curb politically motivated expressions that were critical of religion; in 1934 the Dordrecht Court convicted a socialist for expressing during a public speech that 'a god that invented tuberculosis, is not a god but a criminal'.¹¹¹ Nevertheless, prosecutions under article 147 were already very scarce at that time.

3.4 Freedom of expression and public debate around the 1930s

The adoption of new speech offences in the 1930s was not accompanied by a fundamental debate about the necessity of restrictions of the Constitutional right to freedom of expression.¹¹² On the one hand, this can be traced back to the pragmatic, non-principled way of dealing with constitutional issues: at one point the government even denied that article 7 Constitution set any restrictions on the adoption of new criminal laws, arguing that it only contained rules for preventive measures.¹¹³ On the other hand, it has to do with the role of freedom of expression in political culture. Although the Dutch tend to take much pride in their enlightened tradition of freedom of speech and tolerance, in the heydays of pillarisation free speech did not play such an important role at all. This is also illustrated by the strict rules for broadcasting that emerged during that period: any programme that could possibly "hurt the feelings of groups in society" or that was "too political", could be banned prior to broadcast. The supervising committee thus prohibited thousands of programmes, including lectures about Spinoza ("too atheistic") and Erasmus ("ridiculising monks").¹¹⁴

The scope of Dutch public debate was highly influenced by the system of "pillarisation" that originated in 1917 and continued up to the 1960s. During those decades Dutch society was strictly divided into different subcultures or "pillars" (Catholic, Protestant, socialist, liberal/general), which influenced almost every aspect of people's lives: the pillars had their own political parties, media of communication, clubs and societies etcetera. The central government actively supported such associations. The pillars' leaders not only controlled political parties but also pulled the strings in the pillars' media of communication. Broadcasting time was divided among those pillars through their respective organisations; newspapers also adhered to particular pillars. Competition in the newspapers was thus unknown in the Nether-

109 Van Stokkom, Sackers & Wils 2006, p. 55.

110 Prosecutor Abspoel, in: Fekkes 1968, p. 50.

111 Janssens & Nieuwenhuis 2005, p. 240.

112 Peters 1981, p. 191.

113 *Handelingen I* 1932-33, p. 43.

114 Van Vree 2006, p. 84.

lands: a great majority of the people tended to subscribe to the newspaper of their pillar. Accordingly, newspapers were never forced to report in a sensationalist manner to attract more readers: ‘a yellow press could never have flourished amidst these serious, devoted political and religious newspapers, relying on a readership that considered its paper as “a friend of the family”.’¹¹⁵ The press thought of itself as having a great responsibility in shaping public opinion and protecting it against irrational forces. The media functioned as a platform in the hands of the pillars’ elites to inform the members of their pillar about the ideas and plans they deemed relevant for them to know. Accordingly, ‘journalists informed within the parameters of an internalised or otherwise enforced sense of what was (not) to be done and (not) to be told.’¹¹⁶

The dominant attitude among the people was one of passive adherence and loyalty to their pillar. Nevertheless a certain “overlapping social cohesion” was also in place: although the subcultures had very different interests, there was a strong conviction among the people that their leaders would do what is best in the general interest. In the end, people did agree on the most basic principles.¹¹⁷ Cohesion was also maintained by the fact that socio-economic divides largely cut across ideological divides and the other way around. Moreover, also cutting across the pillars was a public sphere ‘dominated by Christian and middle-class moral values, a culture in which, according to current historiography, there was virtually no room for dissenting voices, for raw emotions (...)’.¹¹⁸ Public debate and politics were characterised by a distant, legal atmosphere where bourgeois “stateliness” and a stiff attitude were expected of the elite.¹¹⁹ The media reinforced this: ‘[i]n spite of their diverging political and religious views, the five broadcasting corporations are equally committed to the dominant bourgeois culture pattern (...) Television thus acts as a reinforcement for the model of “civility” in social behaviour (...) Anyone holding or aspiring to a leading position in Dutch society (...) must acknowledge these standards [of civility: good manners, self-possession, sense of responsibility, MvN]. They have the effect of imbuing all conflict with some restraint, and of minimising open conflict.’¹²⁰ Popular sovereignty was not very highly regarded in Dutch political culture; Parliamentary affairs were conducted rather quietly among the élite, which remained at a large distance from the people. Politics were regarded as a form of “administration”.¹²¹ Most people were not really interested in or knowledgeable about politics; although they were quite active in community organisations, they entrusted Parliamentary politics to their pillars’

115 Van Vree 2006, at 80.

116 Brants & Van Praag 2006, p. 29.

117 Lijphart 1988, p. 86.

118 Van Vree 2006, p. 80.

119 Te Velde 2006, p. 18.

120 Bagley 1973, p. 20.

121 Te Velde 2006, at 24.

leaders. Generally there was not much fear of mass uprisings, except for the temporary revolutionary threat in 1918. In this quiet atmosphere, self-restraint in the exercise of freedom of expression was a stronger force against hateful speech than the criminal law.

3.5 Militant democracy in the 1930s

With the rise of fascism and anti-Semitism around Europe in the 1930s, the Netherlands were faced with the question of whether to defend democracy against this new enemy – to adopt substantive militant democracy measures or to cling to a more formal conception of democracy. During most of the 1930s (and before) a relativistic, value-neutral vision of democracy was widespread in the Netherlands. Neutrality was the keyword – even though in practice some laws did actually target particular opinions, as the Anti-Revolution Act from the 1920s illustrates.¹²² This act included several legal changes to deal with the increasing revolutionary threat that was also present in the Netherlands – in 1918, socialist party leader Troelstra vainly attempted to proclaim a socialist revolution in the Netherlands.¹²³ One of the laws the Anti-Revolution Act set out to change was article 131 CC: previously, only “incitement to any criminal offence” was prohibited, but from now on it also included a prohibition of “incitement to violent behaviour against the public authorities”. The new wording thus targeted more general incitement against the public authorities where no specific criminal offence was mentioned.¹²⁴ When left-wing parties in Parliament expressed their concern that the proposal would criminalise incitement to revolution, the government ascertained that propagating non-violent revolution would still be allowed – the law would only target *violent* attempts to overthrow the system.¹²⁵ The government thus reassured Parliamentarians that only antidemocratic *means* were prohibited, not antidemocratic *values*;¹²⁶ revolutionary political parties were allowed to pursue their goals within the democratic system, as long as they would obey to the rules of that system.

Article 131 Criminal Code: incitement

The oldest provision relevant to hate speech is that of general incitement to a criminal offence: article 131 Criminal Code has been part of the Dutch Criminal Code since its inception in 1886. It is placed under the heading “offences against public order”, and its rationale is the protection of public order against disturbance.

122 Stb. 1920, 619.

123 See Eskes 1988, p. 73.

124 *Handelingen I* 1919-20, p. 821; *Handelingen II* 1919-1920, p. 2742.

125 Eskes 1988, p. 75.

126 Eskes 1988, p. 75-77.

Article 131 Criminal Code is concerned with, as Janssens and Nieuwenhuis put it, “sowing wind in order to reap a storm”.¹²⁷ It reads that ‘any person who publicly – orally, in writing or by means of portrayal – incites to any criminal offence or to violent behaviour against the public authorities’ is liable to a maximum sentence of five years’ imprisonment or a fine not exceeding €19.000. Article 132 criminalises various means of publication, display etcetera of inciting writings or images. Article 131 is broader than article 137d in the sense that it criminalises incitement to any criminal offence (or violent behaviour against the public authorities, which will mostly constitute a criminal offence as well), while article 137d only criminalises *discriminatory* incitement – based on membership of a certain group. The term “incitement” in article 131 – in Dutch “opruïing” – means ‘arousing the thought of any act, attempting to create the opinion that this act is desirable or necessary and arousing the wish to call it into being’.¹²⁸ The aim of incitement is thus to convince others of the necessity to commit an offence. Whether the addressees feel incited as a result, or whether the act is subsequently carried out, is irrelevant.

The word “incitement” includes an element of intention. The minimum required is that the defendant has willingly and knowingly accepted the considerable risk that his expressions would arouse the wish to commit a criminal offence or violent behaviour against the authorities.¹²⁹ It is not an offence to criticise government or society more generally or to advance theories of a totally different society.¹³⁰ Article 131 only applies to incitement to particular criminal acts, though the criminal act that is incited does not have to be mentioned explicitly or in legal terms.¹³¹ Incitement can also be expressed covertly or implicitly: in two cases from 1916 and 1934, the Supreme Court ruled that expressing moral appraisal for a criminal act can constitute incitement under art. 131.¹³²

The criminalisation of “formal insult” in 1934 is another example of a measure that was presented as value-free, only targeting the form and not the contents of expressions – though the primary incentive behind its adoption was clearly to target anti-Semitic expressions. An exception to this neutrality was the law on proscription of political parties, the *Wet Vereniging en Vergadering* (WVV), which included a substantive element: a political party could be proscribed on the grounds that its goals “violated the rights of others”. However, this law was interpreted restrictively in practice.¹³³

127 Janssens & Nieuwenhuis 2005, p. 171.

128 Fokkens 2010, Aant. 1b.

129 Janssens & Nieuwenhuis 2005, p. 183. The Dutch ‘voorwaardelijk opzet’.

130 Noyon/Langemeijer/Rommelink 2010 (art. 131), Aant. 1b.

131 HR 17 November 1890, *W* 5967 en HR 11 May 1914, *NJ* 1914, 889.

132 HR 26 June 1916, *NJ* 1916, p. 703 (Dienstweigeringsmanifest); HR 5 February 1934, *NJ* 1934, p. 620.

See Noyon/Langemeijer/Rommelink 2010 (art. 131), Aant. 1b.

133 Eskes 1988, p. 50.

In the mid-1930s the German experience with national-socialism led to discussion of the conception of democracy: the fear was growing that antidemocratic parties would abolish democracy by legal means. Yet the government was wary of abandoning its traditional value-neutral stance, as appears from statements by several ministers: it did not wish to target particular ideas or groups, but only wanted to protect society against formal-revolutionary aspirations.¹³⁴ Instead, the government proposed further “neutral” measures to deal with the national-socialist threat. It became a criminal offence to wear uniforms or symbols of political endeavours; however, this new law targeted the wearing of uniforms in relation to *any* political goal so as to avoid losing its neutral image. The same was true for the proscription of party militias (*Wet op de Weerkrpsen*). The government found proscription of the national-socialist party NSB still too harsh a measure.

That the Dutch government still clung to a formal democracy conception may be explained by the lack of real threats to Dutch democracy until the end of the 1930s. The “quiet” Netherlands did not have a recent history of mass uprisings; neither was there a tradition of xenophobia against minorities. The history of welcoming religious minorities may have to do with this, although “tolerance” in fact often amounted to an indifferent attitude and sectarianism that was not devoid of stereotypes.¹³⁵ Dutch colonialism did not come with such obvious racist strands as in England, but rather was characterised by paternalism and a sense of cultural superiority: ‘a combination of dogmatism and authoritarianism with an unshakable belief in the rightness and value of the ethical teachings of Christianity’.¹³⁶ Racist and fascist groups also remained marginal in the Netherlands. In the 1930s most people condemned membership of the NSB, especially when the organisation started to become more and more oriented towards Germany and anti-Semitism.¹³⁷

4 AFTER THE WAR: THE 1950S

4.1 Militant democracy

Right after the horrors of the Second World War, the Dutch tended to reconsider these formal democracy views. Already in 1936, legal scholar Van den Bergh was one of the first to propagate a more substantive conception of democracy: he contended that the Netherlands should defend certain fundamental principles that underlie democracy – including freedom of religion and non-discrimination – because the core of democracy

¹³⁴ Eskes 1988, p. 153 (Colijn), p. 181 (Donner).

¹³⁵ Vuijsje 1986, p. 123.

¹³⁶ Bagley 1973, p. 39; 221.

¹³⁷ Van Donselaar 1991, p. 9.

lies in respect for every person's dignity rather than in the majority principle.¹³⁸ In the 1930s, newspapers and the government were critical of Van den Bergh's plea for a more militant democracy.¹³⁹ After the Second World War, this seemed to change. The idea of substantive militant democracy gained much popularity in the first years after the war, and criticism of the old "neutral" laws – including formal insult – appeared. As Pompe argued in 1945, '[t]here cannot be neutrality towards justice and truth. To abstain from a resolute position in this regard amounts to moral cowardice.'¹⁴⁰ In 1944, the government in exile adopted the London Decision E 102: it ruled that existing national-socialist and fascist parties and any party that would continue their activities, were automatically dissolved. This piece of legislation applied a substantive criterion to the proscription of organisations and thus introduced an aspect of "streitbare Demokratie" into Dutch law just after WWII.¹⁴¹ This robust idea of defending the nation against all "evils in society", which was visible immediately after the war, was already relative in the 1950s. The views about criminalising *ideas* became more nuanced – as such, the renewed attention for militant democracy did not translate into much new legislation: for instance, plans to amend the constitutional rules on political parties failed. Eventually the idea seemed to lose its appeal.

Yet when some former national-socialists took the initiative to reinstate the NSB after the war – the National European Social Movement (NESB) was set up in 1953 by a former SS-member and a former NSB-member – the government was quick to react. Months after the beginning of the movement, the public prosecutor started proceedings against its leaders for participating in an illegal organisation as meant by the London decision.¹⁴² The Court of Appeal, however, judged that there was no evidence of the NESB being a continuation of the NSB, as they did not advocate racial discrimination. The Supreme Court then set an important precedent: it ruled that the defendants could be convicted because the "actual activity" rather than only the literal goals of the organisation should be taken into account.¹⁴³ Convicting the NESB for its literal goals would have been more difficult, because the organisation deliberately tried to cover its national-socialist character by using terms such as "national forces", "community of peoples" and "family and health policy" instead of explicitly setting out a racial superiority doctrine.

138 Van den Bergh 1936.

139 Eskes 1988, p. 253-255.

140 Pompe 1945, p. 59.

141 Eskes 1988, p. 365.

142 See Van Donselaar 1991.

143 Van Donselaar 1991, p. 217.

4.2 Public debate and minorities after the war

Besides triggering a modest militant democracy, the Second World War also had wider implications for the way the Netherlands were to deal with minorities. The relative innocence with which the Dutch used to confront minority groups suddenly came to an end as a result of feelings of shame and guilt for their inability to prevent the massive deportations happening before their eyes.¹⁴⁴ The resulting trauma led to a certain reluctance in confronting ethnic minority groups and to a strong force against racism. A clear image of good and evil had been created, and society – guided by the ruling elite – was quick to condemn adverse treatment of minorities. Countering racism and fascism (often put together in Dutch postwar discourse) became a cornerstone of Dutch democracy, and this affected the way new minorities were to be treated in the decades to come. Ethnic minorities came to be viewed as vulnerable groups in need of assistance; critical debate about minorities could not take place out in the open.

This taboo on critically discussing immigration issues was also related to the “decent” nature of Dutch public debate and the tradition of pillarisation,¹⁴⁵ as set out in par. VI.3.4. In the pillarised political system – which was still prevalent in the 1950s and the first half of the 1960s – the Dutch elites had developed the practice of accommodation: channeling conflicts in a decent, quiet manner outside of the eyes of the public. The political system of proportional representation with its coalition governments made sure that power was always divided between several groups, aligned to the pillars. Since the pillars’ leaders had to find some way of governing the country and keeping stability in the democratic system despite their differences, they cooperated within the political system. Lijphart has characterised this as a “con-sociational democracy”: a democratic system with a highly fragmented political culture, which could easily lead to instability, but which is turned into a stable system by rival leaders who are aware of the risks involved.¹⁴⁶ It was important to seek consensus, as interests differed greatly. The Dutch system was not based on competition but on cooperation. This implied that certain sensitive issues were declared taboo in political debate, because bringing them up would divide the volatile consensus that existed. The nationwide standard of “civility” and restraint, to which leaders of all denominations ascribed, helped to avoid conflict.¹⁴⁷ The practice of consensus-seeking among rival elites was regulated by the informal “rules of the game”. Politics were seen as “business” aimed at achieving results, where sensitive issues were “depoliticised”.¹⁴⁸ Consensus-seeking took place behind closed doors; an

144 Vuijsje 1986, p. 8.

145 See Bagley 1973, p. 141.

146 Lijphart 1968, p. 17-18.

147 Bagley 1973, p. 20.

148 Lijphart 1988, p. 125-126.

open Parliamentary debate was only a final step in decision making. As a result, an information gap existed between elite and mass which the media consolidated.

5 THE 1960S/70S

5.1 Depillarisation and polarisation

In the 1960s, processes such as deconfessionalisation and individualisation led to the demise of the pillar system, which culminated by the end of the 1960s. Voters' loyalty to their parties disappeared, as did mechanisms of social control within pillars. The breaking of religious bonds resulted in a more homogeneous society, but also in more competitive, polarised politics between left and right. Political parties – especially from the left – adopted a more adversarial mode of politics by stressing their mutual differences.¹⁴⁹ More generally, emancipation and full self-development – participation instead of passive adherence to the political situation – were paramount in the 1970s. Social movements such as the women's movement and the peace movement entered the democratic system in alternative ways such as through demonstrations, thus “breaking open” public debate for new perspectives.¹⁵⁰ The pillarised newspapers and broadcasting organisations survived (as they do up till now), however they were largely detached from their original ideologies. New organisations entered the system. In general, journalism became more independent, critical and professionalised. The media took on the role of “public watchdog”, of informing citizens about those facts and contexts that citizens should know in order to be able to participate in the democratic system (cultural-pedagogic function).¹⁵¹ The media were greatly influenced by the progressive values of democratisation and emancipation of vulnerable groups, which many journalists endorsed.¹⁵² Media such as the *Telegraaf* provided a counterforce against this dominant tide; as such, the left-right polarisation in society could also be seen in the media.

Despite more polarised relationships, the pillarised practice of keeping potential conflict under the carpet had not faded away. In the 1970s a small group of Dutch South-Moluccan youth engaged in hostage-taking and train hijacking so as to press the Dutch government to support an independent South-Moluccan republic. The Netherlands moreover had to deal with violence from the “Red Youth” movement and from Palestinian groups in the 1970s. With regard to such incidents the government practised a policy of de-escalation instead of presenting terrorism as a huge problem to society; the media obediently followed requests to refrain from reporting in a

149 Lijphart 1988, p. 13.

150 Van Kersbergen & Pröpper 1995, p. 202.

151 Brants & Van Praag 2006, p. 29, 38.

152 Van den Broek 2002, p. 71-72.

sensationalist manner.¹⁵³ In society at large, the Moluccan actions did not result in much “we/they” polarisation: the conservative part of the Netherlands regarded South-Moluccans as loyal and royalist allies, while the progressive part stressed the Dutch postcolonial indebtedness towards them. The moderate public discourse made sure that no “moral panic” emerged around terrorism.¹⁵⁴

5.2 The debate about immigration

Notwithstanding the increasing polarisation in the 1960s/70s, the taboo on critical debate about immigration/integration was still strongly in place. Although there certainly were discussions *within* the government about the desirability of accepting immigrants, political leaders were anxious not to show any signs of xenophobia to the outside world in order to avoid arousing public feelings of this kind.¹⁵⁵ Bagley, who conducted comparative research about race relations in England and the Netherlands in the 1960s, noted that ‘the Dutch have an unshakable belief in the high standards of Dutch hospitality to oppressed aliens and refugee groups, and secondly a firm conviction that no race prejudice exists in the Netherlands. These assumptions have been built into the Dutch value structure over a period of many years.’¹⁵⁶ Although stereotypes about immigrants (both positive and negative) were common, ‘the Dutch newspapers accepted in good faith official versions of immigrant behaviour and problems, and the official versions tended to view immigrants in a favourable and sympathetic light.’¹⁵⁷

The authorities and even academics were long reluctant to initiate studies on the integration of immigrants. According to Bagley ‘the apparent reason for the reticence of the authorities to initiate studies in this field is that race is an area of potential controversy and social conflict; and, by the traditional rules of the *verzuiling* system, an overt silence is maintained about such matters.’¹⁵⁸ The reluctance to discuss minority issues that emerged after the war remained a strong force and was transmitted to younger generations – one could even say that its effects are still felt today: Eyerman argues that ‘[th]e fact that sensitive issues, like the treatment of Jews and other ethnic minorities during the occupation, and anxieties relating to the arrival of refugees from former colonies, were never fully discussed, might help explain some of the explosion of emotion after the murder of Van Gogh.’¹⁵⁹ Besides the strong force of the WWII experiences, this may have to do with the progressive values that had

153 De Graaf 2010, p. 36.

154 De Graaf 2010, p. 37, 49.

155 Oostindie 2010, p. 28.

156 Bagley 1973, p. 92.

157 Bagley 1973, p. 167.

158 Bagley 1973, p. 131.

159 Eyerman 2008, p. 127-128.

become dominant since the “cultural revolution” of the 1960s: the Netherlands came to see itself as a progressive “beacon” where issues such as emancipation, human rights, and development aid were high on the agenda.¹⁶⁰ Though this “revolution” was of course not uniquely Dutch, it did have a particularly strong and long-lasting influence here – after all, the longstanding pillarised structure of society had just disappeared while nothing had come in its place.

From the 1970s, when immigration increased, small cracks were becoming visible in tolerant Dutch society. Contrary to the long-cherished image of the Netherlands as a country where ethnic discrimination did not exist, it actually appeared to be prevalent in employment, housing and other areas of daily life.¹⁶¹ In that period, several conflicts appeared in urban neighbourhoods between native Dutch people and immigrant “guest workers” who came to live in there.¹⁶² Resistance against Turkish and Moroccan “newcomers” led to some ethnic riots in those neighbourhoods, though not on the same scale as in the United Kingdom. ‘On the whole (...), as is generally the case for Dutch social relations and culture, ethnic conflicts are less extreme than in many other countries.’¹⁶³ In the 1970s, it also became more common for the authorities and the press to express doubts about the integration of immigrants in society; yet people almost never openly expressed radical arguments against immigration in public debate.¹⁶⁴ Anti-racism was still the dominant attitude among politicians and the media.

While the traditional pillarised system disappeared, minority groups started to create their own small *niches* in Dutch society through the remnants of pillarisation that still existed, such as public broadcasting organisations and denominational schools.¹⁶⁵ The idea was initially that members of minority groups would leave the country at a certain point, a belief shared by the immigrants concerned and the government alike. Indeed, many of them had come to the Netherlands as “guest workers” from Turkey and Morocco and intended to stay temporarily. By the end of the 1970s, it was slowly becoming clear that most immigrants – and their families who often moved to the Netherlands – were here to stay. The government continued with its existing policy, but this time with the goal of making minorities’ integration into Dutch society easier instead of preparing them to leave.¹⁶⁶

160 Adang, Quint & Van der Wal 2010.

161 Bovenkerk 1978. See also: Congresbundel ‘Recht en raciale verhoudingen’, 21 January 1983, Utrecht: Willem Pompe Instituut: signaling that the existence of racism in the Netherlands had been systematically underestimated.

162 Adang, Quint & Van der Wal 2010, p. 82.

163 Van Dijk 1991, p. 109.

164 Oostindie 2010, p. 34.

165 Van Dijk 1991, p. 109.

166 Sniderman & Hagendoorn 2007, p. 1.

5.3 Changes in the law: articles 137c/d

In 1971, the government amended the offence of group insult in article 137c and adopted a new criminal provision on incitement to hatred, discrimination and violence: article 137d.¹⁶⁷ Both provisions still exist today, in slightly amended versions.

During most of the 1970s the government denied that there were any problems of racial hatred in the Netherlands at all, so the adoption of new hate speech provisions in this period may seem surprising. In fact, the main reason for adopting the new offences was the desire to comply with international legal obligations.¹⁶⁸ The government had ratified the Convention on the Elimination of Racial Discrimination (CERD) and was keen to implement its provisions into Dutch law, although it actually found special laws against racial hatred of little relevance: the idea was still prevalent that racial discrimination was largely absent in the Netherlands.¹⁶⁹ Nevertheless, legislative history also mentioned that society was becoming increasingly diverse so that it was important to stress the norm of tolerance.

Article 4 CERD obliges States Parties to criminalise all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and incitement to violence against any race or group of persons of another colour or ethnic origin. In Dutch law this was translated into article 137d: “incitement to discrimination, hatred and violence”. Despite the fact that CERD does not deal with “insult” literally, the government set out to amend article 137c too – it feared that the Netherlands would possibly fail in its duty to comply with CERD by not doing so.¹⁷⁰ Article 137c was changed from ‘expressing oneself in an insulting manner about a group in society’ to ‘making insulting expressions about a group of persons on account of their race or religion/belief’. This meant that, from now on, the offence dealt with *substantive* insult. Moreover, under the new law only *racial* and *religious* groups would be protected against insult, whereas the provision formerly covered any group in the Netherlands. Article 137d was confined to these same discrimination grounds. The government also included the ground *religion / belief*, despite the fact that CERD only deals with *racial* discrimination. This was because the UN was expected to draft a Convention on the Elimination of all kinds of Religious Discrimination and

167 The government also included an amended publishing/distribution offence in art. 137e, which included a freedom of expression clause for utterances ‘intended for the provision of factual information’. This was adopted to preserve the freedom to publish factual information about issues of racial or religious discrimination, for instance citing discriminatory expressions. *Kamerstukken II 1967-68, 9724, nr. 3, p. 5.*

168 Van der Neut 1986, p. 33; Swart 1970, p. 75.

169 *Kamerstukken II 1967-68, 9723, nr. 3, p. 4; Kamerstukken II 1967-68, 9724, nr. 3, p. 3.*

170 *Kamerstukken II 1967-68, 9724, nr. 3, p. 4.*

Intolerance, which would form the “religious” counterpart to CERD.¹⁷¹ Eventually, the UN never adopted such a convention.

5.3.1 *Changing rationale*

The change from formal to substantive insult was an important one, not only because this covered a wider range of expressions, but also because it amended the rationale behind the law. After the 1970s, the *content* of expressions rather than the form became decisive: what mattered was *what* was said rather than *how* it was said. Expressions of racism and religious discrimination were declared “out of order”, no matter in what form – although an element of insult or incitement was necessary. More generally, the rationale for articles 137c-d shifted towards equality arguments in the 1970s. The government found new hate speech bans necessary to preserve an atmosphere where the fundamental rights of every person were respected.¹⁷² The rationale of protecting *public order*, which was dominant in the 1930s, was thus broadened: public order now included “preserving a decent society without discrimination”.

5.3.2 *The scope of article 137c*

The government’s proposal on changing article 137c met with criticism from different sides. One of the objections was that it regulated more than CERD requires and could prove a danger for freedom of expression. Parliamentarians argued that “substantive insult” was a vague norm.¹⁷³ According to the government, restricting speech on the grounds of content was more just than restricting speech on the grounds of form: in the latter situation, smart people who cover their insulting ideas in factual language can escape the law more easily than less eloquent people.¹⁷⁴ The government stressed the importance of freedom of expression – ‘any unnecessary restriction is reprehensible’ – but contended that it had taken utmost care in drafting the current provisions so as not to put unnecessary constraints on free speech.¹⁷⁵ The new offences were presented by the Minister of Justice as a liberalisation compared to the 1934 law. Since only public insult *on account of* race, religion or belief would be criminal, the law only prohibited insult ‘on grounds about which one cannot argue anymore’, against ‘violation of that which is of fundamental importance to human existence’. Therefore, only ‘violating the intrinsic worth of or discrediting the group concerned because they have a certain race, religion or belief’ is a criminal offence; ‘criticism of people’s

171 *Kamerstukken II* 1967-68, 9724, nr. 3, p. 4.

172 Janssens & Nieuwenhuis 2005, p. 130 and Brants, Kool & Ringnalda 2007, p. 213.

173 *Kamerstukken II* 1968-69, 9724, nr. 5, p. 2-3.

174 *Handelingen II* 1969-60, p. 4348.

175 *Kamerstukken II* 1969-70, 9724, nr. 6, p. 3-4.

convictions or behaviour in whatever form falls outside the scope of art. 137c.¹⁷⁶ The criminal law would only be used when criticism degenerates into violation of one's honour or reputation or into incitement to hatred against groups on account of the mere fact that its members have a certain religion.¹⁷⁷ Insult of a religious conviction would only engage the criminal law if 'conclusions are drawn as regards the persons concerned'.¹⁷⁸ Moreover, the Minister of Justice held that prosecution policy in this area should be cautious.¹⁷⁹ Yet, when the law was changed in the 1980s, the Minister of Justice pointed out that he could imagine that ridicule of certain religious rituals may imply that the group itself is made ridiculous, and can thus constitute criminal insult under article 137e.¹⁸⁰ This piece of legislative history has gained renewed relevance in the 21st Century debates surrounding "insult of religion" (see par. VI.7.1.4).

5.3.3 *Groups protected*

Some Parliamentarians criticised the government's proposal for being too *restrictive*, as article 137c protects only racial and religious groups. Yet the government held that not all groups in society are in need of the same protection from the criminal law: 'there is less reason for protection of groups that are not so vulnerable or that have the means to defend themselves. Moreover, one should take account of the extent to which verbal attacks on the group can cause disturbances in society and the extent to which it can be expected that society itself will correct this.'¹⁸¹ Still, the offences are not drafted "asymmetrically"; in principle they protect all racial and religious groups – small and big, minorities and the majority. Later the government added that, even when certain groups (for instance, religious groups) occupy a relatively strong position in society, insult to its members must still be prohibited: there is no defence against such expressions, no matter how strong the group's position.¹⁸²

5.3.4 *Effective use of articles 137c/d*

The explanatory report to the new provisions states that they 'aim at *banning from public life* expressions which form a gross insult to the honour of persons belonging to certain groups, or a threat to their elementary interests' (emphasis added).¹⁸³ Yet those high ambitions were soon tempered. When the proposal was put before Parliament, several MPs warned against too high expectations of the new law's

176 *Kamerstukken II* 1969-70, 9724, nr. 6, p. 4.

177 *Kamerstukken I* 1970-71, 9723 & 9724, p. 4.

178 *Kamerstukken I* 1970-71, 9723 & 9724, p. 4.

179 *Handelingen II* 1969-70 (Uitvoering IVURD), p. 4350.

180 *Kamerstukken II* 1988-89, 20239, nr. 5, p. 15.

181 *Kamerstukken II* 1969-70, 9724, nr. 6, p. 3.

182 *Kamerstukken I* 1970-71, 9723 en 9724, p. 4.

183 *Kamerstukken II* 1967-68, 9724, nr. 3, p. 5.

capacity to counter discrimination, since criminal law would not prevent persons with profound feelings of racial or religious hatred from expressing themselves. The government replied that expectations about the preventive function of the offences should not be set too high indeed; criminal law only has a limited role to play in dealing with tensions in society, and hate speech regulations can even enhance the conflict situations they aim to deal with.¹⁸⁴ The Minister of Justice expressed the hope that, in practice, the new provisions would not have to be used too often.¹⁸⁵ Rather, the law had a symbolic function in demonstrating to everyone that such expressions are not allowed.¹⁸⁶ Indeed, the whole legislative history of article 137c-e in the 1970s echoes the idea that the offences were meant to demonstrate the norm of equality rather than to be effectively used in court. They were the final part of the protection against discrimination, which the authorities considered to be only a minor problem in the Netherlands (a view that commentators criticised¹⁸⁷). Legal scholars wrote that hate speech bans were indeed scarcely prosecuted in the 1970s, though official numbers are not available.¹⁸⁸

5.3.5 *Interpretation by the courts*

Two hate speech cases reached the Supreme Court in the 1970s, both of which concerned pamphlets by the far-right political party *Nederlandse Volksunie (NVU)*.¹⁸⁹ One of those pamphlets read that ‘as soon as the NVU has conquered political power, it will start expelling all Surinam, Turkish and other “guest workers” from the Netherlands’. The defendant complained to the courts that this expression did not constitute unlawful discrimination, since ‘as soon as the NVU came to power’ the law would be changed to the extent that expulsion would not be unlawful anymore. The Court of Appeal – followed by the Supreme Court – argued that seeking political support for such discriminatory treatment nevertheless amounts to “incitement to discrimination” under article 137d.¹⁹⁰ “Incitement” should thus not be interpreted too restrictively; a political programme as such can be a form of incitement, as it logically urges people to support the party. In the other case, the Supreme Court again upheld the defendant’s conviction.¹⁹¹ Van Donselaar has argued that the hate speech proceedings against NVU members in the 1970s and 1980s did indeed contribute towards the party’s decline: such measures put much pressure on the party and forced it to exercise restraint.¹⁹²

184 *Kamerstukken II* 1969-70, 9724, nr. 6, p. 3.

185 *Handelingen I* 1970-71 (Goedkeuring IVURD), p. 558.

186 *Kamerstukken II* 1969-70, 9724, nr. 6, p. 2.

187 Swart 1970.

188 Keijzer & Rummelink 1985, p. 23-24; Swart 1970.

189 HR 24 June 1975, NJ 1975, 450; HR 14 March 1978, NJ 1978, 664.

190 HR 14 March 1978, NJ 1978, 664.

191 HR 24 June 1975, NJ 1975, 450.

192 Van Donselaar 1991, p. 222.

5.3.6 Party proscriptions

With the incorporation of CERD, the Dutch government adopted an element of substantive militant democracy in its laws. Besides the changes in hate speech bans of art. 137c-e, CERD also caused an amendment to the law on party proscriptions in 1971: the *Wet Vereniging en Vergadering* (WVV) came to include racial discrimination as a ground for proscribing a political party (as required by article 4 CERD). A structural law was now adopted which deliberately proscribed certain viewpoints – both in individual expressions and in political endeavours. Yet the explicit proscription ground “racial discrimination” already disappeared in 1976, when the WVV regime was amended and moved to the Civil Code in a general regulation of the proscription of organisations. In this process of legal change, conceptions of democracy and fundamental rights did not receive much attention.¹⁹³ With the move to the Civil Code, all specific proscription grounds were abolished in favour of the general rule that parties could be proscribed if their goal or functioning violated public order or morals.

In practice the authorities appeared hesitant to use this new regime.¹⁹⁴ When the NVU emerged in the 1970s, politicians expressed their repugnance against the party – but many still resisted the idea of proscribing the party, because that would have far-reaching consequences for the democratic process.¹⁹⁵ In this regard something had changed since the 1950s, when proscription of the NESB met hardly any resistance in the light of fresh memories of the war. When it came to the NVU, the authorities initially took less far-reaching measures, such as prosecuting members of the party. After long hesitation, a court procedure was initiated to dissolve the party in 1977. A possible explanation for this change of mind was that the government was under international pressure to conform to its obligations under article 4 CERD: in 1975 the Committee for the Elimination of Racial Discrimination criticised the Netherlands for allowing the NVU to take part in elections (although the party never gained much electoral success).¹⁹⁶ The Amsterdam Court in first instance stressed that party dissolutions should be handled with great care, but declared the NVU a proscribed party: it considered that the party had tried to create and deepen divides between groups on the basis of colour and/or descent.¹⁹⁷ Though political parties were free to

¹⁹³ Eskes 1988, p. 415–419.

¹⁹⁴ Eskes 1988, p. 442: it lasted long before the government initiated actions against extreme right-wing party NVU, but eventually a claim for dissolution was made – see below.

¹⁹⁵ Van Donselaar 1991, p. 163

¹⁹⁶ Van Donselaar 1991, p. 164.

¹⁹⁷ *Rechtbank Amsterdam* 8 March 1978, NJ 1978, 281. The court declared that NVU was a prohibited party (and accordingly, that participating in its activities was a criminal act under art. 140 Criminal Code), but did not dissolve it: this had to do with the existence of a foundation related to NVU, which would also have had to be dissolved to reach the desired effect. Since no claim was made to dissolve this foundation, the court found that dissolution of NVU would not make sense either.

discuss immigration problems in and outside Parliament, the NVU's activities threatened to undermine the fundamental rights of others and were thus "potentially dangerous" and in violation of public order and morals.¹⁹⁸

5.3.6.1 *Militant democracy and the Constitution*

Dutch law provides several options to deal with anti-democratic forces, such as party proscriptions and criminal law provisions. The Constitution itself does not have a "supra-constitutional" mechanism that protects its fundamental principles against change. Nevertheless, the procedure for changing the Constitution is rather difficult. After a normal law-making procedure, new elections need to be held; after that, a two-third majority in Parliament is required. The Dutch Constitution does not contain a clause on "abuse of right", as article 17 ECHR does. The legislature explicitly rejected such an approach in the process of amending the Constitution in 1983. According to the State Commission preparing the amendments, 'a legal order based on the freedom of its citizens should not withhold to them freedom of expression or association solely on the ground that they are antipathical to such freedoms.'¹⁹⁹ The government followed this viewpoint: it considered the existing limitation grounds sufficient.²⁰⁰ Moreover, such a general clause would pose the risk of governmental abuse of power and could create legal uncertainty.²⁰¹ The government furthermore argued that an "abuse of right" clause would add a political component to defining the limits to fundamental rights: 'the judge would, for instance, have to answer the question of the point at which a person loses his right to freedom of expression if he propagates changes in the existing constitutional structure; if he contests other people's religious or political viewpoints; if he propagates inequality between men and women, etcetera (...).'²⁰² Notwithstanding the legislature's rejection of the "abuse of right" concept, article 17 ECHR has actually played a role in Dutch law. At the end of the 1970s, election committees used the provision to declare invalid the municipal election lists of candidates submitted by the NVU and the Centruumpartij, thus blocking them from participation.²⁰³

5.4 Freedom of expression

When discussing the amendments to articles 137c-e in the 1970s, the Minister of Justice repeatedly stressed the fundamental role of freedom of expression. He even

198 Nevertheless, the eventual outcome of the civil procedure was unsatisfactory: the Supreme Court also found NVU in contravention of the law, but was not willing to attach any legal consequences to this finding. Because the authorities had targeted only the NVU itself and not the foundation that actually ruled the NVU, the court did not see the point of dissolving the NVU. As a result, the NVU was allowed to continue its activities.

199 Cals & Donner 1969, p. 46.

200 *Kamerstukken II* 1975-76, 13872, nr. 3, p. 8 and *Kamerstukken II* 1976-77, 13872, nr. 7, p. 4.

201 Burkens 1971, p. 149.

202 *Kamerstukken II* 1976-77, 13872, nr. 7, p. 4.

203 See Eskes 1988, p. 468.

considered freedom of expression to be one of the most important rights, ‘especially in a democracy such as ours, where from the clash of opinions (...) the truth – or at least a compromise – shall result. Freedom of expression allows raising one’s voice against injustices (...).’²⁰⁴ Later, the Minister even added that freedom of expression was ‘the most important fundamental right’.²⁰⁵ (Formally, the government has always rejected a hierarchy of fundamental rights or a “preferred position” of freedom of expression.²⁰⁶) He repeatedly explained that the new offences did not restrict freedom of expression further than strictly necessary. Moreover, he held that the law should be used prudently. Nevertheless it is telling that a real discussion about the rationales behind the articles – and the necessity of dealing with these harms in such broadly drafted offences – did not take place.²⁰⁷

In case law, freedom of expression played only a marginal role. Despite the emergence of progressive values in public debate in the 1960s, the Supreme Court still accepted that demonstrators were convicted for showing messages such as ‘Johnson murderer’ and ‘The president of the United States is a war criminal’ (under article 117 CC – insult of a friendly head of state or member of government).²⁰⁸ The Supreme Court judged that the ‘offensive words’ used to criticise the president’s Vietnam-politics were ‘not necessary at all’. As par. VI.3 showed, the criterion of “gratuitously offensive” expressions was already used in case law of the 1930s. Peters has argued that it was so often used to prohibit criticism of the government, that it seemed as if the courts saw it as their task to protect the government against criticism.²⁰⁹ In the few hate speech cases under articles 137c-e that are known from this period, freedom of expression was not explicitly considered by the courts either.²¹⁰ Although the prohibition of judicial constitutional review may have to do with this, by the 1960s the Netherlands had become a party to the ECHR – a treaty which has direct effect in the Dutch legal order. Yet at that time the Convention did not play much of a role in Dutch case law; it was simply unknown to many lawyers.

This situation was related to the general lack of “constitutional thinking” in the Dutch courts:²¹¹ the idea of individual rights as guarantees against government power, which implies that restrictions to those rights require strict scrutiny, is not so deeply rooted in Dutch tradition. In public debate, too, the Constitution used to be one consideration

204 *Handelingen II* 1969-70 (Uitvoering IVURD), p. 4347.

205 *Handelingen I* 1970-71 (Goedkeuring IVURD), p. 555.

206 Peters 1981.

207 Rosier 1997, p. 250.

208 HR 5 November 1968, NJ 1969, 78; HR 7 November 1967, NJ 1968, 44. Since those convictions led to much criticism, the offence was amended in 1978: it now concerns only insult of a head of state/member of government if this person is present in the Netherlands in official capacity.

209 Peters 1981, p. 94.

210 HR 24 June 1975, NJ 1975, 450; HR 14 March 1978, NJ 1978, 664.

211 Peters 1981, p. 169

among many: ‘constitutional arguments have rarely been trumps in public debate (...) Even when after the nineteen sixties the system of pillarisation changed and in the newly found democratic atmosphere individualism became more marked than group cohesion, the constitution became merely one of the sources in which to look for normative orientation.’²¹² The Constitution has the character of a “mandate” towards the government rather than a strong guarantee for citizens against the government. Disputes were mostly handled pragmatically without referring to higher norms; trust in the government’s “decency” was high. This attitude can be traced back to the tradition of consensus-seeking.²¹³ With the emergence of more polarised relationships in society in the 1970s, these characteristics slowly lost importance. In the courtroom, appeals to international human rights were made with increasing frequency; this forced the courts to delve into the meaning of those rights.²¹⁴

It has been argued that the role of freedom of expression in Dutch law is limited because of the relatively important freedom of association in the open political system.²¹⁵ The democratic system is relatively open to new political parties and to smaller parties, so that the freedom to participate in this system is very important. In jurisdictions with closed systems – such as England – freedom of expression is of more importance, since it is less easy to make use of one’s right to political association. Though this may be a factor in the Dutch tradition of dealing with freedom of expression, it cannot fully explain why countries with open political systems such as Belgium have historically attached more importance to freedom of expression than the Netherlands. The particularly Dutch ideas about freedom of speech may also have to do with its tradition of consensus-seeking and channeling social conflicts, which continued to live on after pillarisation had faded.

5.5 Blasphemy

Until the beginning of the 1960s, expressions that contravened the dominant Christian values were unacceptable in Dutch society. Informal control and self-restraint were generally sufficiently strong to counter such “abuse”. For instance, in 1964 a storm of protest followed after a satirical TV show broadcast a sketch presenting TV-viewing as “the new religion” and “the moving image” as “the new God”.²¹⁶ However, the “cultural revolution” and the process of secularisation made sure that those attitudes quickly changed. Satire and criticism as regards religion and its adherents came up in art and literature. This also had its bearing on the case law on blasphemy: in 1968, writer Gerard Reve was famously acquitted of blasphemy in the “Donkey”-

212 Witteveen 1993, p. 94.

213 Koopmans 1979, p. 105.

214 Peters 1981, p. 170.

215 Eskes 1988, p. 2.

216 Kennedy 1995, p. 118.

judgment.²¹⁷ Reve had written a letter in which he depicted God as incarnated in the form of a donkey, describing how he would make love to him. The Supreme Court found no violation of article 147. Referring to legislative history, it held that only the specific intention to “denigrate the Supreme Being” can be qualified as “scornful” and that Reve – who elaborately set out how his writings expressed his love for God – did not have this intention. Commentary in the media showed how ideas on criminalising blasphemy had already changed in the 1960s: ‘in the beginning of the 1930s, 90 percent of Dutch people regarded themselves as belonging to a church (...) These days it would be impossible to pass such a law through Parliament.’²¹⁸ Even the prosecutor himself expressed doubts about the necessity of the law, as did several theologians: according to many people, ‘prosecution for blasphemy is simply out of date.’²¹⁹ Attorney-General at the Supreme Court Rummelink concluded in the “Donkey”-procedure that article 147 is based on the view that religion is so highly valued in society that it deserves more protection than other conceptions, since it only criminalises offence to *religious* feelings: ‘[t]he provision assumes a state that professes the Christian religion, and one may question whether this can be maintained when that conception of the state disappears (...).’²²⁰ With the “Donkey”-judgment the Court set a very high standard of proof, as a result of which no cases have been prosecuted under article 147 ever since.

6 THE 1980s/1990s

6.1 Changes in the law: articles 137c/d

By the 1980s discrimination had become a serious problem in Dutch society.²²¹ “New” types of hate speech appeared that were not yet covered by art. 137c-e, such as incitement to hatred against homosexuals. Emancipation movements became increasingly successful in putting these issues on the public agenda. This culminated in an amendment to articles 137c-e in 1991. Two new discrimination grounds were added: *gender* and *hetero- or homosexual orientation* (the former only in article 137d).²²² Initially, the government was not yet convinced of the need to criminalise hate speech on the grounds of gender; it emphasised the need for prudence in restricting speech.²²³ After the Council for Emancipation pointed out that such a provision could play a role in countering discrimination and aggression against women

217 HR 2 April 1968, NJ 1968, 373 m.nt. Bronkhorst.

218 H. Bianchi, *Het Vrije Volk* 13 October 1966. Source: Fekkes 1968, p. 187.

219 Fekkes 1968, p. 199: Hoofdartikel ‘Uit de tijd’, *Het Vrije Volk*, 2 november 1967.

220 Conclusie A-G Rummelink, HR 2 April 1968, NJ 1968, 373 m.nt. Bronkhorst.

221 Rosier 1997, p. 75.

222 Stb. 1991, 623.

223 *Kamerstukken II* 1987-88, 20239, nr. 3, p. 2-3.

– for instance, during demonstrations by the women’s movement – the government became convinced of the need to adopt “gender” as a discrimination ground in article 137d. Both the Council for Emancipation and the government were against inclusion of this ground in article 137c, though for different reasons.²²⁴ The Council feared that prohibiting insult on the grounds of gender would turn out negatively for the women’s movement if the law was applied symmetrically: it might be used to curb feminist literature, thus to protect established interests. The government’s reason for opposing the inclusion of gender was that discrimination of women was not so much caused by public insults, but rather by ‘ideas about the role of women in society’. The causal link between insulting speech and discriminatory acts was thus weak, the government argued; discriminatory acts against women were mainly caused by already existing views in society with regard to the role of women, which ‘are experienced from birth on’.²²⁵ Why this would be different for the other discrimination grounds was not explained. In the end, it was decided not to adopt the discrimination ground of gender in article 137c. Nevertheless, such utterances can arguably fall under article 266 CC if they also constitute individual insult.

6.1.1 Rationale

The legislative history of this period also sheds a new light on the general rationale of articles 137c-e. The government put much emphasis on the danger that hateful expressions could lead to *negative imaging* of groups, which in turn can lead to discriminatory acts against their members. The amended articles formed part of a package of general antidiscrimination legislation; general point of departure was that criminal law has a role in protecting people from discrimination. The Minister argued that ‘public expressions of insult or incitement can “spread like an oil stain” and affect the whole group’s position in society. This can possibly lead to discriminatory acts against individuals.’²²⁶ Insulting expressions against homosexuals, for instance, could lead other people – who do not yet have such views – to adopt those viewpoints: ‘[f]or those who rarely or never come in touch with persons belonging to those groups, the image of those groups will be formed by what they hear or read about them. If this is insulting, it will negatively affect the image of the group.’²²⁷

The danger of “negative imaging” thus again appeared as an important rationale for the articles 137c-e. Protection of people’s honour or sensibilities (apart from the consequences this may have), which received attention in earlier legislative processes, was no longer mentioned at all.²²⁸ The rationale of maintaining public order also

²²⁴ *Kamerstukken II* 1987-88, 20239, nr. 3, p. 3-4.

²²⁵ *Kamerstukken II* 1988-89, 20239, nr. 5, p. 6 and nr. 8, p. 1.

²²⁶ *Kamerstukken II* 1987-88, 20239, nr. 3, p. 7.

²²⁷ *Kamerstukken II* 1988-89, 20239, nr. 8, p. 1.

²²⁸ Rosier 1997, p. 90.

played an important role: insult or incitement to hatred against both minorities and majorities can set groups against each other.²²⁹ Van Stokkom *et al.* consider that, given the system of the law (the offences are still placed under public order offences), the main rationale for art. 137c-e should still be sought in the protection of public order against disturbance.²³⁰ As the legislative process of the 1970s shows, public order has a broader meaning than merely “avoidance of violence and riots”: it means that the state must create an atmosphere of tolerance and respect for everyone’s fundamental rights.²³¹ “[I]n a pluralistic society based on equality and respect for the fundamental rights of every person, such expressions can contaminate public discourse, can undermine tolerance and mutual respect and endanger peaceful coexistence.”²³² The rationale for the articles 137c-e is thus still a mixture of public order and negative imaging/non-discrimination.

6.1.2 *Non-discrimination and freedom of expression in the Constitution*

The relationship between freedom of expression and non-discrimination was an important point of discussion when the law on hate speech was changed in the 1980s/1990s. In 1983 some important amendments had been made to the Constitution, which touch upon the relationship between those rights. One of these was the adoption of an explicit right to non-discrimination in article 1 of the Constitution. Thereafter, articles 137c-e came to be viewed as a species of the general constitutional norm of non-discrimination.²³³

When the government subsequently amended art. 137c-e in the 1990s, it made a conscious choice to restrict freedom of speech in order to protect people from discrimination. The argument went that public hate speech could bring other people to turn their backs on certain groups – as history had shown – and that the members of such vulnerable groups could not defend themselves against such public allegations.²³⁴ The government also made clear that articles 137c-e already provide for the “balancing act” between fundamental rights, and that the judiciary does not have much of a role in this regard.²³⁵ The courts were not expected to weigh those rights against each other, unless a defendant explicitly advanced that his right to freedom of expression had been infringed in a manner exceeding the boundaries set by international human rights law. By the 21st Century the courts abandoned this viewpoint

229 See *Kamerstukken I* 1990-91, 20239, nr. 76a, p. 7.

230 Van Stokkom, Sackers & Wils 2006, p. 71.

231 Van Bemmelen/Van Veen 1990, p. 53.

232 Brants, Kool & Ringnalda 2007, p. 213.

233 Nota Minderhedenbeleid, *Kamerstukken II* 1982-83, 16102, nrs. 20-21, p. 97.

234 *Kamerstukken I* 1990-91, 20239, nr. 76c, p. 2-3.

235 *Kamerstukken I* 1990-91, 20239, nr. 76c, p. 5.

and started to elaborately weave the right to freedom of expression into their judgments.

6.1.3 Proposal for a “freedom of expression clause”

The government’s proposal for amendment of art. 137c-e originally included a “freedom of expression clause” in a new art. 137f. The idea was to adopt a specific ground for justification in the interest of free speech, exempting ‘expressions aimed at giving an opinion about public interests’ from the criminal law. The government proposal followed an initiative by the Dutch section of the International Commission of Jurists (NJCM), the idea being that the addition of new discrimination grounds made the balance between freedom of expression and its restriction grounds even more pressing.²³⁶ Eventually, there was not enough support in Parliament to adopt the clause. Many MPs pointed out that it was hard to imagine a justification for insult and especially for incitement to hatred/discrimination/violence on the grounds of race; they feared that racist expressions would thus go unpunished.²³⁷ Moreover, some doubted whether it would be in line with the Netherlands’ obligations under CERD. Since the government did not want to leave the impression that it was unwilling to counter racial discrimination, and considering the comments by Parliament and minorities’ organisations, article 137f was eventually deleted from the proposal. The notion that an appeal to freedom of expression could possibly overrule the criminality of discriminatory expressions was thus not yet entrenched. In this regard it is also telling that the broadening of articles 137c-e did not meet with much opposition in Parliament, advisory bodies or in legal debates – except for the small Christian parties who feared their freedom to express their religious convictions, particularly on homosexuality.²³⁸ In general, the idea of countering hate speech through relatively broad criminal law provisions did not raise many eyebrows at the time.

6.1.4 Effective use of hate speech bans

By the end of the 1980s a change had taken place in the ideas about prosecuting for hate speech. Prudence in using the criminal law, still prevalent in the 1970s, was abandoned. Now the government emphasised the importance of effective criminal law to counter hate speech: in reaction to questions about prosecution policy, the Minister of Justice stated that ‘this proposal deals with an evil in society which is so serious that it cannot be ignored (...) On the contrary, the criminal law must function (...).’²³⁹ According to the Minister, criminal law was an important instrument for countering

²³⁶ *Kamerstukken II* 1987-88, 20239, nr. 3, p. 9.

²³⁷ *Kamerstukken II* 1987-88, 20239, nr. 4, p. 4.

²³⁸ Rosier 1997, p. 95.

²³⁹ *Handelingen II* 28 March 1990, p. 3100.

the unfair and random subordination of groups.²⁴⁰ More generally, there appeared a tendency to use the criminal law as an instrument for enhancing *social cohesion*: the government tended to blame increasing criminality on “de-pillarisation” and the subsequent loss of social bonds.²⁴¹ The setting and maintenance of norms by means of the criminal law had an important function in achieving social cohesion within society, so the government held.²⁴²

This new approach was related to both the government’s general policy on minorities and increasing far-right activity. By the end of the 1970s, it was obvious that the idea that problems of discrimination did not exist in the Netherlands, was far too optimistic. With the economic downturn and increasing unemployment of the 1980s, challenges surrounding minorities and discrimination became even more pressing. When it became clear that many immigrants would stay permanently, the government started to admit that negative perceptions of minority groups did indeed exist in the Netherlands; it thus amended its policy. In its 1983 policy on minorities, the government set out to tackle discrimination more actively. The effective use of existing criminal law on hate speech would form part of those efforts.²⁴³ The document mentioned that ‘the government has notified the Public Prosecutor on several occasions how much importance it attaches to an active prosecution policy’: dismissal of hate speech cases on the grounds of policy (as opposed to dismissal on technical grounds) was allowed in exceptional cases only.²⁴⁴ From the 1990s on, the head of the Public Prosecution started to draft policy directives on discrimination offences. These set out that as a rule, prosecution must be initiated for such offences and that the police must take up any report.²⁴⁵

The emergence of far-right groups from the end of the 1980s also led to increased public attention for racism and other forms of discrimination, and to the emergence of anti-racist groups that were to pressure the government to take action. There was also the international awareness of racism – international bodies drew the government’s attention to the need to tackle discrimination actively: the CERD Committee and Dutch NGOs stressed the need to take an active stance against racist speech.²⁴⁶ Moreover, active prosecution for hate speech can be placed in the more general development of a movement towards a system where the government not only respects fundamental rights (refrains from interference), but also actively guarantees their enjoyment by every citizen. While the focus in the 1970s was on citizens’ rights

240 *Kamerstukken II* 1988-89, 20239, nr. 5, p. 11.

241 Brants 1992, p. 325-338.

242 *Kamerstukken II* 1997-98, 25600 VI, nr. 2, p. 16; *Kamerstukken II* 2001-02, 28600 VI, nr. 2, p. 9-21

243 Nota Minderhedenbeleid, *Kamerstukken II* 1982-83, 16102, nrs 20-21, p. 96-97.

244 Nota Minderhedenbeleid, *Kamerstukken II* 1982-83, 16102, nrs 20-21, p. 99.

245 Tijdelijke Wetenschappelijke Commissie Minderhedenbeleid 1996, p. 24.

246 Tijdelijke Wetenschappelijke Commissie Minderhedenbeleid 1996, p. 26. See the CERD case of L.K. v. The Netherlands (1993).

against the government, in the 1980s – when criminality had greatly increased – the idea that the government must effectively prosecute in order to protect citizens against criminal offences became more common.²⁴⁷ Indeed, the trend towards effective use of the law on hate speech continued in the 1990s and thereafter: to give an idea, between 1998 and 2007, the courts dealt with an average number of 124 cases per year – between 1954 and 1967 there were said to be 13 convictions in total.²⁴⁸

6.2 Interpretation by the courts

From the 1980s on, there has been a wealth of case law on articles 137c-e. This part elaborates some general developments in this case law.

6.2.1 Political discourse about immigration and multiculturalism in the 1980s/1990s

In line with Dutch discourse about multiculturalism – and with CERD – the courts regularly judged strong criticism of immigration to be a criminal offence under articles 137c/d. For instance, in 1995 the Supreme Court upheld a conviction under article 137c for possession of folders drafted by far-right party CP'86, which suggested a relationship between immigration and criminality and spoke about a “multiracial hotchpotch”.²⁴⁹ In 1996, members of the far-right party Centrumdemocraten were convicted under art. 137c-d for suggesting that affirmative action towards immigrants constituted “discrimination of the Dutch” and for criticising the alleged failure of the government’s policy of supporting immigrants.²⁵⁰

On several occasions, the courts used article 137c-d to set limits to the expressions of far-right politicians in the area of immigration. Par. VI. 5.3.6 already mentioned the 1978 NVU case, where the Supreme Court accepted the Court of Appeal’s ruling that the promotion of a political programme that would – if effectuated – discriminate against people on the grounds of race, constitutes incitement to discrimination.²⁵¹ This judgment made clear that article 137d limited the ways in which political groups can achieve legal reform in the Netherlands. Article 137d also protected groups against *negative imaging* by politicians. In 1999 the Supreme Court upheld MP Hans Janmaat’s conviction under article 137d for using the words ‘we will abolish multicultural society as soon as we can’ during a public demonstration – in conjunction with expressions of other members of the party’s board at the same demonstration:

247 See Moerings 1994.

248 LECD 2009, p. 58. This includes both discriminatory expressions and *acts* under art. 137c-g and 429quater; however, the great majority of discrimination offences generally concerns expressions. of all discrimination offences the prosecution dealt with between 1998-2007, 78% concerned art. 137c; 10% concerned 137d and 6% concerned 137e. For numbers between 1954-1967: Swart 1970, p. 75.

249 HR 2 May 1995, NJ 1995, 621.

250 HR 16 April 1996, NJ 1996, 527.

251 HR 14 March 1978, NJ 1978, 664.

‘Primacy to the Dutch people’ and ‘Full is full’.²⁵² The Court of Appeal (followed by the Supreme Court) held that these expressions were aimed at the removal of ethnic minorities from Dutch society and that article 137c and 137d protect citizens against ‘negative imaging that affects their human dignity’, which was at stake in the present case. The same rationale of protecting groups against negative imaging in the eyes of others is also found in a 1989 case that led to a conviction for incitement to discrimination. This concerned an election pamphlet which stated that Turks, Moroccans and Africans were a threat to Dutch society and that ‘defense’ against ‘the liquidation of the Dutch people and culture’ was necessary.²⁵³ The Supreme Court argued that such expressions could eventually lead to a situation in which people would be subjected to violations of their fundamental rights – thus incitement to discrimination.

6.2.1.1 *Columns and satire*

Under article 137c, the strict legal rules were occasionally relaxed in the context of provocative, satirical columns. For instance, in 1996 columnist Theodor Holman was acquitted for group insult with regard to a piece entitled “Humanism no longer exists”, which included the sentence ‘I still find every Christian dog a criminal, praying a childish thing and the church a puppet show, though I would not want to deny anyone the right to be a criminal, a childish person or to like puppet shows.’ The Court of Appeal ruled that there was no evidence of Holman’s intention to insult Christians, because the expressions were part of a column in a non-denominational newspaper where the author made use of exaggeration to reinforce his argument.²⁵⁴ However, when polemicist Theo van Gogh was prosecuted for an article with coarse satirical jokes about Jews and the Second World War, the Supreme Court gave short shrift to such arguments.²⁵⁵ It ruled that Van Gogh’s expressions were insulting *exactly because* of his polemical style and lack of nuance, which made them “gratuitously offensive”. Accordingly, the “gratuitously offensive” criterion continued to play a role after the law was changed.²⁵⁶ This gave the courts the opportunity to judge how necessary an offensive style is in the context of the whole article and thus to enforce particular “civility norms” in public discourse.²⁵⁷

252 HR 18 May 1999, NJ 1999, 634. Note that in 1995 the Amsterdam Court had ruled – in a different case – that the words ‘Primacy to the Dutch people’ as such are not criminal, because they do not explicitly deal with race or religion. *Rechtbank Amsterdam* 13 June 1995, *NJ* 1995, 664.

253 HR 14 March 1989, NJ 1990, 29.

254 *Gerechtshof Amsterdam* 20 February 1996, *Mediaforum* 1996-4.

255 HR 11 February 1986, NJ 1986, 689.

256 See also HR 11 February 1986, NJ 1986, 689; HR 18 October 1988, NJ 1989, 476 m.nt. GEM (in uitspraak Hof); Hof Amsterdam 26 January 1993, *Informatierecht/AMI* 1993, 3.

257 See Hof Amsterdam 26 January 1993, *Informatierecht/AMI* 1993, 3, where the court criticises such an approach and rules that prudence is required in assessing the gratuitously offensive form of expressions. However, the Supreme Court did not apparently share this view in this case.

6.2.2 Indirect insult; harm v. offence

In defining the limits of legitimate criticism under article 137c, it has been a challenge for the courts to deal with indirect forms of insult. In 1982, the Court of Appeal at 's-Hertogenbosch had to give a judgment concerning an image of two soldiers, one with the word "Israel" on his helmet and the other with a swastika. The defendant asserted that he merely intended to criticise Israeli politics.²⁵⁸ The Court refuted this argument and ruled that the defendant's alleged intention 'does not diminish the feelings this image arouses for Jews', considering their connection with Israel. This judgment has been criticised for criminalising mere *offence to sensitivities*, rather than real *harm*.²⁵⁹ In some other cases – for instance, on Holocaust denial – "offence to sensitivities" also played an implicit role.²⁶⁰ As Feinberg's work shows, according to liberal theory the use of "offence" as a ground for engaging the criminal law should be limited. In Dutch law, too, several commentators argue on the grounds of teleological and legal-historical arguments that, in a proper reading of article 137c, insult should not include "offence to feelings".²⁶¹ Instead, it must be interpreted as an attack on the objectively identifiable "moral integrity" of a person or group: a disqualification of persons because they belong to a certain group.²⁶² The abovementioned cases – where "offence" played a role – can be placed in the context of specific sensitivities related to the Second World War that have affected the interpretation of article 137c. As the courts have ruled that grievous references to the war can constitute insult of Jewish people,²⁶³ it has been suggested that 'the shadow of the Holocaust affects the law on art. 137c/d'.²⁶⁴ The problems of defining insult in relation to the group's history and specific characteristics have become even more pressing in the recent past – especially in the case of religious groups (see VI.7.1.4).

6.3 Political parties & militant democracy

The 1980s and 1990s saw an increase in far-right activity, with several political parties coming and going. Such parties were now able to gain some seats in municipal elections and an occasional seat in the national Parliament, occasioning a debate on whether they should be proscribed by law. When the Centrumpartij (CP) emerged in the 1980s, there was a fair degree of resistance to proscription: it was feared that this would drive their ideas underground.²⁶⁵ The party presented itself as more moderate

258 Gerechtshof 's-Hertogenbosch 22 September 1982, NJ 1984, 600.

259 See Rosier 1997, p. 45

260 Gerechtshof Arnhem 4 June 1982, NJ 1983, 422; HR 27 October 1987, NJ 1988, 538 m.nt. Van Veen; HR 18 October 1988, NJ 1989, 476, m.nt. GEM; HR 21 February 1995, NJ 1995, 452.

261 See Rosier 1997, p. 36-37 and Janssens 1998, p. 386-395.

262 Janssens & Nieuwenhuis 2005, p. 32.

263 HR 27 October 1987, NJ 1988, 538 m.nt. Van Veen; HR 18 October 1988, NJ 1989, 476, m.nt. GEM.

264 HR 18 October 1988, NJ 1989, 476, m.nt. GEM.

265 Vuijsje 1986, p. 52-53.

than earlier movements such as the NVU (though its individual members did have some extreme affiliations): it avoided explicit racism and focused instead on ‘protecting Dutch culture’ that was said to be ‘inundated by immigrants’.²⁶⁶ When the CP collapsed under the weight of internal struggles, successors CD and CP’86 soon emerged. However, as the boundaries between these parties and more extreme organisations were gradually fading, the issue of proscription reappeared on the agenda.²⁶⁷

In 1988, the party proscriptions regime in the Civil Code was amended again: the proscription ground was changed from “public order or morals” to simply “public order” (article 2:20 Civil Code).²⁶⁸ In the process of amending the law, the government explicitly set out what “public order” means in the context of party proscriptions: it is a broad concept which includes the “generally accepted principles of our legal system”.²⁶⁹ These imply the unacceptability of unjustified attacks on people’s freedom or human dignity, the use of violence or threats against public authorities, as well as racial discrimination and other prohibited forms of discrimination. Moreover, expressions which incite to hatred or discrimination and “degrading aspirations” provided grounds for proscribing a party.²⁷⁰ However, this only applied to activities whose uninterrupted continuation would lead to society’s disruption.²⁷¹ This implies a strict consequential test: prohibiting a party is only possible if its activities involve a real risk of trouble. Eskes thus argued that the new regime signaled a slight move towards formal democracy, because the government’s interpretation of public order was rather strict – it tended towards the United States’ “clear and present danger test”.²⁷² Though legislative history points to a substantive component in the regime – it mentions racial discrimination as a ground for dissolution – this legislative history also made clear that proscription is only an option in exceptional cases; a substantive “streitbare Demokratie” is a last resort option only.

Nevertheless, in the first proscription procedure under the new law (and the only one so far), the Court did apply a more substantive conception of democracy. In 1998, a proscription procedure was initiated against the Nationale Volkspartij/CP’86 (the new name for CP’86), which had gradually become more radical and more oriented towards national-socialism. The procedure was begun after the party’s leaders had already been criminally convicted for taking part in a criminal organisation (article 140(1) CC), as NVP/CP’86 systematically incited to hatred in its pamphlets and during

266 Van Donselaar 1991, p. 178.

267 Van Donselaar 1991, p. 219.

268 Another important amendment was the act of proscribing a party would now automatically lead to dissolution of that party by the court; earlier, those two decisions were separated.

269 *Kamerstukken II* 1984-85, 17476, nr. 5, p. 3.

270 *Kamerstukken II* 1984-85, 17476, nr. 5, p. 3.

271 *Kamerstukken II* 1986-87, 17476, nr. 57b, p. 4.

272 Eskes 1988, p. 576.

party meetings.²⁷³ The criminal convictions paved the way for the Minister of Justice to request dissolution of the party before the Civil Court – though in fact, the party had already stopped functioning after the criminal procedure. The Court indeed judged in favour of dissolving NVP/CP’86, as the party’s activities were solely aimed at ‘inciting to and/or promoting the discrimination of non-Western immigrants’.²⁷⁴ The Court did not delve into the concrete dangers to democracy in its judgment: the fact that the party repeatedly incited to racial discrimination justified dissolution. Accordingly, it seems that elements of substantive militant democracy do play an important role – though more case law is necessary to draw conclusions on this point. It is not unimaginable that propagation of antidemocratic views that does not constitute racial discrimination – such as propagation of a theocracy – can also provide grounds for dissolution, considering the interpretation of public order as the “generally accepted principles of our legal system”.²⁷⁵

According to Bellekom, the Netherlands has never clearly opted for one of either conceptions of democracy: ideas on Dutch militant democracy are still “underdeveloped”.²⁷⁶ The authorities have always dealt with such problems in a pragmatic manner, thereby “smuggling away” the principled issues involved. In his later work, Bellekom identified a third democracy conception to which he thinks the Netherlands adheres: the “non-dogmatic” conception. This is based on a number of democratic rules, but does not offer a theoretically founded solution to the fringe problems a democracy can encounter.²⁷⁷ Eskes concluded, in the light of his study of freedom of association and the proscription of political parties in the Netherlands, that the Netherlands takes the middle road between a “streitbare Demokratie” and a formal democracy, but that it has on several earlier occasions opted for the formal conception.²⁷⁸

In the field of *demonstrations*, legislation and case law officially adopted a value-neutral approach. Nevertheless, in practice demonstrations by far-right groups were more often prohibited as a preventive measure than other manifestations with great risks for public order.²⁷⁹ This changed in the second half of the 1990s: consensus on prohibiting far-right manifestations eroded and practice became more capricious. Legal procedures against mayors’ decisions to restrict demonstrations became more frequent (also due to the increased number of demonstrations), and the idea that demonstrations

273 HR 30 September 1997, NJ 1998, 118.

274 Rechtbank Amsterdam 18 November 1998, AB 1999, 329 m.nt. Kanne. Since the party was dissolved by default, it may be questioned whether the judgment would have been different if they had shown up – moreover, no appeal was lodged.

275 Van der Woude 2009, p. 23.

276 Bellekom 1982, p. 135.

277 Bellekom 1987, p. 22.

278 Eskes 1988, p. 566.

279 Van Donselaar 1997, p. 24.

can only be prohibited in highly exceptional circumstances gained more ground among mayors and the courts alike.²⁸⁰

6.4 The debate on immigration

Although by the mid-1990s things were gradually changing, the informal public ban on discriminatory expressions continued to stand relatively strongly through the 1980s and beginning of the 1990s. The anti-racism movement became even stronger in that period, in reaction to the emerging far-right movements and increased incidence of racist crimes.²⁸¹ Those movements started to gain more momentum as socio-economic disadvantages and segregation of minorities became more pressing issues, which in turn led to a widespread fear that an “epidemic” of racist violence would break out. The government and anti-racist organisations became increasingly active in countering this tide.²⁸² The fact that racist expressions led to public outrage, together with the internal struggles within organisations, ensured that the far right never became a really strong force in the Netherlands as it had become in countries like France and Austria.²⁸³

The media and politicians made sure that this consensus held. They tried to isolate the far right and they upheld the decency in debate about immigration and multiculturalism. “Racism” had a wide connotation at that time; it was even considered racist to make connections between ethnicity and criminality – reports on this issue could not be published – or to discuss real social conflicts between ethnic/religious groups in urban neighbourhoods.²⁸⁴ Expressions that fell outside this consensus often led to comparisons with the Second World War, which symbolised everything that was evil. The influence of the war was still felt in the way minorities were depicted in public debate: they were looked upon rather paternalistically – Van Dijk noted in 1991 that

it is felt that minorities may be “helped”, but they should not defend their rights, let alone make demands, or “force us” to employ them. Therefore, although less openly vilified and socially more “taken care of” than in other countries, the minority groups in the Netherlands have less social, political, and cultural power than minority groups in the surrounding countries of Western Europe.²⁸⁵

“Tolerance” often meant an indifferent “live and let live”-mentality, influenced by pillarisation. The creation of separate institutions for minorities received more

280 Loof 2008, p. 98.

281 Vuijsje 2008; Wagenaar & Van Donselaar 2008, p. 21; Adang, Quint & Van der Wal 2010.

282 Vuijsje 1986, p. 23.

283 Van Donselaar 1991, 12-14.

284 Vuijsje 2008, p. 28.

285 Van Dijk 1991, p. 110.

attention than diversity *within* institutions,²⁸⁶ though financial support for separate institutions was already fading in the 1980s. This approach to multiculturalism – which was pragmatic rather than principled²⁸⁷ – has been criticised for leading to separation rather than integration.²⁸⁸ In the 1990s the government became more conscious of the economic marginalisation and segregation of minorities; the increasing diversity of immigrant groups – including refugees – made the traditional approach harder to sustain. The government thus set out a stricter policy of “civic integration” for minority groups, which replaced the old adagium of “integration while retaining one’s own identity”.²⁸⁹ From the mid-1990s the previously held consensus slowly changed as immigrants themselves became aware of the need for integration, while public figures such as Bolkestein started to discuss the policy of multiculturalism.²⁹⁰

7 AFTER 2001 – REVISITED

That multiculturalism had been removed from the political domain for so long, was facilitated by the practice of consensus politics. When the pillarised system disappeared and polarisation emerged in the 1970s, some thought that this was the end of Dutch “pacification democracy”. However, the political culture had changed again by the 1980s: parties dropped their confrontational style and consensus-seeking returned.²⁹¹ Lijphart had earlier predicted that a more homogeneous society (after pillarisation) together with a tradition of consensus-seeking among elites would lead to a “cartel” democracy, where problems are depoliticised and bureaucrats and interest groups play an important role.²⁹² Such a system was predicted to be very stable but less democratic, because voters have little to choose. This is indeed how the Dutch system in the 1980s and 1990s is now characterised: a “depoliticised” democracy.²⁹³ By the 21st Century, the drawbacks of this system suddenly came to light.

7.1 Interpretation by the courts

In the 1980s, the government abandoned the idea of criminal law on hate speech as a “last resort” and this new focus on effective prosecution for hate speech offences was extended by the end of the 1990s with the Discrimination Directives. Accordingly, a relatively large number of new judgments were published after 2000. In the changing socio-political climate of the past decade, the case law on article 137c-d has also

286 Kennedy 2009, p. 22.

287 Oostindie 2010, p. 43-44.

288 Joppke 2004, p. 247.

289 Joppke 2004, p. 247.

290 Vuijsje 2008, p. 31.

291 Koole & Daalder 2002, p. 33.

292 Lijphart 1968, p. 38.

293 Koole & Daalder 2002, p. 41.

become more diffuse – the legislation leaves room for multiple interpretations. It became difficult to find common ground in interpreting articles 137c-d, especially now that the relationship between freedom of expression, non-discrimination and freedom of religion was the focus of much attention. This was apparent, for instance, in the debates on insult of homosexuals by orthodox believers.

Hate speech on the grounds of physical, psychical or mental handicap

A final amendment to articles 137c-e was made in 2005, when *physical, psychical or mental disability* was added to the list of discrimination grounds.²⁹⁴ This proposal was motivated by the pervasiveness of discrimination and subordination of disabled persons, ‘a reprehensible phenomenon that has to be countered clearly and directly’.²⁹⁵ Parliament had requested the government to draft such a bill at a moment when the government was drafting a general bill on Equal Treatment on the grounds of Disability or Chronic Disease (which was adopted in 2003).²⁹⁶ During this process of change in articles 137c-e, the government again emphasised that effectiveness and maintenance of the law on hate speech is important.²⁹⁷

7.1.1 Article 10 ECHR

Article 10 ECHR now plays a vital role in the courts’ reasoning on article 137c/d.²⁹⁸ Until the end of the 1990s, appeals to freedom of expression were usually rather easily put aside in hate speech cases. Often, the courts merely reasoned without further explanation that article 10(2) ECHR simply allows states to draft criminal law provisions such as art. 137c/d, or that infringement of freedom of expression is ‘necessary in a democratic society in the interest of protecting the rights of others’.²⁹⁹ From the end of the 1990s, the courts have gradually awarded defendants’ appeals to freedom of speech more attention. It has become common practice within the framework of “contextual interpretation” to set out an elaborate discussion of art. 10 ECHR and the European Court’s case law: freedom of expression is viewed as part of the “context” within which expressions are judged. Under the influence of the ECHR, the courts have paid much attention to the democratic rationale by according greater

²⁹⁴ Stb. 2005, 111.

²⁹⁵ *Kamerstukken II* 2001-02, 28221, nr. 3, p. 1.

²⁹⁶ Wet van 3 april 2003 tot vaststelling van de Wet gelijke behandeling op grond van handicap of chronische ziekte, based on EU Directive no. 2000/78/EG, 27 November 2000 (PbEG L 303).

²⁹⁷ *Kamerstukken II* 2001-02, 28221, nr. 6, p. 2 and 10.

²⁹⁸ HR 9 January 2001, NJ 2001, 204; Gerechtshof ’s-Gravenhage 23 January 2008, NJ 2008, 184 (Hofstadgroep); Rechtbank Amsterdam 2 June 2008, LJN BD2957, BD2966, BD2977; Gerechtshof Amsterdam 20 June 2008, LJN BD7024; Gerechtshof Amsterdam 21 January 2009, NJ 2009, 191 m.nt. Buruma.

²⁹⁹ Gerechtshof Den Bosch 22 September 1982, NJ 1984, 600; HR 14 March 1989, NJ 1990, 29; HR 16 April 1996, NJ 1996, 527; HR 18 May 1999, NJ 1999, 634.

protection to expressions in the context of public debate. In many of those cases, the individual rationale is also apparent: the courts take into account whether an expression is ‘of importance to *him* in public debate’, and individual religious convictions behind expressions play a role.

It is notable how variedly article 10 is interpreted by different courts: from a very broad protection of freedom of expression – including the freedom to “offend, shock or disturb”³⁰⁰ – to a focus on “duties and responsibilities” and protection against offence to religious feelings.³⁰¹ Even taking into account the difference in the facts of these cases, the courts also seem to value the principles derived from the ECHR quite differently. Partly this can be explained by the fact that the ECtHR’s case law leaves states a wide margin of appreciation. The complexity of the Dutch hate speech provisions and the wide range of possibilities within the framework of “contextual interpretation” also leave much room for differing interpretations.

7.1.2 Religious motivation & contextual interpretation

Under article 137c, contextual interpretation has gradually become an important tool for the courts to find a balance between different values. In this framework, expressions that seem insulting at first can “lose their insulting character” when assessed in relation to their context – unless they are “gratuitously offensive”. However, judging what this “context” actually includes appears to be far from easy: it can entail so many aspects – the religious conviction of the defendant, public or political debate, art/literature – that it seems an all-encompassing concept. Contextual interpretation has become particularly important in the field of religiously motivated insult, where defendants put forward their religious conviction as a factor that takes away the insulting nature of expressions.

In 2001-2003 the Supreme Court dealt with several cases of religiously motivated expressions about homosexuality.³⁰² In the “Dominee” case, a preacher had sent a letter to the local newspaper in which he expressed his objections – said to be based on the Bible – to ‘paedophilia, homophilia and polygamy’: he concluded that there should be no tolerance for those ‘nasty and filthy sins’.³⁰³ Another case dealt with an MP for the orthodox Christian party RPF: in a TV programme where he was asked for his opinion about homosexuality, he had said that all God’s commandments are equally important to live up to: ‘why would a practising homosexual be any better than

300 Rb Amsterdam 2 June 2008, LJN BD2957 and LJN BD2966; Rb Amsterdam 23 June 2011, BQ9001 (Wilders).

301 Gerechtshof Amsterdam 21 January 2009, NJ 2009, 191 m.nt. Buruma.

302 HR 9 January 2001, NJ 2001, 203; HR 9 January 2001, NJ 2001, 204; HR 14 January 2003, NJ 2003, 261.

303 HR 14 January 2003, NJ 2003, 261.

a thief?’³⁰⁴ In both cases, the Supreme Court acquitted the defendant with an appeal to the context of the expressions. The Court judged that expressions which are ‘recognisably in direct connection to their religious views and as such are meaningful to them in public debate’ can lose their insulting character if they are not gratuitously offensive.³⁰⁵

Hence the context includes a combination of (1) public debate and (2) the defendants’ religious conviction. The Supreme Court has interpreted the first factor – public debate – in a broad sense. In the “Dominee” case, the Court found that the defendant’s intention to warn society against “sins” indicated that the expressions were ‘meaningful to him in public debate’. In another judgment, the Supreme Court took into consideration that the expressions were made within the ambit of a public debate about gay marriage.³⁰⁶ The second factor, taking account of the *religious motivation*, is related to the right to freedom of religion. In some of the rulings freedom of religion is an explicit consideration,³⁰⁷ others focus only on freedom of expression.³⁰⁸ This has led commentators to discuss which right – freedom of expression or freedom of religion – is decisive, and accordingly, whether religious expressions are generally afforded more protection than other expressions.³⁰⁹ This is one of the reasons why hate speech law has been much criticised in the past decade: it has given people the idea that religion is an excuse to say things that others may not express. Another point of debate is how to assess whether an expression is based on a religious conviction. A leading principle in Dutch law on freedom of religion is that judges shall be “reserved” in interpreting whether something belongs to a religion; this assessment should be left to the person or persons concerned as much as possible, considering the principle of state neutrality in religious matters.³¹⁰ Neutrality would be endangered if judges were to decide whether a particular utterance is really an expression of a person’s religion. Therefore it is quite remarkable that in a Court of Appeal case against Muslim preacher El Moumni, experts in theology were called upon to decide whether his expressions could reasonably be regarded as expressing his Islamic convictions.³¹¹ In the other cases mentioned, the courts have refrained from explicitly ascertaining whether the defendants’ expressions did indeed relate to their religious conviction (but one can imagine that the judges were more familiar with the Christian convictions that were at stake in those cases, and that accordingly there was less need to ask an expert).

304 HR 9 January 2001, NJ 2001, 203.

305 HR 9 January 2001, NJ 2001, 203, par. 3.4.4; HR 14 January 2003, NJ 2003, 261, par. 3.4.1.

306 HR 9 January 2001, NJ 2001, 204, par. 3.4.4.

307 HR 9 January 2001, NJ 2001, 203; Gerechtshof ’s-Gravenhage 18 November 2002, NJ 2003, 24 (El Moumni).

308 HR 9 January 2001, NJ 2001, 204; in HR 14 January 2003, NJ 2003, 261 the Court does not explicitly mention either of the rights.

309 Vermeulen 1989; Stolwijk 1988; Loof 2007.

310 Galenkamp 2005.

311 Gerechtshof ’s-Gravenhage 18 November 2002, NJ 2003, 24.

7.1.3 Case law on the debate about immigration

It remains to be seen whether the legal boundaries of public discourse have expanded along with the informal limits after 2001. In a judgment from 2003, the Supreme Court continued the line set out in previous judgments from the 1980s-1990s. The Court upheld the conviction under article 137c of a defendant who had sent several letters-to-the-editor to a newspaper, writing that asylum seekers are thieves, killers and rapists and that a recently committed murder in the region had been committed by an asylum seeker. The Supreme Court did not follow the defendant's plea that he had wished to criticise the state of affairs in a murder investigation, where the police allegedly failed to investigate the role of asylum seekers.³¹² Although the expressions were indeed made in the context of a public debate, the Court ruled that they were gratuitously offensive and thus exceeded the limits what is acceptable in public debate (referring to article 10 ECHR).³¹³

However, more recent judgments in courts in first and second instance paint a varying picture. In 2009, the Hague Court of Appeal acquitted a defendant for spreading pamphlets with the text 'Voucher: Go to Morocco for Free (...) to be handed over personally by the mayor so as to thank Moroccan youth for disturbing the "children's play day"'. It has been decided that the family and friends of those young people will be offered a trip back to Morocco.³¹⁴ The Court considered that this could not be regarded as insult but rather as a satirical way of criticising the mayor for failing to act after disturbances caused by young Moroccans. Insult under article 137c must be interpreted strictly as 'affecting persons' intrinsic value or discrediting them', the Court held. Commentators had long advocated this strict interpretation of "insult", but in 1980s-90s case law the courts did not always follow this line.³¹⁵

In 2010, the Amsterdam Court of Appeal acquitted a columnist of student magazine Havana: he had written a provocative piece with the main purpose of criticising Israeli people.³¹⁶ His column started with the remark that 'Since the nazi period it is no longer cool to say negative things about Jews, but sometimes I do understand how the events of 1937 could have happened (...)'. The piece also included some other negative references to Jewish people (though mainly targeting Israelis). The Court judged that this particular expression was, in principle, insulting. However, judging it within its broader context, it also held that this provocative first sentence was aimed at drawing people's attention to the column; in the light of the column as a whole – which the Court did not find insulting – the words were not judged gratuitously offensive. In its

312 HR 15 April 2003, NJ 2003, 334.

313 HR 15 April 2003, NJ 2003, 334, par. 3.5.

314 Gerechtshof 's-Gravenhage 11 February 2009, LJN BH2481.

315 Janssens & Nieuwenhuis 2005, p. 32; Rosier 1997, p. 45.

316 Gerechtshof Amsterdam 17 February 2010, LJN BL4528.

general remarks, the Court also discussed article 10 ECHR and the specific context of artistic expressions, such as columns. That the context of a satirical column does not always help the defendant, however, becomes clear from a 2006 case before the Amsterdam Court of Appeal.³¹⁷ Here, a website owner had taken on the pseudonym of Christian journalist Andries Knevel to express hateful remarks about homosexuals and Jews ('in my view the death penalty is still a light penalty for homosexuals'). The defendant contended that those expressions should not be taken seriously and that he had no intention of insulting anyone, but rather to draw the attention of the public to existing fundamentalist-Christian ideas in a humorous and provocative manner. The Court of Appeal did not accept this argument; it held that the defendant should have engaged in such a debate without the contentious passages, which are 'not necessary to conduct the debate' and are 'offensive and outside the limits of the acceptable'. Accordingly, the practice of judging whether a provocative style is "necessary" has not disappeared.

This struggle with the interpretation of article 137c and the scope of freedom of expression can also be seen in a 2009 case where the defendant had written on his weblog a piece called 'Radical Muslims want to predominate': 'We should not talk with such Muslim terrorists. We should kick them out of the country (...) Stay in your desert to screw your camels (...)'. The Haarlem Court in first instance acquitted the defendant, noting that he only intended to target radical Muslims or terrorists and their extreme behaviour, not Muslims in general; therefore insult of Muslims in general could not be proven.³¹⁸ The Court of Appeal, however, ruled that the expressions were clearly insulting for Muslims, who were targeted as a collective group rather than merely the radical elements within the group. As these expressions denied Muslims' human dignity, the Court of Appeal convicted the defendant under article 137c.³¹⁹ In this regard the "Polinco"-case is also of interest: this webforum referred to coloured people as "filthy" and "inferior", to gays as "crawling animals" and to non-Western immigrant women as "rats".³²⁰ Although the Court in first instance had acquitted the defendant because of doubts about the public character of the website – a judgment later overruled by the Court of Appeal – the insulting and gratuitously offensive character of these expressions was beyond doubt for both courts. In 2011 the Hague Court in first instance convicted a website administrator for insult and incitement to hatred against Muslims for a whole range of coarse messages ("parasites", "monkeys" etcetera), but acquitted the defendant for insult with regard to the message '[the plan to turn back criminal Antillian youth] comes way too late. The Antillians are present with enough people to make a whole new army of professional young criminals

317 Gerechtshof Amsterdam 17 November 2006, LJN AZ3011.

318 Rechtbank Haarlem 7 April 2009, LJN BI0374.

319 Gerechtshof Amsterdam 11 October 2010, LJN BO0041.

320 Gerechtshof Amsterdam 23 November 2009, LJN BK4139.

(...).³²¹ This expression was found to be directed solely at criminal individuals within the group, not at the group as such. Moreover, the Court judged the expression ‘try to mention a big Dutch societal problem for which Jews are NOT responsible’ to be in violation of article 137d, but not 137c; it is incitement to hatred because it constitutes an “intrinsically conflictuous dichotomy”, but it is not evidently insulting, according to the Court.

7.1.4 Indirect insult and indirect incitement on the grounds of religion

When it comes to case law on hate speech on the grounds of religion, in 2009 the Supreme Court showed that nowadays the law is indeed interpreted rather strictly, as compared to twenty years earlier.³²² When a member of the far-right organisation National Alliance placed a poster in a window facing the street with the words “Stop the cancer called Islam”, the Court of Appeal ruled that this expression is insulting on the grounds of religion, holding that ‘considering the connection between religion and its adherents’, this gratuitously offensive statement about Islam is also insulting for Muslims. The Supreme Court overruled this judgment. It judged that article 137c protects only *persons* from insult and not *religion itself*, even though an expression about a religion may offend people’s feelings. After all, it is only criminal to express an insult ‘about a group of people on account of their religion’. With an appeal to legislative history, the Supreme Court found that an expression can only be criminal if it ‘undeniably concerns a group of people’; criticism – even when strongly worded – of a group’s opinions or behaviour falls outside the ambit of article 137c.³²³ It is notable that the Supreme Court came to this conclusion in the first step of the contextual interpretation framework: it judged that an expression that does not constitute insult of *people* is not insulting as such, so that it is not necessary to take into account the context (second step) – including freedom of expression – or the gratuitously offensive criterion (third step). The judgment explicitly overrules parts of an earlier decision by the Amsterdam Court of Appeal which ordered that Geert Wilders should be prosecuted for his expressions about Islam and Muslims (see par. VI.7.1.6). While the Minister of Justice was initially planning to change article 137c to include indirect insult, after the Islam poster judgment the government no longer has plans for any such legal changes.

Commentators have questioned whether more indirect forms of insult are now also excluded from article 137c for the other discrimination grounds, such as race; on the one hand all grounds were put on an equal par in legal history, but on the other hand

321 Rechtbank ’s-Gravenhage, 12 May 2011, LJN BQ4301.

322 HR 10 March 2009, *NJ* 2010, 19 m.nt. Mevis.

323 Par. 2.5.1-2.5.2.

CERD – which forms the background for Dutch law as well – stresses the particular importance of combating *racial* discrimination.³²⁴

7.1.5 Article 137d: indirect incitement and speech-consequences

The new development towards a restrictive interpretation of article 137c in the field of religion leaves unimpeded the use of article 137d in such cases. In 2010, the Utrecht Court in first instance had to deal with posters in a window facing the street, depicting a church in flames and the words “burn the” before it, as well as a Christian cross next to a swastika.³²⁵ Since the depictions and texts only referred to the Christian religion and not to Christian people, the Court had to acquit the defendant under article 137c in the light of the Supreme Court’s 2009 judgment. However, the Court did convict for *incitement to violence* on the grounds of religion under article 137d: it argued that the public message of a church in flames, in combination with the other messages, constituted an incitement to others to burn a church. The Court easily overstepped the real risk of violent consequences – strictly viewed, this risk is irrelevant under article 137d; what matters is whether expressions are adequate to incite to violence. It ruled that the defendant’s conviction would pass the test of article 10 ECHR, since the posters constituted incitement and they ‘conflict with the values that the ECHR protects’ and ‘do not contribute to public debate’.

In 2008, the Court of Appeal convicted a defendant for messages on a website that read: ‘As soon as the Islamic law is in force in the Netherlands I will be the first to throw every protesting homosexual from a tower(...)’ and ‘Amsterdam pride or hell? In an internet statement they [the Mujahedeen] threaten to make Amsterdam a hell (...) Brothers, for the record, the Canal Parade is taking place on Saturday 6 August 2005 from 14.00h. Let’s make it an explosive party.’³²⁶ The Court of Appeal declined to follow the defendant’s plea that he did not mean things seriously and that he had not tried to convince anybody to take action. Firstly, the Court was not convinced that the statements concerned a ‘completely imaginary situation’ and were not meant seriously. Secondly, the Court did ‘not consider it unimaginable that certain groups or persons indeed see the defendant’s statements as an inducement to use violence against homosexuals, or as an encouragement of their already existing intentions to this end. Expressions such as these obviously stir up hatred and discrimination against homosexuals, which from time to time actually lead to violence against them.’ The Court did delve into the link between speech and consequences but did not require a strict relationship.

324 Noot P.A.M. Mevis, HR 10 March 2009, *NJ* 2010, 19.

325 Rechtbank Utrecht 26 April 2010, LJN BM8138.

326 Gerechtshof Amsterdam 20 June 2008, LJN BD7024.

In 2011 the Supreme Court moreover ruled that expressions whose meaning may not be immediately clear to an average person – in this case, the words “Combat 18” (Combat is a far-right movement; in these circles the numbers 1 and 8 refer to the first and eight letter in the alphabet: AH, which stands for Adolf Hitler) – can still be regarded as incitement to hatred or discrimination, although it is “indirect”. The courts may take into account the associations that an expression arouses in the particular circumstances in which it is uttered, the Supreme Court held.³²⁷ This judgment again makes clear that under Dutch hate speech law the link between speech and consequences – who is actually incited by such an indirect expression? – may be quite loose.

7.1.6 The prosecution of Geert Wilders

When in 2009 the Amsterdam Court of Appeal demanded the prosecution of Geert Wilders, a heated debate followed. The case dealt with several of Wilders’ expressions about Islam (such as his comparison of the Qu’ran with Mein Kampf) and Muslim immigration (“no more Muslim immigrants”), including his propaganda-style film *Fitna*. This concerned only expressions outside Parliament; MPs enjoy immunity for their expressions made in Parliament. Parliamentary immunity has become an issue of debate around the Wilders case: some argue that it should be extended to Parliamentarians’ expressions outside Parliament, since political debate for a large part takes place outside that realm.

The prosecution service had initially declined to prosecute Wilders for these expressions – allegedly on the grounds that prosecution was not likely to lead to a conviction: his expressions were uttered in the context of a political debate and were directed against Islam rather than Muslims.³²⁸ However, considering the case law up to that point, it seems more likely that policy considerations played a role: there was a risk that such prosecution would give Wilders a great platform to become a “free speech martyr”. As the prosecution’s directive no longer allows policy dismissals on such grounds, it seems that they were forced to come up with technical reasons to dismiss the case. A consortium of Muslim organisations then successfully complained to the courts about the prosecution’s refusal. When the Amsterdam Court of Appeal ruled that the prosecution must proceed with the case, the increasing controversy surrounding hate speech bans was brought to the fore. The Court of Appeal had used an elaborate argumentation to argue that Wilders should be prosecuted, which gave many people the idea that he had already been convicted. Though the Court of Appeal’s decision is not a real judgment about the criminality of Wilders’ expressions – the Amsterdam Court in first instance later dealt with the substance of the case –

³²⁷ HR 23 November 2010, *NJ* 2011, 115, par. 2.7.

³²⁸ Press release Public Prosecution Service 30 June 2008, <www.om.nl/onderwerpen/discriminatie/@148328/wilders_niet/>.

some of its argumentations will nevertheless figure in this paragraph as they stand in sharp contrast to the eventual judgment by the Court in first instance.

The discussion around Wilders' prosecution had made it clear to the public that the courts can set legal limits to Wilders' political speech. As a result, the legitimacy of the offences was increasingly called into question. Wilders' supporters regarded the prosecution as a political process that meant the end of freedom of expression in the Netherlands. More moderate commentators also criticised the Court of Appeal's decision – some for principled reasons, others for the pragmatic consideration that prosecution would cater to Wilders' interests. After all, the court proceedings gave him the chance to exploit his role as a victim of the established elite – a role that he played to the fullest during the subsequent court proceedings. He successfully recused the judges after a row over an alleged attempt to influence a witness, so that the case had to be started all over again; this gave Wilders an excellent opportunity to mock the judiciary as part of the “leftist elite”. The public prosecution twice requested acquittal, for the same reasons as when it initially declined to prosecute the case. The prosecution's elaborate concluding argument, which set out a particularly liberal interpretation of articles 137c-d, functioned as the basis for the eventual judgment by the Amsterdam Court in first instance. Wilders' final acquittal led to many relieved reactions in the Netherlands. Whereas the criminal convictions of politicians such as Janmaat and Glimmerveen received ample attention in the Netherlands at the time³²⁹ – the idea that criminal law can set restrictions to hate speech in political debate was largely accepted – many now argue that Wilders' expressions should be countered by public debate, not law.

Article 137c

Par. VI.7.1.4 showed how the “Islam poster” judgment overruled the Court of Appeal's reasoning about insult of religion. When the Court in first instance in the Wilders case had to deal with some of his expressions under article 137c – including ‘the foundation of the problem is the fascist Islam, the sick ideology of Allah and Mohammed as laid down in the Islamic Mein Kampf: the Koran’ – the “Islam poster” judgment functioned as an important precedent.³³⁰ The Court repeated that ‘criticism – in whatever form – of a group's opinions or behaviour falls outside the ambit of article 137c’ and that expressions must ‘undeniably concern a group of people’ – defamation of religions is not covered. The earlier decision of the Court of Appeal on this matter had been very different: it had ruled that disqualification or contempt of certain characteristics, traditions or symbols pertaining to a religion can insult persons on the grounds of their religion.³³¹ The Court of Appeal had argued that the right to

329 NRC Handelsblad, ‘Vervolging Wilders lokt haatmails uit; rechters wijzen op verschil met tijdperk-Janmaat’, 14 March 2009.

330 Rechtbank Amsterdam 23 June 2011, LJN BQ9001, par. 4.2.

331 Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 12.1.3.

freedom of expression must be balanced against ‘the right not to be offended in one’s religious feelings’, basing itself to a large extent on ECtHR case law.³³² In the view of the Court in first instance, however, Wilders’ expressions about Islam were not punishable under article 137c.

The Court in first instance found that not all of Wilders’ expressions were only directed at Islam: the utterance ‘you will see that all the evil that Allah’s sons conduct against us and against themselves, comes from the Qu’ran’ was actually directed at Muslim people instead of merely their religion. Nevertheless, the Court found that this is criticism of people’s *behaviour*, which article 137c does not cover. This line of case law was set in the Islam poster judgment, where it was derived from legislative history.³³³ Despite that, harsh criticism of people’s behaviour could practically fall under article 137c or even 137d in earlier case law.³³⁴

The Court of Appeal had been more critical of the idea of prosecuting Wilders under article 137c than under article 137d: it argued that most of his expressions should not necessarily be prosecuted under article 137c, except for the expressions comparing the Qur’an with Hitler’s *Mein Kampf*. The Court argued that Dutch democracy and its culture of ‘open debate, tolerance and respect for each other’s viewpoints’ can lead to a situation where expressions, even though strictly falling under article 137c, are better not prosecuted in order to leave freedom for ‘counter-forces in public debate itself’.³³⁵ The Court of Appeal thus set an important nuance to the rule that hate speech offences should always be prosecuted – however, this was largely overshadowed by the remainder of the judgment.

Article 137d – incitement to hatred

The Court of Appeal had also ordered the prosecution for several of Wilders’ expressions under article 137d. It interpreted “incitement to hatred” relatively broadly, building upon older case law: as the creation of an “intrinsically conflictive dichotomy” between different groups – for instance between native Dutch people and “aliens”.³³⁶ The form of the words used was an important factor here, particularly the use of suggestive language and strongly one-sided generalisations.

The Court in first instance differentiated between expressions directed at Islam and expressions directed at Muslims, as it had also done under article 137c.³³⁷ The Court

332 Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 10.

333 *Handelingen I* 1970-71 (Goedkeuring IVURD), p. 555.

334 HR 15 April 2003, *NJ* 2003, 334; HR 2 May 1995, *NJ* 1995, 621.

335 Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 13.2.

336 For the first time in HR 2 April 2002, *NJ* 2002, 421 m.nt. Mevis (in the Court of Appeal’s judgment, the Supreme Court did not deal with incitement to hatred contentwise). Later Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma.

337 Rechtbank Amsterdam 23 June 2011, LJN BQ9001, Par. 4.3.1.

did so with an appeal to legislative history of the 1970s, which states that criticism of people's convictions is not covered by either 137c or 137d. As some of Wilders' utterances prosecuted under article 137d targeted religion instead of believers, he was acquitted for this part.

Many of his expressions did target Muslims, rather than Islam. However, the Court set forth a strict interpretation of incitement to hatred: in order to qualify as such, utterances must include a "power-strengthening element" or "reinforcing element".³³⁸ It considered this requirement to be more important than the "intrinsically conflictive dichotomy" requirement. After all, not *all* case law on 137d put forward this requirement. In any case, the prosecutor's concluding argument had put forward a strict view of what an "intrinsically conflictive dichotomy" means: this refers to creating a dichotomy between two groups by outlining, from a one-side perspective, how one group falls victim to the other group's harmful characteristics; as a result, a conflict of interest appears which may well lead to serious and violent conflicts.³³⁹

The Court derived its new "power-strengthening element" interpretation of article 137d from the public prosecution's concluding argument, relying on two arguments: first, the words "incite to" in 137d must be interpreted similarly to "incitement" in article 131 CC, thus a strict interpretation. Secondly, the Court set forth that "hatred" is an extreme emotion of deep aversion and hostility, so that a "provocative element" is needed. In one judgment from 1996 the Court of Appeal had also required the existence of a clear "element of incitement" under article 137d,³⁴⁰ but in other case law – including that of the Supreme Court – this element has not received attention. The prosecution in the Wilders case elaborated that

the power that is needed to generate hatred depends on the already existing relationship between the targeted group and the group to be incited (...) If there is already a certain distrust or animosity between two groups, the image conveyed needs less power to generate hate (EcrtrHR Zana v. Turkey). In a society such as ours, where groups generally get along peacefully, the image conveyed about a particular group (the intrinsically conflictive dichotomy) will need to be powerful. (...) In the Dutch context utterances will almost always need to be accompanied by elements that are suggestive or that lack nuance, in order to be sufficiently powerful.³⁴¹

As such, the prosecution set forth that prohibiting hate speech deserves more scrutiny outside the context of a conflict. The Court judged that most of Wilders' expressions did not contain such a power-strengthening element – neither in themselves nor when

338 Rechtbank Amsterdam 23 June 2011, LJN BQ9001, Par. 4.3.1.

339 Public prosecutor's concluding argument in the Wilders case, 25 May 2011, p. 54; English summary of public prosecutor's concluding argument in the Wilders case, 15 October 2010.

340 Hof Amsterdam 23 December 1996, *NJCM-Bulletin* 1997-3; Woltjer 1997.

341 Public prosecutor's concluding argument in the Wilders case, 25 May 2011, p. 55.

viewed in the context of the whole utterance.³⁴² This was the case, for instance, for the expressions ‘[w]e want no more Muslims to enter the Netherlands, many Muslims to leave the Netherlands, denaturalisation of Islamic criminals (...)’. The Court also considered the following expression “coarse and denigrating” but not inciting:

The demographic composition of the population is the largest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here. We have to stop the tsunami of Islamisation. That stabs us in the heart, in our identity, in our culture. If we do not defend ourselves, then all other items in my programme will prove to be worthless.

As to one utterance, though, the Court held that Wilders’ words were of an inciting character, because he urged people to defend themselves against Muslims:

I do know that there will be no Islamic majority in a couple of decades. However, the number is growing. With aggressive elements, imperialism. Walk in the street and see where this ends. You feel that you are no longer living in your own country. A conflict is going on and we have to defend ourselves. In due time, there will be more mosques than churches!

However, considering that in the same interview Wilders had said that he was only against Islam and not against Muslims, the Court concluded that he did not incite to hatred – ‘an extreme emotion of deep aversion and hostility’. The second part of the film *Fitna* was also considered to be of an inciting character: it showed how more and more Muslims would come to live in the Netherlands, combined with images of Muslims in the Netherlands next to images of gays being hanged and women killed. ‘These images suggest that, with the growing number of Muslims in the Netherlands, violence and criminality will increase, and that this is also caused by Muslims who already live in the Netherlands’, the Court held. However, ‘these images need to be viewed in connection with the rest of the film and in the context of public debate. The message of the film as a whole, as the defendant repeatedly emphasised, is the bad influence of Islam.’ Moreover, in the period when Wilders made his film, multicultural society and immigration had a prominent place in Dutch public debate – and according to the ECtHR, expressions uttered in public debate may ‘shock, offend or disturb’. Wilders must be allowed to express his main message about the alleged dangers of Islam in his role as a politician in public debate, so the argument goes; after all, he has also repeatedly emphasised that he has nothing against Muslims who assimilate. Therefore the Court concluded that the film *Fitna* as a whole, in the context of public debate and the defendant’s wish to warn against Islam, does not incite to hatred. The Court of Appeal had instead reasoned that the structure of his expressions – the use of repetition to gradually build up a picture of an Islamic threat – was aimed at convincing people that discriminatory action is necessary.³⁴³

³⁴² Rechtbank Amsterdam 23 June 2011, LJN BQ9001, Par. 4.3.2.

³⁴³ Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 12.1.2.

The context of public debate – and Wilders’ role as a politician – played a vital role in the Court in first instance’s interpretation of article 137d: this context even excused the harshest messages, and the Court did not consider whether they are gratuitously offensive (the third step in the framework of contextual interpretation). It is notable that the Court of Appeal had a very different idea of Wilders’ role in public debate: it held that Wilders’ harsh expressions “block” public debate in such a manner that Muslims are actually excluded from participating in it: he “silences” Muslims by requiring that they give up their religion in order to become accepted as full-fledged citizens.³⁴⁴ This “silencing” argument had not been used by the Dutch courts before, and it was criticised in legal literature as well as in the newspapers: it is hard to see how his expressions actually block others from participating in a discussion.³⁴⁵ In Butler’s words, such speech acts are “perlocutionary” instead of “illocutionary” – their effect is not automatic but depends on numerous factors.

The Court of Appeal had argued that the political context of the expressions did not automatically excuse Wilders – politicians may even have greater responsibilities because of the influence they have on others.³⁴⁶ Moreover, when judging all Wilders’ expressions in relation to each other – also a form of contextual interpretation – the Court found an indication that Wilders did indeed aim at targeting Muslims instead of only the contents of their religion (as he contended). Thus the context worked to enhance his criminal liability.³⁴⁷ This approach has been criticised, for the Court of Appeal in turn dealt with Wilders’ expressions as a whole, separated from their respective contexts.³⁴⁸ However, the Court in first instance’s approach of separating Wilders’ particular “expressions about Islam” from “expressions about Muslims”, without viewing them in the light of Wilders’ whole ideology, clearly has its drawbacks as well. The Court in first instance also put much emphasis on the coherence and context of the utterances, but there the context worked so as to *take away* his culpability: this context included the right to freedom of expression. The Court did mention some of the nuances in the ECtHR’s case law on this point – quoting Féret and Erdogan – but eventually opted for a larger degree of freedom of expression than the ECtHR usually does.³⁴⁹

Article 137d – Incitement to discrimination

As to incitement to discrimination, the Court again made it clear that there are few limits to public debate about immigration. The Court of Appeal had ruled that the

344 Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 13.2.

345 Nieuwenhuis, case note to Gerechtshof Amsterdam 21 January 2009, *Mediaforum* 2009-3.

346 The court mistakenly used the legislative history of the 1930s to make its case about article 137d – which was only drafted in the 1970s.

347 Gerechtshof Amsterdam 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 12.1.3.

348 See Nieuwenhuis, case note to Gerechtshof Amsterdam 21 January 2009, *Mediaforum* 2009-3.

349 Rechtbank Amsterdam 23 June 2011, LJN BQ9001, par. 4.3.1.

politician's expressions such as 'close the borders, no more Muslims into the Netherlands' could hardly be understood in any other way than being aimed at convincing people that those plans should actually be carried out.³⁵⁰ This concurred with the ECHR's view on Article 17 ("abuse of right"), and the Court pointed to the ECHR decision in *Glimmerveen c.s. v. the Netherlands*: 'every participant to public debate, even if a politician is concerned, abuses his right to freedom of expression if (...) he incites to discrimination and hatred against a group or religious community'.³⁵¹ Indeed, in earlier Dutch case law it had been easily accepted that the promotion of a political programme that would – if effectuated – discriminate against people, falls under article 137d.

The Court in first instance found that such expressions – including 'whoever does not adjust to our dominant culture, will be expelled from the Netherlands' did not incite to discrimination.³⁵² Though no "power-strengthening element" is needed for incitement to discrimination, in the Court's view proposals for discrimination are easily excused by their political context. Whereas Wilders' expressions are discriminatory as such, they are political proposals in the context of public debate; within this debate, Wilders has much room to voice the ideas 'which he hopes to realise when he comes to power in a democratic manner'. Therefore, 'in the defendant's perspective these utterances are necessary in a democratic society'. Moreover, the Court again stressed that multiculturalism and immigration were prominent items in public debate at that time, and 'as this debate becomes more serious, there must be more room for freedom of expression'. As the utterances did not transgress so far as to be excluded from public debate – and because Wilders declared that his proposals were not meant to target every Muslim – the context deprived his expressions of their discriminatory character. The Court thus adhered to a formal democracy conception: even though Wilders' substantive proposals would violate the fundamental right to non-discrimination if effectuated, his expressions to this end are not easily prohibited.

The Wilders case shows that the legal boundaries between insult and legitimate criticism in the multiculturalism debate are indeed shifting, a development that could already be seen in some case law on article 137c from 2009. In the field of article 137d, the Wilders judgment provides a very progressive interpretation which was not yet visible in previous case law.

350 *Gerechtshof Amsterdam* 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 12.1.2.

351 *Gerechtshof Amsterdam* 21 January 2009, *NJ* 2009, 191 m.nt. Buruma, par. 12.2.2.

352 *Rechtbank Amsterdam* 23 June 2011, *LJN* BQ9001, par. 4.3.2.

7.1.7 Radicalisation, extreme speech and hate speech: the Hofstadgroep

The courts have also had to deal with expressions *by* a radical minority directed *against* the dominant group, in the case against the *Hofstadgroep*.³⁵³ This was a group of radical Islamic youth, including the murderer of Theo van Gogh (Mohammed Bouyeri), who were accused of possession and distribution of radical-Islamic writings and incitement to hatred against nonbelievers. These included, for instance, writings where it was argued that only Allah has the right to make laws and that governments which do not act in accordance with the sharia are “false gods”. The group members were prosecuted for membership of a criminal/terrorist organisation (article 140/140a Sr) that had as its presumed goal the distribution of radical-Islamic expressions (which, according to the prosecution, constituted a criminal offence under article 137d and 131). The case raised many vital questions with regard to hate speech and the democratic paradox, the scope of public debate and the relationship between minorities and majority. One of these questions eventually reached the Supreme Court, whereas many other questions only emerged before the Court of Appeal and did not come back in the highest instance.

The question before the Supreme Court was whether article 137d must be interpreted “symmetrically”: does the provision protect the *majority* against hate speech or only vulnerable *minorities*? This was relevant because some of the group’s writings expressed the opinion that one should show hatred towards “nonbelievers” – meaning in the group’s view every person who did not share their radical religious views. The Court of Appeal ruled that article 137d was not applicable in this case, because it is intended to protect vulnerable minorities and nonbelievers cannot be regarded as such.³⁵⁴ However, the Supreme Court rejected this asymmetrical interpretation of article 137d. It followed the Attorney-General, who had pleaded that hate speech against a majority group is also a criminal offence: despite the fact that the legislative history of the 1970s echoes the idea that there is less reason to protect the majority, the eventual text of article 137d is not limited to protecting minorities. Moreover, the legislative documents of the 1980s do not give any indications that article 137d should be limited to hate speech against minorities.³⁵⁵

The Court of Appeal’s judgment also deals with the context of religious convictions in judging extreme expressions. In this case, the three-step contextual interpretation test was used with regard to article 137d for the first time (it was repeated in the Wilders judgment). The Court placed the case in the framework of both articles 9 and 10 ECHR and pointed out that prosecution for religiously motivated expressions can infringe upon freedom of religion. It held that expressions can be deprived of their

353 HR 2 February 2010, LJN BK5172 / BK5182 / BK5174 / BK5196 / BK5175 / BK5189 / BK5193.

354 Gerechtshof ’s-Gravenhage, 23 January 2008, NJ 2008, 184.

355 Conclusie P-G par. 49.

“hate-inciting” character if they express the author’s religious views as derived from the Qur’an or Hadith. In the Court’s subsequent considerations about the facts, it no longer referred to the Qur’an and/or Hadith as the basis for the defendants’ religious views; however, in some of its earlier considerations about the eventual goal of the group, the Court did delve into the group’s religious views and thereby based itself on an expert witness on radical Islam. The Court held that adherence to salafi ideology does not inevitably lead to violence and that adherents – including the group members concerned – differ on the question whether sharia law should be imported into non-Islamic countries and whether violence should be used. Therefore the Court rejected the view that the group’s radical ideology should lead to the conclusion that they intended to use violence to enact sharia law in the Netherlands.

Moreover, the Court of Appeal placed the case in the framework of a “democratic paradox” and delved into the requirements of the ECHR for prohibiting extreme speech. It held that the protection of the democratic public order against ‘powers that could gravely upset or even destroy it’ should be balanced against the protection of the fundamental rights enshrined in art. 9 and 10 ECHR, rights which belong to democracy’s core components. The Court then set out the limits to freedom of expression and religion, referring to the ECtHR judgment in *Gündüz v. Turkey*: expressions which denounce democracy and the rule of law but which do not advocate violence – including the advocacy of sharia and theocracy – do not automatically lose the protection of article 9/10 ECHR. Distancing oneself from “nonbelievers” is allowed, and even the expression of intolerance and hostility towards them shall only be restricted if the limits of acceptable speech – that is, mainly, the criterion that expressions shall not be gratuitously offensive – are not crossed. According to the Court, the general risk that such extreme speech will lead to overthrowing democracy is not sufficient reason to restrict expressions; pleading for theocracy or sharia surely does not automatically lead to violence and should thus not be restricted unless a real risk of violence exists.³⁵⁶ However, the Court set a clear limit to expressions in which “jihad” is advocated; those expressions are found to be capable of inciting to terrorist violence.

The writings of Mohammed Bouyeri did actually incite to “jihad”: they repeatedly referred to injustices against Muslims in heated and angry wording. The Court found that these writings entail a real, actual risk that people follow his calls. Though there is no risk of a “general decline of Dutch democracy”, the expressions are liable to incite persons – even if only one – to commit a terrible act. Such an act, in turn, can lead to the disruption of democracy or at least to great unrest which may provide a fertile ground for further violence.³⁵⁷ Accordingly, the defense of democracy against

³⁵⁶ The Supreme Court did not delve into this issue.

³⁵⁷ *Gerechthof ’s-Gravenhage* 23 January 2008, NJ 2008, 184.

a radical ideology does not appear to be enough reason *in itself* to criminalise expressions, without the risk of violence or (as in the NVU case) discrimination.

Furthermore, as the defendant had made it clear in his texts that no negotiation was possible with nonbelievers, the Court of Appeal found that he did not have the intention to participate in public debate: apparently, an expression cannot be considered as “meaningful to him in public debate” if in fact no public discussion takes place and the defendant does not wish to initiate such a debate. Similarly, the Amsterdam Court of Appeal found that a defendant who only uses coarse words to impress likeminded people who read his weblog, does not intend to contribute to a debate about matters of public interest.³⁵⁸

7.2 Wider developments: public debate and political culture

The fact that the Hofstadgroep members were prosecuted for hate speech illustrates how discussions about militant democracy have developed. Before the 21st Century, militant democracy primarily had the meaning of protecting democracy against parties that discriminate against minorities. In current debates, however, the issue is often linked to protecting democratic principles *against* religious minorities that are said to be antipathical towards them.³⁵⁹ This was apparent, for instance, in the government’s proposal to criminalise “glorifying terrorism”. Thus, nowadays militant democracy is increasingly linked to the protection of the majority against radical ideas. These developments can be placed in the context of an emerging “majority culture”. Now that most of Dutch society is no longer divided along religious or ideological lines, a new dynamic has been created where the majority increasingly sets the boundaries of what is acceptable for minorities.³⁶⁰ This dynamic was strengthened after 11 September 2001.

The ECtHR’s case law seems, on the one hand, to enhance this development: in its report “Fundamental Rights in a Plural Society”, the government held that there are substantive-democratic limits to political opinion formation, referring to the ECtHR’s ruling in *Refah Partisi v. Turkey*. Political parties that aim to achieve a theocratic system can be prohibited as soon as they form a real threat to democracy, the government argued.³⁶¹ On the other hand, the ECtHR’s *Gündüz v. Turkey* judgment caused the Court of Appeal in the Hofstadgroep-case to limit this type of militant democracy.

358 Gerechtshof Amsterdam, 23 November 2009, LJN BK4139.

359 See for instance Nota Radicalisme en Radicalisering, *Kamerstukken II* 2005-06, 29754, nr. 30, p. 14 about the use of article 2:20 BW to counter radical organisations.

360 Kennedy 2009, p. 20.

361 Nota Grondrechten in een Pluriforme Samenleving, *Kamerstukken II* 2003-04, 29614, nr. 2, p. 8.

When it comes to party proscriptions, it is notable that in 2006 international anti-terrorist efforts caused the government to amend article 2:20 Civil Code to deal with terrorist organisations. Organisations placed on the EU’s “terrorist lists” are now automatically proscribed without a court intervention. The grounds for such proscription may relate to expressions by their members, such as incitement to terrorism. At first sight, such proscriptions seem to entail a formal militant democracy conception: action against terrorism concerns the prohibition of violence, thus the formal rules of democracy. However, substantive reasons can play a role too. Radical writings that do not directly advocate terrorism may lead to a group’s proscription: the Hofstadgroep, after all, was placed on the EU list after being convicted by the court in first instance. There is, accordingly, a thin line between targeting terrorist groups and targeting groups because of their radical opinions.

On the contrary, however, the limits of public debate have become wider with regard to anti-*minority* speech: expressions are not so easily regarded as “racist” (and thus “antidemocratic”) as before. In *case law*, the boundaries seem to be widening too – in particular with the Wilders judgment, although in many cases the courts are still “streitbar” towards hate speech against minorities. In the Court of Appeal’s decision in the Wilders case, for instance, the Court explicitly adhered to a strong militant democracy conception. The ECtHR’s case law helped the courts here, as it also supports a militant democracy conception in the field of hate speech. In other cases the ECtHR’s case law has instead been used to argue for a broad concept of freedom of expression – it can indeed work both ways.

7.2.1 *Conflicting visions on freedom of expression and hate speech*

In the past decade, the eroding consensus about the limits to freedom of expression has manifested itself in the debates about the effective prosecution of hate speech and in the abundance of new legislative proposals. Two opposing tendencies can be seen in the debate, which are difficult to reconcile. It is this divide between two conceptions of the limits to freedom of expression that makes it so difficult for the authorities to deal with “hate speech” provisions.

On the one hand, many politicians – often from government parties in the centre – have emphasised the need for a “decent” public debate.³⁶² Many are worried that a strongly worded discourse about multiculturalism aggravates social tensions and breaks down social cohesion, and that this will lead to even more exclusion and radicalisation. It is in this context that some parties wish to maintain article 147 and propose a new ban on genocide denial: they have a firm conviction that prohibition of

³⁶² See for instance press release “Kabinet intensificeert bestrijding haatuitingen”, Kabinetsreactie op WODC-rapport *Godslastering, discriminerende uitlatingen wegens godsdienst en haatuitingen*, 12 October 2007.

hate speech – including offensive expressions towards religions – is an important means to protect minority groups.³⁶³ The ECtHR’s case law provides arguments to substantiate the wish to maintain such a “decent” public debate. The “civilised debate” strand was also apparent in the proposal on glorifying terrorism: critics argued that this proposal brought back ideas of the state as a paternalistic guardian of morals.³⁶⁴

On the other side of the spectrum, there are voices that advocate the right to “say what they think” or the “right to offend” without restrictions; they argue that tensions in Dutch society have been covered up for decades. Many have come to regard freedom of expression as the single most important right, ranking higher than non-discrimination or freedom of religion. The murder of Theo van Gogh and threats to other opinion leaders have strengthened the idea that freedom of expression is a sacred value that needs to be protected against outside threats, that is, against radical Islam. The sensitivities of religious groups about insult of their religious convictions and symbols – see the Danish cartoons – have led this group to emphasise the importance of freedom of speech even more.

Freedom of expression may have become an important consideration in public debate, but not all of its advocates are promoting the same right for their *adversaries* as well. A typically individualistic idea of freedom of expression as “my right to say what I think” – as well as equality being “my right not to be discriminated” – has developed among majority and minorities alike. Fortuyn’s sympathisers went to court to complain about his “demonisation”; Geert Wilders advocates an unlimited freedom of speech for himself, but simultaneously proposes to ban the Qu’ran. Also, those claiming the freedom to express radical religious views (for instance, about homosexuality) are among the same groups who push for stricter limitations to expressions that offend religious feelings. Dommering has noted that people are increasingly inclined to make official complaints about others’ expressions, sometimes leading to the courts to challenge the refusal to prosecute.³⁶⁵ Accordingly, a climate has emerged in which people prefer to fight the battle of ideas against their opponents before the authorities instead of in the “marketplace”. It is also notable that restrictions of extreme religious speech do not cause the same popular cries for freedom of expression as the prosecution of Wilders does. It thus seems that the idea is losing ground that freedom of speech is a right that is especially important for ideas that one loathes and ideas that go against the dominant tide. Instead, freedom of expression has become a “trump card” that is used strategically to advance one’s own viewpoints.

The Arab-European League (AEL) has laid bare the hypocrisy in free speech debate: between 2006 and 2009, members of the League published several provocative

363 See also the Council of State’s advice on article 147: *Kamerstukken II* 2009-10, 32203, nr. 4 (RvS).

364 Dommering 2005.

365 Dommering 2003, p. 107.

cartoons – including a Holocaust-denial cartoon – with the aim of testing Dutch law and prosecution policy. They wanted to show the double standard in Dutch views about freedom of expression: on the one hand, public debate depicts Muslims as oversensitive to expressions concerning their religion. On the other hand, when something is concerned that Dutch society regards as insulting, freedom of expression is easily discarded. In its press statements, the AEL made clear that it did not actually believe in the cartoon’s suggestion that the Holocaust had not happened; it was really meant as a test case. The Court in first instance followed the AEL’s argument:³⁶⁶ since the publication of the cartoon was closely linked to the goal of engaging in the debate about the limits of freedom of expression – and considering the press statement in which the organisation distanced itself from the cartoon’s contents – the Court judged that it was not insulting within its particular context. The Court of Appeal, however, found that the Holocaust denial cartoon was gratuitously offensive and thus fell within the reach of article 137c, notwithstanding the eventual goal of the defendants. According to the Court, the suggestion that victims have made up or exaggerated the Holocaust is extremely offensive for Jewish people.³⁶⁷ It is telling that the discussion about the limits of freedom of expression has now even reached the courts in this manner, providing the context to a hate speech judgment. It has been argued that the quick prosecution of the AEL, set against the prosecution’s slow and pragmatically motivated decision not to go ahead with the case against Gregorius Nekschot for his anti-Muslim cartoons, indeed perfectly illustrates the double standards of the Dutch authorities.³⁶⁸

7.2.2 *The political system and “media logic”*

In order to close the circle presented in this chapter, this paragraph returns to the social-political context behind hate speech bans that was already touched upon in the first paragraph, to place the sudden “earthquake” in public debate against the historical context set out in the previous paragraphs.

After 2001, robust discussion about immigration and integration, particularly of Muslims, has become the “new consensus” – to such an extent that more optimistic views about multiculturalism are nowadays set aside as naïve and old-fashioned. Sniderman and Hagendoorn have shown that attitudes towards the Muslim minority in the Netherlands were already deteriorating by the end of the 1990s. However, during that period people still considered it important to practice tolerance. This changed after 2001, when influential politicians began to bring integration issues to the forefront of public debate. The authors explain this as follows: the same people who are most concerned about “threats” to national identity are also those who find

³⁶⁶ Rechtbank Utrecht 22 April 2010, LJN BM1984 / BM1987.

³⁶⁷ Gerechtshof Arnhem 19 August 2010, LJN BN4204.

³⁶⁸ Dommering 2010.

conformity very important. In turn, concerns about conformity make people inclined to follow authorities, such as politicians. ‘The result for party leaders on both left and right is the same: that part of their constituency most likely to oppose multiculturalism is the same part whose opposition is most easy to contain.’ As such, ‘the most effective restraint [on support for extremist policies] has been a refusal of mainstream parties and leaders to give them the option of extremist policies to back.’³⁶⁹ Accordingly, when Pim Fortuyn started to break the taboo on immigration debate, the genie was out of the bottle. Fortuyn was able to do so because he presented himself as a more credible figure than erstwhile far-right politicians: he appealed to liberal values and did not express “traditional” racism.

The changes in public debate after 9/11 were part of a wider emergence of populist politics, which could be seen in many European countries. By the turn of the millennium, Lijphart’s warning indeed came true: the “depoliticised” system – with its undemocratic features – led to anti-establishment opposition in the Netherlands.³⁷⁰ The relative openness to new parties and the large amount of floating voters, caused by the lessening of ideological ties and party loyalty, enhanced the rise of new anti-system parties in Parliament.³⁷¹ A more competitive and adversarial style of politics emerged as the established parties came under attack: while the traditional parties positioned themselves closer to each other, new parties made use of their diminishing heartland and of the space they left open.³⁷² This steered a development towards polarisation: ‘the days of a “permissive consensus” for the political elite to foster agreement and consensus are over and instead adversarial politics is becoming a more common feature of Dutch politics.’³⁷³ Besides the processes of individualisation and deconfessionalisation that were still at work, new factors such as globalisation contributed to this change. Voters were increasingly mobilised on the grounds of national identity and outside “threats” such as immigration.³⁷⁴ While the formal “rules of the game” in Dutch politics have remained the same – established parties and coalition politics prevent such radical change: the need to compromise is still there – the informal rules have changed: from avoidance of conflict to polarisation, especially on migration and European integration.³⁷⁵ Meanwhile, mainstream parties have adopted much of the right-wing populists’ discourse on immigration and Islam, a discourse that has also permeated the media landscape.

369 Sniderman & Hagendoorn 2007, p. 9 and 107.

370 Andeweg 2001, p. 123-124.

371 Mair 2008.

372 Pennings & Keman 2008, p. 158.

373 Pennings & Keman 2008, p. 155.

374 Irwin & Van Holsteyn 2008.

375 Pennings & Keman 2008.

Increased competition has led to a demand-driven market where media increasingly rely on their consumers. Elements of “media logic” have entered Dutch society: citizens, the media and politicians influence each other in a “prisoner’s dilemma”.³⁷⁶ The media increasingly build the agenda for politics instead of the other way around.³⁷⁷ Politicians are forced to adapt to the functioning of the media, especially to the “laws of television”. However, the extent to which “media logic” plays a role in the Netherlands should not be overestimated: at least in traditional journalism there is still a sense of responsibility to inform rather than merely entertain the audience.³⁷⁸ Research on newspaper reporting about Islam from 1998-2004 showed that reporting was relatively balanced, though the topics that were reported about often had a negative connotation (e.g. terrorism, fundamentalism) and in the period immediately after the assassination of Theo van Gogh there were many negative articles.³⁷⁹ Still, it can be noted that before the 21st Century, radical views (such as those from the far right) did not enter the media so easily, as they adhered to self-imposed limits. Nowadays public debate is not only more open to radical views (here, the influence of the internet can be seen), but the traditional and new media also provide a bigger platform for such opinions because of their newsworthiness. Whereas the media in the 1970s reported in a moderate manner about terrorist violence – as agreed with the government – in order to curb popular emotions,³⁸⁰ this seems unimaginable nowadays.

The media have also become more differentiated, especially with the rise of the internet. Public debate has become chaotic, audiences are fragmented and it is difficult if not impossible to have an overview of what is available.³⁸¹ There are many forums where like-minded people “meet” and preach to their own choir, without offering alternative views to those they already hold – a “digital pillarisation”.³⁸² As a result, it is difficult to keep up an informed public debate with critical reflection and counterbalancing views: the “marketplace of ideas” has fallen apart into many small marketplaces that are not necessarily trading with each other.

Finally, public debate has become more emotional: being robustly and negatively emotional is no longer taboo. On the Internet, Dutch people tend to use more insulting and threatening words than their fellow Europeans.³⁸³ This may have to do with the fact that political citizenship and a critical public debate have never been strong parts of Dutch democracy: many still have difficulties discovering how to constructively

376 Raad voor Maatschappelijke Ontwikkeling 2003.

377 Van Noije, Kleinnijenhuis & Oegema 2008.

378 Brants & Van Praag 2006, p. 38.

379 D’Haenens & Bink 2007.

380 De Graaf 2010, p. 36.

381 Van Kersbergen & Pröpper 1995, p. 208-209.

382 ACB Kenniscentrum 2009, p. 49.

383 Research by newspaper Trouw, 6 October 2008: <www.trouw.nl/nieuws/nederland/article1872393.ece/Schelden_op_nieuwssites_typisch_Nederlands_.html>.

engage in public debate.³⁸⁴ The tradition of consensus-seeking may make it more difficult to debate with passion and respect at the same time; the idea that a consensus must be found is still in the back of many people's minds. If that is not possible, abusive language is used instead. 'The minority who always felt disregarded, are now calling the "elite" names; the "elite" who used to guard the consensus are adapting slightly and using new arguments to force the others to adopt the same opinions as they have themselves.'³⁸⁵ Indeed, many politicians have reacted to the populist challenge by trying to enforce a new "civility" in public discourse, such as through hate speech bans.

Delimiting public discourse through excluding extreme opinions is by no means alien to Dutch criminal law. The form of expressions is traditionally an important factor in determining their acceptability, indicating a tendency to keep public discourse clean from irrational elements. Nevertheless, in this regard the role of criminal law provisions should not be overestimated: Dutch public debate in itself was always rather polite and self-controlled up till the 1990s. In this society, the role of hate speech bans and the rationales behind them was never a point of thorough discussion until recently, which leaves judges with many unanswered questions now that hate speech has become a much debated issue.

384 Kennedy 2009, p. 253.

385 Kennedy 2009, p. 253.

CHAPTER VII

ENGLAND AND WALES

1 INTRODUCTION

Criminal law in the field of hate speech has undergone significant changes in the past decade in England & Wales.¹ Until 2005, the legal framework with regard to hate speech included the offences of *stirring up racial hatred* (part 3 Public Order Act 1986) and the unwritten common law offence of *blasphemous libel*, as well as the more remotely relevant offences of section 5 Public Order Act 1986 ('using threatening, abusive or insulting words likely to cause harassment, alarm or distress') and the common law offence of *sedition libel*. Many changes have taken place in the past decade against the background of international and homegrown Islamic terrorism and the emerging challenges to British multicultural society. Both the common law offences of *blasphemous libel* and *sedition libel* were abolished in 2009 and several new statutory offences have been adopted: *stirring up hatred on the grounds of religion* (2005), *stirring up hatred on the grounds of sexual orientation* (2010) and *encouragement of terrorism* (2006).

This chapter first outlines the new developments in English hate speech law since 2001 and explains their rationales and the wider background against which they have taken place (par. 2). In order to gain a better understanding of why hate speech law has developed the way it has, paragraph 3 sketches the historical framework behind hate speech laws in chronological order. This includes the general constitutional framework on freedom of speech and its restrictions as it existed before the Human Rights Act 1998 (par. 3.1), and during the 1930s-1950s (par. 3.2), the 1960s-1970s (par. 3.3), 1980s (par. 3.4) and the 1990s (par. 3.5). Paragraph 4 revisits the period after 2001.

2 DEVELOPMENTS IN HATE SPEECH LAW AFTER 2001

2.1 Stirring up religious hatred – part 3A Public Order Act 1986

English law has enshrined a prohibition of *incitement to racial hatred* since 1965, but attempts to extend this law to religious hatred (or other discrimination grounds) were unsuccessful until the 21st Century. The government's attempts to outlaw incitement

¹ For the sake of easier reading, and with apologies to the Welsh, I will simply refer to England in the rest of this chapter.

to religious hatred intensified after 2001 and the Racial and Religious Hatred Act was adopted after three failed proposals in 2005. This added a new part 3A to the Public Order Act 1986 next to the prohibition of incitement to racial hatred in part 3.

Legal framework: Racial and religious hatred

The offence of *stirring up racial hatred* is found in Part 3 Public Order Act 1986. Section 18 holds liable any person who ‘uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting’ if

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

The Crown Prosecution Service (CPS) understands the word “likely” to mean “probable” and not just “liable”.² There need not be actual disorder or hatred. Section 17 defines “racial hatred” as ‘hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.’ Racial groups can include mono-ethnic religious groups such as Sikhs or Jews (*Mandla v. Dowell Lee* [1983] 1 All ER HL). The House of Lords has held that the term “bloody foreigners” (uttered against three Spanish women) could, depending on the context, be regarded as demonstrating hostility to a racial group.³ The CPS interprets “hatred” as

a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence. Sometimes it may be obvious that a person intends to cause racial hatred; for example, when a person makes a public speech condemning a group of people because of their race and deliberately encouraging others to turn against them and perhaps commit acts of violence. Usually, however, the evidence is not so clear-cut and we may have to rely upon people's actions in order to prove their intentions.⁴

The requirement that “threatening, abusive or insulting words” are used implies that moderate language or reasoned argument is not covered. The restriction is based on the *manner* in which expressions are uttered rather than their *content*.⁵ Hence the dissemination of ideas about racial superiority or inferiority in moderate language, and the dissemination of facts (whether true or false) are not punishable.⁶ Nevertheless, experience has shown that the term “insulting” can be interpreted broadly.⁷ The exact

2 CPS, *The Crown Prosecution Service response to the All-Party Parliamentary Inquiry into Anti-semitism*, 2008, par. 92.

3 *R v. Rogers*, [2007] 2. W.L.R. (House of Lords). This case did not concern s. 18 POA, but the racially aggravated version of s. 4 POA (see par. VII.2.6).

4 CPS Prosecution policy and guidance, ‘Violent extremism and related criminal offences’, 2011.

5 Fenwick & Phillipson 2006, p. 515.

6 White Paper Public Order Act 1986, Cmnd. 6234, p. 30.

7 See the interpretation of the word ‘insulting’ under s. 5 Public Order Act 1986.

meaning of “stirring up hatred” is not further defined, but the White Paper to the Act at least makes clear that it does not include words or material that cause offence to people’s feelings or that affect the sensitivities of members of a racial group.⁸

Besides words, behaviour and display of written material, various other acts are also criminal offences, if they are intended or likely to stir up racial or religious hatred: respectively *publishing or distributing written material* (s. 19); *public performance of a play* (s. 20); *distributing, showing or playing a recording* (s. 21); *broadcasting a programme or including it in cable programme service* (s. 22); and *possession of racially inflammatory material* (s. 23).

In s. 18, the following is said about the required mental element (*mens rea*):⁹

- * under s. 18(1)(a) – “if he intends to stir up racial hatred” – the use of threatening, abusive or insulting words, etc. is assessed objectively.
- * under s. 18(1)(b) – if there is no intention to stir up racial hatred, but hatred is “likely to be stirred up” – it must be proved that either
 - he *intended* his words, etc. to be threatening, abusive or insulting, or
 - he was *aware* that his words, etc. might be threatening, abusive or insulting.

Under sections 19, 21 and 23 a reverse regime applies: *mens rea* elements need not be proved by the prosecution, but in case no intention to stir up racial hatred is shown, it is a defence for the accused to show that he was not aware of the content of the material and did not suspect or have reason to suspect that it was threatening, abusive or insulting.

The offence is triable either way, meaning that the case can be heard before a Crown Court (conviction on indictment), consisting of a judge and a 12 person jury; or it can be heard before a Magistrates’ Court (summary conviction), consisting of three lay justices appointed by the Crown or a single professional judge. In the Crown Court the maximum sentence is 7 years’ imprisonment and/or a fine; in the Magistrates’ Court this is 6 months’ imprisonment and/or a £5,000 fine. Prosecution only takes place upon the consent of the Attorney General and has been relatively rare so far. From 1987 to 2004 there have been 65 prosecutions in total (in the Netherlands there was an average of 124 prosecutions *per year* from 1998 to 2007), of which 44 resulted in convictions, 5 in acquittals, 6 cases were dropped by the prosecution and 10 had other outcomes.¹⁰

8 White Paper Public Order Act 1986, Cmnd. 9510, p. 39, see also Feldman 2002, p. 1050 and Fenwick & Phillipson 2006, p. 515.

9 See Ormerod, Smith & Hogan 2005, p. 990.

10 HL Deb 31 January 2005 col. WA4-WA5 (Lord Goldsmith, Attorney-General). The other outcomes are as follows: ‘two cases in which the defendant was bound over, two cases where the defendant absconded, two cases that are ongoing, one case where the defendant died before completion of the proceedings, one case where a *nolle prosequi* was entered, one case where the proceedings were stayed on the ground that the defendant was medically unfit to be tried and one case where the outcome is unknown.’

Most persons convicted received prison sentences – up to two years. During this period the Attorney General has declined to give his consent to three prosecutions on the grounds that they were not in the public interest.¹¹

Stirring up religious hatred is outlawed in part 3A Public Order Act 1986 (as inserted by the Racial and Religious Hatred Act 2005). Section 29b provides that ‘a person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.’ The requirements for incitement to religious hatred are much stricter than those for racial hatred: the former requires “threatening words” to be used instead of “threatening, abusive or insulting” words and it requires *intention* (the racial hatred offence requires either intention or likelihood of stirring up racial hatred). Moreover, the offence of stirring up religious hatred is accompanied by a specific clause on the protection of freedom of expression, which is intended to protect robust debate about religion. S 29J reads as follows:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Religious hatred is defined by s. 29A as ‘hatred against a group of persons defined by reference to religious belief or lack of religious belief.’ This includes at least the religions widely recognised in the UK, such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha’ism, Zoroastrianism and Jainism as well as branches or sects within those religions, and non-religious groups such as Atheists and Humanists.¹² The Explanatory Notes make clear that ‘the offences are designed to include hatred against a group where the hatred is not based on the religious beliefs of the group or even on a lack of any religious belief, but based on the fact that the group do not share the particular religious beliefs of the perpetrator.’¹³ As such, religiously *motivated* hate speech – amongst other things, against nonbelievers – is covered as well. The same sentences as for racial hatred apply; the offence can only be prosecuted with the consent of the Attorney General.

The new offence was originally designed to be similar to “stirring up racial hatred”, but the House of Lords changed it considerably – they had various objections to equalising race and religion and the implications for freedom of expression. As a result of the Lords’ amendments the proposal ‘landed on the statute books like a ship-

11 HL Deb 31 January 2005 col. WA4-WA5 (Lord Goldsmith, Attorney-General).

12 Racial and Religious Hatred Act 2006 – Explanatory Notes, 2006, par. 12.

13 Racial and Religious Hatred Act 2006 – Explanatory Notes, 2006, par. 12.

wreck'.¹⁴ What was the background behind adopting this new offence? Legislative history points to several reasons. First, it was widely thought that the law on hate speech was discriminatory: the racial hatred offence protected adherents of mono-ethnic religions (Judaism and Sikhism) but not Muslims, whereas the common law offence of blasphemy only protected Christianity. This perceived inequality towards Muslims was already felt in the wake of the Salman Rushdie affair, when organisations unsuccessfully complained about the refusal to prosecute Rushdie for blasphemy on account of his novel "The Satanic Verses".¹⁵ The Home Secretary at that time (Blunkett) has later said that the religious hatred law was indeed meant mainly to protect Muslims: '[t]hey were the primary beneficiaries because they would have been provided with a degree of certainty they didn't have before.'¹⁶

The urge to legislate in the field of religious hatred was felt even more strongly after 2001: a second reason for adopting the offence was that the terrorist attacks of 9/11 and the London tube bombings in 2005 have heightened the fear of violence, disturbances and hateful remarks against Muslims. Media reporting indicated a number of violent assaults, verbal abuse and attacks on property against Muslims in the immediate aftermath of 9/11, some of them serious.¹⁷ Several disturbances against Muslims by extreme-right groups took place in towns such as Oldham, Burnley and Bradford in 2001; Home Office minister Goggins contended that if an offence of religious hatred had existed at that time, such disturbances might have been prevented.¹⁸ Nonetheless the government made no attempt to show how outlawing incitement to religious hatred could solve the problems mentioned. The offence itself does not require that public disorder is caused or is even likely to be caused. Accordingly, the "violence/disorder" rationale must be regarded as broader than merely protecting minorities from physical attacks. As several remarks by government spokespersons show, the law is an attempt to preserve community cohesion. The Minister stated that 'we want to create a society in which people, whatever their religious background or beliefs, can live free from fear (...) Legislation on its own does not create community cohesion, so this legislation must be seen alongside the many other initiatives and activities that government, local and national, take to try to build up community cohesion.'¹⁹ According to Home Office Minister of State Blears, the government's aim was to 'promote good and tolerant relations between different communities (...) The provisions we propose are designed to fill a gap and to prevent

14 Botsford 2007, p. 24.

15 R (Choudhury) v. Chief Metropolitan Stipendiary Magistrate [1991] 1 All ER 306 (Divisional Court): the Divisional Court confirmed the conventional view that the offence of blasphemous libel only protects the Christian religion.

16 Christopher Caldwell, "After Londonistan", *New York Times magazine* 25 June 2006, under V.

17 EUMC 2002, p.29.

18 House of Commons (2005), p. 17.

19 HC Standing Committee 28 June 2005 – debate Racial and Religious hatred Bill, at 26.

hate-mongering, because racial and religious hatred in itself has a corrosive effect on our communities, whether or not it immediately leads to specific acts of violence.²⁰

The two related rationales of equally protecting all faith groups and of preserving public order in the broad sense of “social cohesion” both point to a largely symbolic value of the religious hatred offence – to send out a clear message to minorities that the law protects them. It has also been contended that the Bill was introduced as a concession towards Muslims in a time when anti-terrorism measures are applied disproportionately against them, or to win Muslim support in the fight against terrorism.²¹ In any case, the requirement that the Attorney General shall consent to prosecutions already indicates that the offence was not designed to be rigorously enforced – this requirement serves as an extra check against arbitrary prosecutions and to protect freedom of expression.

With the introduction of the religious hatred offence, the government not only had in mind to outlaw hate speech *against* religious groups; it regarded the new offence as a means to target extreme religious speech as well. The provision on religious hatred was first proposed in the Anti-Terrorism, Crime and Security Bill 2001, where it attracted much criticism for dealing with religiously motivated hate speech in the context of anti-terrorism law. Yet, the government seemed to view both hate speech against minorities and extreme speech as closely linked. The Explanatory Notes to the religious hatred law make clear that it covers extreme religious speech – for instance, against nonbelievers.²² Home Secretary Blunkett stated that a situation in which the prosecution could take action under the new offence would be the following: ‘extremists within a faith community making repeated threatening statements (...) saying that God would never ever allow unbelievers to be pleased with them and created them to be enemies.’²³ Secretary of State for Constitutional Affairs Lord Falconer also gave the example of ‘a Muslim cleric in a lecture to similarly minded members of the Islamic faith [who] makes emphatic claims that sexual perversion is rife among infidels, there is nothing wrong with hating Christians and to be a good Muslim, that is something one ought to do.’²⁴ In this regard, critics hold that hate speech bans tend to target exactly those groups they intend to protect: some Muslim organisations were against the offence because it was said to force the police to cast their investigation net so wide that it would target the whole Muslim community.²⁵ Although the offence of religious hatred is narrowly formulated, it is possible to

20 HC Standing Committee debates Serious Organised Crime and Police Bill, 20 January 2005, col. 398 and 426.

21 Nash & Bakalis 2007; Botsford 2007.

22 Racial and Religious Hatred Act 2006 – Explanatory Notes, 2006, par. 12.

23 HC Deb 7 December 2004 – Written ministerial statements, David Blunkett col. 82.

24 HL Deb 11 October 2005 – Racial and religious hatred bill, col. 169 (Lord Falconer).

25 Kevan 2006; Select Committee on Home Affairs 2001, Appendix 14: Memorandum submitted by a consortium of Muslim organisations and individuals, p. 9.

interpret it broadly: whether speech is considered “threatening”, for instance, is likely to be regarded as a question of fact. This makes appeal against the jury’s verdict more difficult.

One commentator has noted that the role of jury trial may turn out to be particularly negative towards unpopular extremists from minority communities,²⁶ while it can turn out positively for speakers who are popular with the majority of the people. As regards the latter category, there is also an interesting paradox with regard to the role of juries. On the one hand, the risk that juries can acquit despite clear evidence can be problematic in hate speech cases: it creates a situation where defendants can position themselves as martyrs in court and thus win support among the public. On the other hand, it must be noted that there is the traditional British view of the jury as the ultimate guardian of civil liberties against the arbitrary use of authority: it is the prerogative of the jury, “the people”, to acquit someone even in spite of all the evidence available. Related to this, it is also feared that public opinion and the political climate of the day will force the Attorney General to prosecute – or to leave – certain cases, thus being vulnerable to the charge of political decision-making.²⁷

2.1.1 Civil liberties and human rights

In parliamentary and wider public debate on the religious hatred law, freedom of expression was an important consideration for both sides. For the opposition (Conservatives and Liberal Democrats), it was a “trump card” to argue against the offence; for its part, the Labour government made several attempts to show that the new law did not infringe upon free speech any further than strictly necessary. The offence attracted much criticism from journalists, writers and civil liberties organisations that feared that the law would limit their ability to satirise or vigorously criticise religious ideas, figures and customs. This relates to a more general fear that there is ‘a new orthodoxy in the air, which provides that people must restrict their speech so that they do not cause offence or encourage people to dislike others, whatever the views of the person to be disliked.’²⁸ Critics further feared that the most vocal and conservative “representatives” of minority groups would increasingly push for prosecutions. Concerns were also expressed about the implications of putting race and religion on an equal par. The government repeatedly attempted to show that those fears were ill-founded: ‘[t]he legislation will not prevent robust and sober religious debate, let alone comedy. There must be words which are threatening, abusive or insulting. There must be an intention to stir up hatred, or likelihood in all the circumstances that it will be stirred up. “Hatred” is a strong word. It goes beyond contempt or ridicule. It is not, as has been pointed out, hatred of a religion but of a group which

²⁶ Hare 2006, p. 533.

²⁷ Select Committee on Home Affairs 2001, Appendix 11: Memorandum submitted by Liberty, p. 10.

²⁸ HC deb Racial and Religious Hatred Bill, 11 July 2005, col. 605 (Mr Grieve)

is defined by reference to its religious beliefs.²⁹ Within the House of Lords, strong criticism from the opposition finally led to the adoption of several amendments that circumscribed the offence considerably.

In the arguments proposed by the government to introduce a religious hatred offence, the European Convention on Human Rights played an important role. The Convention, which had been incorporated into UK law by the Human Rights Act 1998, clearly placed its mark upon the political debates about religious hate speech. One of the arguments proposed was that freedom of expression (art. 10 ECHR) must be balanced against freedom of religion (art. 9 ECHR), which was said to require states to protect people from hatred on the grounds of their religion (see par. III.5 for the discussions within the ECtHR on this point).³⁰ Moreover, it was argued that article 14 ECHR requires that people of all religions are treated equally so that the law should be extended to cover religious groups that are ethnically diverse. The parliamentary Joint Committee on Human Rights found that the offence was likely to be held justifiable under article 10 ECHR.³¹

Even though the balance between different rights is set by the legislature in the first place, the government found that both the Attorney General and the courts still had a role in balancing freedom of speech against other rights and interests.³² However, again the role of juries can complicate the matter: '[j]uries do not give reasons. They either convict or they acquit, and neither way does one know why they do so. Therefore, one can only look at the way in which the matter was summed up by the judge to see whether he directed the members of the jury correctly, unless, of course, they come to a perverse decision (...)'³³ Accordingly, the balance between freedom of expression and other rights/interests can become rather diffuse.

2.1.2 Prosecutions for stirring up racial and religious hatred after 2001

Until now there has only been one prosecution in the field of religious hatred:³⁴ on 21 June 2010, a jury acquitted British National Party (BNP) activist Anthony Bamber for distributing leaflets in which Muslims were accused of being responsible for heroin trade from Afghanistan and Pakistan – the leaflet stated that it was time for Muslims

29 House of Commons (2005), Lord Goldsmith (then Attorney-General), col. 287.

30 Joint Committee on Human Rights 2005, Appendix 2a: Letter from Caroline Flint MP, Parliamentary Under-Secretary of State, Home Office, at 70.

31 Joint Committee on Human Rights 2001. This concerned the originally proposed offence, without the Lords amendments – identical to the racial hatred clause.

32 HC Standing Committee debates, Serious Organised Crime and Police Bill, 20 January 2005, Minister Blears, col. 400.

33 HL Deb Racial and Religious Hatred Bill, 11 October 2005, col. 198 (Viscount Colville of Culross)

34 See HC 14 October 2010, Written answers Attorney-General, col. 404W.

to apologise and pay compensation for this “crime against humanity”.³⁵ As to the racial hatred offence, the past years have shown some convictions for serious cases of racial incitement.³⁶ Among other things, Simon Sheppard and Stephen Whittle were found guilty of inciting racial hatred against Jews through Holocaust denial leaflets, including one called “Ohdruff, Auschwitz Holiday Resort”. Though the CPS found that Holocaust denial was not an offence in itself, it did prosecute because ‘[t]he whole subject was treated in a way that was insulting and abusive and as a subject for humour.’³⁷ It is notable, however, that the CPS did not prosecute in a case concerning the distribution of leaflets that opposed mixed race relationships and urged support for a white power party – according to the CPS, ‘this amounted to no more than free political speech, however controversial.’³⁸

Another case involved a leaflet depicting the most infamous Danish cartoon of the Prophet Mohammed with a bomb in his turban, as well as a picture of protestors against the cartoon with placards calling for the ‘slaying of those who insult Islam’. The leaflet posed the question ‘which do you find the most offensive?’. The CPS took no action – amongst other things because ‘[s]omething that can cause widespread offence is not necessarily criminal.’³⁹ The CPS equally declared ‘offensive but vigorous’ a song posted on YouTube that questioned racial changes and linked this to images such as the 7/7 bombings.⁴⁰ Indeed, the CPS – after the All-Party Parliamentary Inquiry into Antisemitism had recommended that they conduct a review of incitement to hatred cases – concluded that ‘there are high legal hurdles to clear in order to bring a successful prosecution for an offence of incitement to racial hatred – “hatred” is a strong term and the offence does not necessarily encompass material that stirs up ridicule, prejudice, or which causes offence.’⁴¹ The CPS held that

[f]indings from the review of the racial hatred cases which were prosecuted indicate a determination on behalf of the CPS to prosecute robustly cases which meet the test set down in the Code for Crown Prosecutors. There are nonetheless particular challenges in prosecuting such cases, some of which are inherent in the level of proof required to secure a conviction, for example, in terms of proving “hatred”, “intends to stir up” and “likely to stir up”. Others relate to the very fine judgments to be made in relation to freedom of speech.⁴²

35 BBC News, ‘Preston BNP activist cleared over anti-Muslim leaflets’, 21 June 2010, <www.bbc.co.uk/news/10371070>.

36 Neil Martin; Michael Heaton & Trevor Hannington; <www.cps.gov.uk/publications/prosecution/violent_extremism.html>.

37 Simon Sheppard and Stephen Whittle, 8 January 2009, <www.cps.gov.uk/news/press_releases/101_09/index.html>.

38 CPS 2008, Annex C: Review of incitement to racial hatred cases for 2006/07, Case 10.

39 CPS 2008, Annex C, Case 12.

40 CPS 2008, Annex C, Case 13.

41 CPS 2008, par. 87.

42 CPS 2008, par. 115.

Under the racial hatred offence, there have also been prosecutions for “reverse racism”. Stephen Dempsey received a three year prison sentence for distributing hand written notes – glued to bridges, into magazines in a shop, in phone boxes etcetera – from “The Brothers of Islam” and “The Brothers of Africa”, which described amongst other things how ‘in America white women wore strappy high heeled shoes whilst they watch a black man crying choking to death in a white man's gas chamber’ and how the authors would ‘love to slice open the stomach of heavily pregnant white women before stamping on the foetus’. Moreover, the CPS sometimes deals with extreme speech in the field of terrorism under the racial hatred offence. In 2007, four members of the Islamic group Al Ghurabaa were convicted for stirring up racial hatred (as well as for other counts such as solicitation of murder) for their expressions during a demonstration near the Danish Embassy in London against the Danish cartoons. They had called for British soldiers to come back in body bags and chanted such slogans as ‘[d]emocracy go to hell. Freedom go to hell. UK you must pay. Sharia is on its way. 7/7 on its way. UK you will pay: Bin Laden on his way’.⁴³

Indeed, the CPS expressly deals with racial/religious incitement and incitement to terrorism in a special joint division, often taking these charges together (see par. VII.2.5.1).⁴⁴ Similarly, Abu Hamza Al-Masri – a well-known radical Muslim imam – was convicted to seven years’ imprisonment in 2006 for stirring up racial hatred and for other offences such as soliciting murder. During his speeches in Finsbury Park mosque and in community centres, he had expressed hatred against Jews (i.e. describing them as ‘sons of monkeys and pigs’) and had encouraged the killing of non-believers: ‘[k]illing a Kafir [infidel] for any reason you can say it is OK even if there is no reason for it’.⁴⁵ He also compared life among infidels to living ‘inside a toilet’. In his summing up to the jury, Justice Hughes said that ‘[i]t is not an offence to describe living in England as a toilet (...) You are entitled to your views and in this country you are entitled to express them, but only up to the point where you incite murder or use language calculated to incite racial hatred.’⁴⁶

2.2 Stirring up hatred on the grounds of sexual orientation

Only a few years after the adoption of the religious hatred clause, the government proposed to extend the law on hate speech with a further ground: sexual orientation.

43 Rahman, Saleem, Javed and Muhid, 18 July 2007, see <www.cps.gov.uk/publications/prosecution/violent_extremism.html> (D. Cartoon protesters). Three defendants appealed against their sentence; on appeal, their sentences were reduced but still consisted of 30 months to 4 years’ imprisonment. R v. Saleem, R v. Muhid, R v. Javed [2007] All ER (D) 462 (Oct) (Court of Appeal, Criminal Division).

44 CPS 2008, par. 99.

45 BBC News, ‘Timeline: Hamza trial’, 7 February 2006, <news.bbc.co.uk/2/hi/4644030.stm>; <www.cps.gov.uk/publications/prosecution/violent_extremism.html>.

46 BBC News, ‘Timeline: Hamza trial’, 7 February 2006, <news.bbc.co.uk/2/hi/4644030.stm>; <www.cps.gov.uk/publications/prosecution/violent_extremism.html>.

The offence has come into force on 23 March 2010.⁴⁷ The Criminal Justice and Immigration Act 2008 has inserted the words ‘or hatred on the grounds of sexual orientation’ in Part 3A of the Public Order Act 1986 so that sexual orientation hatred is included in the “religious hatred” part of the Act. It thus follows the wording of the religious hatred offence, except that the savings clause on freedom of expression (s. 29JA) reads differently than s. 29J on religious hatred (see below). The newly added s. 29AB defines sexual orientation hatred as ‘hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both).’

Secretary of State for Justice Straw introduced the new clause in 2007, arguing that ‘it is a measure of how far we have come as a society in the past ten years that we are now appalled by hatred and invective directed at people on the basis of their sexuality. It is time for the law to recognise this.’⁴⁸ The government wished to counter expressions that create an atmosphere where hatred and crimes against them are acceptable. As Minister Eagle stated:

We are committed to ensuring that all people can live free from the fear and discrimination that can and does ruin lives and blight communities. It is important that gay, lesbian and bisexual people are accepted by our society and are able to play a full part in it... We should not underestimate the damaging effect of incitement to hatred, because it damages not only individuals, who might end up as targets of crime, feeling discriminated against and isolated from society, but entire communities as well as the community spirit that is so important to a successful and democratic society. Left unchecked, that creates an atmosphere in which hatred and intolerance aimed at particular groups are seen as normal and acceptable, and it makes crimes against particular groups and individuals seem more justified and acceptable too.⁴⁹

As in the religious hatred offence, the rationale of preserving social cohesion plays a role, as well as the “negative imaging” rationale. More direct public order concerns were expressed as well: gay rights group Stonewall brought to the government’s attention popular reggae lyrics that exhorted listeners to kill homosexual people, as well as statistics showing a 167% rise in offences with a homophobic element in 2 years time.⁵⁰ In fact, homophobic speech uttered directly against individuals could already fall under public order offences such as s. 5 Public Order Act (see par. VII.2.6); the police, prosecution and the courts take such offences particularly seriously when they are aggravated by homophobic hostility. The police code of

47 It was adopted in s. 74 and schedule 16 of the Criminal Justice and Immigration Act 2008; see Commencement No. 14 Order 2010, <www.legislation.gov.uk/uksi/2010/712/article/2/made>.

48 The Times, ‘Inciting hatred against gays could lead to 7 years in prison’, 9 October 2007.

49 Public Bill Committee examining the Criminal Justice and Immigration Bill, HC Deb, col. 660-662, 29 November 2007.

50 Public Bill Committee examining the Criminal Justice and Immigration Bill, HC Deb, col. 75-76, 16 October 2007.

practice thus already required a response to “homophobic hate incidents”, a very broad category that also includes actions which are not criminally prohibited. For instance, on the basis of this code the police launched investigations against the Anglican bishop of Chester and the Secretary-General of the Muslim Council of Great Britain for remarks disapproving of homosexual conduct.⁵¹

An important difference with the religious hatred law is the freedom of expression clause (s. 29JA), which reads as follows:

In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

The House of Lords inserted this clause – the so-called “Lord Waddington-amendment” – at a late stage of the legislative process, with the idea that this would make it easier for the police to distinguish between legitimate and illegitimate speech.⁵² As such, the Lords wished to make sure the police would not construe criticism of homosexual practice as “incitement to hatred” – as had been the case, they found, under the hate crime code of practice. Lord Waddington also referred to the offence of “threatening, abusive or insulting words and behaviour” in s. 5 Public Order Act, under which a person was convicted for mere criticism of homosexuality (*Hammond v. DPP*, see par. VII.2.6). ‘The scandals to which we have often referred could not have occurred unless the police and sometimes the prosecution authorities had thought that threatening, abusive and insulting behaviour – the requisites for prosecution under the present Public Order Act – could be inferred from mere comment or criticism’, Lord Waddington held.⁵³ Notably, critics hold that these legislative debates ‘rarely invoked evidence-based studies of police practice or consultation with the police themselves. Instead, members of both the House of Commons and the House of Lords used press coverage, personal correspondence with members of the public, anecdotal experience, and alleged “unofficial” discussions with Chief Constables to represent policing in particular ways (...) In focusing on the “heavyhanded approaches taken by the police”, legislators consistently relied upon a small group of cases to argue that police were both over-using and enforcing the POA 1986 in a disproportionate manner.’⁵⁴ The amendment caused a struggle between the Lords and the government; the latter was against the clause on the grounds that the Human Rights Act already forced the police and the courts to take account of freedom of expression anyway. Eventually the government had to concede defeat.

⁵¹ Leigh 2009, p. 382.

⁵² HL Deb 3 March 2008, Lord Waddington, col. 924.

⁵³ HL Deb 21 April 2008, Lord Waddington, col. 1366

⁵⁴ Johnson & Vanderbeck 2010, p. 66 and 68.

Though many public figures expressed their concerns about the consequences of this new offence for free speech, the tone of newspaper reporting was not as negative as it was during the process of adopting the religious hatred offence.⁵⁵ Instead the Lords' insertion of a freedom of expression clause attracted some criticism for being a victory of the evangelical right over gay rights, though others in turn criticised the government's "remorseless energy" to attack freedom of expression against the Lords' amendment.⁵⁶ In January 2011 the first prosecution on the grounds of this new law started in a case concerning five men who allegedly distributed a leaflet called "The death penalty?" outside a mosque and through letterboxes.⁵⁷ At the time of writing, the case is still pending and the contents of the leaflet are not known yet.

2.3 Blasphemous libel

The introduction of a religious hatred offence was intertwined with another legislative measure: the repeal of the offence of blasphemy (effectuated by the Criminal Justice and Immigration Act 2008). Blasphemy had been a common law offence in England for hundreds of years. During the 20th century there were many attempts to abolish the law, but they all failed because such proposals provided little political advantage. One of the arguments against abolishing the offence was that as soon as the majority of the public was no longer offended by blasphemous statements and public opinion shifted, juries would simply no longer convict.⁵⁸ Before the *Whitehouse v. Lemon* judgment in 1979 (see textbox), the government could also argue that the distinction judges made between *content* and *manner* of speech provided enough safeguards: 'so long as the decencies of debate were observed all doctrines could be criticised [this] seemed at times to turn the affair into one related solely to matters of public order – an area that the Home Office felt much more comfortable with.'⁵⁹

In the past ten years, a range of proposals towards abolition came to the fore.⁶⁰ Many Parliamentarians argued in favour of repealing the law because it was perceived as discriminatory, particularly during the adoption of the "stirring up religious hatred" offence. As the *Rushdie/Satanic Verses* case⁶¹ confirmed, the law only protected Christianity. Moreover, many considered the offence to be very uncertain and broad

55 Goodall 2009.

56 See Cath Elliott, 'Don't let faith be a front for prejudice', *The Guardian* 13 July 2009; Henry Porter's blog, 'Chipping away at free speech', *Guardian.co.uk* 9 November 2009.

57 CPS press release, 'Five men charged in first prosecution for stirring up hatred on the grounds of sexual orientation', 28 January 2011, <www.cps.gov.uk/news/press_releases/104-11/>. BBC News, 'Pair charged with stirring up homophobic hatred', 27 January 2011, <www.bbc.co.uk/news/uk-12298858>.

58 Nash 1999, p. 197.

59 Nash 1999, p. 212.

60 Hare 1999; mentions attempts in 1989 (Tony Benn in the House of Commons), 1995 (Lord Avebury in the House of Lords), 2001, 2002, 2005 etc..

61 *R (Choudhury) v. Chief Metropolitan Stipendiary Magistrate* [1991] 1 All ER 306 (Divisional Court).

whereas it could – in theory – lead to an unlimited prison sentence.⁶² Initially the government did not wish to go as far as to abolish it, because of criticism from religious leaders and organisations and because of the symbolic value that the law still had in British constitutional structure and society.⁶³ Yet, after the adoption of a religious hatred offence, it was easier for the government to repeal the offence of blasphemy – at least the government was shown to be doing something to protect religious persons from verbal attacks. It was also argued that international human rights bodies were highly critical of the English blasphemy law and that the existence of the offence hindered the government's efforts to challenge oppressive blasphemy laws in other jurisdictions.⁶⁴ These arguments were accompanied by the view that the offence had fallen into disuse: it is telling that the prosecution took no action against the public reading on Trafalgar Square of a poem which had led to a conviction for blasphemy 25 years earlier in the “Lemon” case (see textbox).⁶⁵ A liberal judgment on blasphemy in the “Jerry Springer” case in 2007 helped those in favour of abolition,⁶⁶ right after this judgment the government committed itself to proposing to abolish of the offence.

Blasphemy and the “Jerry Springer case”

R (Green) v. City of Westminster Magistrates Court, [2007] EWHC 2785 (Admin) – Divisional Court⁶⁷

In this case, the organisation Christian Voice sought to bring a private prosecution⁶⁸ against the producers of the satirical theatre play “Jerry Springer: The Opera”. The play is a parody of Jerry Springer’s television show and depicts Springer treating Satan, Christ, God, Mary and Adam and Eve as his show guests exhibiting ‘considerable excesses, as his terrestrial guests habitually do’. The Divisional Court accepted the magistrates’ refusal to allow this prosecution, arguing that the core of the offence of blasphemy is ‘material relating to the Christian religion, or its figures or formularies, so scurrilous and offensive in manner that it undermines society generally, by endangering the peace, depraving public morality, shaking the fabric of society or tending to be a cause of civil strife (...) What is necessary to make such material a crime is that the community (or society) generally should be threatened. This element will not be shown merely because some people of particular sensibility are, because deeply offended, moved to protest. It will be established if but only if what is done or

62 Law Commission 1985.

63 Garcia Oliva 2007, p. 73. See also Minister Hazel Blears in HC Deb 7 February 2005 col. 1224: ‘There is no consensus in the country on the issue. I believe that 48 per cent. of people polled thought that the blasphemy laws should be repealed, while 38 per cent. thought they should remain or be extended.

64 HL Deb, 5 March 2008, col 1121, (Baroness Andrews, Parliamentary Under-Secretary of State).

65 Garcia Oliva 2007, p. 72.

66 Hare 2009, p. 297-298.

67 The Divisional Court deals with appeals from the Magistrates’ Courts’ judgments and consists of at least two professional judges.

68 For the common law offence of blasphemy, private prosecutions could be brought as well.

said is such as to induce a reasonable reaction involving civil strife, damage to the fabric of society or their equivalent.’

The Court also proposed a liberal interpretation of the ECHR on this point, arguing that ‘[w]hilst the law of blasphemy may well be “consonant” with the right to freedom of thought and to manifest one’s religion enshrined in article 9 – see *Wingrove v. UK* (1996) 24 EHRR 1 at para 48, it does not seem to us that insulting a man’s religious beliefs, deeply held though they are likely to be, will normally amount to an infringement of his article 9 rights since his right to hold to and to practise his religion is generally unaffected by such insults. The article 10(2) basis for the crime of blasphemous libel is best found, as it seems to us, in the risk of disorder amongst, and damage to, the community generally.’ Finally the Court found that ‘this play, whether tasteful or objectionable or otherwise, has as the object of its attack not religion but the exploitative television chat show (...) the play as a whole was not and could not reasonably be regarded as aimed at, or an attack on Christianity or what Christians held sacred.’ This interpretation stands in stark contrast to earlier case law on blasphemy. Case law is very scarce, but in general one can say that *before* the 1979 House of Lords judgment in *Whitehouse v. Lemon* (“Gay news”)⁶⁹ the offence was commonly interpreted as requiring that:

- * The Christian religion (or Church of England) is vilified or the truth of it was denied. This could include vilification or denial of God, Christ, the Bible, Christian doctrines, beliefs, institutions, sacred objects and rituals.
- * As to the manner in which expressions are uttered, it was required that (a) “scurrilous, abusive or offensive” language is used⁷⁰ or (b) that there was “objectively contumelious, violent or ribald conduct or abuse”.⁷¹ It was not punishable ‘to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves.’⁷²

In *Whitehouse v. Lemon* the House of Lords significantly broadened the offence by delving into its mental element (*mens rea*): the Lords judged that the offence is one of strict liability, meaning that it is not relevant whether or not the author had the intention to blaspheme, whether the defendant intended to shock or arouse resentment, or even whether he was indifferent to this result. It is enough that expressions are *likely* to shock or outrage the feelings of believers. The previously existing safeguard, that blasphemy was about manner not content, was placed in the background. After *Whitehouse v. Lemon* the actus reus of the offence was so uncertain that, according

69 *R v. Lemon (Gay News)*, [1979] 1 All ER 898 (House of Lords).

70 “Foote” judgment, see also Law Commission 1985.

71 House of Lords 2003, p. 47.

72 Stephen 1950, Article 214, p. 163.

to the Law Commission, it was ‘hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto*’.⁷³

2.4 Seditious libel

In 2009, another age-old common law offence was abolished: seditious libel. Lord Lester had proposed an amendment to the Coroners and Justice Bill to this end (together with abolition of the offences of defamatory libel and obscene libel), which the government accepted. It was argued that

those are arcane offences which have largely fallen into disuse. They stem from a bygone age when freedom of expression was not seen as the right that it is today. As we heard in the Committee, taking the initiative to abolish them will be a positive step in helping our country, the United Kingdom, to take a lead in challenging similar laws in other countries where they are used to suppress free speech.⁷⁴

In fact, the UK’s own reputation as regards suppressing speech through seditious libel law had indeed been rather bad in earlier times.

Seditious Libel

This common law offence used to be extremely broad, referring to

an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty’s subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.⁷⁵

From the end of the 19th Century, the judiciary began to liberalise the offence (*R v. Burns*, 1886). Yet it was still used to curb dissenting speech, for instance in the 1909 case of *R v. Aldred* where a person was prosecuted for advocating independence from India and for glorifying independence martyrs. In the 1920s, the offence was often used against Communists. Before the adoption of the “stirring up racial hatred” offence, seditious libel had also been used to prosecute for hate speech.⁷⁶ After 1947, when in *R v. Caunt* the courts applied a strict subjective test (“deliberately intending to stir up disorder”), no more prosecutions were reported and the offence came to be

⁷³ Law Commission 1981, par. 6.1.

⁷⁴ Lord Bach, *House of Commons Library, Coroners and Justice Bill: Lords amendments*, 6 November 2009, SN/HA/5211

⁷⁵ Stephen 1950, p. 92.

⁷⁶ Lester & Bindman 1972.

regarded as a dead letter. Seditious libel finally made a quick comeback in the case against Rushdie/The Satanic Verses, where the Court narrowed it down further – judging that ‘proof of an intention to promote ill will and hostility between different classes of subjects did not by itself establish a seditious intention, since not only did there have to be proof of an incitement to violence but it had to be proved that the violence or resistance or defiance was intended to disturb constituted authority, ie a person or body holding public office or discharging a public function of the state.’⁷⁷

2.5 Encouragement of terrorism: the Terrorism Act 2006

In the wake of the London tube bombings the Terrorism Act 2006 was adopted, creating several new offences related to terrorism. Particularly important for the purposes of this thesis is section 1 of the Terrorism Act 2006 that criminalises “*encouragement of terrorism*”, which includes “*glorification of terrorism*”.

Encouragement of terrorism: legal framework

Section 1 of the Terrorism Act 2006 criminalises the publication of a statement (or causing another person to publish a statement) that is ‘likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences’. Terrorism is defined by reference to the broad definition in s. 1 Terrorism Act 2000.⁷⁸

Following subsection (3), statements that are *likely to be understood by members of the public as indirectly encouraging terrorism or Convention offences* include statements

- which glorify the commission or preparation (whether in the past, future or generally) of such acts or offences *and*
- from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

“Glorifying” includes “any form of praise or celebration”.⁷⁹

⁷⁷ R (Choudhury) v. Chief Metropolitan Stipendiary Magistrate [1991] 1 All ER 306 (Divisional Court).

⁷⁸ “Convention offences” (s 20(2)) are offences listed in Schedule 1 to the Terrorism Act 2006 and comprise several offences that have been translated into UK law from a number of international treaties; as such the UK government aimed to implement the CoE Convention on the Prevention of Terrorism, which lists the offences concerned as ‘terrorist offences’ in appendix 1.

⁷⁹ S. 20(2).

Subsection (4) further explains that *how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it* is determined with regard to (a) the contents of the statement as a whole and (b) the circumstances and manner of its publication.

Where the *public* is referred to in section 1, this is taken to mean any section of the public inside or outside the UK (s 20(3)). It is irrelevant whether any person is in fact encouraged or induced to the commission (etc.) of the offences concerned (s 1(5)(b)).

The mental element of the offence is set out in subsection (2), which requires that at the time of publication the person

- (i) *intends* members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate the acts or offences or
- (ii) is *reckless* as to such encouragement or inducement.

If there is no intention to encourage or induce – thus only if situation (ii) applies – it is a defence for the accused to show that the statement did not express his views nor had his endorsement and that it was clear, in all the circumstances of its publication, that it did not express his views nor have his endorsement.⁸⁰ This defence is intended to protect, for instance, news broadcasters.⁸¹

The offence is triable either way (by a jury in the Crown Court or by the Magistrates' Court). Before the Crown Court, a maximum sentence of 7 years' imprisonment or a fine is provided for, or both. On summary conviction in the Magistrates' Court, the maximum sentence is 12 months' imprisonment or a £5,000 fine, or both (s 1(7)).

Section 2 criminalises the dissemination of publications that encourage or induce acts of terrorism, which includes distribution, circulation, giving, selling or lending a publication and providing services that enable others to take note of the publication. A similar defence as in section 1 is provided for in s. 2(9), which makes sure that the universities and libraries are protected from criminal liability.

The offence was prompted by the 7/7 bombings and the government's urge to show a reaction to radical Muslims condoning the attacks – the plan already appeared in the 2005 Labour Party manifesto. There was presumed to be a gap in the law: specific incitement to terrorist acts was already punishable, while generalised incitement to terrorism was not yet covered.⁸² Initially, the bill would target “glorifying terrorism” specifically; later this offence was included as part of the “encouragement” offence.

⁸⁰ S. 1(6). Section 3 provides an exception to this rule, which applies to electronic publications; it describes a situation where despite his non-endorsement of a statement, a person can still be held liable for it.

⁸¹ Terrorism Act 2006 – Explanatory Notes, at 27.

⁸² Joint Committee On Human Rights 2005(a), p. 21.

The government was at pains to emphasise that encouragement of terrorism could indeed contribute to radicalisation and, eventually, terrorism. The offence was said to be needed to ‘deal with those who (...) contribute to the creation of a climate in which impressionable people might believe that terrorism was acceptable’⁸³ – hence an indirect public order concern. Even when no specific act is incited, such speech would create a climate in which resorting to terrorism is seen as legitimate.⁸⁴ Another argument for adopting the offence was the need for implementation of article 5 of the Council of Europe Convention on the Prevention of Terrorism and of UN Security Council Resolution 1624/2005. The British government had itself pushed for the inclusion of such a clause in the UN SC Resolution.⁸⁵

The perceived gap in previous legislation, however, did not prevent prosecutions for encouragement of terrorism under existing criminal offences, such as soliciting murder under s. 4 of the Offences Against the Person Act 1861. This section provides that ‘whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, shall be guilty of a misdemeanour’. In the 2004 case *R v. El-Faisal*, the Court of Appeal convicted Muslim cleric Abdullah El-Faisal for soliciting murder as well as stirring up racial hatred under the Public Order Act 1986.⁸⁶ El-Faisal had given numerous lectures in mosques, encouraging his audience to kill Jews, Christians and other “unbelievers” and to attend training camps to wage Jihad against the West.⁸⁷ He was sentenced to nine years’ imprisonment, later reduced to seven years by the Court of Appeal. Other prosecutions in relation to terrorist speech have taken place under s. 58 Terrorism Act 2000, which criminalises collecting, recording or possessing information ‘likely to be useful to a person committing or preparing an act of terrorism’.⁸⁸ However, the courts have put a stop to this by judging that this section only covers documents likely to provide *practical assistance* to a person committing or preparing an act of terrorism; it does not extend to theological or propagandist material.⁸⁹

The provisions on encouragement of terrorism have met with much criticism, mainly relating to the lack of necessity for adopting it, the legal uncertainty that it is said to create and its implications for freedom of expression.⁹⁰ The concept “glorification” –

83 HC deb vol. 438, 26 October 2005, col. 334.

84 HL deb vol. 6777, 17 January 2006, col. 551.

85 Terrorism Act 2006 – Explanatory Notes, p. 20.

86 *R v. El Faisal* [2004] EWCA Crim 456 (Court of Appeal, Criminal Division); see Joint Committee On Human Rights 2005(a), p. 23.

87 Jamie Doward, “Cleric who urged jihad to be freed from prison”, *The Observer*, 20 August 2006.

88 Khan/Muhammed/Munshi/Suleiman, <www.cps.gov.uk/publications/prosecution/ctd_2008.html>; Pa Modou Jobe, <www.cps.gov.uk/publications/prosecution/ctd_2009.html>.

89 *R v. K.*, [2008] EWCA Crim 185 (Court of Appeal, Criminal Division); *R v. Malik*, [2008] All ER (D) 201 (Jun) (Court of Appeal, Criminal Division).

90 Joint Committee on Human Rights 2005(a), p. 16-22.

even though it is elaborated in the Terrorism Act 2006 as ‘including any form of praise or celebration’ – is a vague term, which could be interpreted to include expressions of understanding for and sympathy with terrorist acts.⁹¹ The Home Secretary has stated that explaining or understanding terrorist acts is different from glorifying, and that the offence does not cover such expressions. This does not seem self-evident, however; much disagreement is to be expected in the future interpretation of this provision.⁹² This is aggravated by the broadness of the definition of terrorism (s 1 Terrorist Act 2000), which potentially includes a wide range of activities, including animal liberation activities and armed struggle against oppressive dictatorships.⁹³ Lord Goodhart provocatively stated that ‘the definition of terrorism is so wide that it extends to the actions of Robin Hood and his merry men or the War of American Independence’.⁹⁴

2.5.1 *Prosecutions for encouragement of terrorism*

Terrorist speech has quickly become an important issue for the Crown Prosecution Service: in 2007 the Attorney General announced a ‘national strategy to enhance the prosecution of extremist radicalisers who incite others to terrorism, violence or hatred of other groups’, bringing together law enforcement agencies and prosecutors to coordinate their work in this field.⁹⁵ So far several defendants have been found guilty of s. 1 and 2 of the Terrorism Act 2006, receiving serious prison sentences.⁹⁶ One defendant was sentenced to two years’ imprisonment for praising Osama Bin Laden and suggesting that appropriate targets to ‘kill infidels’ would be four listed accountability institutions (representing ‘the corrupt and decadent western society and economy of our enemy’).⁹⁷ Another defendant was found guilty of s. 2 for writing a leaflet which called upon its readers to join the ranks of Osama bin Laden and to take up arms against the US and the UK.⁹⁸

Par. VII.2.1.2 on incitement to hatred already showed that people are often prosecuted for terrorist speech offences and stirring up racial hatred at the same time: the CPS deals with cases of racial, religious or sexual orientation hatred within its Counter Terrorism Division. This Division aims to tackle “violent extremism”, which is defined as

91 Article 19 2006, p. 7.

92 Joint Committee On Human Rights 2005(a), p. 28.

93 Davis 2005, p. 76.

94 HL Deb, 28 February 2006, col 143.

95 CPS 2008, par. 103.

96 <www.cps.gov.uk/publications/prosecution/ctd_2008.html>: Hodges; Bilal Mohammed; Shella Roma and Amjad Mahmood; Ishaq Kanmi, Abbas Iqbal, Ilyas Iqbal. See also Saleem and others: the jury found Brooks not guilty of s. 1 Terrorism Act 2006.

97 Hodges, 19 February 2008, <www.cps.gov.uk/publications/prosecution/ctd_2008.html>.

98 Shella Roma and Amjad Mahmood, <www.cps.gov.uk/publications/prosecution/ctd_2009.html>.

the demonstration of unacceptable behaviour by using any means or medium to express views which: foment, justify or glorify terrorist violence in furtherance of particular beliefs; seek to provoke others to terrorist acts; foment other serious criminal activity or seek to provoke others to serious criminal acts; or foster hatred which might lead to inter-community violence in the UK. Such conduct can give rise to a number of offences which include, for example, incitement to racial hatred.⁹⁹

A leading member of the far-right group Aryan Strike Force, for instance, was convicted for stirring up racial hatred as well as encouragement of terrorism (s. 2 Terrorist Act 2006) for – amongst other things – distributing an instruction video on how to make a flamethrower which could be used against black people.¹⁰⁰ According to the CPS, such cases show that it is a myth that terrorism prosecutions are focused on the Muslim community only: ‘[n]o matter what the background or motivation of a defendant, my Division uses terrorism legislation to prosecute only where it is appropriate to do so (...) if you look behind the headlines, you will find a range of ideologies in the cases we have dealt with in the last two years.’¹⁰¹ As such, terrorist speech and incitement to hatred – by Islamic terrorist groups, far-right groups and others – are deliberately taken together. When deciding whether to prosecute for such offences, the CPS takes account of the following free speech considerations:

Free speech includes the right to offend. Indeed the courts have ruled that behaviour that is merely annoying, rude or offensive does not necessarily constitute a criminal offence. The distinct common thread in terms of criminal prosecutions under the radicalisation umbrella has been a manifested desire to kill, maim or cause a person or group of people immense fear for their personal safety through the threat of (often) extreme violence based on their colour or religion, and urging others to take this course. Prosecutions are not limited to cases of the above, however, and in addition there have been prosecutions for deeply insulting behaviour. This fits behaviour which falls short of a desire to commit violence but is nevertheless threatening, abusive or insulting and intends to stir up racial hatred.¹⁰²

2.6 Discussion on section 5 Public Order Act 1986

Section 5 Public Order Act 1986

Section 5 Public Order Act holds liable any person who ‘(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within

⁹⁹ HM Crown Prosecution Service Inspectorate 2009, par. 6.14.

¹⁰⁰ Michael Heaton & Trevor Hannington, <www.cps.gov.uk/publications/prosecution/violent_extremism.html>.

¹⁰¹ Sue Hemming, Head of Counter Terrorism Division Crown Prosecution Service, “We prosecute terrorists no matter what their background or beliefs”, *Eastern Eye*, 30 June 2010, <www.cps.gov.uk/your_cps/our_organisation/eastern_eye.html>.

¹⁰² CPS Prosecution policy and guidance, ‘Violent extremism and related criminal offences’, 2011.

the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.’

Section 5(3)(c) provides that it is a defence for the accused to prove that his conduct was *reasonable*, which shall be judged objectively. Section 6(4) provides that a person is guilty of the offence only if he *intends* his words or behaviour (etcetera) to be threatening, abusive or insulting (or his behaviour disorderly), or is *aware* that it may be threatening, abusive, insulting or disorderly. Under s. 5 a person is liable under summary conviction only, meaning that such cases are not heard by a jury but by a Magistrates’ Court. The maximum sentence is a fine of £1,000.

Section 5 POA ’86 is related to two other offences: sections 4 and 4A POA ’86, which criminalise the use of threatening, abusive or insulting words or behaviour with the intent to cause fear or provocation of violence (s. 4) or harassment, alarm or distress (s. 4A). Section 5 is most relevant with regard to hate speech and has been used to prosecute for hate speech several times. The offences are limited to speech/behaviour ‘within the hearing or sight of a person likely to be caused harassment, alarm or distress’, thus making sure that there must be an identifiable victim (no general hate speech through the media, for instance). ‘A police officer may be such a person, but remember that this is a question of fact to be decided in each case by the magistrates. In determining this, the magistrates may take into account the familiarity which police officers have with the words and conduct typically seen in incidents of disorderly conduct.’¹⁰³ The defendant must ‘take the audience as he finds it’. Hence if the audience is insulted then the behaviour can be considered insulting as well: it is no defence to argue that the audience’s reaction was unreasonable.¹⁰⁴

The words “threatening, abusive or insulting” in the sections 4, 4A and 5, as well as the term “disorderly behaviour” in sections 4A and 5, shall be given their ordinary meaning – ‘an ordinary sensible man knows an insult when he sees or hears it’.¹⁰⁵ The courts have occasionally interpreted the terms “threatening, abusive and insulting” broadly, which may be considered problematic in the light of the Human Rights Act 1998 and article 10 ECHR.¹⁰⁶

The offences of sections 4, 4A and 5 Public Order Act can lead to higher maximum penalties when they are “racially or religiously aggravated” and thus a form of “hate

103 Crown Prosecution Service guidelines for the section 5 offence, 1 November 2010; DPP v. Orum [1988] 3 All ER 449 (Divisional Court).

104 Jordan v. Burgoyne [1963] 2 All ER 225 (Divisional Court); Bosma 2000, p. 114.

105 Brutus v. Cozens [1972] 2 All ER 1297 (House of Lords), at 1300, per Lord Reid.

106 Ormerod, Smith & Hogan 2005, p. 978.

crime”.¹⁰⁷ Under s.28 Crime and Disorder Act 1998, an offence is racially or religiously aggravated if

- (a) the offender demonstrates towards the victim hostility based on the victim’s membership (or presumed membership) of a racial or religious group (at the time the offence is committed, or immediately before or after the offence is committed); or
- (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

The provisions aim to prioritise hate crime, but are different from ordinary sentencing practices or guidelines that have a similar goal. The Crime and Disorder Act 1998 and the Criminal Justice Act 2003 contain qualitatively different types of the offences concerned: the *fault* for these offences is found greater than for the basic offences in the Public Order Act 1986.¹⁰⁸ Racial or religious hostility is an *element* that the prosecution must prove – thus it concerns issues of fact that are for the jury to decide upon, instead of just aggravating factors that judges must consider in sentencing.¹⁰⁹ Section 146 Criminal Justice Act 2003 also makes sure that crimes aggravated by hostility on the basis of *sexual orientation* or *disability* are treated as more serious offences with higher sentences. This act does not create specific new versions of s. 4, 4A and 5 Public Order Act, as is the case with racially and religiously aggravated crime. Nevertheless it makes sure that homophobic or disability aggravated offences are treated as very serious offences by the police, prosecution and the courts.

The wording of the offence has appeared to be capable of covering various types of speech and behaviour, including criticism or dissent on controversial matters of public interest – expressions which are likely to cause harassment, alarm or distress merely because of their controversial nature.¹¹⁰ Experiences with s. 5 Public Order Act 1986 led to scepticism about the ability of criminal justice actors – particularly the police – to distinguish hate speech from legitimate criticism. Accordingly, there have been proposals to amend this offence. Geddis shows that, though s. 5 has mostly been used to address violent and anti-social behaviour, some judgements have silenced controversial opinions on public matters.¹¹¹ He concludes that ‘the Divisional Court has adopted a “pro-civility” approach to s. 5, by accepting that protecting the public from offence caused by another’s insulting speech is a legitimate limit on a dissenting

107 S. 28 Crime and Disorder Act 1998, as amended by the Anti-Terrorism, Crime and Security Act 2001.

108 Malik 1999, p. 419.

109 House of Lords 2003, p. 35.

110 Geddis 2004, p. 856.

111 Geddis 2004, p. 857.

speaker's right to freely express herself.¹¹² As such, generalised hate speech – without a specific victim – falls under s. 5 as well.

One of those cases – *Hammond v. DPP* – concerned an evangelical Christian who was convicted for publicly preaching his disapproval of homosexuality; Hammond had stood in the centre of Bournemouth on a Saturday afternoon carrying placards citing “Stop Immorality”, “Stop Homosexuality”, “Stop Lesbianism” and “Jesus is Lord”.¹¹³ This led to indignant responses by the public and even physical assaults on the defendant, upon which the police ordered him to cease his activities – which he refused. The Magistrates' Court found a violation of s. 5; it argued that the offence's aim to prevent disorder was legitimate and that there was a pressing social need for restricting his freedom of speech, as ‘the words (...) were directed specifically towards the homosexual and lesbian communities implying they were immoral and there is a need to show tolerance towards all sections of society’.¹¹⁴ Upon appeal, the defendant argued that his conduct was “reasonable” (s. 5(3)(c)), because the right to freedom of expression under art. 10 ECHR also covers expressions that may be shocking or offensive to others, while the reaction of bystanders does not in itself justify a restriction on a person's freedom of speech. In addition, he argued that his expression did not amount to gratuitous insult but was a ‘sincere reflection of his deep-seated religious beliefs’.¹¹⁵ The Divisional Court also mentioned article 9 ECHR but did not delve into the defendant's religious motivations in detail: ‘Article 9 puts the case in a slightly different context but (...) does not really add anything’ next to Article 10 in this case. The Court judged that the question whether the defendant's conduct was “insulting” had to be treated as a question of fact, so that the Magistrates' Court judgment could only be overruled in case it was a perverse finding of fact, which was not the case. The Court further found that s. 5(3)(c) (the “reasonable” defence) is indeed the appropriate place to consider the right to freedom of expression as enshrined in article 10 ECHR, yet it was open for the Magistrates' Court to reach the conclusion that the defendant's conduct was not reasonable. In other cases concerning criticism of homosexuality, however, the prosecution decided not to press charges – for instance in the case of a Christian preacher who told a police officer that homosexuality was a sin.¹¹⁶

In *Norwood v. DPP*,¹¹⁷ the Court even found that it was ‘hard to find much of a role for any of the section 5(3) defences’. In this case, the defendant had put a poster in

112 Geddis 2004, p. 855.

113 *Hammond v. DPP*, [2004] EWHC 69 (Divisional Court).

114 Geddis 2004, p. 864, citing from *Hammond v. DPP*, [2004] EWHC 69 (Divisional Court), at 19.

115 Geddis 2004, p. 865.

116 BBC News, ‘Charge against ‘gay sin’ preacher dropped’, 17 May 2010, <news.bbc.co.uk/2/hi/uk_news/england/cumbria/8687395.stm>.

117 *Norwood v. DPP*, [2003] EWHC 1564 (Divisional Court).

front of his window with the words “Islam out of Britain” and “Protect the British people”, which showed pictures of the World Trade Centre in flames and a Crescent and Star with a prohibition sign. The English courts convicted him for the religiously aggravated version of s. 5, which was later upheld by the ECtHR (see par. III.4.3). The defendant’s claim that his expressions merely attacked the Islamic religion as opposed to Muslims as individuals, was rejected because ‘it could not, on any reasonable basis be dismissed as merely an intemperate criticism or protest against the tenants of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally.’¹¹⁸

That s. 4A can also lead to broad interpretations, is shown in the case of militant atheist campaigner Harry Taylor, who was convicted for leaving anti-religious cartoons on Liverpool Airport’s multifaith prayer room (including one of the Danish cartoons and a cartoon showing the pope wearing a condom on his finger).¹¹⁹ A possible reason for such broad interpretations is that traditionally, judicial review in the field of public order offences has been rather marginal: often the courts only assess the reasonableness of the police’s conduct.¹²⁰ That the scope of judicial review can differ considerably is illustrated by the case of *Percy v. DPP*, where the Court gave due regard to freedom of expression under s. 5 POA ‘86. In this case, the conviction of a protestor for defacing the US flag in the vicinity of US military service personnel – she had put a stripe across the stars and written the words “Stop Star Wars” across the stripes as an expression of protest against the use of weapons of mass destruction – was quashed on the grounds that it was a disproportionate infringement of freedom of expression under article 10 ECHR.¹²¹

2.6.1 *Proposals for amendment of section 5 POA ‘86*

The parliamentary Joint Committee on Human Rights has criticised the approach to policing of protest, including the role of s. 5 Public Order Act, in its 2009 report “Demonstrating respect for rights? A human rights approach to policing protest”.¹²² The Committee recommended that s. 5 be amended to remove the reference to “insulting” in s. 5 POA, after expert witnesses drew attention to cases in which the police had used the offence in a way that stifled legitimate protest. Human rights organisation Liberty had mentioned the example of a young man demonstrating outside the Church of Scientology’s London headquarters with a sign that read “Scientology is not a religion, it is a dangerous cult”, against whom the police issued

118 Geddis 2004, p. 862 and *Norwood v. DPP*, [2003] EWHC 1564 (Divisional Court), at 33.

119 BBC News, ‘Militant atheist’ found guilty of religious harassment’, 4 March 2010, <www.bbc.co.uk/blogs/ni/2010/03/militant_atheist_found_guilt_o.html>.

120 Williams 1967, p. 20.

121 *Percy v. DPP*, 21 December 2002, *Times Law Reports* 2002 (Divisional Court).

122 Joint Committee on Human Rights 2009.

a summons for refusing to take down his sign.¹²³ Though the case was not prosecuted eventually, such examples show how policing can have a chilling effect on speech. The Committee concluded that '[s]ection 5 of the Public Order Act gives the police a wide discretion to decide what language or behaviour is "threatening, abusive or insulting". Whilst arresting a protestor for using "threatening or abusive" speech may, depending on the circumstances, be a proportionate response, we do not think that language or behaviour which is merely "insulting" should ever be criminalised in this way.'¹²⁴ The Government, however, appeared unwilling to amend s. 5:

While the Government understands the reasons for the Joint Committee's proposal, we consider that it would in fact be counter productive. As some respondents to our consultation pointed out, the proposal would result in the courts being left in a very curious position on having to decide on a case by case basis whether particular words or behaviour were (criminally) abusive or merely (non-criminally) insulting. The Government also agrees with the views of the police and the CPS that the effect of the amendment on minority ethnic and faith communities is likely to be negative and would have a detrimental effect on victims of hate crime (...). In its current form, Section 5 protects citizens from being gratuitously insulted as they go about their business in public (...). Although Section 5 is a broad offence which offers the police wide discretion, the courts have held that it does not conflict with the right to freedom of expression contained in Article 10 of ECHR and sections 5 and 6 contain the necessary balance between the right of individual freedom of expression and the right of others not to be insulted and distressed.¹²⁵

Instead the government proposed to issue guidance to the police about the use of s. 5, which has been published in 2010: this manual places s. 5 and other relevant crimes in the light of article 10 ECHR and English case law.¹²⁶

2.7 Hate speech since 9/11: wider background

Several trends can be discerned from the developments on hate speech law as described in the previous paragraphs. First, one can detect from the legislative history of the religious and homophobic hatred offences a rationale of preserving social cohesion between communities and "rallying around the same civic values" (an indirect public order concern). Though it must be said that a real public order risk – the risk of increasing violence against Muslims as a result of anti-Muslim attitudes after 9/11, and the risk of violence against sexual minorities – was not entirely absent, the measures proposed were rather symbolic means to show that something was being done to protect those groups. This rationale can be seen against the background of the integration of ethnic minorities in Britain and the accompanying worries about social

123 The case was not prosecuted eventually.

124 Joint Committee on Human Rights 2009, at 85.

125 Joint Committee on Human Rights 2010, Letter to the Chair of the Committee from Rt Hon David Hanson MP, Minister of State, Home Office, dated 13 January 2010.

126 Association of Chief Police Officers 2010.

cohesion: it seems that multicultural society is seen as an inherent public order problem that needs to be addressed.¹²⁷ However, this rationale is not as new as it seems: the idea of preventing disharmony between groups was already an important consideration behind the law on seditious libel as well as the racial hatred law.

A striking trend is that anti-terrorism law and hate speech are often connected to each other, in political debates as well as by the CPS. The offence of stirring up religious hatred was first proposed in an anti-terrorism bill, in part to deal with the problem of religious extremism. Hence hate speech and extreme speech are intertwined in English law. In the House of Lords much criticism was expressed on the frequent linkage between religion and terrorism. Critics say that the offence was introduced to win Muslim support for anti-terrorism proposals disproportionately targeting them (such as the encouragement of terrorism offence). Besides speech offences as such, a broad approach has been taken to banning terrorist organisations – they can also be proscribed on the grounds of “glorifying terrorism”, thus on ideological grounds. It is notable that the anti-terrorism paradigm has emerged strongly after 9/11, with the balance between national security and civil liberties tending towards the former.¹²⁸ Extreme speech from radical Islamist groups, however, is not just a post-9/11 phenomenon: it has its roots in the 1980s/1990s, when the UK is said to have become a breeding ground, a “haven” for radicalism as Islamists from the Middle East were given political asylum.¹²⁹ Though reactions to the issue were scarce during those years, the problem of homegrown terrorism – that appeared with the 7/7 bombings – suddenly placed extremist speech high on the political agenda. The current approach towards terrorist/extremist speech and organisations, combined with a broad definition of terrorism which possibly targets ideology instead of merely violent action, has led critics to contend that Britain is adopting its own version of a militant democracy.¹³⁰ This is striking since, traditionally, the idea of a militant democracy is almost absent from British constitutional thinking, especially where freedom of association is concerned: this freedom has generally been well upheld in the course of the 20th century. In 2005 the government and the Joint Committee on Human Rights still maintained that proscription of *racist* organisations would not be helpful to race relations or community cohesion.¹³¹

The approach to *hate speech* in England & Wales seems to have been influenced by the increased attention for hate *crime*. Since the racist murder of Stephen Lawrence in the 1990s and the subsequent inquiry into police behaviour surrounding it, hate crime

127 Vance 2004, p. 233.

128 See Kavanagh 2006, p. 600.

129 Elaine Sciolino & Don Van Natta, ‘For a decade, London thrived as a busy crossroads of terror’, *New York Times* 10 July 2005. See Parker 2007, p. 727.

130 Cram 2009; Roach 2004, p. 172.

131 Joint Committee on Human Rights 2005b, p. 32.

has been taken much more seriously. The law now treats racially, religiously, homophobic or disability aggravated offences as more serious and deserving of higher sentencing, whereas the CPS sets out that ‘it will usually be in the public interest to bring a prosecution’ in such cases.¹³² This also counts for s. 4, 4A and 5 Public Order Act, but with enforcement of hate speech under parts 3 and 3A Public Order Act the situation is different because of the Attorney General’s role. Nevertheless these developments in the field of hate crime may have affected the law on hate speech towards the protection of more groups. The House of Lords’ *R v. Rogers* judgment (on s. 4 Public Order Act) makes clear that racially aggravated crime is taken very seriously and that the rationale behind prohibiting racially discriminatory speech is no longer limited to public order arguments:

The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as “other”. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.¹³³

Finally it must be noted that there has been a clear influence of the Human Rights Act 1998 (HRA) on hate speech law in the past decade. The HRA has changed the climate of public and legal discussion¹³⁴ – arguments based on the ECHR and its case law are increasingly advanced in politics as well as in judicial decisions. Still, this does not always mean that human rights arguments are *decisive* – offences restrictive of speech such as s. 1 Terrorism Act 2006 can still be adopted, accompanied by declarations that they do not infringe the Human Rights Act, despite contrary declarations by the Joint Committee on Human Rights.

3 HISTORICAL/CONSTITUTIONAL FRAMEWORK

3.1 Freedom of expression and its restrictions before the Human Rights Act 1998

In order to understand more clearly why hate speech law has developed the way it has, this paragraph delves deeper into the historical/constitutional framework with regard to freedom of expression and its restrictions. The lack of a written constitution has meant that, until the incorporation of the Human Rights Act in 1998, Britain did not

¹³² Crown Prosecution Service, *Policy for prosecuting cases of racially and religiously aggravated crime*, October 2009, p. 5.

¹³³ *R v. Rogers*, [2007] 2. W.L.R. (House of Lords), Baroness Hale of Richmond.

¹³⁴ Barendt 2009, p. 866.

have such extensive written guarantees for civil liberties as many continental European states did.¹³⁵ Despite this, freedom of expression has always played an important role in politics and public debate: free speech is historically regarded as an essential liberty. One commentator has noted that ‘this is a right imbued with such totemic power in the contemporary British press that a reader might be forgiven for thinking that cities might fall and economies slide into the ocean before the British public would countenance the silencing of a single voice.’¹³⁶ Even during the adoption of the race hatred act – which nowadays can hardly be called controversial – there was stark opposition on speech grounds: The Times, for instance, feared that the offence would lead to ‘legal harassment of unpopular or officially deprecated opinions’. There is a traditional suspicion of the police acting as censors of speech by using their powers of arrest – though this has not stopped such actions from take place.¹³⁷

In this context the UK has also made reservations to article 4 CERD and article 20 ICCPR: the former is interpreted with due regard to – particularly – freedom of opinion and expression.¹³⁸ The government reserves the right not to introduce any further legislation under article 20 ICCPR, ‘having legislated in matters of practical concern in the interests of public order’.¹³⁹ It is telling that during the drafting process of CERD in the 3rd Committee, UK representative Lady Gaitskell put forward the view that ‘article IV went to the very heart of the draft Convention, since it involved what her delegation considered to be the fundamental right – freedom of speech (...) Her country (...) defended the right of all organisations, even fascist and communist ones, to exist and to make their views known, even though those organisations held views which the majority of the people utterly repudiated. (...) No matter how odious the ideas of any group or organisation were, her country could not agree to the banning of it.’¹⁴⁰

Debates about new legislation are usually accompanied by a strong opposition campaign that aims to preserve freedom of expression, which may explain why offences which are common in other European countries, such as “group insult” and “incitement to discrimination”, have never gained much ground in England.¹⁴¹ The courts, too, have generally expressed the view that freedom of expression is an important liberty¹⁴² – though such considerations did not necessarily influence the outcome of the cases at hand. Curiously, English law recognises the vital importance of freedom of expression but simultaneously exhibits a ‘preference for public peace-

135 The Magna Charta of 1215 and the Bill of Rights 1689 proclaimed certain liberties, but were limited in scope.

136 Goodall 2007, p. 105.

137 Williams 1967, p. 170.

138 <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.

139 <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

140 UNGA Official Records, 22 October 1965, UN Doc A/D.3/SR.1315, paras. 1-2

141 See Bailey, Harris & Jones 1995, p. 668.

142 Amos 2002.

fulness (...) over freedom of expression':¹⁴³ '[b]y and large, Parliament and the judiciary have taken the view that free speech is a very good thing as long as it does not cause trouble.'¹⁴⁴ The broad common law offences of seditious libel and blasphemous libel provided good examples of this. Traditionally, English law does not shy away from interfering with free speech on the grounds of preserving the collective peace in society.¹⁴⁵ Nevertheless the importance of free speech can be seen in the traditional unwillingness to interfere with the *content* of speech, thus with particular opinions, if there is no public order connection¹⁴⁶ – though it must be admitted that this has sometimes meant an interpretation of public order that disproportionately targeted certain opinions as opposed to others.¹⁴⁷ Public order has always been the most important ground for restricting hate speech – that is, long-term disorder and public peace rather than “clear and present dangers” such as under U.S. law. Hate speech bans have mostly followed public order outbreaks, such as the Public Order Act 1936 (fascist marches) and the Race Relations Act 1965 (race riots).¹⁴⁸ As long ago as 1871, Mr. Gladstone said in the House of Commons that “[i]n this country there is a great and just unwillingness to interfere with the expression of any opinion that is not attended with danger to the public peace.”¹⁴⁹ This can be seen in the inclusion of words like “threatening, abusive or insulting” in several speech bans, which aims to make sure that reasoned argument is not criminal; accordingly, it makes a distinction between the *content* and *manner* of speech.

3.1.1 *Civil liberties and Parliamentary Sovereignty*

International human rights have never before played a large role in English law on hate speech and English law in general until 1998; although the UK is a signatory to the most important human rights treaties, a dualist system of incorporation has prevented the European Convention and other human rights treaties from being applied directly by the courts until the HRA. Before 1998, a person had no remedy before an English court for a violation of the ECHR, since it was not part of municipal law – though it did have an indirect impact.

The English have had a very particular view on civil liberties for a long time, which is still influential. The political system is characterised by Parliamentary Sovereignty, meaning that Parliament has the prerogative to make any law it wishes without being constrained by constitutional norms. Legislation cannot bind successive Parliaments.

143 Feldman 2002, p. 769.

144 Robertson & Nicol 1992, p. 1.

145 Vance 2004, p. 235.

146 Oyediran 1992, p. 245.

147 Gearty 2007, p. 35.

148 Williams 1967, p. 11-12.

149 Parl. Deb. 3rd S., vol. 205, 24 March 1871, cols 574-575.

As Dworkin wrote, ‘the majoritarian premise, and the majoritarian conception of democracy it produces, have been more or less unexamined fixtures of British political morality for over a century.’¹⁵⁰ The idea of a militant democracy – that protects itself by means of safeguards in the constitution – is alien to the system. In the absence of a written constitution, Britain has developed a unique conception of civil liberties: ‘[t]he British approach arises from a belief that the traditional way of doing things – and the arrangements that result from such an approach – fully protect the rights, liberties and freedoms of the people. This “traditional way” incorporates the twin pillars of Parliamentary Sovereignty and the Rule of Law, together with an acceptance that there is a culture of political liberty, fairness, moderation, pragmatism and common sense.’¹⁵¹

In the British constitutional system one cannot speak of freedoms as “rights” in the sense of written entitlements but rather as “residual liberties” guarded by the common law, as the constitutional theorist Dicey (emerging from Burke’s tradition) influentially put it. This means that ‘everyone is free to do what is not forbidden by law’. For a long time the British have spoken only about general “liberty” instead of particular “liberties” or “rights”; granting particular rights could only diminish the sphere of general liberty that people already had anyway, it was thought.¹⁵² ‘For long the dominant view was that British liberties, emerging from the common law and the decisions of the ordinary courts, were better protected than the rights enshrined in a constitution or statute as in other states. What could so easily be given by the state could with equal facility be removed.’¹⁵³ It was upon judges to decide in which cases liberty could be limited, on the basis of common law; legislation used to be the exception to the common law and should thus be interpreted restrictively.¹⁵⁴ Judges assumed “presumptions” that Parliament would not want to restrict liberty too extensively, including the presumption of freedom of expression. Another judicial presumption was that Parliament would not want to act in contravention of international legal obligations – as such, the ECHR already played an indirect role in English law before the coming into being of the HRA.¹⁵⁵ This residual status of rights such as freedom of speech, however, meant that they actually functioned next to other powerful interests.

Despite the liberty of expression, speech offences in the common law were not always interpreted in a liberal manner. Hate speech bans in England – inspired by the age-old sedition offence – are traditionally concerned with conduct that “undermines the

150 Dworkin 1996, p. 16.

151 Forman & Baldwin 2007, p. 415.

152 Feldman 200, p. 70.

153 Kavanagh et al. 2006, p. 486.

154 Kummeling 1994, p. 100.

155 Kummeling 1994, p. 100.

authority of the state” by creating disharmony between groups, instead of the impact on individuals or groups.¹⁵⁶ Majoritarian constraints on unorthodox speech have been easily accepted in a framework of freedoms that is not grounded in the idea of “protecting the individual against the state”. The continental European idea of rights against “The State” which have to be safeguarded by that same state – as influenced by the French Revolution – is fairly non-existent.

Indeed, freedom of expression has always been guarded rather by general culture than by law – by citizens and the media defending their freedoms. England traditionally has a culture of adversarial and lively debate, of robust argumentation and disputation, enhanced by the two-party system and the left-right divide as well as a strong notion of popular sovereignty in politics. Even in the 19th Century when formal voting rights were still reserved for the happy few, all parts of the nation took part in political debate.¹⁵⁷ Sharp criticism and ridicule of politicians – including subversive cartoons – have long been part of the political culture. Furthermore, engagement in public debate outside formal political channels – in the form of public protest – is a vital part of this culture, though there have traditionally been many police controls in this area. As Gearty writes, “[t]he UK is a free society because those who live in this country think of themselves as free: the assumption becomes the norm that guides conduct (...) As long as this is the cultural assumption, then it is likely that freedom of speech will remain a real part of the practice of civil liberties in Britain.”¹⁵⁸

The traditional difficulties in legal protection may explain why there has not been much discussion of the rationales for freedom of expression. Generally the democratic rationale has deserved more attention than the individual autonomy rationale – which may explain some of the problems in upholding freedom of expression in certain contexts, such as religiously motivated speech (*Hammond v. DPP*).¹⁵⁹ According to Cram, ‘in the absence of any philosophical justification for speech there has often been no clear sense in our constitutional history of when expression might be legitimate and worth defending or, conversely, when countervailing interests ought to trump speech claims (...) the most recent efforts to close off avenues of political dissent in the Terrorism Act 2006 have benefited directly from the legacy of under-theorised accounts of why expression matters.’¹⁶⁰

Where the previous paragraphs have shown that a balancing act between freedom of expression and freedom of religion and/or non-discrimination is not uncommon in political debates and judicial decisions of the past decade, this has not always been the

156 Oyediran 1992, at 250.

157 Colley 1992, p. 362-363.

158 Gearty 2007, p. 153.

159 Weinstein 2009, p. 61; Fenwick & Phillipson 2006, p. 16.

160 Cram 2009, p. 75.

case. There is no general principle of non-discrimination in English law, though the common law guarantees formal equality before the law and successive Race Relations Acts have targeted racial discrimination in employment and the provision of goods and services. Later, legislation targeting discrimination on other grounds has been gradually developed.¹⁶¹ As to freedom of religion, it is notable that in 1994 De Smith & Brazier could still write that '[f]reedom of conscience and religion does not call for an extensive discussion. Freedom of conscience falls partly within the scope of freedom of expression, partly under freedom of assembly and association. The law does not concern itself with individual beliefs or disbeliefs unless a person propagates his views in scurrilous terms or in circumstances likely to give rise to a breach of the peace (...).'¹⁶² The absence of discussion about freedom of religion – until the multiculturalist debate in the 21st Century – may be related to the long dominance of the Anglican church, as well as to the idea that “general liberty” was more important than particular freedoms.

3.1.2 Restricting speech against the mainstream: seditious libel and blasphemous libel

The contradiction between England's free speech tradition and the vital importance of preserving peaceful social relations comes back strongly in the common law offences of seditious libel and blasphemous libel, which were both abolished in 2009. The traditional rationale for seditious libel is that “the Queen's subjects” shall refrain from upsetting the government or its subjects, from criticising the status quo – as such, the offence has laid the foundations for curbing extremist speech in Britain.¹⁶³ As Barendt notes, '[t]he classic definition of sedition reflects a traditional, conservative view of the correct relationship between state and society. Governments and public institutions are not to be regarded as responsible to the people, but in some mystical way, as under the doctrine of the Divine Right of Kings, are entitled to respect of their subjects.'¹⁶⁴ The offence and its rationale have had a profound influence on modern hate speech law. Seditious libel is related to blasphemous libel in the sense that the latter's rationale was also to hold “the fabric of society” together – in the case of blasphemy, by protecting Christianity. After all, Britain has an established church of which the Queen is head – as such, the state and the Anglican Church are intimately linked. The common law of blasphemy had to prevent people from undermining the authority of the state by undermining Christianity. Just as the crime of seditious libel, it came about as a means of dealing with criticism of the status quo, and it was effectively used as such for hundreds of years, amongst others against liberal clergymen and free-

161 Sex discrimination act 1975; Disability discrimination act 1995; Employment equality (Religion or Belief) regulations 2003; Employment Equality (Sexual orientation) regulations 2003.

162 DeSmith & Brazier, 1994, p. 522.

163 See Cram 2009, p. 76-85.

164 Barendt 2005, p. 163.

thinkers.¹⁶⁵ With the case of *R v. Lemon* (*Gay News*), however, the rationale had turned towards protecting the feelings of believers against shock or outrage.¹⁶⁶

Optimists interpret the repeal of both offences as the end of the government's attempts to attack criticism of the status quo and the protection majority values. Nevertheless, parts of the ancient offences are now being taken over by statute law – incitement to religious hatred (for blasphemy) and encouragement of terrorism (for sedition).¹⁶⁷

3.2 The 1930s-1950s: the Public Order Act 1936

Public order law as it exists today builds upon the Public Order Act 1936 (POA '36), which was enacted in response to the public disorder by anti-Semitic marches of the British Union of Fascists and the opposition to it.¹⁶⁸ Section 5 of the POA '36 (the precursor for current s. 4 Public Order Act 1986) criminalised threatening, abusive or insulting words intended or likely to lead to a breach of the peace. In 1934 the prospects for fascism looked bright; press magnate Lord Rothermere supported the British Union of Fascists, headlining "Hurrah for the Blackshirts" – though he dropped his support after the group became more openly pro-Hitler and anti-Semitic.¹⁶⁹ The Act made it possible for the police to exert greater control on fascist meetings that were becoming increasingly violent, and it seems to have succeeded in curbing fascist propaganda and marches: '[p]olice shorthand writers regularly attended British Union meetings in search of insults and often found them (...) The result was a definite modification of Fascist propaganda with less provocation to Jews and other anti-Fascists.'¹⁷⁰

Besides its immediate trigger of curbing emerging fascism, the POA '36 also had a wider purpose: to exert greater social control through increased police powers and to deal with political extremism in general.¹⁷¹ The adoption of the act encountered much criticism from different sides, and the Home Office also showed itself to be concerned about its impact on civil liberties: when the police proposed that the government ban a fascist movement in 1934, the Home Office responded that

while such movements should be closely watched, there was no argument for banning them. To do otherwise would be to break the long-established political tradition of allowing people to hold whatever views they liked, so long as they did not break the law or urge others to do

¹⁶⁵ Barendt 2005, p. 187

¹⁶⁶ *R v. Lemon* (*Gay News*), [1979] 1 All ER 898 (House of Lords).

¹⁶⁷ See Cram 2009.

¹⁶⁸ Lester & Bindman 1972, p. 351; Rumney 2003.

¹⁶⁹ Cross 1961, p. 95-96 and 118.

¹⁷⁰ Cross, 1961, p. 177; Lester & Bindman 1972, p. 351.

¹⁷¹ Thurlow 1998, p. 82. (also dealing with other movements that could pose a threat to public order in demonstrations, such as the National Unemployed Workers' Movement)

so. Only if public order appeared to be on the verge of breaking down would the government contemplate restricting political liberty.¹⁷²

Indeed, a general proscription regime for national socialist organisations was not at issue – from the 20th Century, freedom of political association has been firmly established: ‘[t]he right of association for political ends is a strongly embedded entitlement in British political culture. It is a freedom that has been forged in past eras of repression, when the branding of a political association as unlawful was frequently turned to as a means of hindering the advance of the ideas for which its members stood.’¹⁷³ Though the government did consider proscribing the Communist party during wartime, they eventually refrained from doing so – instead, its newspaper *The Daily Worker* was banned and other restrictions on individual members were applied.¹⁷⁴ Accordingly, whereas party prohibitions were considered too far-reaching, the government did not shy away from curbing freedom of expression of those considered “politically extremist”.

The POA ’36 was interpreted broadly: from the 1940s-1960s, it was often used to suppress criticism of the government. Especially the term “insulting” – just as in modern section 5 POA ’86 – was prone to overbroad interpretations.¹⁷⁵ For instance, in July 1940 a pacifist was convicted before a magistrate who is reported to have said: ‘[i]t is your duty as a loyal citizen to support the government and support the powers that be. You must put restraint on yourself from patriotic motives and not do anything that is likely to embarrass the authorities.’¹⁷⁶ A young man was convicted to two months’ imprisonment for distributing leaflets advertising a Communist meeting and for uttering the words ‘[t]his rotten Government is holding 390 million Indian people in slavery’ during a speech.¹⁷⁷

3.3 The 1960s-1970s: Race relations

Though the offences of sedition and s. 5 POA ’36 were occasionally used to prosecute for hateful speech, in the 1960s a specific offence of incitement to racial hatred was considered necessary. Against the background of postwar immigration, there were increasing racial tensions and activities of neo-Nazi groups.¹⁷⁸ Whereas successive governments had appeared reluctant to enter this ‘legislative minefield’ – also because of widespread indifference towards the problem of racism at that time – in 1964 the Labour Party in its election manifesto pledged to introduce measures against racial

172 Thurlow 1998(a).

173 Gearty 2007, p. 155.

174 Beetham, Byrne, Ngan & Weir 2002, p. 108-9.

175 Williams 1967, p. 159-160.

176 Kidd 1940, p. 265.

177 Kidd 1940, p. 264.

178 Williams 1967, p. 178.

incitement.¹⁷⁹ In 1965, the offence of “stirring up racial hatred” (the precursor of today’s offence in part 3 Public Order Act 1986) was adopted in s. 6 Race Relations Act 1965. The proposal had gone accompanied by heavy opposition in both Parliament and the media that emphasised the offence’s dangers to freedom of speech – especially since no “breach of the peace” requirement was included.¹⁸⁰ The Times warned that the offence would be ‘an instrument of political censorship’ and would open the way to ‘to legal harassment of unpopular or officially deprecated opinions’. It was also feared that ‘the more extreme pronouncements of Welsh and Scottish Nationalists [would] run foul of the law’.¹⁸¹ Eventually, however, opposition against the offence faded away as it was narrowed down considerably – especially through the element of intention.

Incitement to racial hatred: the old offence (1965)

Under s. 6(1) Race Relations Act 1965 a person would be held criminally liable if ‘with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins:

- (a) he circulates or distributes written matter which is threatening, abusive or insulting;
- (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on ground of colour, race or ethnic or national origins.’

Prosecutions could only be initiated with the consent of the Attorney General.

The crime of incitement to racial hatred could (and can still) be regarded as a public order offence. Though it was originally enacted in a race relations act and it did not contain any specific requirement that public disorder should be caused, its rationale is to preserve public order rather than to protect the rights and dignity of minorities or prevent offence.¹⁸² According to the government at the time, ‘[t]hese offences are entirely separate from the anti-discrimination provisions of the race relations legislation. They deal with the stirring up of racial hatred rather than with acts of racial discrimination (...) They are concerned to prevent the stirring up of racial hatred which may beget violence and public disorder.’¹⁸³ In later times, various amendments were proposed that would criminalise the expression of offensive views, but they were always rejected¹⁸⁴ – legislative history shows that ‘[t]he Clause is designed to deal with more dangerous, persistent and insidious forms of propaganda campaigns’ which can

179 Lester & Bindman 1972, p. 360.

180 Leopold 1977.

181 Williams 1967, p. 176.

182 Malik (M.) 2009, p. 104.

183 White Paper, Cmnd 6234, p. 30.

184 Bailey, Harris & Jones 1995, p. 665 (referring to the government White Paper leading to the Public Order Act 1986: Cmnd 9510, p. 39.)

lead to hatred and eventually to violence.¹⁸⁵ The offence can be viewed as an effort to give substance to the crime of seditious libel,¹⁸⁶ that was not considered adequate to protect against hate speech.¹⁸⁷

During the adoption of the offence, the possible inclusion of incitement to *religious* hatred in the law was also discussed. This idea was rejected, because religion was viewed as something inherently different from race – connected to certain convictions and teachings and thus more open to criticism. As Sir Frank Soskice argued in the House of Commons, ‘[p]eople can change their religion (...) it is utterly different from something which they cannot help, such as the colour of their skin.’¹⁸⁸ Moreover, he held that there was no evidence in England of hatred being stirred up on the grounds of people’s religion, while s. 5 of the Public Order Act could be used if necessary. The Law Commission was also against a religious hatred offence in 1981:

[I]n our view there is no parallel in England and Wales between the social pressures on racial groups which gave rise to the necessity (...) of (...) s. 5A, and the present situation in regard to religious worship. But the decisive argument against an offence of this character is that it would be concerned, not with protecting the feelings of individuals wounded by insults relating to their religious beliefs, but with prevention of incitement to hatred of such individuals because they hold particular religious beliefs. This is something quite different (...).¹⁸⁹

Section 6 Race Relations Act 1965 was also used to curb “reverse racism”, which is not surprising considering its main rationale of protecting public order; this can be endangered by inciting hatred against a majority, too. In *R v. Malik*¹⁹⁰ (1967), a Black Power advocate was convicted to twelve months’ imprisonment for stirring up hatred against white people at a public meeting. He was described by a witness as having said ‘I want to tell you about souls. The black man has soul. The white man has no soul. He is a soulless person.’ The Court of Appeal did not delve into the issue of using the racial hatred law against the majority. In the same year, four members of the Universal Coloured People’s Association were convicted for stirring up hatred against white

185 HC Deb 3 May 1965, Race Relations Bill, par. 941 (Sir Frank Soskice, Secretary of State for the Home Department)

186 Williams 2009, p. 93.

187 In *R v. Caunt* (1947, 64 LQR 203), the editor of a local newspaper in Lancashire had verbally attacked British Jewry, writing that ‘[v]iolence may be the only way to bring them to the sense of their responsibility to the country in which they live.’ The defendant was acquitted because the prosecution had failed to prove that he had deliberately intended to stir up disorder. The case was only judged in first instance and never has an appellate court decided on whether this was the right test for seditious libel. See Williams 1967, p. 347-349.

188 HC deb Standing Committee B 27 May 1965, col. 83.

189 Law Commission 1981, p. 119-120.

190 *R v. Malik* [1968] 1 All ER 582 (Court of Appeal, Criminal Division).

people at Speaker's Corner in London, where they had called upon coloured nurses to give white patients the wrong injections.¹⁹¹

The crime of incitement to racial hatred has always been concerned with deterrence through norm-setting rather than with effective enforcement of the law. Prosecutions were few in the 1960s-1970s, but the case of *R v. Malik* shows that they could result in relatively high prison sentences. Legislative history makes clear that the offence was meant to deal with the more extreme racist statements and not to target the "ordinary man in the street".¹⁹² Racism as a viewpoint as such was not prohibited; the UK has made a reservation to article 4 Convention on the Elimination of Racial Discrimination (CERD). Criticism related to immigration – including issues such as advocating the repatriation of immigrants to their countries – was not meant to be criminalised: it was thought that such expressions were best countered in an open public debate. The offence was indeed used mostly against the members of hardcore racist organisations.¹⁹³ In this regard, the first prosecution under the Act was an odd one. This concerned a 17 year-old who had attached a tract with "Blacks not wanted here" to the front door of an MP's house; the Court of Appeal quashed his conviction on the ground that it did not concern distribution to the *public*.¹⁹⁴

1968 saw the landmark case *Southern News*, which would greatly influence future prosecutions in this area.¹⁹⁵ Four members of the Racial Preservation Society had distributed a journal that called for halts to further immigration and for the repatriation of coloured immigrants; it also warned against race mixing and speculated about genetic differences between races. Before the Sussex jury, the defendants set out to emphasise their rational purposes, introducing a controversial expert witness on the topic of physical anthropology and racial characteristics. As such "[t]he Court became a forum for speculation about the effects of miscegenation, the purity of the races (...) the prosecution offered no objection to this speculation and the judge did not question its relevance."¹⁹⁶ The jury acquitted the defendants, a decision which is thought to have negatively influenced the Attorney General's willingness to consent to further prosecutions. It was now feared that unsuccessful prosecutions could give a measure

191 Dickey 1968, p. 493 (referring to report in *The Times* Nov 29-30, 1967); see also Leopold 1977, p. 396.

192 Race Relations Bill, HL Deb 26 July 1965, Lord Stonham (Joint Parliamentary Under-Secretary of State at the Home Office), par. 1012.

193 See Jordan and Pollard, *The Times* January 26, 1967: conviction of Jordan, National Socialist movement leader, and Pollard, his 19 year-old accomplice, for distributing anti-Semitic cartoons and copies of a broadsheet entitled *The Coloured Invasion*. See also the case against Vincent Carl Morris in 1967, who had incited two youths to distribute an anti-Semitic and anti-coloured immigration leaflet entitled *Britons Awake* (Dickey 1968, p. 492).

194 *R v. Britton*, 19 December 1966, [1967] 1 All ER 486 (Court of Appeal, Criminal Division)

195 See Dickey 1968, p. 493; Lester & Bindman 1972, p. 370.

196 Longaker 1969, p. 132.

of respectability to racists – as the example of *Southern News* had shown.¹⁹⁷ It is striking that in England the type of expressions in *Southern News* were regarded as representative of the writings of “more moderate racialist movements”¹⁹⁸ – in other countries such as the Netherlands those would have counted as obviously racist. After the *Southern News* trial, “rationalised” racist literature has become more frequent in England. More generally, the law on racial incitement is thought to have helped to make racist publications more cautiously worded.¹⁹⁹ According to Lester & Bindman,

[s]ince the enactment of section 6 there has been a decided shift in the style of racialist publications. They tend to be more cautiously worded. Their contents are less anti-Semitic and more directed to pseudo-national discussion of the adverse impact of coloured immigration upon British society. They disclaim any intention to stir up racial hatred and purport to be contributions to public education.²⁰⁰

Some contend that the law has indeed achieved its limited goals: to curb the most extreme racist expressions.²⁰¹ Others hold that this result is a mixed blessing, creating a situation where persons successfully evade the law; as many idle demands for prosecution have been made, the law has created mistaken hopes.²⁰² Numbers of the amount of prosecutions are not available from the 1960s-1970s; to give an indication, an article from 1968 mentioned 15 prosecutions having taken place from 1965-1968.²⁰³ Lord Scarman concluded in 1976 that the law had become an “embarrassment to the police”, who could not do much against the racist demonstrations that were increasingly taking place.²⁰⁴ As a result, in 1976 the offence was changed: from now on, *intention* to stir up racial hatred was no longer an element. The section was moved from the Race Relations Act 1965 to the POA '36, where section 5A criminalised the use of threatening, abusive or insulting words or behaviour ‘in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.’

While the police had difficulties in countering racist demonstrations, anti-government speech and demonstrations continued to be restricted under public order law.²⁰⁵ During this period, the traditional British deference towards the ruling elite gradually declined and authority was increasingly challenged.²⁰⁶ In *Williams v. DPP*, a defendant was convicted for s. 5 POA '36 for having distributed leaflets outside a club for US

197 Leopold 1977, p. 398.

198 Dickey 1968, p. 495.

199 Dickey 1968(a).

200 Lester & Bindman 1972, p. 371.

201 Rumney 2003, p. 140.

202 Lester & Bindman 1972, p. 371.

203 Dickey 1968, p. 494.

204 Cmnd 5919, 1975, par. 125.

205 Gearty 2007, p. 36.

206 Forman & Baldwin 2007, p. 13.

servicemen, opposing the Vietnam war and inviting US soldiers to desert from the army. His appeal at the Divisional Court was dismissed: the Court held that ‘it was difficult to imagine anything more likely to be insulting and to occasion a breach of the peace than an invitation to a member of the armed forces to desert.’²⁰⁷ Nonetheless, in its judgment *Brutus v. Cozens* in 1972 the House of Lords gave a liberal interpretation of the word “insulting” in s. 5 POA ’36: it held that behaviour which affronts other people, or which expresses disrespect or contempt for their rights or causes resentment or protest, is not necessarily “insulting behaviour” within s. 5 of the Act.²⁰⁸

3.3.1 Race relations: politics and the media in the 1960s-1970s

In English public debate in the 1960s-70s, open racism was not exceptional. As the Commission for Racial Equality stated,

[w]e do not have to go very far back to recall the days in which our cities were disfigured by slogans demanding that “Niggers Go Home” and proclaiming “White Power”. It is less than forty years since it was perfectly acceptable for public figures as well as political extremists to call for repatriation of non-white immigrants. We know that this kind of physical and verbal vandalism led to the practices of so-called “Paki-bashing” and “nigger-hunting” (...).²⁰⁹

Race became an increasingly pressing issue with growing levels of immigration combined with economic problems in the 1960s. Violence against immigrants – such as during the race riots in 1958 – was common and even increased during the 1970s.²¹⁰ So-called “moderate racialist statements”, such as calls for repatriation of immigrants, could be found in newspaper headlines and editorials but were also half-condoned in politics. During the discussion about the Race Relations Bill, Lord Radcliffe opposed the goals of the Bill on the ground that immigrants were “guests” who would one day return, and that prejudice and discrimination were not necessarily morally wrong.²¹¹ Some MPs also found that such a law would favour racial minorities over the majority. Nevertheless, politicians who openly played the race card could generally count on repercussions, such as Conservative MP Enoch Powell. In his infamous “Rivers of blood” speech in 1968, he warned of the consequences of immigration:

As I look ahead, I am filled with foreboding; like the Roman, I seem to see “the River Tiber foaming with much blood.” That tragic and intractable phenomenon which we watch with horror on the other side of the Atlantic but which there is interwoven with the history and existence of the States itself, is coming upon us here by our own volition and our own

207 *Williams v. DPP*, *Criminal Law Review* 1968, p. 563 (Divisional Court)

208 *Brutus v. Cozens*, [1972] 2 All ER 1297 (House of Lords)

209 Commission for Racial Equality 2005.

210 Kavanagh et al. 2006, p. 90; Adang, Quint & Van der Wal 2010, p. 27.

211 Lester & Bindman 1972, p. 112.

neglect. Indeed, it has all but come. In numerical terms, it will be of American proportions long before the end of the century.²¹²

The speech caused much political unrest and resulted in Powell's dismissal from the Conservative Shadow Cabinet. Unlike these political repercussions, Powell's anti-immigrant messages made him very popular with the public. The appeal of "new" racist discourse in postwar Britain can be explained by the "anecdotal form" in which it was communicated to the people: linking it to ideas about "neighbourhood", "community" and "territory" gave racism a sense of legitimacy.²¹³ While overt racist terminology was no longer acceptable, Powell used race 'not out of a conviction of racism but one of nationalism. His speeches and writings attempt a sophisticated account of area, region, neighbourhood and community that is being changed irrevocably by immigration of culturally foreign groups (...) This recoding of "race" was recognised by his audience which could "decode" it.²¹⁴ His messages were willingly distributed via the media, and many other politicians countered such ideas on pragmatic grounds only. In fact, Powell's viewpoints were adopted in a more covert form by mainstream politicians such as Thatcher – thus leading to the emergence of a new political commonsense. The first-past-the-post parliamentary system, after all, forces mainstream political parties to be responsive to the public and adopt "populist" viewpoints.²¹⁵ Not only politicians, but even judges were sometimes reported to condone racist statements in the 1960s/70s: in *R v. John Kingsley Read*, concerning a defendant who had referred to the racial murder of an Asian youth with the words 'one down, a million to go' and referred to 'niggers, wogs and coons', the judge in his summing-up to the jury 'praised the defendant as a man who had the guts to stand up publicly for the things he believed in (...) He poured scorn on the prosecution and the idea that the defendant might have committed an offence.'²¹⁶ Not surprisingly, the defendant was acquitted.

Racist viewpoints could regularly be found in the British press until well into the 1980s.²¹⁷ As Ian Law summarises:

The form and content of racism in British society is continually subject to remaking and transformation partly through news coverage. These representations of race have included the brutal and pragmatic economic racism of the slave trade era, the paternal and idealised imagery of the noble savage, the caricatures of minstrelsy, the Victorian science of racial inferiority and the vilification of intermarriage, "half-castes" and emerging poor black communities in British cities in the 1920s and 1930s. Cottle's review of the relevant

212 April 20, 1968: <www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html> (entered 2 March 2010).

213 Brown 1999.

214 Brown 1999, p. 268.

215 Norris 2005, p. 232.

216 Central Criminal Court 6 Jan 1978, unreported: see Bindman 1982.

217 Law 2002; Van Dijk 1991.

literature has also identified that in the 1950s and 1960s Asian and African-Caribbean migrants were cast as a “number” problem linked to urban decline, public ill-health and violence and disorder. In the 1970s, the period of the “Great Moving-Right Show” in British politics, immigrant numbers, young black muggers and the conflict between the extreme Right and anti-racist organisations were dominant news themes.²¹⁸

A study by Hartmann and Husband in 1974 found that ‘the Press has continued to project an image of Britain as a *white* society in which the coloured population is seen as some kind of aberration, a problem, or just an oddity, rather than as “belonging” to the society.’²¹⁹ Other studies confirm that the British press used to perpetuate negative ideas of blacks, Asians and refugees.²²⁰ Not only were statements such as those by Enoch Powell willingly distributed; editorials, comments and headlines were sometimes overtly anti-immigrant. Consider, for instance, the following headlines: ‘New Asian invaders’ (The Sun 17 May 1976); (about Tamil refugees) ‘They’re cheats, not refugees’ (Sun 19 feb 1987) and ‘a motley crew of malcontents (...) a nasty little cargo load of hooks, crooks and comic singers’ (Daily Star 19 feb 1987).²²¹ After a new anti-immigrant speech by Enoch Powell in 1985, the Sunday Express criticised those who called him a racist: they contended that it was undeniable that Britain had a ‘race problem’ which had been ‘swept under the carpet’ for years.²²²

Racist feelings in society thus found an outlet in – and were arguably reinforced by – several English newspapers, which had developed as polarising, partisan instruments in the hands of a few powerful owners. The development of the British press has undergone much influence from the classic libertarian theory of press freedom as a property right, which is best led by the hidden hand of the market.²²³ The idea was that everyone could start their own newspaper and thereby propagate their own political views – though in practice this right was limited, considering the costs involved in making a newspaper. Press freedom has always been widely seen as an integral part of British democratic political culture and the market was traditionally regarded an unbiased medium conveying honest and true information, that is to be protected from “corrupting” government intervention.²²⁴ The press has thus developed as a “fourth estate”, a “watchdog” to check political power while also being a power on its own.²²⁵ Accordingly, the provocative headlines and comments that can be seen in the coverage of race relations did not stand on their own – they were part of a general tendency towards dramatic presentation of issues and the reinforcement of popular fears. Indeed,

218 Law 2002, p. 37.

219 Hartmann & Husband 1974, p. 145.

220 Critcher, Parker & Sondhi 1975; Van Dijk 1991.

221 Gordon & Rosenberg 1989, p. 7.

222 Sunday Express, 22 September 1985.

223 Curran & Seaton 2003, p. 346.

224 Kuhn 2007, p. 34.

225 Critics have contended that the press has never fully realised this watchdog function, as it often tended to identify closely with the interests of the state: see Negrine 1994, p. 22-23.

certain newspapers functioned as an outlet for emotions in public debate (though quality newspapers continued to exist as well).

While using polarising, adversarial styles of reporting, most mainstream newspapers simultaneously tended to police the boundaries of legitimate dissent against “radicals”, stressing national unity and common values and thus acting as a socially cohesive force.²²⁶ During the interwar period, the so-called “press barons”²²⁷ were so attached to Britain and its empire that they sometimes ended up openly expressing racism and anti-Semitism in their newspapers.²²⁸ Accordingly, the wide boundaries of public debate about immigration and race relations in Britain – as they continued to exist until the 1980s – must be seen in the context of the development of a press that was not afraid to forcefully propagate views of their own; and those views often stressed patriotism and unity against “outsiders”. This press tradition stands in sharp contrast to British public broadcasting, which has developed in a public service “social responsibility” model that has had to practice due impartiality in matters of politics – after all, it is financed by taxpayers.

It is notable that in this climate, Britain developed a policy of multiculturalism rather than assimilation of immigrants. Conservatives such as Powell had their own arguments for opposing assimilation: they believed that it was impossible. This way they arrived at the same conclusion as liberals, though for different reasons. Eventually, the liberal strand became dominant, leading to “an élite-crafted, official multiculturalism”.²²⁹ However, the influence of Powellism had already made it more and more difficult for immigrants to be allowed to enter Britain – its immigration policy effectively differentiated on the grounds of race.²³⁰ As such, “[a]lthough multiculturalism as a policy made some significant gains in redressing the inequities of assimilation, the paradigm of the “other” was already firmly established within the UK by this time.”²³¹

3.4 The 1980s: public order and national security

The Thatcher administration from 1979 until 1990 marked a period of new law and order legislation and a significant shift in the scale of national security versus individual liberties in favour of the former. During this period, civil rights advocates developed growing concerns about the power of the executive and Parliament’s ability to control

226 Curran and Seaton 2003, p. 49; Van Nierop & Moore 2006, p. 8.

227 Powerful newspaper proprietors who used their papers as an instrument of propaganda according to their own personal tastes.

228 Curran & Seaton 2003, p. 49.

229 Joppke 1999, p. 225.

230 Poynting & Mason 2007, p. 65.

231 Poynting & Mason 2007, p. 65.

it, as well as about the scope of new legislation that was making the “residue” of liberty smaller and smaller without adequate protection on the part of the courts.²³² In the light of political violence around the conflict in Northern Ireland, the government took several measures to curb civil liberties. Indeed, while WWII had not been so influential in triggering militant democracy measures in the UK, the conflict in Northern Ireland was. In 1988, the government issued a media ban for terrorists: the Home Secretary issued a notice to the BBC and the Independent Broadcasting Authority that required them to refrain from allowing the broadcasting of expressions of individuals that represented terrorist organisations or that supported, solicited or invited support for such organisations. The government motivated the ban by pointing out that representatives of terrorist organisations who publicly justified their activities had ‘caused widespread offence to viewers and listeners throughout the United Kingdom, particularly just after a terrorist outrage.’²³³ The ban was also meant to prevent terrorists from increasing their support base via television appearances. Yet it was directed not only against proscribed terrorist organisations but also against three lawful political parties, including Sinn Fein.²³⁴ The ban – which was actually ineffective, because TV stations ended up hiring actors to say the same things the terrorists had said – was upheld by the House of Lords²³⁵ and was repealed in 1994 after the IRA ceasefire.

The 1980s also saw the adoption of the Public Order Act 1986 (POA '86) which extended statutory powers, and there was a rise in the use of police powers to curb demonstrations. The Act now required demonstrations to be notified in advance to the police and widened the conditions for their restriction. In the decades leading to its adoption there had been ‘a persistent series of sporadic outbreaks of public disorder reflecting industrial, racial and other social tensions.’²³⁶ Critics contended that the Act illustrated the increasing intolerance of the government towards public assemblies and demonstrations.²³⁷

The Public Order Act moreover adopted its current s. 5 in 1986; this section’s aim was to protect the direct victims of ‘hooligans on housing estates causing disturbances, throwing things down the stairs, banging on doors [and] groups of youths persistently shouting abuse and obscenities’.²³⁸ Its broad scope has later resulted in the section being effectively used to criminalise mere offensive speech or conduct, even where no particular victim could be identified.

232 Kavanagh et al. 2006, p. 487; Ewing & Gearty 1990, p. 9.

233 Ewing & Gearty 1990, p. 244.

234 Ewing & Gearty 1990, p. 243

235 *R (Brind) v. Secretary of State for the Home Department*, [1991] All ER 720 (House of Lords).

236 Smith 1987, p. 20-21.

237 Douzinas, Homewood & Warrington 1988.

238 Smith 1987, p. 117.

With the adoption of the POA '86, the law on incitement to racial hatred changed once again. The offence was amended into the current version (either “likely” or “intended” to stir up racial hatred, see par. VII.2.1). Furthermore it was modernised: it now applied not only to words or behaviour but also to plays, recordings and broadcasting. Moreover, *possession* of racially inflammatory material was now also criminalised – in this sense the connection to public order has become very loose. The amendment in 1976, where “intention to stir up hatred” was no longer required but only “likelihood” had to be proved, had ‘made the task of the prosecutor somewhat easier, but it had the paradoxical effect that a person who distributed such material with a mischievous intention could argue that the recipients of his material were unlikely to be influenced by it, and he was therefore not guilty if his audience were already corrupt, or were members of an anti-racist organisation (...).’²³⁹ Between 1979 and 1986, 59 prosecutions had been reported for incitement to racial hatred.²⁴⁰ One reason for this small number was that ‘racist literature has not been so intemperate since the 1986 Act as previously.’²⁴¹

In 1991 the then Attorney General asserted that ‘decisions whether or not to prosecute were always taken by him personally and only on evidential grounds’ – however, the police openly doubted whether there was enough willingness to prosecute.²⁴² In 1986, there was a change of procedure as regards the Attorney General’s consent to prosecutions: ‘[b]efore the POA '86, the Attorney General used to consider complaints of racial incitement within his own office. Since it came into force, complaints are referred to local police who report to the Crown Prosecution Service. Only if prosecution under the racial incitement provisions is considered the only or best/better option is the matter referred to the Attorney General for his consent.’²⁴³

The 1980s also had its share of large-scale race riots – this was regularly connected to demonstrations by the National Front and the opposition to it.²⁴⁴ ‘Racism was vicious, visceral and often fatal. “Paki bashing,” the pastime of hunting down and beating up Britons with brown skin, became a national sport in certain circles (...) Workplace discrimination was endemic and police brutality frighteningly common.’²⁴⁵ Racism in the print media was still prevalent until well into the 1980s – in fact it has been noted that many newspapers took an even more aggressive stance on race issues in the 1980s.²⁴⁶ Non-violent marches by coloured people were reported as “mobs”, using the

239 Smith 1987, p. 154.

240 Smith 1987, referring to HC deb 19 March 1986, vol. 94, col. 88.

241 Bailey, Harris & Jones 1995, p. 667.

242 Bindman 1992, p. 260-261.

243 Bindman 1992, p. 261.

244 Adang, Quint & Van der Wal 2010, p. 28-29.

245 Kenan Malik, “Assimilation’s failure, terrorism’s rise”, New York Times, 6 July 2011.

246 Gordon & Rosenberg 1989, p. 2.

metaphor of a “black tide” against the police.²⁴⁷ This was connected to the influence that Powellism had on Thatcher’s new right politics. Yet at the same time, the Labour party issued a strong anti-racist policy in the local councils where they were in charge, including anti-racist training and affirmative action programmes.²⁴⁸ In turn, “anti-antiracists” portrayed anti-racists as “hysterical” or “secondary racists” who are ‘only interested in suppressing the truth and the right to free speech’.²⁴⁹

3.5 The 1990s: the Human Rights Act 1998, changes in media landscape

The 1990s marked a significant change in civil liberties law with the adoption of the HRA, which incorporated the European Convention on Human Rights in British law. The Act can be placed against the backdrop of the increasing power of the executive over Parliament, unease about the willingness of judges to uphold civil liberties and a general “decline in the culture of liberty”²⁵⁰ under Thatcher, which the Labour government wished to change when it came to power in 1997.²⁵¹ While the idea of residual rights emanates from a period when Parliament was acting as a “watchdog” over the executive, an increasing power of the executive over Parliament had now negatively affected the ability of the democratic process to protect civil liberties. Thus ‘[t]he HRA was seen by those in Government as a tool for creating a “human rights culture” in the UK.’²⁵² A growing influence of fundamental rights was already apparent in the case law in the years before the HRA came into force: judicial activism in the field of civil liberties was increasing²⁵³ – including in freedom of expression cases. Freedom of expression had been elevated from a “presumption” to a constitutional right in some important cases judged before the HRA came into force.²⁵⁴

Given the principle of Parliamentary Sovereignty, the role of the judiciary as the guardian of civil liberties was still a sensitive point in England and Wales. Neglecting this principle would have been a bridge too far, so the HRA does not overrule it. The judiciary cannot strike down legislation which it considers in violation of human rights; instead, judges can make a “declaration of incompatibility” if legislation appears to violate human rights. The initiative is thus conveyed to Parliament to amend the legislation in order to make it compatible with human rights. The HRA also

247 Gordon & Rosenberg 1989, p. 17.

248 Joppke 1999, p. 240.

249 John Vincent in *The Sun*, 13 October 1985; Paul Johnson in *The Daily Mail* 17 June 1985.

250 Leigh & Masterman 2008, p. 16.

251 Kavanagh et al. 2006, p. 487.

252 Leigh & Masterman 2008, p. 10 and 16.

253 Gearty 2007, p. 37.

254 Barendt 2009, p. 859; Fenwick & Phillipson 2006, p. 6, referring to *Derbyshire*, 1993 AC 534; *R v. Central Independent Television plc* (1994 3 All ER 641); *Reynolds v. Times Newspapers*, 1999 4 All ER 609; *R v. Secretary of State ex parte Simms*, 2000. See also *Redmond-Bate v. DPP*, [1999] EWHC Admin 732 (Divisional Court).

requires public authorities – including the police, the Attorney General and the courts, but *not* Parliament – to act compatibly with ECHR rights. Moreover, the courts must read and give effect to legislation in a way which is compatible with Convention rights (article 3 HRA). Since 1998 the idea of judges as the guarantors of civil liberties has become more entrenched in the wake of a whole range of newly adopted anti-terrorism laws, which the judiciary has sought to interpret in a human rights compliant manner. Accordingly, the courts now delve into article 10 ECHR – and sometimes article 9 – in hate speech cases: as such the British constitutional system has started to find a way to incorporate human rights into its body of principles. This is obviously not an easy task, especially considering the role of the jury that does not motivate its judgments.

3.5.1 *Racism, the media and society in the 1990s*

The 1990s saw a notable change as regards the acceptance of racism in society, including the occurrence of racist expressions in the mass media. The overt anti-immigrant messages that were commonplace until the 1980s had become much less normal in the 1990s: a change had taken place in what was regarded as acceptable language. After the inquiry into the police investigation of the murder of black teenager Stephen Lawrence in 1993, which had shown how institutionalised racism actually was in Britain, the issue appeared high on the public agenda.²⁵⁵ Both the press and politicians increasingly sought to expose and oppose racism²⁵⁶ – the British National Party, for instance, were presented as “bigots” in the headlines. Multi-culturalist policies had now spread from local city councils to national politics with the Labour government coming to power in 1997.

Though overt anti-immigration discourse had become taboo by the 1990s, certain newspapers still reported negatively about refugees and asylum-seekers.²⁵⁷ Moreover, negative reporting about Islam and Muslims was apparent.²⁵⁸ Van Dijk noted that by 1989 a striking new development was ‘the extensive coverage of Islam and the definition of Muslims as a political, social and cultural “threat” (...) Although negatively valued cultural differences have always been a prominent feature of ethnic affairs coverage, there seems to be a marked tendency towards a definition of such differences in terms of a threat to the British people and their culture in particular, and to western values in general.’²⁵⁹ The affair surrounding the fatwa on Salman Rushdie for his *Satanic Verses* had brought Islam to the forefront of British public debate: the first time Muslims appeared as a unified group – describing themselves in terms of

255 See Michael Mansfield QC, ‘Put race before ratings’, *Media Guardian*, 19 April 1999, who described the Stephen Lawrence inquiry as the ‘biggest sea change in media coverage of race’.

256 Ian Law 2002, p. 9.

257 Richardson 2004, p. xv.

258 Richardson 2004; Allen 2004.

259 Van Dijk 1991, p. 90.

religion – was around the Rushdie affair.²⁶⁰ Calls for prohibition of *The Satanic Verses* initiated in South-Asia and subsequently spread to Britain, where Saudi groups started lobbying with publishers and the government. As such, ‘a world-wide politicised Islam, particularly of Middle Eastern provenance, entered the British scene, casting aside old sectarian and national-origins divisions in favour of a unified and more militant Muslim identity.’²⁶¹ Subsequently ‘the Rushdie affair divided the British elite, which reflects the entrenchment of multiculturalism in Britain. Parts of the Labour party (...) sided with the anti-Rushdie campaign (...) On the other hand, the Rushdie affair led to an unprecedented questioning of multiculturalism, even by those who had helped to create the latter (...) In fact, the Rushdie affair induced a reflection on the British “beliefs and traditions” that every minority group had to respect.’²⁶² It is telling that the government endorsed a 1997 report by the Runnymede Trust about increasing “Islamophobia” in Britain, which uses a broad definition of Islamophobia – including “closed views of Islam” – that has been criticised for capturing legitimate criticism of Islam.²⁶³ The Rushdie affair ‘brought to the surface, and polarised, race and religious relations within Britain’, serving as ‘a watershed moment for framing the Muslim “other” as a threat – the “stranger within” and possible “fifth column”(...)’.²⁶⁴ It was also a watershed in another sense: ‘Rushdie’s critics lost the battle in the sense that they never managed to stop the publication of *The Satanic Verses*. But they won the war by pounding into the liberal consciousness the belief that to give offence was a morally despicable act.’²⁶⁵

4 AFTER 2001 REVISITED

After 2001, the tone of media reporting about Islam and Muslims is said to have deteriorated.²⁶⁶ However, reactions to the terrorist attacks of 9/11 and 7/7 were mixed: notoriously sensationalist newspapers also ran headlines such as ‘Don’t Blame the Muslims’, ‘Islam is not an Evil Religion’ and ‘Reach Out to Muslim Friends’ and ‘[t]here is now a disdain among broadcast and print journalists for phrases like “Muslim terrorist” that conflate “the distinction between terrorists and followers of Islam”’.²⁶⁷ Indeed, overt racism in the press is not common anymore – as opposed to the 1960s-1980s. However, news media have

260 Joppke 1999, p. 251.

261 Joppke 1999, p. 252.

262 Joppke 1999, p. 254.

263 Joppke 2009, p. 456.

264 Poynting & Mason 2007, p. 69.

265 Malik (K.) 2009, p. 153.

266 Richardson 2009.

267 Joppke 2009, p. 463.

reported heavily on the growth and vociferousness of fringe Muslim groups with anti-western and isolationist ideologies that, in turn, have gone some way to both shape and simultaneously reaffirm public fears and concerns that have been subsequently – and quite inappropriately – attributed to all Muslims without discrimination (...) Across all of these spheres and domains in the British context (...) the same messages and justifications underpin them: that it is Muslims, their inherent difference, uni-dimensionalism, and incompatibility with “normal” values and “normal” ways of life that are reason enough to view Islamophobia and anti-Muslimism as acceptable.²⁶⁸

As such, prejudiced reporting about Muslims often comes up in more subtle ways compared to press reporting about immigration in the 1960s-80s. Demonstrations of extremist organisations such as the National Front are also increasingly targeted at Muslims, leading to serious riots.²⁶⁹ It is notable that the far-right British National Party (BNP) has been increasingly successful in local and European elections with their openly anti-Islam and anti-immigrant campaigns. In the Westminster first-past-the-post political system itself, extremist forces have so far not had success in gaining Parliament seats, as their European counterparts have. Norris predicted in 2005 that ‘the conditions should be ripe for radical right parties in Britain, given widespread public hostility toward the entry of asylum seekers and political refugees, as well as pervasive anti-EU sentiments and illiberal attitudes toward Britain’s ethnic minorities. Nevertheless the growth of the NF and BNP has been curtailed so far by their extremist image, their narrow, single-issue agenda, and the substantial vote thresholds facing parties contesting the single-member plurality districts (...)’.²⁷⁰ At the national elections in 2005 and 2010, the BNP indeed greatly increased the percentage of votes received – without resulting in any seats in Parliament.

The government itself responded to the terrorist attacks in the 2000s with a dual strategy of ‘toughening anti-terror laws (...) while going the extra mile in accommodating Muslim claims. (...) There was to be no doubt that “terrorists”, and not “Muslims” as such, were targeted by the anti-terror measures.’²⁷¹ After the 7/7 attacks, the government made clear that it would react robustly to hate crimes against Muslims and it took several initiatives to strengthen the moderate forces within the Muslim population.²⁷² While the Labour government had adhered to a policy of pragmatic multiculturalism from the 1990s, in 2001 it made a move “beyond multiculturalism” by focusing on common elements of nationhood and citizenship and criticising minority practices that had not been subject to scrutiny before.²⁷³

268 Allen 2004, p. 21-22.

269 Adang, Quint & Van der Wal 2010, p. 31.

270 Norris 2005, p. 233.

271 Joppke 2009, p. 464.

272 EUMC 2005, p. 12; Joppke 2009, p. 465.

273 Joppke 2004, p. 251.

Critics fear that English law, politics and public debate are still too much focused on preventing offence against minority groups. They think that, since the Rushdie affair and especially the Danish cartoons, a “marketplace of outrage” has come into being, where people easily feel offended in their religious sensibilities and where the most easily offended wish to use the law to demand respect.²⁷⁴ Similar views were heard during the Behzti affair, when the performance of a controversial play written by a British-born Sikh woman had to be terminated because demonstrators broke into the theatre. The play was set in a Sikh temple and included controversial scenes such as rape by a temple elder.

However, though affairs such as the Danish cartoons and the Behzti affair are often presented as a “we/they” conflict between “our value of free speech” versus “their religious sensibilities”, Grillo has noted that they are actually much more complex: the Sikh reactions to the Behzti affair were varied and intersected with homeland politics, generation differences, gender, caste etcetera.²⁷⁵ Some have argued that with the government following the loudest and most conservative voices within communities to set the standard for freedom of speech, ‘contemporary British multiculturalism is a pessimistic affair.’²⁷⁶ Speech is regarded as ‘an inherent problem, because it could offend as well as harm, and speech that offended could be as socially damaging as speech that harmed (...)’.²⁷⁷

Though “harm” or “offence” to individuals may now play a certain role, the central rationale behind hate speech bans in England is still the protection of public order. Hate speech and extreme speech are taken together – banning anti-minority and anti-majority speech are two sides of the same coin: preserving public peace. The way of preserving this is traditionally through focusing on the most serious cases in order to leave room for a robust public debate, including offensive expressions – though this idea has not always been upheld in practice. It is to be awaited how this will turn out under the new offences and with the continuing influence of broad offences such as section 5 POA ’86.

²⁷⁴ See Appignanesi 2005; Fenwick & Phillipson 2006, p. vii.

²⁷⁵ Grillo 2007.

²⁷⁶ Kunzru 2005, p. 120-122.

²⁷⁷ Malik (K.) 2009, p. 151; 155.

CHAPTER VIII

SYNTHESIS

1 INTRODUCTION

This chapter presents a synthesis of the findings in all previous chapters by comparing Dutch and English law, and international influences on both systems on the basis of the theoretical ideas set out in chapter II. It thus answers in an elaborate fashion the research question put in chapter I: how have the ideas behind hate speech law in the Netherlands and England and Wales – including the influence of European and international law – developed since 2001 and how can the history of current hate speech laws explain these developments?

The current chapter's structure goes from narrow to broad: it starts with a comparison of the legal instruments (par. 2), then deals with the courts' way of dealing with freedom of expression (par. 3) and makes a start with setting out international legal influences on Dutch and English law (par. 4). The chapter then deals with the issue of racial v. religious hate speech and the boundaries of public debate (par. 5) and with prosecution for hate speech (par. 6); paragraph 7 analyses the use of some specific rationales behind hate speech bans (public order and equality; social cohesion; offence/legal moralism). The final paragraphs delve a bit deeper: they elaborate upon the relationship between majority and minorities and militant democracy (par. 8), freedom of expression in political culture (par. 9) and the shifts in public debate, politics and the media after 2001 (par. 10) in order to close the analysis.

2 THE LAW ON HATE SPEECH AND EXTREME SPEECH

The law on extreme speech in England has undergone various legislative changes with the adoption of new offences of stirring up religious and sexual orientation hatred, encouragement of terrorism and the abolition of blasphemy and sedition. In Dutch legislation, as yet not much has changed, although many proposals to change hate speech law are being debated: abolition of the offence of blasphemy and/or broadening of the offence of group insult, a proposal to criminalise genocide denial, and a failed proposal to criminalise glorifying terrorism.

Hate speech bans have always been more strictly circumscribed in England than in the Netherlands: the Netherlands has criminalised *group insult* and *incitement to discrimination, hatred and violence*, whereas English law only contains a prohibition

of *stirring up hatred* (though incitement to violence is covered by other laws). The latter includes less discrimination grounds: it has incorporated *race* since 1965 but *religion* only since 2005 and *sexual orientation* since 2010. Dutch law has included the grounds *race* and *religion/belief* since 1971, *gender* (only in art. 137d) since 1991, *sexual orientation* since 1991 and *physical, psychical or mental handicap* since 2005. Moreover, the wording of the incitement to hatred offences is stricter in England; the law on racial hatred was explicitly meant to criminalise only the most serious forms of racist speech and an even stricter regime applies for religious and sexual orientation hatred. Specific freedom of expression clauses exist for the latter two offences. Finally, the consent of the Attorney-General is required for any prosecutions in England in the field of racial, religious and sexual orientation hatred, which serves as an extra check against arbitrary prosecutions and for preserving freedom of expression.

Whereas the debate about abolishing the offence of blasphemy is still going on in the Netherlands, in 2008 it has been abolished in England. The adoption of a new “religious hatred” offence made it easier to do so, as something could be offered to religious communities in return. Moreover, the common law offence of blasphemy was potentially much more far-reaching than its Dutch equivalent – not only because of its uncertain content, but also because it allowed for private prosecutions and could, in theory, lead to an unlimited prison sentence. In the Netherlands efforts towards abolition have not succeeded yet; this may have to do with the fact that the law has been interpreted strictly since the *Reve* case, as well as with the influence from Christian parties in the coalition governments.

However, in English legislation there is a stronger urge to restrict speech on the grounds of protecting public order. As opposed to the Netherlands, the offence of “glorifying terrorism” (or rather, “encouragement of terrorism”) was adopted in England. Moreover, general public order offences (particularly s. 5 Public Order Act 1986) can be used to prosecute for hate speech – and they are sometimes interpreted broadly.

3 THE COURTS AND FREEDOM OF EXPRESSION

Before the adoption of the Human Rights Act in England the right to freedom of expression was not written down. Nevertheless it belonged to the general sphere of liberty that people enjoyed – it functioned as a “presumption” before the courts. However, far-reaching judge-made offences of blasphemy and sedition make clear that the people’s sphere of liberty has not always been large. Judgments regarding hate speech *legislation* were rare, but in *R v. Malik* and *R v. Britton* freedom of expression did not play a role at all. Moreover, the potential reach of general public order law (s. 5 POA ’86) is great as judges have tended to respect a large degree of discretion for the police.

In the Netherlands the right to freedom of expression in the Constitution has never had much influence on hate speech judgments either, since judicial constitutional review is not allowed and freedom of expression is formulated as a “mandate” to the government rather than a right. Legislative debates of around 1990 still expressed the idea that the balancing between freedom of expression and non-discrimination was not something to be done by the courts, but should be left to the legislator. Article 10 ECHR has only recently begun to have a substantive influence on Dutch hate speech law, despite the fact that judicial review on the grounds of the ECHR has been possible for a relatively long time.

In both the Netherlands and England, freedom of expression started to play a more important role in judicial reasoning around hate speech in the 21st Century, with some elaborate argumentations around article 10 ECHR. There remain some structural differences in the way in which the courts are able to take freedom of expression into account, however. Many hate speech cases in England are judged by juries, which do not have to motivate their decisions, so that the way freedom of expression is taken into account is not transparent (except in the judge’s instruction) and appeals are limited. Nevertheless, English juries can simply acquit a defendant in spite of all the evidence when they feel that freedom of expression must prevail – the jury’s prerogative. On appeal, various terms in hate speech legislation are dealt with as questions of *fact*, such as “threatening, abusive or insulting”: the appeals court then follows the jury or judge in first instance when it comes to interpreting such terms. This makes it somewhat more difficult for English courts to systematically take fundamental rights into account in hate speech cases, despite the existence of the HRA, which requires that the courts read and give effect to legislation in a way which is compatible with Convention rights. In certain cases, the courts have found ways to do so; in other cases, this has been more challenging. In other respects the HRA does offer more possibilities for taking ECHR rights into account than Dutch law does: it requires all public bodies to take account of the ECHR, including the prosecution and Attorney-General. In the Netherlands, the Discrimination Directive leaves hardly any room for the prosecution to take freedom of expression considerations into account – though the prosecution does sometimes take the liberty of doing so, such as in the Wilders case.

The courts in the Netherlands have developed the doctrine of “contextual interpretation” – as influenced by the ECtHR – to deal with hate speech cases, which has enabled them to take account of freedom of expression and sometimes freedom of religion. Dutch case law has thus become more elaborate *qua* fundamental rights argumentations. It is striking how, in cases surrounding immigration/multiculturalism debate after 2001, the courts interpret these provisions *and* article 10 ECHR very differently, painting a diffuse picture.

4 INTERNATIONAL INFLUENCES

There are important differences in the way the Netherlands and England have taken international human rights law into account. Both article 20 ICCPR and article 4 CERD express awareness of the risks of hate speech and take as points of departure the ideas of militant democracy and protection of minorities against negative imaging, which are mirrored in Dutch law. Particularly CERD expresses the view that active prosecution for hate speech is indispensable to counter intolerance, so states have far-reaching positive obligations in this field. CERD requires states to criminalise certain *viewpoints* without an element of incitement or intention. This absolutist interpretation has met much criticism; it may even contravene article 19 ICCPR. CERD has had an important influence on Dutch law – article 4 provided the direct basis for Dutch legislation on hate speech as it was amended in the 1970s – although the Netherlands did not adopt the most far-reaching clauses that require criminalising the “dissemination of ideas based on racial superiority/hatred”.

The UK has instead entered a reservation to article 4 CERD, as it considered the article a too extensive restriction of the freedom of expression. It has also entered a reservation to article 20 ICCPR: the UK reserved the right not to enact any further legislation on hate speech, ‘having legislated (...) in the interests of public order’. During the drafting process of article 20, the UK and US representatives advocated the “power of democracy” in dealing with hateful speech against other states who were concerned about the *defence* of democracy. In this regard, it should be noted that Dutch law – as well as the whole political system – is more open to international influences than English law. England is traditionally more sceptical towards international and European influences, clinging to its own traditions of civil liberties and Parliamentary Sovereignty. Since the HRA 1998, however, the ECHR has clearly placed its mark on English law and political debates. Parliamentary debates and government documents about the religious hatred offence regularly mention the ECHR.

Events such as the Rushdie affair and the Danish Cartoons affair have put pressure on the international human rights framework itself, bringing up the question whether its way of regulating hate speech is still capable of dealing with religious and other sensitivities in increasingly plural societies and whether a one-size-fits-all solution works. With the internet such expressions have become truly global, whereas value systems in the field of speech and religion still differ widely. This causes difficulties in upholding global norms, especially when such debates are used for political purposes – the highly politicised “defamation of religions” discussion is exemplary of this. However, the Netherlands still has a blasphemy prohibition on the statute books while the ECtHR’s case law on blasphemy is not too critical of such prohibitions – in this regard it has been noted that ‘[o]ne of the reasons for the entrenched positions in the defamation of religions debate is an apparent inability and/or unwillingness on

the part of states, especially in Europe, to recognise the ambivalence of their own legal systems towards the protection of anti-religious hate speech.¹ This argument also played a role in England's abolishment of its blasphemy offence. The hypocrisy that is apparent in certain Western debates about freedom of speech may indeed enhance global movements against free expression; this is also apparent in the debates about Holocaust denial. As Dworkin has stated, "Muslims who are outraged by the Danish cartoons point out that in several European countries it is a crime publicly to deny, as the president of Iran has denied, that the Holocaust ever took place. They say that western concern for free speech is therefore only self-serving hypocrisy, and they have a point. But of course the remedy is not to make the compromise of democratic legitimacy even greater than it already is (...)." ²

4.1 European law

In the Council of Europe and the European Union, there have been multiple developments towards positive obligations in the field of hate speech and extreme speech; these reflect the continental European "positive liberty" approach towards human rights. The EU's Framework Decisions, in particular, were informed by an instrumental view of the criminal law.

When it comes to *extreme* speech, the drafters of the CoE Convention used ECtHR case law – the rather unusual case of *Hogefeld* – to argue that combating indirect incitement to terrorism was ECHR-compliant; in turn, the ECtHR's *Leroy* judgment explicitly mentions the CoE Convention. In *Herri Batasuna* the Court also placed the party's dissolution in the light of the 'international wish to condemn the public glorification of terrorism'.

English law has been influenced by such international law efforts against terrorism – in fact, much more so than by "traditional" international human rights law on hate speech such as CERD and the ICCPR. The government used the positive obligations from the CoE Convention and the UN Security Council resolution 1624 (2005) to justify the law on "glorifying terrorism", and restricted civil liberties further than these instruments required. In the Netherlands, though traditionally more open to international law, lawmakers saw no need for changes in hate speech law as a result of these instruments.

The *hate speech* treaties and documents from the CoE (Cybercrime Protocol) and the EU (Framework Decision on Racism and Xenophobia) reflect the difficulties the

1 Parmar 2009, p. 374.

2 Ronald Dworkin, "Even bigots and Holocaust deniers must have their say", *The Guardian*, February 14, 2006.

international community has in finding European common standards on the relationship between freedom of expression and non-discrimination. Indeed, England has made sure that states may choose to punish only speech that is “likely to disturb public order” or that is “threatening, abusive or insulting”, matching its existing legislation.

The ECtHR is also struggling with how to deal with hate speech now that developments towards immigration populism are taking place in many European countries. Its case law on hate speech – including revisionist speech – is still largely based on the militant democracy idea from the Convention’s coming into being. Yet it appears increasingly challenging to draw the line, such as in *Féret* where the dissenting judges warned against the “banalisation of racism” that would result from such a militant stance. The Court has long closed article 10’s “marketplace of ideas” to racist and xenophobic expressions in the broad sense: it used to view these expressions as “low value speech” – lacking propositional content – which thus fell outside public debate (expressions falling within public debate deserve more protection). Nowadays the Court increasingly views anti-immigration speech as part of public debate, thus indicating a change in its direction – although in the end this did not influence the outcomes: even within public debate such expressions go too far, the Court holds. It is indeed difficult to uphold that the anti-immigrant expressions the Court had to deal with generally lack propositional content: they may be aimed at communicating ideas (rather than only to do harm) and multiculturalism does clearly figure in public debate in many European countries. Since 2008 the ECtHR has also made less use of article 17 – a particular component of militant democracy – in its case law about hate speech. It is to be awaited whether the Court’s approach is really shifting along with the harsh public debate in many European states.

The Court also seems ambivalent as to the role the historical context plays in hate speech judgments, such as around Holocaust denial or apology of other grave crimes. Sometimes it pleads for a larger margin of appreciation as states are themselves in a better position to assess expressions in their political or historical context; in other cases, it argues for strict supervision because an “outsider perspective” is a good way of getting states to deal with the unresolved pieces of their past (*Orban, Lehideux et Isorni, Vajnai*). The argument then goes that after a certain lapse of time one must be able to leave discussion free in a stable democracy. However, in cases about Holocaust denial (“clearly established historical facts”) this argument is not used – as such, it seems that the Holocaust casts a shadow over the law on hate speech. This may lead to future dilemmas in how the Court has to deal with denial or glorification of other grave crimes.

5 HATE SPEECH: RACE, RELIGION AND THE BOUNDARIES OF PUBLIC DEBATE

In the multicultural societies that both the Netherlands and England have become, new exclusion-inclusion lines have been drawn on the grounds of religion and “culture”. Accordingly, there has been much discussion about whether or not to couple hate speech on the grounds of *race* to hate speech on the grounds of *religion* in the law.

Both the Cybercrime Protocol and the EU Framework Decision on Racism and Xenophobia include religious hate speech (the Framework Decision: “at least”) if it is used as a *pretext* for hatred on the grounds of race. This reflects the idea that religious hate speech is of a different kind than racial hate speech – religion involves ideas, practices, ways of life which are rightly open to criticism – but that such criticism can easily be used as a pretext for hatred against persons which is actually based on exterior features or descent or which contains the same “essentialised” thinking. That does, of course, leave unimpeded that it can be very difficult to define when such is the case. The CERD Committee deals with religious discrimination only if there is a link with ethnicity – however, this line can be thin.

In England, religion was expressly left out of hate speech law in the 1960s because it was viewed as something inherently different from race – connected to certain convictions and teachings and thus more open to criticism – and because there was no evidence in England of hatred being stirred up on the grounds of people’s religion. In 2005 this situation had become very different: religious diversity had greatly increased and Islam had come to the forefront of public debate. The idea of putting race and religion on an equal par in the religious hatred law led to many concerns, however; many feared that it would limit satire or vigorous criticism of religious ideas, figures and customs. Strong criticism within the House of Lords led to the adoption of several amendments that circumscribed the offence considerably. Paradoxically, under general public order law (s. 4 and 5 Public Order Act) the courts do regularly prohibit offensive expressions that specific hate speech bans so strongly try to keep out of their reach.

In the Netherlands, race and religion have always been treated equally in hate speech legislation. However, the legitimacy of this approach is regularly questioned nowadays.³ A pressing issue that has now emerged in case law and legislative debates is whether insult of religion amounts to insult of religious *persons*. Legislative history showed that article 137c was originally meant to prohibit only ‘violating the intrinsic worth or discrediting the group concerned, because they have a certain race, religion or belief’; criticism of people’s convictions or behaviour in whatever form falls outside

3 Various authors, “Stelling: de woorden ‘godsdienst of levensovertuiging’ in art. 137c WvSv dienen geschrapt te worden”, *Nederlands Juristenblad*, 2003/16.

the scope of art. 137c.⁴ Insult of a conviction would only engage the criminal law if ‘conclusions are drawn as regards the persons concerned’.⁵ When the law was changed in the 1980s the Minister of Justice pointed out that he could imagine that ridicule of certain religious rituals can also imply that the group itself is made ridiculous, and can thus constitute criminal insult under article 137e. The first piece of legislative history was used in the “Islam poster” judgment, where the Dutch Supreme Court was for the first time confronted with the question whether an insulting statement about Islam can be equated to insult of Muslims. The Supreme Court’s finding that article 137c does not cover insult of religion has brought up the question whether expressions in the harsh debate on multiculturalism and immigration will generally lead to more strict interpretations of the law. In 2003, the Supreme Court had judged the comparison of asylum seekers to “thieves, killers and rapists” insulting under 137c. Yet the Amsterdam Court in first instance’s judgment on Geert Wilders, as well as some other judgments in first and second instance from 2009 on, do suggest that the legal boundaries between free speech and insult are expanding along with public debate. However, such judgments are regularly overruled by appeals courts: case law as a whole thus paints a diffuse picture. Article 137d was generally interpreted broadly in the few cases that have come up in the 21st Century: the courts do not often require a close link between speech and consequences or very inciting language. The Wilders case is the first to put forward a very strict view of incitement to hatred and discrimination. For incitement to hatred, language must have a “power-strengthening element” and in the context of a political debate almost anything can be said if that debate is already conducted robustly. The judgment by the Amsterdam Court in first instance was diametrically opposed to the Court of Appeal’s decision to have Wilders prosecuted: that decision put forward a strong militant democracy idea. Since articles 137c and 137d leave room for multiple interpretations and because the rationales have never been elaborately discussed, it is no surprise to see judges come up with such differing interpretations.

In England, the more narrowly worded racial hatred law has mostly been interpreted strictly, though one may question whether some of the earlier case law in the 1960s indeed concerned the most extreme racist utterances.⁶ However, general public order offences (sections 4 and 5 of the Public Order Act ’86) have been used to curb hate speech in more far-reaching ways. *Norwood v. DPP*, for instance, led to a conviction for the words ‘Islam out of Britain – protect the British people’ – as such, the distinction between “insulting persons” and “insulting religion” is less strictly adhered to than in the Dutch Supreme Court. The same counts for the ECtHR which upheld

4 *Kamerstukken II* 1969-70, 9724, nr. 6 (MvA), p. 4.

5 *Kamerstukken I* 1970-71, 9723 en 9724 (MvA), p. 4.

6 *R v. Malik* [1968] 1 All ER 582 (Court of Appeal, Criminal Division); *R v Britton*, 19 December 1966, [1967] 1 All ER 486 (Court of Appeal, Criminal Division).

Norwood's conviction. The CERD Committee has made clear that strongly worded criticism of the *practices* of an ethnic group – even if these include human rights violations – can count as hate speech under article 4 CERD, as long as the statement is clearly directed against a particular ethnic group (*Gelle v. Denmark*; *Kamal Quereshi v. Denmark* (2)).

6 PROSECUTION FOR HATE SPEECH

When adopting their hate speech laws in the 1960s-70s, both the Netherlands and England expressed the idea that hate speech bans can only form a modest contribution to combating racism and intolerance: hate speech offences were supposed to have a rather symbolic role. In the Netherlands, however, the idea that hate speech bans should be used with prudence was relinquished in the 1980s/1990s and beyond. This happened in the light of a general trend towards more effective use of criminal law, as well as the increase in far-right activity and the the strong national and international anti-racist movement. In England, the idea has always been – and is still – that only the most obvious cases of hate speech should be prosecuted. The consent of the Attorney-General is required for prosecution of hate speech (not for “glorifying terrorism” or s. 5 Public Order Act), and prosecutions are rare. The CPS still employs a strict test for prosecution of racial and religious hatred, but general public order law – with its large role for the police – has led to prosecutions for much less extreme cases.

This difference is related to both jurisdictions' approaches to freedom of expression (see par. VIII.9) and to discrimination. In the Netherlands, concerns about discrimination – with international bodies exerting pressure to take an expeditious approach – have mainly led to more effective tackling of hate *speech*, being a “concluding piece” of anti-discrimination legislation. In England, the Stephen Lawrence affair did bring to the forefront the importance of tackling discrimination – but the focus has been primarily on “hate crime” (common crimes with a discriminatory element). When it comes to *speech*, the “sphere of liberty” is still considered so important that a cautious approach is required. The tradition of civil liberties determines a certain sphere where the law should preferably not be present. In the Netherlands, criminal law is rather viewed as an “instrument for regulating society” in a broad sense. Nevertheless sentences are generally much higher in England – there, the law targets only the most extreme cases, and effectively tries to deter such expressions. In the Netherlands, sentences have more of a symbolic character while effective *prosecution* must make sure the norm is upheld.

In the Netherlands, the strict prosecution policy on hate speech in the 21st Century – where cases may not be dismissed for policy reasons such as “creating free speech martyrs” – has led to heated controversies in the cases of Gregorius Nekschot and

particularly Geert Wilders. Whereas Dutch law on hate speech was originally enacted with the idea that it was no panacea against racism, the more recent focus on effective prosecution suggests that this stance has been left behind. At the same time, however, the boundaries of public debate about multiculturalism and immigration have widened dramatically. The courts and the prosecution then face increasing dilemmas. This is exacerbated by legislation which allows for multiple interpretations, and by the fact that the judiciary itself has come under increased scrutiny in a polarised society. The Wilders case has brought to the forefront the increasing controversy surrounding hate speech bans in the Netherlands – now that it has become clear to the general public that the courts can set legal limits to Wilders’ political speech, the legitimacy of the offences is increasingly called into question.

Even though many politicians appeared relieved after Geert Wilders’ acquittal, suggestions to liberalise the law generally meet much opposition. In 2005 Parliament – including Geert Wilders’ party – still adopted a broadly supported request to tackle hate speech more expeditiously. Apparently there is still a firm belief in the functioning of hate speech bans as such. Several international and European legal instruments also require using the criminal law against hate speech.

Research suggests that hate speech bans can indeed contribute to the decline of extreme forces and can deter politicians from too extreme expressions. However, it is questionable whether this strategy will continue to work in the widely changed context of the 21st Century Netherlands: a paradigm shift has taken place in public debate and firm opposition to immigration and multiculturalism has become the new political correctness. The broad Dutch legislation, especially when taken together with the strict prosecution policy, leads to high expectations of the law. This puts pressure on the authorities to act and in turn, pressure from those favouring the expression *not* to act. In England, the narrowly circumscribed ban on “stirring up racial hatred” is said to have achieved its goal of curbing the most extreme expressions; some argue that it has caused people to successfully evade the law with less extremely worded racism *and* that the law has created mistaken hopes because many people have made idle demands for prosecution.

7 RATIONALES

7.1 Public order and negative imaging

In both jurisdictions the rationale of public order plays an important role behind hate speech bans. In England it is by far the most important rationale – public order is almost the only “valid” reason to restrict hate speech. Both the Dutch and the English hate speech laws are concerned with long-term consequences of speech rather than “clear and present dangers”. In Dutch law, the link between speech and consequences

may be quite indirect indeed. In this regard it must be noted that real public order problems such as inner city riots and disturbances – also in the sphere of immigration and multicultural society – have been more frequent and serious in England than in the “quiet” Netherlands.⁷ In England, hate speech law is less concerned with speech leading to *discrimination*, as in the Netherlands; the narrowly drafted English law is meant to prevent the stirring up of hatred that is so serious that it may lead to violence. Dutch law is based on a broader rationale. The offences are placed under the heading of public order legislation, but in the 1970s – when hate speech law was amended in the light of the implementation of CERD – the main rationale shifted towards equality arguments. Prevention of hateful expressions was considered necessary to preserve a climate in which the fundamental rights of every person are respected. Later, considerations of public order and non-discrimination/negative imaging have become intertwined again; the protection of public order must be regarded in the broad sense of preventing that different groups are set against each other. Legislative history of the 1980s shows a conscious attempt to balance freedom of expression against non-discrimination in favour of the latter. Politicians who pledged to use discrimination as soon as they come to power have been convicted under article 137d; the ECtHR has also judged this to be a legitimate course of action.⁸ In the Wilders case, the Amsterdam Court in first instance challenged this interpretation of “incitement to discrimination”: it held that proposals for discrimination are easily excused by their political context, especially when public debate is already raging heavily.

Related to the broad idea of public order, the rationale of preventing “negative imaging” of minority groups in the eyes of others is traditionally paramount in Dutch law: it provides the background for both articles 137d and 137c.⁹ The latter was adopted in the 1930s against Nazi hatred campaigns – insult refers to people’s “honour” and “reputation”, thus not only to the effects of speech on the individuals targeted, but also on the effects on other people. Negative imaging is also a vital rationale behind hate speech bans under the ECHR, the ICCPR and the CERD – all influenced by the WWII experiences. These instruments express a strong belief in the potential of hate speech bans to counter brutalisation against minorities – though in the Netherlands this seems to be changing. The conviction that criminal law is an effective means to counter negative imaging can be challenged, however: such laws necessarily target only the crudest messages at the surface (and skilled persons can easily circumvent the legal boundaries), while it is the whole array of subtle stereotypes and prejudice which works its way through a society and influences people’s attitudes. Moreover, the eventual strength of hate speech depends on context and history – in stable democracies it is a different story than in Weimar Germany.

7 Adang, Quint & Van der Wal 2010.

8 HR 14 maart 1978, NJ 1978, 664; HR 18 May 1999, NJ 1999, 634; ECommHR Glimmerveen and Hagenbeek v. the Netherlands (inadmissible), 11 October 1979.

9 *Kamerstukken II* 1987-88, 20239, nr. 5, p. 6 (MvA).

These drawbacks leave unimpeded that hate speech bans may be warranted to protect people against violence or outright attacks to their human dignity. Under article 137c the rationale of *mental harm* has not received as much attention in legislative history as the rationale of negative imaging, though the literal wording would suggest otherwise. With regard to this rationale, one must keep in mind the difference between *harm* and *offence* though: the Dutch courts have long interpreted “insult” to include expressions that were actually offensive to people’s feelings rather than harmful for either public order or individuals, though this has been changing in the 21st Century. The English approach towards hate speech bans in principle excludes criminalisation of merely offensive expressions, but this has not always been upheld under s. 5 Public Order Act.

7.2 Social cohesion and common values

In both the Netherlands and England there is a strong movement towards achieving public peace and social cohesion via hate speech bans. In England, the adoption of the 2005 “religious hatred” offence was partly motivated by the wish to maintain social cohesion in an increasingly diverse society – this symbolic measure had to demonstrate to minorities that the law protects them. At the same time, the Terrorism Act 2006 made sure that minorities themselves had to refrain from too extreme expressions that violated these “common values”. This idea can be traced back to old common law offences such as “seditious libel”.

The rationale of preserving common values was also present in the failed Dutch proposal to criminalise “glorifying terrorism” and subsequent debates about extreme speech. The difference is that in the Netherlands, this idea was connected to the wish to preserve “decency” in public debate. This idea has a long tradition in Dutch law on hate speech: the “gratuitously offensive” criterion works to keep public discourse clean by banning its irrational elements. The gratuitously offensive form of expressions also plays a role in the ECtHR’s case law. The Court – in its case law on religious insult and blasphemy – even suggests that expressions can only fall within public debate if they are not gratuitously offensive – this indicates a view of public discourse as a “clean” and rational place. The Dutch and ECtHR approaches both lean towards Habermas’ ideas of “rational dialogue”, which has been criticised for excluding minority groups whose voices seem less rational to the majority. Though Dutch case law still uses the ‘gratuitously offensive’ criterion (except in the Wilders case), 21st Century case law on article 137c does suggest that the space for “irrational voices” may be slowly broadening.

7.3 Blasphemy and religious hatred: offence and legal moralism

The ECtHR has conceded that the right to freedom of religion warrants protection of people’s religious sensibilities – an approach that has been much criticised in the Court

itself and by other international human rights bodies. In both the Netherlands and England, the law on blasphemy has been connected to this idea of protection of religious feelings against offence (though not always to the right to freedom of religion). When the law was adopted in the 1930s Netherlands, this rationale was interconnected with protecting public order against communist anti-religious pamphlets. In England, the offence of blasphemy was originally grounded in the protection of Christianity against verbal attacks, considering its central role in society with its Established Church. It was thus a way of protecting the state and society at large. In later case law, when the role of Christianity was fading, the rationale of protecting religious feelings emerged in case law (*Gay News*). In parliamentary debates about “stirring up religious hatred”, this idea also appeared: one of the arguments proposed was that the right freedom of expression (art. 10 ECHR) must be balanced against the right to freedom of religion (art. 9 ECHR). In the last English blasphemy prosecution in the “Jerry Springer” case, the Divisional Court did not follow the ECtHR on this point: it argued that ‘it does not seem (...) that insulting a man’s religious beliefs, deeply held though they are likely to be, will normally amount to an infringement of his Article 9 rights since his right to hold to and to practise his religion is generally unaffected by such insults.’

The English religious hatred law brought up a storm of protest when it was proposed. The Rushdie affair and the elites’ reaction to it had led to strong fears that freedom of expression would be curbed in order to give in to religious sensibilities. In the end, the religious hatred offence was narrowed down so much that it is not likely to cover such speech anymore – though there is always a risk that words such as “threatening” will be interpreted broadly. In the Netherlands a similar demand for “respect for religious feelings” still comes up occasionally: critics of the Dutch proposal to abolish the law on blasphemy pointed to the need to protect religious sensibilities in an increasingly plural society. If the law on blasphemy can no longer do this then perhaps article 137c can, it was thought – however, the Supreme Court has judged otherwise. In the Netherlands the demand for “respect for sensibilities” is less new than in England: the idea that other rights such as non-discrimination and freedom of religion can set limits to free speech, is more entrenched.

In Feinberg’s account on “liberty-limiting principles”, it became clear that the law should not take “*offence* to people’s sensibilities” – a temporary shocking or unpleasant mental state – as seriously as *harm*, which is a setback of interests that violates a person’s rights. Because taking offence is ‘constituted by a set of judgments which only an individual can make’,¹⁰ prohibition of offensive expressions gives the most “skittish” individuals or groups the power to determine what the rest of the people can see or express, on the basis of their own sensibilities. Blasphemous expressions are likely to fall under *offence* rather than *harm*: it is difficult to construe

¹⁰ McKinnon 2006, p. 132.

that verbal attacks on matters held sacred by people – as opposed to verbal attacks towards people on the grounds of their membership of a certain group – infringe people’s interests. Though Feinberg’s account does not aim to exclude *all* types of offence from the criminal law, it views offence from bare knowledge – people are offended by the mere fact that a film is being shown or a book has been published, without necessarily seeing or reading it themselves – as insufficient reason for a prohibition. As such, the ECtHR’s case law is difficult to reconcile with liberal principles: in *Otto-Preminger-Institut*, the mere fact that the film was widely advertised was enough to justify its seizure, despite it being an arthouse film.

What the ECtHR has also made clear in *Otto-Preminger-Institut* and *Choudhury* is that it accepts blasphemy laws to function in a “pro-majoritarian” fashion – which is striking, given that the ECtHR has often underlined the importance of pluralism and of minority voices in public debate. In *Otto-Preminger v. Austria*, the Court explicitly stated that protecting the religious majority in a certain area against insults to their religious feelings can be a legitimate course of action. In England, the old common law offence of blasphemy indeed functioned to protect only the Christian majority, which was one of the reasons for its repeal. In the Netherlands, the law at least only protects monotheistic religions and it is not clear whether other religions than Christianity are covered – something that was already criticised in the 1960s as being old-fashioned, but which still remains the law. As opposed to the ECtHR, the Human Rights Committee has been critical of such discriminatory blasphemy laws and of the broad reach of many blasphemy laws in general – the Committee focuses on the rights of minorities to freedom of expression and is critical of the majoritarian tendencies that blasphemy laws often have.

8 PROTECTION OF THE MAJORITY AND MINORITIES

8.1 The blurring of hate speech and extreme speech

The relationship between the interests of the *majority* v. the interests of *minorities* is a central issue in debates about hate speech in the 21st Century, amongst other things in discussions about incitement to terrorism. In English legislative history on “encouragement of terrorism” as well as “stirring up religious hatred”, hate speech and extreme speech were often dealt with simultaneously: incitement to religious hatred was also meant to include certain types of religiously *motivated* extreme speech towards dominant groups. The English prosecution service also deals with hate speech and extreme speech together in its strategy on tackling violent extremism; there have been several prosecutions in this field. As such, the two types of speech become blurred – which is also the case in some of the ECtHR’s case law on extreme speech: the ECtHR uses the term “hate speech” in situations where hatred is stirred up by an insurgent group against the *government* (and indirectly against the rest of the

population). Since the rationale behind the prohibition of extreme speech in the context of terrorism is quite different from that in hate speech against minority groups, one has to be mindful of the dangers of blurring hate speech and extreme speech. The central rationale behind prohibiting extreme speech is the protection of national security and public order, which is closely linked to majority interests (often translated into state interests). It is particularly important to construe those restrictions in such a manner that the right to freedom of expression of individuals and/or minorities *against* the state is respected. Nevertheless it must be admitted that protection of the majority and protection of minorities are not so easily separated: they often overlap, such as in the case where minorities themselves express intolerance towards other minorities. International human rights law has generally appeared to be more critical of bans on subversive “anti-majority” speech than of “anti-minorities” speech bans. Though the case of *A.K. and A.R. v. Uzbekistan* does not throw much light on the Human Rights Committee’s stance on the boundaries of extreme speech, its draft General Comment suggests a critical attitude towards offences such as “glorifying” or “justifying” terrorism.

8.2 Hate speech bans and majority interests

Critics have argued that it is attractive for states to use hate speech bans to restrict the expressions of *minorities* – which they were originally intended to protect – against the dominant tide. In England, case law has long made clear that “reverse hate speech” against a majority is a criminal offence; the law is, after all, more focused on public order than on preventing discrimination against vulnerable groups. Dutch law, when interpreted literally, protects both minorities and the majority. Law practitioners used to disagree about the question of whether “anti-majority” hate speech falls under art. 137c-d; in 2010, the Supreme Court judged in the *Hofstadgroep*-case that this is indeed possible under article 137d. Considering the main rationale for adopting the article in the 1970s, this may seem surprising – indeed, the prosecution of the *Hofstadgroep* may be placed in the newfound focus on majority protection through hate speech bans.

8.3 “Glorifying terrorism” and majority interests

The many national and international efforts since 2001 to prohibit glorifying terrorism show a development towards increased targeting of extreme speech against the majority. Such laws and instruments express the idea that democracy should be militant against extreme ideas that might lead to terrorism: potential terrorists are the new “enemy” against which democratic states must protect themselves. The English law, for instance, was a reaction to the 2005 London bombings, which were carried out by homegrown terrorists who learned their radical ideas in London. The EU Framework Decision on terrorism was informed by the idea of tackling the root causes which can lead to radicalisation, including the propagation of extreme worldviews that justify violence. This brings up the question at which stage the authorities must inter-

vene: terrorism is mostly preceded by a radicalisation process, but radical ideas certainly do not necessarily lead to violence. It is often assumed that individuals move to extremism through a gradual process of ascending stages in a “pyramid” – from the base of those who sympathise with an extreme cause, to the group that justifies radical action, to those engaging in illegal and/or violent action. However, targeting the lower part of the pyramid entails the risk of creating a “thought police”, whereas experts have questioned whether this view of ascending stages towards radicalisation is correct: radical groups in the lower part may actually *compete* with their extremist counterparts on the top. The ECtHR’s case law on extreme speech will not easily put limits to states’ efforts to curb indirect incitement or glorification of terrorism. The ECtHR does not tend to require a strict relationship between speech and potential consequences, but rather assesses if words are “liable” to incite to violence. Incitement or glorification in indirect, symbolic language may be legitimately prohibited, depending on several factors. In the context of a violent conflict such as in Turkey, such expressions are more easily restricted. It is remarkable that in *Leroy v. France*, the link between speech and potential consequences is even looser than in many Turkish cases, though one would expect the Court to apply a stricter test. In *Leroy*, the Court seems to base itself on the rationales of *offence* or *legal moralism* rather than harm.

Laws targeting “anti-majority speech” such as those on glorifying terrorism indeed entail the risk of being used in a way that comes close to legal moralism and/or offence. Whereas they may aim to deal with real dangers of violence, they may also target expressions for the mere reason that the majority considers them “inherently immoral” or offensive. In liberal theory, such rationales are not acceptable: criminal law should not be concerned with enforcing morality as such, but only with protecting the rights of others. Moreover, a very *large* freedom of expression is particularly important for minority groups, who often have less chances at the “marketplace” and whose views have a larger chance of being suppressed as being “irrational”. The risk of overreactions is particularly apparent around justifying or glorifying terrorism, where the ideas expressed can be offensive to many people.

8.4 Religiously motivated speech

Extreme speech (or hate speech) that is *religiously* motivated, also brings up the question of where the boundaries are between fundamentalism and extremism. Take, for instance, the advocacy of a theocratic system: when do such expressions become a threat to democracy? This is a pressing issue that is related to the concept of neutrality between different conceptions of the good: at which stage does toleration make way for protection of core liberal values? The Court of Appeal in the Hofstad-groep case presented the first principled judgment about these matters in the Netherlands: it judged that anti-democratic views which do not advocate violence

cannot be prohibited too easily. The Court of Appeal made use of the ECtHR's case law, which already had to deal with such issues in *Gündüz* and *Refah Partisi*.

In *Refah Partisi*, the ECtHR put forward a substantive militant democracy view: it judged that 'the principle of secularism is certainly one of the fundamental principles of the State (...) an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion.' According to the Court, the political party's aims to set up a plurality of legal systems and to enact sharia law were possible violations of fundamental rights, against which democracy may protect itself if those risks are sufficiently imminent. The Court is thus of the view that pluralism between different conceptions of the good may be limited in order to preserve pluralism itself. Yet outside the context of political parties – in the case of *Gündüz v. Turkey* – the Court defended the freedom of expressing fundamental religious conceptions that go against the principle of secularism, as long as they do not constitute hate speech or incitement to violence. After all, mere speech by an individual does not easily pose an imminent risk to democracy.

In the Netherlands it is notable that the courts deal with religiously motivated hate speech or extreme speech from the viewpoint of both freedom of expression and freedom of religion: a defendant's religious conviction can be a factor in judging whether, given the context, an expression is insulting. This way of approaching religiously motivated speech poses some challenges to the Dutch system, particularly when judges have to decide whether an expression does indeed emanate from a religious conviction. In England, the Divisional Court in *Hammond v. DPP* did mention article 9 ECHR but considered that it need only use article 10 to deal with such religiously motivated expressions.

8.5 Background: militant democracy

In the Netherlands, the proposal on glorifying terrorism and the use of hate speech bans against "anti-majority" expressions show that discussions about militant democracy are now often geared towards the defence of the majority against radicals (particularly Muslim radicals) who express opposition to democratic principles. Wider discussions about citizenship also tend to focus on the obligations for minorities to accept "our" democratic principles. Besides fears about terrorism, these developments have been influenced by intolerant currents within religious groups themselves and the increased attention for this phenomenon. Accordingly, among certain sections of the public – including progressive circles – the idea has taken root that the Dutch democratic system must be militant against Islam as the new enemy. This development draws upon well-known enemy concepts from the Second World War: Islam is then equated to fascism and presented as a force that is anti-democracy and anti-vulnerable groups.

In the Netherlands, militant democracy used to be viewed as the defence of democracy against groups that are antipathical towards *minorities*. The extent of this militant democracy – how substantive it really was – is a matter of discussion: before the Second World War there was a rather formal idea of democracy, but after the war formal and substantive elements were used interchangeably without a clear choice for either. In the field of hate speech bans, international human rights law has introduced clear elements of a substantive militant democracy approach in the 1970s. The idea that democracy must protect itself against racist *viewpoints* is thus more entrenched in the Netherlands than in England, though there must still be an element of insult or incitement.

In England, the idea that speech bans protect the majority is less alien: majoritarian interests have always been important. Hate speech bans have been inspired by the age-old sedition offence and are traditionally concerned with conduct that “undermines the authority of the state” by creating disharmony between groups, rather than its impact on individuals or groups. Though the idea of militant democracy is not unfamiliar to English law,¹¹ it has a very different meaning than in the Netherlands: it is more focused on the protection of the state against those who wish to use antidemocratic *means* – particularly terrorism. There has always been a focus on the public order aspects of speech, though that may be long-term public order risks rather than “clear and present dangers”. In England, the idea of a militant democracy to protect minorities – in the way it has developed in the Netherlands – has not been influential; the party proscriptions regime is limited to groups related to terrorism rather than focusing on substantive goals that parties are pursuing. In the absence of a written constitution, Parliament can theoretically pass every law it wishes and it is arguably possible for political groups to come to power and do away with democracy and civil liberties – though constitutional scholars disagree on this point¹² and the HRA has arguably set the threshold higher.

That England has adopted legislation on “encouraging terrorism” while the Netherlands have not, can also be seen in the light of the general balance between national security and civil liberties around the threat of terrorism. In England the balance is traditionally more in the direction of national security than in the Netherlands. During the conflict in Northern Ireland the British government was widely criticised for restricting civil liberties – including freedom of speech and assembly – for the sake of national security. These concerns have newly arisen after the WTC attacks and the London bombings when a range of new counterterrorism laws were adopted. The Netherlands had its own share of terrorism in the 1970s but these crises were dealt with in a typical Dutch way: the government tried to “de-escalate” the situation by discussing matters *in camera* and diverting the public’s attention away from the

¹¹ See Cram 2009.

¹² Laws 1995; Griffith 1979.

conflict.¹³ The media were asked to refrain from giving the conflict too much attention, which they did – shying away from creating “enemies” and even from using the word “terrorist”. This situation is unthinkable in England, but also in the Netherlands of the 21st Century.

The difference in approach towards “anti-majority” and “anti-minority” speech in the Netherlands and England is related to their conception of public order: in England, the meaning of public order is not so much related to the interests of a decent society at large, but rather to protecting the interests of the government of the day that could be affected by public order problems. Therefore English law has long exhibited a ‘preference for public peacefulness (...) over freedom of expression’,¹⁴ which can be seen in the old common law of sedition and blasphemy. These offences tended to protect the interests of dominant forces, rather than to protect minorities; the flexibility of common law made it easy to adapt to the particular interests of the time. The notion of public order around hate speech bans in the Netherlands is more geared towards the interests of society in general, including equal dignity and fundamental rights: protecting public order means protecting a democratic society – and that includes fundamental rights. Here we see the influence of international human rights law. Still, it must be noted that, in the 1960s, Dutch courts were not averse to curbing anti-government speech under the law of “insult of public authorities” / “insult of a friendly head of state”. Contrary to the English situation, the standard used by the Dutch courts was that expressions should not be “gratuitously offensive”: accordingly, such case law can be placed in the Dutch tradition of preserving decency in public debate.

Both jurisdictions’ ideas about “majority v. minorities” – and about the legitimacy of hate speech bans – are connected to their highly different conceptions of fundamental rights. In England, majoritarian constraints on unorthodox speech have been easily accepted in the “rule of law” tradition: in this system, it is the people themselves who are assumed to defend their fundamental rights against government interference that can sometimes be far-reaching – a culture of liberties *against* the state. British governments do try to propose far-reaching hate speech bans, which are then strongly opposed in public debate and in parliamentary opposition. In the Dutch system, the idea is more entrenched that the state curbs freedom of expression to regulate society and guarantee the rights of others – the state as a guarantor of fundamental rights. In the continental *Rechtsstaat* conception that can be perceived in Dutch law, it is the state itself that has the task of guaranteeing people’s fundamental rights: this is seen as part of the common good that the state must promote.¹⁵ The Dutch approach is one of “positive liberty”, where the state has an interest in guaranteeing that everyone’s fundamental rights – such as non-discrimination – are respected and that there is a

13 De Graaf 2010, p. 33-36 and 44.

14 Feldman 2002, p. 769.

15 Brants & Franken 2009, p. 17-18.

decent society. The typically Dutch pillarisation history has enhanced this prioritising of civilised debate over individual liberties such as freedom of expression. A positive liberty approach is also prevalent in international human rights law and under the ECHR, where protection against hate speech is seen as necessary in order to protect the rights of others.

The new Dutch developments towards “majoritarianism” can be placed in the larger context of the emergence of a “majority culture” in the Netherlands that is replacing the old “culture of minorities”, as Kennedy has observed. The Netherlands used to leave much room to the minorities in its midst, as no group was ever dominant in the pillarised system. The loss of religious bonds and great ideologies has resulted in a situation where the majority has to decide how much room it is willing to leave for minorities; this creates a new dynamic, wherein discussions often focus on the “stranger” who has to adopt to “our culture”.

When looking at Lijphart’s majoritarian and consensus models of democracy, we can see that the British political system is geared more towards a majoritarian model, with its voting system that tends to result in a two-party system with one party in government and the other in opposition. The Netherlands have long been a clear example of a consensus democracy, where minority interests were smoothly included in decision-making – after all, the country used to consist of merely minorities that had to deal with each other in coalition governments. In contrast to the Netherlands, England has long had a protestant majority that has slowly incorporated several minorities in its midst, but it has never been a country consisting of mere minorities. That England has traditionally focused on public order and “anti-majority/anti-government speech” while the Netherlands have traditionally focused on “anti-minority speech” is related to these traditions.

9 FREEDOM OF EXPRESSION IN POLITICAL CULTURE

We have seen that English hate speech law is more strictly worded than Dutch hate speech law and that prosecutions in England have mostly focused on grossly racist utterances. One may start to explain these differences by looking at the important role that freedom of expression traditionally plays in English political culture, a liberty that has been strongly defended in the media, civil society and in Parliament. Liberties such as freedom of speech are historically linked to patriotism: they are regarded as something particularly British, a defining characteristic of ‘the most free nation in the world’.¹⁶ There is a tradition of robust discussion, where debates often take on an adversarial form with two opposing sides. The political system has usually put two parties opposite each other in Parliament, while strong left-right divisions have also

¹⁶ Colley 1992, p. 336.

exercised considerable influence – elements which seem to have led to an adversarial manner of discussion. The English press has a libertarian tradition with newspapers as polarising, partisan instruments that tend to take clear sides in discussions and to defend freedom of expression strongly.

In the Netherlands, freedom of speech has not played an equally vital role in political-legal culture. Legislative debates around hate speech bans do mention the importance of freedom of expression – particularly the discussions about article 137c – and hate speech bans in the 1970s were adopted under the assumption that prosecution would be the exception: in this sense, freedom of expression was not unimportant. However, a real discussion about the rationales behind the articles – and the necessity of dealing with these harms in such broadly drafted offences – did not take place. The adoption of new discrimination grounds in the 1990s did not raise many eyebrows; a proposal for a freedom of expression clause was voted down because most Parliamentarians could not imagine that freedom of expression could ever prevail over non-discrimination (at least in the field of race). Convictions of far-right politicians for hate speech hardly received any attention in the media before the 21st Century.

This can be linked to the longstanding tradition of quiet, decent debate and pacification in the Netherlands: for a long time, politeness and self-control were dominant in Dutch public debate. During the pillarised period this was facilitated by the media, which were able to keep taboo-subjects hidden from the public. The attitude of “keeping things quiet” was reinforced by the dominant bourgeois standards of civility in social behaviour at that time, which had ‘the effect of imbuing all conflict with some restraint, and of minimising open conflict. Civility is thus an important regulator of inter-bloc behaviour, and serves to minimise conflict (...)’¹⁷ Therefore, discrimination in the Netherlands was long thought to be ‘a rare and a disgraceful thing (...) The rule of pillarisation – keeping potential conflict areas out of sight – seems to have operated to a large extent in the case of racial discrimination.’¹⁸ Pillarisation had created a culture of consensus seeking among the pillars’ political leaders, so that debates about controversial political issues kept within the closed circle of the ruling elite. Daalder noted in 1964 that ‘[t]he difference between England and the Netherlands is (...) that the Dutch establishment does not enter the political battle with conviction, but consciously (...) isolates itself.’¹⁹ By the 1970s he noted that this had changed much: polarisation was emerging strongly. Despite the far-reaching changes in Dutch society during the 1970s, however, polarisation faded away in the 1980s and certain aspects of the pillarised period did not disappear at all. Decent non-adversarial debate and pacification have stayed part and parcel of Dutch political culture until the 21st Century. Te Velde has argued that, comparing the Netherlands to Britain,

17 Bagley 1973, p. 20.

18 Bagley 1973, p. 141.

19 Daalder 1974, p. 18.

[t]he gradual development of parliamentary democracy and liberal traditions showed many similarities in the two countries. However, the atmosphere of politics differed widely (...) there were not many countries that differed so much from the British example in relation to both culture and liveliness of political and public life (...) The Dutch Parliament was not nearly as popular as the British parliament and, compared to Britain, Dutch election campaigns were generally rather quiet. A distant, legal atmosphere permeated parliamentary politics. The notion of popular sovereignty did not enter the Dutch constitution in the nineteenth century, nor has it entered it since, and politicians have tended to stress the distance between the electors and the elected.²⁰

It is also vital to take a closer look at the immigration debate and the prevalence of racism in the media and society. In Dutch law, as under the ECHR and UN human rights treaties, racist speech has long been considered as “non-value speech” that does not form part of public debate in a democracy. For a long time, robust criticism of multicultural society in public debate was also regarded as racism, leading to moral outrage. Expressions that were considered to be “moderately racist” in England in the 1960s-80s were considered obviously racist in the Netherlands. Outright racism in the Dutch media and Parliament was – until the 2000s – a taboo, guarded by self-control in public debate and by the courts when necessary. The Dutch even prided themselves in saying that racial discrimination did not exist until the 1980s, but that was too optimistic: in society at large, racism was also present. Nevertheless, in England ethnic conflicts with accompanying public order problems were more extreme than in the Netherlands. The Netherlands were certainly not unfamiliar with the experience of colonialism and ideas of superiority and paternalism accompanying it, but outright racism was curbed by the experiences in the Second World War which were of a different kind than in Britain. Feelings of guilt made the approach towards minorities specifically cautious. Bagley’s research in the 1970s also found that Dutch people considered religious differences more important than ethnic status. The emphasis in discussing race relations was on social conformism and adherence to cultural standards rather than on ethnic characteristics: ‘the Dutch tend to be extremely tolerant and generous towards ethnic groups who are familiar with, and loyal to, Dutch institutions. At the same time they can be extremely suspicious of, and initially hostile towards, groups who are not familiar with Dutch linguistic and cultural norms.’²¹

In English media and society, until well into the 1980s racism was much less of a taboo. The media and educational institutions had communicated an ‘ideology of chauvinism and social superiority’, influencing all social classes – exacerbated by the competition for housing and jobs among the lower classes.²² In the 1960s-80s, influential politicians such as Enoch Powell developed a language of patriotism – influenced by Britain’s experience as a colonial world power – which they connected

20 Te Velde 2006, p. 18.

21 Bagley 1973, 59 and 144.

22 Bagley p. 237, 242.

to the people's worries with regard to immigration.²³ The two-party system forced more mainstream politicians to adopt such messages, reflecting beliefs that were held by large parts of the public – being responsive to the public is more important in a political system where two parties are directly competing for power. In the Netherlands, meanwhile, the taboo on critical debate about immigration was directed from top down and by all main parties in the political spectrum.

The Dutch media long functioned as a platform in the hands of the pillarised elites, with devoted newspapers that had a fixed readership and functioned as a “friend of the family” – this deterred the flourishing of a sensationalist “yellow press”.²⁴ Indeed, the whole public sphere ‘was fully dominated by Christian and middle-class moral values (...) Although the general rules and infrastructure were set by the government, Catholics and orthodox Protestants as well as socialists tried to repress any expression of immorality and sensationalism within their own pillarised organisations (...)’.²⁵ The strong stance against racism continued to exist after depillarisation, when in the 1960s-70s the media came to see themselves as acting in the “public interest” – progressive values were widespread in society and the press. A completely different situation existed in the English press (although English broadcasting media also acted in the public interest).

10 SHIFTS IN PUBLIC DEBATE, POLITICS AND THE MEDIA AFTER 2001

After a speech by Enoch Powell in 1985, the *Sunday Express* criticised those who called him a racist; the paper wrote that Britain had an immigration problem which had been “swept under the carpet” for years. Powell’s anti-immigrant discourse led to political repercussions, but made him very popular with the public – causing mainstream politicians to adopt his viewpoints in more covert form. Replace the year 1985 with 2011 and Powell with Wilders and we see a similar situation in current Dutch society, media and politics. After 2001 the Netherlands has experienced a breakdown of the consensus on a tolerant approach to immigrants and of the stable or “dull” political culture. The former prudence in the debate about minorities suddenly turned into a new consensus where multicultural society was declared bankrupt. The emergence of Fortuyn’s “new realism”, his assassination and that of Van Gogh have shaken up the “root paradigms” of fundamental rights and tolerance for minorities that seemed obvious beforehand.²⁶ That such a sea change in public discourse could take place so suddenly, has been explained by the Dutch preference for conformism and consensus: criticising the existing consensus is initially very difficult because it is

23 Brown 1999.

24 Van Vree 2006, p. 80.

25 Van Vree 2006, p. 84.

26 Eyerman 2008, p. 29.

almost impossible to start a debate that challenges the mainstream view. But once it is finally shattered, a new consensus suddenly takes its place that is very difficult to break in turn: ‘in such a culture, opposing visions are not played out against each other, but follow each other.’²⁷ In England, robust discussion has always been part and parcel of political culture; in the Netherlands it is still difficult to find the middle ground between consensus on the one hand and outright verbal abuse on the other. It has also been argued that exactly those people who are most concerned about conformity, used to obediently follow leading politicians who preached tolerance – but suddenly embraced a completely different view towards minorities once politicians started abandoning the multicultural ideal.²⁸

The sudden popularity of populist politicians in the Netherlands had to do with their appeal to the conservative undercurrent’s fears about immigration as well as to liberal values. The openness of the Dutch electoral system to small political parties also helped them to become “mainstream”: both the Netherlands and England have long dealt with volatility and floating voters, but only in the Netherlands have small anti-immigration parties indeed been able to increase their support base to big proportions. The British National Party has long remained too extreme to appeal to an audience large enough to give them a chance to surmount the high threshold of the British electoral system.²⁹ They have considerably increased their support base in the 21st Century, but this has not led to any seats in national Parliament yet: in this sense the majoritarian election system has worked to exclude extreme parties from power.

Dutch public debate on immigration is influenced by developments in the media, where elements of “media logic” have come up. Conflict and extreme views, which in earlier times did not easily enter the media with their self-imposed limits, have become essential for newsworthiness. Nevertheless, the Dutch press is still ‘a paragon of sobriety and sensibility’ compared to parts of the English press, and reporting about immigration is still relatively balanced.³⁰ However, it is undeniable that in the current arena of public discussion in the Netherlands – especially with the emergence of the internet, but also on television and in the press – much more can be said than, say, 20 years ago. In England, overt racism has instead become less acceptable in public debate since the 1990s. Negative reporting about Islam, however, has been common since the Rushdie affair.

In the Netherlands, extreme voices used to be excluded from public debate – this “rational deliberation” model fit the Dutch consensus democracy well.³¹ Hate speech

27 Kennedy 2009, p. 150.

28 Sniderman & Hagendoorn 2007, p. 9 and 107.

29 Norris 2005, p. 233.

30 Van Vree 2006, p. 79; D’Haenens & Bink 2007.

31 Bovenkerk 2009, p. 11.

bans contributed to keeping public debate “clean” and rational. The informal rules have now widely changed: in political and wider public debate, consensus seeking has made place for polarisation. This has led many to argue, along with Mouffe’s ideas about “agonism”, that polarised “us/them” relationships and antagonism are inevitable and that more room is needed for strong dissent in public discourse. In other circles the increased polarisation has instead led to an even stronger urge to keep public debate rational and decent – however, one may question whether the wish to clean up public debate still works in such a changed society. In England, there have always been more “agonist” dimensions to public debate and politics. Since 2001, the sensitivities around multicultural society and terrorism have led many to question whether the public sphere is perhaps too conflictuous; this has been one of the reasons for adopting new speech bans. Attempts to limit the width of public discussion still lead to strong reactions from opponents, who wish to maintain a robust climate of discussion.

10.1 Freedom of expression as a “trump card”

Immigration populism and the changed nature of public debate in the Netherlands have affected the previously existing consensus about the limits to freedom of expression and the perceived legitimacy of hate speech law. This has become apparent in the widespread resistance to the prosecution of Geert Wilders. Freedom of speech seems to have attained the role of “trump card” in Dutch public debate around multiculturalism; to that extent, the Netherlands seem to be moving towards England.

What seems to be lacking in these debates is the conviction that freedom of speech is a right that is especially important to “shock, offend or disturb” against the dominant tide. Instead, several groups use freedom of expression to protect their own interests and put their adversary in a corner. A typically individualistic idea of freedom of expression as being “the right to say whatever I think” has developed among majority and minorities alike. In this discourse, it has become difficult to uphold the idea that freedom of expression is particularly important for unpopular minorities. This may be because the Dutch conception of freedom of speech is not yet “grown up”, as the traditions of consensualism and “cleaning up public debate” are still influential, while strong adversarial debate – without the typical Dutch “rudeness” – is not particularly well developed.

An individualistic, one-sided “right to say whatever I think” mentality is not exclusive to the Netherlands though. In England, twenty-two imams who had earlier wanted to ban The Satanic Verses wrote to The Times to defend freedom of homophobic speech, while people supporting the Muhammad cartoons wish to criminalise Holocaust denial. Hence “[t]he argument against free speech quickly degenerates into the claim that “my speech should be free but yours is too costly”. It becomes, in other words, a

means to defend particular sectional interests.³² As such, various fundamental rights – freedom of expression, non-discrimination, freedom of religion – are used to defend one's own interests rather than the rights of every human being. A fundamental debate about the appropriate limits to freedom of expression, in connection to the rationales behind such prohibitions, may provide a good start for turning this tide.

³² Malik (K.) 2009, p. 183.

AFTERWORD

Some expressions have the potential to shock and disturb many people because they run counter to widely held values. It is a natural tendency of governments to prohibit such expressions, but this makes it even more important to look critically at the exact reasons why certain expressions should or should not be proscribed by the government, which goals such laws should serve and whether these goals are met. Harm – either to public order or to individuals – is the most important reason to prohibit hate speech. However, the legislature and the judiciary should look carefully at whether there really is a relationship between speech and harmful consequences in order to avoid criminalising speech merely because it shocks or offends many people.

In the Netherlands, prosecution policy reflects high expectations of the use of criminal law to counter hate speech. International human rights documents express the same expectation that countering hate speech can tackle discrimination, and CERD explicitly demands effective prosecution. However, criminal law can only make a modest contribution to counter such speech, especially when public discourse has suddenly undergone a huge shift and expressions that were formerly taboo, have become commonplace. In such a situation, using the criminal law in an attempt to preserve decency in public debate can be counterproductive. The broad reach of Dutch hate speech offences makes matters even more difficult: the judiciary has trouble interpreting articles 137c/d in this new situation. In this sense the English part 3/3A Public Order Act, with its focus on tackling the most extreme expressions and an extra check for prosecution, may serve as an example.

The same is true of the potential of banning extreme speech to counter radicalisation and, eventually, terrorism. Both new international instruments on indirect provocation of terrorism and English law on “glorifying terrorism” aim to tackle what are regarded as the root causes of radicalisation, including the propagation of extreme worldviews that justify violence. Targeting such expressions entails the risk of creating a “thought police”, whereas radical non-violent groups may actually *compete* with their extremist, violent counterparts rather than evolve closer to them. While such laws may form an attempt to deal with real dangers to public order, they also tend to target expressions for the mere reason that the majority considers them “inherently immoral” or offensive. In liberal theory, such rationales are not acceptable: criminal law should not be concerned with enforcing morality as such, but only with protecting the rights of others.

Criminalising hate speech and extreme speech have been increasingly connected to the rationale of preserving “common values” and social cohesion, a development towards “militant democracy” in the sense of protecting democracy against groups or individuals who are antagonistic towards the dominant groups or authorities. This has been the case in England & Wales for some time already, and has also gained some ground in the Netherlands. However, trying to preserve social cohesion with criminal law has many drawbacks: it can run counter to liberal principles of toleration and state neutrality towards different conceptions of the good. The particular problems with criminalising extreme speech against the dominant groups also makes it important to distinguish clearly between hate speech on the one hand and extreme speech on the other; however, English law and the ECrtHR have not always made that distinction.

As a result of the underdeveloped ideas about freedom of expression after pillarisation and the Second World War, the criminalisation of hate speech in the Netherlands was never really an issue in political or public discourse until the 21st Century and Dutch thinking about the rationales behind hate speech provisions is equally underdeveloped. Since 2001, however, freedom of expression has become such an issue that there is a risk of overreaction: it is now used as a “trump card” to advance one’s own viewpoints rather than to protect the same right for one’s adversaries. Moreover, one’s own sensitivities are easily regarded as good reasons to criminalise expressions whereas other people’s sensitivities are simultaneously presented as dangers to free speech. Yet, it is suggested here that the tendency of some groups in the Netherlands to go back to keeping public discourse “rational” and “clean” through hate speech bans – which is also sustained by the ECrtHR – is not the right way to go. Instead it is time to fundamentally think through the rationale behind both articles 137c and 137d and their wording: is the focus on preventing mental harm to individuals (and if so, how does one make sure that *offence* is not covered), or is the goal to prevent negative imaging of groups in the eyes of other people or more general public order concerns – and if so, how wide a range of expressions should be covered in order to achieve this goal? Here it is suggested that more restricted legal provisions – and a more flexible prosecution policy – would be more appropriate with a view to the limited potential of the criminal law in this field. It is time for serious exploration of other means of tackling hate speech, to which end further research would be important.

In view of the relationship between speech and harm and the distinction between harm to individuals and defamation of religions, a particularly critical view is necessary as regards the blasphemy prohibition that is still on the Dutch statute books (even though it is not actually in use) and of the ECrtHR’s case law in this field. Even though nowadays religious hate speech is often used as a pretext for expressing racial hatred, in the liberal paradigm it is still essential – but, admittedly, not always easy – to distinguish between criticism of religious traditions, symbols and figures and hate speech towards individuals.

SAMENVATTING

HAATUITINGEN HEROVERWOGEN. EEN VERGELIJKEND EN HISTORISCH PERSPECTIEF OP HET RECHT OVER HAATUITINGEN IN NEDERLAND EN ENGELAND & WALES

OPZET

Het afgelopen decennium is er in Nederland en Engeland & Wales veel discussie geweest over nieuwe wetgeving op het gebied van haatuitingen en radicale uitingen. In Engeland zijn er nieuwe strafbepalingen gekomen zoals een verbod op “verheerlijken van terrorisme” en op aanzetten tot haat op grond van religie en seksuele gerichtheid. In Nederland zijn die laatste uitingen al veel langer strafbaar, terwijl een verbod op verheerlijken van terrorisme wel is voorgesteld maar uiteindelijk het wetboek niet haalde. Deze discussies roepen de vraag op hoe de overeenkomsten en verschillen tussen beide landen te verklaren zijn, en of er na 2001 sprake is van een breekpunt in het denken over haatuitingen in beide landen.

Deze studie draait dan ook om de vraag hoe de ideeën achter het strafrecht over haatuitingen in Nederland en Engeland & Wales – inclusief de invloed van internationaal en Europees recht – zich hebben ontwikkeld sinds 2001 en hoe die ontwikkelingen kunnen worden verklaard, gezien de geschiedenis van het recht over haatuitingen. Het is een rechtsvergelijkend onderzoek dat zich richt op de ratio, de argumenten achter het recht omtrent haatuitingen en hoe die zich in de loop van de tijd hebben ontwikkeld in de betreffende jurisdicties en waarom; met name welke veranderingen zich sinds 2001 hebben voorgedaan met de opkomst van discussies over de multiculturele samenleving en terrorisme.

Achter de vraag welke uitingen strafbaar worden gesteld ligt de vraag naar de reikwijdte van en de relatie tussen fundamentele rechten – vrijheid van meningsuiting, non-discriminatie en vrijheid van religie en levensovertuiging – en andere publieke belangen zoals de openbare orde. Dit wordt weer beïnvloed door de rechtscultuur en politieke cultuur van een jurisdictie: hoe functioneren het publieke debat, de media en de democratie? Na een overzicht van de belangrijkste theorie achter het verbieden van haatuitingen (hoofdstuk II) wordt geanalyseerd welke van deze ideeën voorkomen in het recht van Nederland, Engeland & Wales en Europees en internationaal recht en in hoeverre dit in de loop der tijd is veranderd. Het onderzoek leidt tot een synthese, waarbij de vergelijking tussen de verschillende rechtsstelsels aan bod komt.

DE WETGEVING

De wetgeving over haatuitingen in Engeland is strenger geformuleerd dan in Nederland en is slechts bedoeld om de meest extreme uitingen aan te pakken. In Nederland zijn zowel aanzetten tot haat, discriminatie en geweld als groepsbelediging strafbaar (artikel 137c/d Sr), in Engeland (deel 3 en 3A Public Order Act) alleen aanzetten tot haat (en in andere wetten ook het aanzetten tot geweld). In Nederland zijn de gronden ras en religie/levensovertuiging (sinds 1971), seksuele gerichtheid (sinds 1991), geslacht (niet voor groepsbelediging, sinds 1991) en handicap (sinds 2005) te vinden; in de Engelse wetgeving zijn de gronden ras (sinds 1965), religie/levensovertuiging (sinds 2005) en seksuele gerichtheid (sinds 2010) te vinden. Voor de laatste twee gelden nog strengere eisen dan voor ras, namelijk het gebruik van dreigende uitlatingen; er geldt ook een speciale vrijheid van meningsuiting-clausule. Ook moet in Engeland de Advocaat-Generaal altijd toestemming geven voor vervolging – er zijn nog maar heel weinig vervolgingen geweest vergeleken met Nederland. Toch zijn er in Engeland enkele meer algemeen geformuleerde openbare ordedelicten (‘dreigende of beledigende uitingen binnen het gehoor of zicht van een persoon die daar waarschijnlijk last, verontrusting of angst van ondervindt’, sectie 5 Public Order Act 1986) waarvoor die toestemming niet nodig is en die soms ruim worden geïnterpreteerd. Bovendien heeft Engeland na de terroristische aanslagen in Londen een wet aangenomen die het aanmoedigen van terrorisme – inclusief verheerlijken van terrorisme – strafbaar stelt, terwijl dit in Nederland niet is doorgezet. Wel is in Engeland het verbod op godslastering in 2008 afgeschaft, terwijl zo’n verbod in Nederland na veel discussie nog in het wetboek staat (artikel 147 Sr).

DISCUSSIE OVER HAATUITINGEN OP GROND VAN RELIGIE VERSUS RAS

Terwijl in Nederland de discriminatiegrond “godsdienst en levensovertuiging” al sinds de jaren ’70 in de wet is opgenomen, is er sinds 2001 veel discussie over de vraag of het terecht is dat haatuitingen op grond van religie wettelijk op één lijn worden gesteld met haatuitingen op grond van ras. Daaraan gerelateerd is de vraag of uitingen gericht op een religie of religieuze symbolen gelijk kunnen worden gesteld met uitingen gericht tegen *personen* op grond van hun religie. In 2009 oordeelde de Hoge Raad in het “Gezwel”-arrest dat artikel 137c (groepsbelediging) alleen ziet op uitingen die onmiskenbaar betrekking hebben op een groep *mensen*; dat grievende uitlatingen over een godsdienst ook de aanhangers van die godsdienst kunnen krenken, is niet voldoende om zulke uitingen aan elkaar gelijk te stellen. De regering was toen juist bezig om middels een wetswijziging te expliciteren dat zulke indirecte belediging ook onder artikel 137c valt, maar zij heeft die poging vervolgens gestaakt.

Nu de grenzen van het publieke discours zijn verruimd, lijken ook rechters moeite te hebben om de grens tussen belediging van mensen en het uitoefenen van geoorloofde kritiek op hun gedrag, eigenschappen of geloof te bepalen. Sinds ongeveer 2008 zijn

in de lagere rechtspraak regelmatig uitspraken te zien die artikel 137c zeer restrictief interpreteren en de vrijheid van meningsuiting sterk benadrukken; sommige van die rechterlijke uitspraken waren ondenkbaar voordat in de 21^e eeuw het debat over de multiculturele samenleving losbarstte. Soms wordt het artikel echter nog wel ruim geïnterpreteerd, dus het totaalbeeld is zeer wisselend. Artikel 137d wordt meestal ruim geïnterpreteerd (overigens is er slechts weinig rechtspraak over dat artikel); politieke voorstellen om immigratie in te perken of harde uitspraken over de multiculturele samenleving zijn regelmatig als aanzetten tot haat of discriminatie beschouwd. In de Wilders-uitspraak werd dit artikel echter voor het eerst heel restrictief geïnterpreteerd, waarbij de politieke context de strafbaarheid bijna automatisch wegnam.

In Engeland vond de wetgever in de jaren '60 dat haatuitingen op grond van religie niet strafbaar moesten worden gesteld – men vond haatuitingen op grond van religie van een andere orde dan haatuitingen op grond van ras. Bovendien was zo'n bepaling niet nodig, vond men, omdat er toch weinig religieuze diversiteit in de samenleving was. Daar kwam de overheid in 2005 op terug toen de samenleving meer multicultureel en multireligieus was geworden. Het voorstel om haatuitingen op grond van religie strafbaar te stellen stuitte op harde kritiek van oppositie, media en schrijvers, die bang waren dat bekritisieren of ridiculiseren van religie niet meer zou mogen; de uiteindelijke wet is zo strikt geformuleerd dat alleen dreigend taalgebruik eronder valt. In Engeland stuiten voorstellen voor nieuwe wetgeving over uitingsdelicten al snel op bezwaren op grond van de vrijheid van meningsuiting. Toch blijkt ondanks die bezwaren dat onder algemene openbare orde-strafbaarstellingen (sectie 4/5 Public Order Act) ook uitingen over *religie* (in plaats van over *mensen*) strafbaar kunnen zijn (Norwood). Bij deze artikelen heeft de politie een grote discretionaire bevoegdheid om op te treden, zodat de toetsing achteraf door rechters niet altijd even streng is. Het is in Engeland soms lastig om de vrijheid van meningsuiting systematisch mee te nemen in de rechtspraak over aanzetten tot haat, omdat deze zaken door een jury worden beoordeeld en die jury haar oordelen niet motiveert – hoewel dat ook betekent dat een vrijspraak niet hoeft te worden gemotiveerd. Wel wordt door hogere rechters sinds de Human Rights Act 1998 steeds vaker verwezen naar de fundamentele rechten uit het Europees Verdrag voor de Rechten van de Mens (EVRM); ook in het wetgevingsproces wordt daar regelmatig naar verwezen.

In Nederland speelde de vrijheid van meningsuiting vóór de 21^e eeuw ook geen grote rol in de jurisprudentie over haatuitingen. In het wetgevingsproces van de jaren '80 werd een duidelijke keuze gemaakt om het recht om niet gediscrimineerd te worden te laten prevaleren boven vrijheid van meningsuiting. De rechter had in het opmaken van die balans dan weinig meer te zoeken, was toen het idee. Nadien is het recht op vrije meningsuiting zoals neergelegd in artikel 10 Europees Verdrag voor de Rechten van de Mens een steeds grotere rol gaan spelen in rechterlijke beslissingen over haatuitingen – de uitspraak-Wilders is daar een duidelijk voorbeeld van.

Het Europees Hof voor de Rechten van de Mens zelf laat nationale staten vaak de vrijheid om haatuitingen te verbieden, hoewel dit anders kan zijn voor de journalistieke weergave van die uitingen (Jersild). Vroeger vielen harde uitingen over multiculturalisme en immigratie volgens het EHRM niet onder de vergaande bescherming van vrijheid van meningsuiting in het publieke debat: dit duidt op een idee van het publieke discours als een plaats voor “rationele deliberatie” waarin zulke uitingen niet thuis horen. Soms stuitte zo’n zaak af op artikel 17 EVRM (misbruik van recht): uitingen waren dan volgens het Hof zodanig in strijd met democratische principes dat de spreker geen beroep meer kon doen op de vrijheid van meningsuiting en een diepgaande behandeling van de zaak niet nodig was. Inmiddels heeft het EHRM al enkele keren geoordeeld dat zulke uitingen wel binnen het publieke debat horen, maar nog steeds hebben staten juist in het immigratiedebat een grote appreciatiemarge om zelf te bepalen welke uitingen ze verbieden. Op het gebied van *godslastering* laat het EHRM staten van oudsher een grote appreciatiemarge; andere internationale organen zoals het VN-Mensenrechtencomité en de Parlementaire Assemblée van de Raad van Europa zijn kritischer over het strafbaarstellen van blasfemie of belediging van religie. Eén van de argumenten daarbij is dat blasfemiewetten vaak de mores van de dominante religieuze groep proberen te beschermen ten koste van minderheidsgroepen.

VERVOLGINGSBELEID

In Nederland kwam uit het wetgevingsproces in de jaren ’70 de overtuiging naar voren dat er niet te snel vervolgd moest worden voor artikel 137c/d: men moest maar niet teveel verwachtingen hebben van het strafrecht om haatuitingen tegen te gaan. Echter, in de jaren ’80/’90 – met de opkomst van extreemrechtse groepen én een actieve antiracismebeweging – werd de trend juist om actief te vervolgen teneinde discriminatie tegen te gaan. Het vervolgen van haatuitingen werd een belangrijk onderdeel van het antidiscriminatiebeleid; dit paste in een ontwikkeling waarbij het strafrecht steeds meer werd ingezet als instrument om de maatschappij te reguleren. In Engeland is men meer geneigd om discriminatie tegen te gaan door gewone strafbare feiten met een discriminatoire component (*hate crime*) tegen te gaan. Het principe van non-discriminatie werd in Engeland lange tijd niet in verband gebracht met uitingsdelicten. De vereiste toestemming van de Advocaat-Generaal heeft er altijd voor gezorgd dat er in Engeland weinig werd vervolgd voor aanzetten tot haat. Toch is het niet slechts symboolwetgeving; er zijn soms erg hoge straffen opgelegd. In Nederland zijn de straffen redelijk symbolisch, maar probeert men een generaal preventief effect te bereiken door actief te vervolgen. Het College van Procureurs-Generaal heeft vanaf 1999 in de Aanwijzingen Discriminatie vastgelegd dat vervolging de regel is en dat argumenten als “martelaarschap” onvoldoende reden zijn om niet te vervolgen. Hoewel een grote meerderheid in de Tweede Kamer een actief vervolgingsbeleid in 2005 nog van harte ondersteunde, is enige tijd later controversen ontstaan rondom de vervolging van cartoonist Gregorius Nekschot en Geert Wilders.

In die laatste zaak maakte het OM een uitzondering op de hoofdregel om altijd te vervolgen en werd het vervolgens teruggefloten door het Hof Amsterdam.

Terwijl er een strikt vervolgingsbeleid geldt voor haatuitingen, zijn de grenzen van het publieke debat sterk verruimd. Daarbij komt dat artikelen 137c/d een ruim bereik hebben en dus voor verschillende interpretaties vatbaar zijn. Bij de één scheidt dit de verwachting dat minderheden beschermd worden en dat er ook daadwerkelijk vervolgd zal worden, bij de ander de verwachting dat het ruimte laat voor een aangepaste – striktere – interpretatie in een nieuw tijdsgewricht. Hoewel de Nederlandse wetgeving over haatuitingen in de jaren '80/'90 een bijdrage leverde aan het tegengaan van extreme groeperingen, is de vraag of dat ook werkt in de huidige context waarin populistische anti-immigratiestromingen al erg populair zijn en het debat is omgeslagen naar een nieuwe politieke correctheid: uitingen die twintig jaar geleden nog strafbaar waren zijn nu dagelijkse kost.

DE RATIO ACHTER STRAFBAARSTELLING VAN HAATUITINGEN

In Engeland is het beschermen van de openbare orde altijd de meest belangrijke reden geweest om haatuitingen te verbieden. Dit was lange tijd het enige “geldige” argument. In Nederland speelde de openbare orde ook een belangrijke rol tijdens het opstellen en wijzigen van artikel 137c/d in de jaren '30, de jaren '70 en eind jaren '80. Wel heeft deze ratio in Nederland sinds de jaren '70 een andere, bredere invulling gekregen dan in Engeland: in Nederland betekent het beschermen van de openbare orde dat een maatschappelijk klimaat waarin iedereen gelijke rechten heeft, moet worden beschermd. Het gaat dus om het beschermen van de algemene belangen van de maatschappij als geheel, inclusief fundamentele rechten. In Engeland is openbare ordebescherming gericht op het beschermen van de collectieve rust in de samenleving, maar beperkingen gebaseerd op de *inhoud* van uitingen (zoals uitingen die tegen het gelijkheidsbeginsel ingaan) worden gewantrouwd. In Nederland is de openbare orderatio sterk gerelateerd aan het tegengaan van negatieve beeldvorming over groeperingen. Dit is de gedachte achter zowel artikel 137c als 137d (ook al lijkt “belediging” te focussen op het effect op een persoon zelf, het gaat eigenlijk ook om iemands “reputatie in de ogen van anderen”). Toch hebben rechters artikel 137c soms wel zo ruim geïnterpreteerd dat “aanstoot” – het kwetsen van iemands gevoelens – er ook onder viel; in de recent jurisprudentie lijkt dit te veranderen.

De ratio van negatieve beeldvorming en het beschermen van gelijke rechten is ook heel belangrijk in internationale mensenrechtenbepalingen over haatuitingen, zoals artikel 20 IVBPR en artikel 4 Rassendiscriminatieverdrag (CERD). Die laatste bepaling was de directe reden voor Nederland om artikel 137d aan het Wetboek van Strafrecht toe te voegen in de jaren '70 en om artikel 137c te wijzigen van formele belediging naar materiële belediging. Beide internationale instrumenten verplichten staten om bepaalde haatuitingen te verbieden en het CERD-comité verwacht tevens

van staten dat zij zulke uitingen actief vervolgen en bestraffen. Men kan zich daarbij afvragen of in alle omstandigheden een grote focus op het strafrecht om haat en negatieve beeldvorming tegen te gaan effectief is; echter, de verplichtingen uit het CERD laten in principe geen ruimte voor een dergelijke afweging.

Sinds 2001 is in het publieke debat over haatuitingen vaker (impliciet of expliciet) de ratio te zien van het bewaren van sociale cohesie (“gemeenschappelijke waarden”), zowel in Nederland als in Engeland. In Engeland is het aanpakken van religieuze haatuitingen bedoeld als symbolische maatregel om minderheden te laten zien dat ze beschermd worden, terwijl zij tegelijkertijd “in toom worden gehouden” door het verbod op het verheerlijken van terrorisme in de Terrorism Act 2006. Die moest juist duidelijk maken dat stromingen binnen radicale minderheden zichzelf ook moesten aanpassen aan een set “gemeenschappelijke waarden”. In Nederland was het bestendige van “gemeenschappelijke waarden” ook te zien bij het voorstel om het verheerlijken van terrorisme te verbieden – een voorstel dat uiteindelijk is gesneuveld. Uit dit voorstel sprak ook de wens om het publieke debat “schoon te houden” van irrationele elementen en al te radicale stemmen, een element dat vaker te zien is in de Nederlandse discussie over haatuitingen (in de jurisprudentie over artikel 137c geldt bijvoorbeeld ook dat uitingen niet “onnodig grievend” mogen zijn, waarbij de stijl en woordkeus een rol speelt). In Engeland wordt een hard publiek debat niet zozeer problematisch gevonden, maar veeleer uitingen die de overheid of dominante groepen in gevaar brengen. Het EHRM lijkt net als Nederland het publieke debat rationeel te willen houden. Echter, het gevaar is dat juist minderheden dan worden uitgesloten omdat hun uitingen minder snel “rationeel” lijken. Inmiddels lijkt de ruimte voor “irrationele” geluiden wel verruimd te worden in de Nederlandse jurisprudentie, nu de vrijheid van meningsuiting meer gewicht heeft gekregen.

BESCHERMING VAN MINDERHEDEN EN MEERDERHEID

Een centraal thema bij haatuitingen sinds 2001, met de toenemende aandacht voor radicalisering en terrorisme, is het omgaan met extreme uitingen die tegen meerderheidsbelangen in gaan versus uitingen die minderheden treffen. Critici van strafwetgeving over haatuitingen hebben er op gewezen dat zulke wetten ook gebruikt kunnen worden om belangen van de overheid of de dominante groep veilig te stellen, waardoor juist tolerantie ten opzichte van uitingen van minderheden in het gedrang komt (ook al was dat oorspronkelijk niet de bedoeling van zo’n wet). In Nederland waren de artikelen 137c/d volgens de wetsgeschiedenis in de jaren ’70 vooral bedoeld om uitingen tegen minderheden te bestraffen, hoewel die artikelen letterlijk zien op uitingen tegen meerderheden en minderheden. In de 21^e eeuw is de discussie opgevlamd over de vraag of de artikelen 137c/d ook zien op uitingen die beledigend zijn of aanzetten tot haat/discriminatie/geweld tegen de meerderheid; in het Hofstadgroep-arrest heeft de Hoge Raad voor artikel 137d uitgemaakt dat dat inderdaad zo is. In Engeland is dit nooit een punt van discussie geweest: al in de jaren ’60 werd de

bepaling over aanzetten tot haat op grond van ras ook gebruikt om Black Power-activisten aan te pakken. De ratio is immers nog meer gefocust op openbare orde dan in Nederland, waar non-discriminatie en minderhedenbescherming bij het wetgevingsproces (onder invloed van het CERD) centraal stonden.

De vervolging van de Hofstadgroep voor radicale uitingen, de poging om het “verheerlijken van terrorisme” strafbaar te stellen en verschillende beleidsstukken over radicaal-islamitische uitingen wijzen er op dat er sinds 2001 in Nederland een grotere focus is komen te liggen op extreme uitingen die tegen de meerderheid en de “gemeenschappelijke waarden” in gaan. De militante democratie – het idee dat de democratie zichzelf moet beschermen tegen vijandige groepen of individuen die haar willen ondermijnen – wordt nu steeds meer gericht op bescherming tegen krachten die tegen de belangen van de dominante groep ingaan. Lang was die militante democratie juist vooral gericht op het beschermen van de democratie tegen “anti-minderheden”-groeperingen en -ideeën, als gevolg van de Tweede Wereldoorlog. De wetswijziging van de jaren ’70 in artikel 137c/e – als gevolg van het CERD – introduceerde componenten van zo’n militante democratie in Nederland (hoewel Nederland op andere gebieden, zoals bij partijverboden, een wisselende mate van militante democratie aanhing). Juist deze component van militante democratie, om minderheden tegen discriminatie te beschermen, lijkt nu minder in zwang te zijn. Overigens steunt het huidige anti-Islamdiscours ook deels op die oorspronkelijke militante democratie-ideeën, in die zin dat de Islam wordt voorgesteld als een ideologie die zelf minderheden discrimineert.

In Engeland is die bescherming van de staat en/of de dominante groep door wetgeving over haatuitingen van oudsher meer gangbaar dan in Nederland: het verbod op aanzetten tot rassenhaat werd daar in de jaren ’60 gebaseerd op het aloude *common law*-verbod van *sedition* (een ruime interpretatie van opruiing tegen de autoriteiten). Die laatste moest juist de staatsautoriteiten beschermen: onmin tussen groepen zou het gezag ondermijnen. Het *common law*-verbod op godslastering was ook gerelateerd aan *sedition*: de samenhang tussen de Engelse staat en de Anglicaanse kerk maakte dat het belasteren van God ook als een aanval op de wereldlijke autoriteiten werd beschouwd. Het beschermde dan ook alleen de dominante Christelijke religie. In latere jurisprudentie werd de ratio achter het Engelse verbod op blasfemie meer gezocht in het beschermen van de religieuze gevoelens van mensen, wat ook in Nederland de voornaamste ratio achter artikel 147 Sr (godslastering) is. In Engeland zijn beide *common law*-verboden in 2008 afgeschaft. De Terrorism Act 2006 wordt door commentatoren wel gezien als een voortzetting in een nieuw jasje van het verbod op *sedition*, terwijl het verbod op aanzetten tot haat op grond van religie het oude blasfemie-verbod zou voortzetten (hoewel die laatste ook op minderheidsreligies ziet en de reikwijdte van de bepaling een stuk nauwer is).

In Engeland is er nooit een sterke militante democratie geweest tegen racistische groeperingen; het verbod op haatuitingen op grond van ras uit de jaren '60 was niet op een militante democratie-leest geschied, maar was meer gericht op het beschermen van de openbare orde (bescherming tegen antidemocratische *methoden*) en was slechts gericht op de meest extreme uitingen. Men wilde aan antidemocratische *ideeën* niets in de weg leggen en wil dat nog steeds niet, ook niet met de recente uitbreidingen in deel 3 Public Order Act. Wel perkte de Britse overheid in de jaren '80 een aantal vrijheden stevig in om terrorisme in Noord-Ierland het hoofd te bieden – een militante democratie om de meerderheid te beschermen.

In het Engelse wetgevingsproces liepen de voorstellen voor het strafbaarstellen van “verheerlijken van terrorisme” en “aanzetten tot haat op grond van religie” vaak door elkaar heen. Dat is ook het geval bij *vervolging* wegens aanzetten tot haat (tegen minderheden) en wegens aanzetten tot terrorisme – dezelfde uiting wordt dan onder beide bepalingen aangepakt. Het EHRM gebruikt soms ook de concepten “hate speech” en “glorifying terrorism” door elkaar in een aantal zaken tegen Turkije met betrekking tot de PKK, waardoor opruiing tegen de staat ook onder “hate speech” valt. Dit is opvallend omdat de ratio erachter verschillend is.

De Raad van Europa en de Europese Unie verplichten staten om het aanzetten tot terrorisme – waaronder ook het verheerlijken van terrorisme zou kunnen vallen – strafbaar te stellen middels een verdrag respectievelijk Kaderbesluit over het voorkomen van terrorisme. Het idee is dat optreden tegen terrorisme in een vroeg stadium – wanneer radicale uitingen worden uitgewisseld – bijdraagt aan preventie van terrorisme. Deze aanname wordt echter betwijfeld in diverse onderzoeken naar radicalisering. Ook het EHRM accepteert regelmatig strafrechtelijke veroordelingen voor het verheerlijken van terrorisme en indirect aanzetten tot terrorisme, terwijl daarbij niet altijd aandacht wordt besteed aan de vraag of een uiting inderdaad schadelijke gevolgen zou kunnen hebben (geen sterke relatie tussen uiting en consequenties). Het risico is dan dat uitingen eigenlijk worden verboden omdat ze zo'n heftige reactie teweegbrengen en de gevoelens kwetsen van veel mensen, terwijl er geen schadecomponent is. Dat risico doet zich ook gelden op de grens met fundamentalistische, religieus gemotiveerde uitingen, zoals het propageren van een theocratie: hoe vroeger men ingrijpt, hoe meer de waarden van staatsneutraliteit en tolerantie in het geding komen.

ACHTERGROND: RECHTSCULTUUR EN POLITIEKE CULTUUR

De verschillen tussen Nederland en Engeland zijn onder meer terug te voeren op de Nederlandse traditie dat de staat zelf de fundamentele rechten van burgers moet garanderen, terwijl in Engeland de focus ligt op fundamentele vrijheden *tegen* de staat. Het is in Engeland niet zozeer de rol van de wetgever om minderheidsbelangen mee te nemen, daar moeten burgers zelf voor opkomen (en dat doen oppositie, media

en belangengroepen dan ook; daarom worden voorgestelde wetten die vrijheden inperken vaak alsnog afgezwakt, maar niet altijd). In Nederland heeft de staat juist de taak op zich genomen om minderheden te beschermen tegen discriminatie door middel van het strafrecht over haatuitingen, en werd het nooit erg problematisch gevonden (ook niet door oppositie, de media en veel NGOs) dat de vrijheid van meningsuiting hiervoor werd ingeperkt. Ook onder internationale mensenrechtenverdragen (EVRM, CERD, IVBPR) geldt zo'n "positieve vrijheid"-benadering: de staat moet effectief de rechten van anderen garanderen door vrijheid van meningsuiting te beperken. Die verdragen hadden in Nederland lange tijd meer invloed dan in Engeland, en deels is dat nog steeds zo.

Deze visie op vrijheid van meningsuiting in Nederland is nog eens versterkt door de verzuilingsgeschiedenis: Nederland is altijd een land van minderheden geweest en de politiek leidde dat in goede banen door moeilijke zaken te "depolitiseren" en het echte debat achter gesloten deuren te laten plaatsvinden. Dit leidde tot een geciviliseerd debat waarin emoties nauwelijks plaats hadden en het grote publiek werd afgeschermd van discussie over bepaalde taboe-onderwerpen. Na een periode van meer polarisatie in de jaren '70 kwam in de jaren '80 pacificatiepolitiek weer terug, ook al was het land al grotendeels ontzuild. Dit bleef zo tot begin 21^e eeuw. Vrijheid van meningsuiting speelde dan ook lange tijd geen grote rol in de Nederlandse politieke cultuur. Lange tijd werd stevige kritiek op de multiculturele samenleving beschouwd als racisme, dus als taboe; het leidde tot morele verontwaardiging. Dit heeft naast de verzuiling ook te maken met de Nederlandse ervaringen in de Tweede Wereldoorlog en het schuldgevoel over de omgang met minderheden. Ook na de verzuiling bleef racisme in het publieke debat een taboe dat werd bewaakt door de elite, door "zelfcontrole" en waar nodig door rechterlijke uitspraken.

Er is niet heel diep nagedacht over de ratio achter het strafbaarstellen van haatuitingen; de overheid wilde in de eerste plaats het CERD goed implementeren, terwijl men daar in Engeland juist heel kritisch over was omdat het verdrag tot vergaande strafbaarstellingen verplicht. Bovendien werd in de daaropvolgende decennia in Nederland de terughoudendheid in het vervolgen overboord gegooid, en ook de uitbreiding van de wetgeving met nieuwe discriminatiegronden in de jaren '80/'90 bracht nauwelijks discussie op gang. Een voorstel voor een speciale vrijheid van meningsuiting-clausule achter de artikelen 137c/e werd niet aangenomen omdat de meeste parlementariërs zich niet konden voorstellen dat vrijheid van meningsuiting in concrete zaken soms zou prevaleren boven non-discriminatie. De veroordeling van politici als Janmaat kreeg haast geen aandacht; men vond het logisch dat uitingen als "wij schaffen de multiculturele samenleving af" strafbaar waren.

In de Engelse politieke cultuur werd een adversair, stevig debat nooit geschuwd. Daarnaast was racisme veel minder een taboe: de Tweede Wereldoorlog had daar een ander soort invloed dan in Nederland. Tot de jaren '80 publiceerden veel media

uitingen over immigratie die in Nederland als racisme zouden kwalificeren, en hadden invloedrijke politici zoals Enoch Powell bij de bevolking succes met hun anti-immigratiegeluid. Andere politici namen dit soort geluiden in verbloemde vorm over. De Engelse overheid wilde in die tijd dan ook niet aan ruime wetgeving zoals in Nederland; zij beschouwde uitspraken zoals “wij schaffen de multiculturele samenleving af” als gematigd racisme, waarvoor de vrijheid van meningsuiting zeker niet beperkt mocht worden. De houding ten opzichte van racisme veranderde in de jaren '90 met het toenemende besef van excessen zoals de Stephen Lawrence-affaire; de remedie tegen racisme werd in Engeland echter gezocht in het aanpakken van *hate crime* en niet in het aanpakken van haatuitingen.

Nederland is inmiddels een land met een min of meer uniforme meerderheid en kleinere minderheden (wat Engeland al langer was), en het beschermen van “gemeenschappelijke waarden” heeft aan belang gewonnen. Terwijl extreme uitingen vroeger werden geweerd uit het publieke debat, geholpen door strafwetgeving, zijn deze informele regels van het discours sinds de opkomst van het populisme omgeslagen: van consensus naar polarisatie. Vrijheid van meningsuiting is dan ook een soort “troefkaart” geworden in het publieke debat. Echter, bij sommigen heeft het gepolariseerde debat juist geleid tot een sterke neiging om het publieke debat nog steeds/weer “schoon” en netjes te houden, onder meer via uitbreiding van de wetgeving over haatuitingen zoals door het strafbaarstellen van Holocaust-ontkenning of indirecte belediging. In Engeland was het debat altijd al scherper; daar is juist met de opkomst van islamitisch terrorisme en het debat over multiculturalisme de vraag opgekomen of het niet wat minder kan. Toch zorgt daar de bezorgdheid over vrijheid van meningsuiting ervoor dat nieuwe wetsvoorstellen soms sterk worden ingeperkt, omdat velen uiteindelijk dat debat niet kwijt willen. In Nederland is de bezorgdheid over vrijheid van meningsuiting relatief nieuw, maar deze vrijheid is in korte tijd uitgegroeid tot een centraal thema in de retoriek van anti-immigratiepartijen en inmiddels ook tot troefkaart in het publieke debat als geheel. Wel wordt deze vrijheid door velen strategisch gebruikt om alleen het eigen recht te verdedigen, terwijl vrijheid van meningsuiting juist van het grootste belang is voor ideeën die men zelf verafschuwt. De Arabisch-Europese Liga stelde onlangs de hypocrisie in het Nederlandse debat over haatuitingen aan de kaak door een cartoon met een Holocaustontkenning te vertonen: terwijl het Moslims vaak verweten wordt dat zij zich te snel beledigd zouden voelen door anti-Islamuitingen, vinden veel mensen het niet meer dan normaal dat de strafwet wel optreedt tegen nationale gevoeligheden zoals het ontkennen van de Holocaust. In die zin kan gesteld worden dat vrijheid van meningsuiting in Nederland nog volwassen moet worden.

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CURRICULUM VITAE

Marloes van Noorloos (1983) received her LL.M degree in International and European Public Law (cum laude) from Tilburg University in 2007. From 2007 until 2011 she conducted Ph.D. research at the Willem Pompe Institute for Criminal Law and Criminology at Utrecht University, including a visit to Queen Mary, University of London to conduct comparative research.

Marloes is chairman of the Working Group on Criminal Law of NJCM (the Dutch section of the International Commission of Jurists) and a member of the Commissie Meijers (Standing Committee of Experts on International Immigration, Refugee and Criminal law). In 2010 she participated in the Nationale DenkTank (National Think Tank) where she worked in a multidisciplinary team of 20 Ph.D. candidates, Master's students and recent graduates to develop creative and practical solutions for the problem 'trust in institutions and in citizens in a changing society'.

Before starting her Ph.D., Marloes worked for the NGO Aim for Human Rights and as a student-assistant at the Department of Criminal Law at Tilburg University. In 2011 she returned to the Department of Criminal Law at Tilburg University to become an assistant professor.

Her publications include:

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