Chapter 2 – ANALYTICAL FRAMEWORK
Introduction

This chapter discusses the relevant international scientific literature on freedom of expression and the regulation of hate speech on the basis of four factors that are presented as opposite pairs: Actions versus Opinions; Public Debate versus Other Types of Expression; Facts versus Value judgments; and Race versus Religion. It is precisely these factors that can be assumed to be particularly relevant for the consistent determination of restrictions to hate speech on the ground of religion uttered in public debate, due to the fact that they form the core subject of controversies in literature. In fact, the factors regroup the more traditional presentation in literature of, on the one hand, the justifications of the right to freedom of expression and, on the other hand, the harms in hate speech that justify restrictions to this right. Therefore a certain interaction and overlap exist in the discussion of the factors. This applies in particular to the first two factors.

The first factor concerns the distinction between the performance of physical actions and the expression of opinions. It discusses different visions about what possible effects of the expression of opinions may justify a restriction to freedom of expression. More specifically, it discusses different notions of harm and perspectives on the harmful effects of hate speech that may result in different requirements for criminal liability for hate speech (para. 1). These different perspectives on harm and criminal liability for hate speech are inextricably linked to the value or function that is attributed to the free public debate in a democracy. Therefore, they are continued in the second factor that examines the distinction between contributions to public debate and other types of expression, such as ‘private speech’, which is directly directed at a particular individual or utterances that can be qualified as an abuse of rights (para. 2).

Subsequently, the third factor concerns the distinction between imputations of specific facts versus the expression of value judgments. In principle, false statements of fact about a particular person are not protected by freedom of expression. This does not apply – to the same extent – to negative value judgments about a person; in principle ample room must exist for such opinions. Difference of opinion exists to the extent this distinction may be relevant for demarcating free critical contributions to public debate from prohibited hate speech (para. 3). Finally, the fourth factor examines the role

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therein of the distinction between negative utterances about race versus negative utterances about religion.\textsuperscript{26} Some consider that the two are equally harmful and therefore the same legal restrictions must apply to both types of speech. Others make a stricter distinction between ‘classic racist hate speech’ and other forms of intolerant speech that, in their eyes, do not have a racist purport and are therefore less reprehensible (para. 4).

Although particular types of hate speech or hate speech bans may be discussed under one specific factor, all factors are relevant for the evaluation of consistency in restrictions to these types of hate speech and in the application of these hate speech bans. The paragraphs always conclude with a synthesis that defines the factors for the purpose of further analysis in this study. The chapter concludes with a synthesis of the factors thus defined that explain the interrelationship and meaning of the factors for the evaluation of consistency in restrictions to hate speech uttered in public debate (para. 5). Together the factors form an analytical framework for the analysis of the positive law. Following chapters will explore whether, and if so how, French law, Dutch law and international and European law make consistent choices as far as these factors/opposite pairs are concerned for the determination of restrictions to hate speech pertaining to religion uttered in public debate.

1. Actions versus Opinions

Free speech theories aim to determine what should be the extent of freedom of expression in a democratic society. The question arises as to which consequences of the expression of an opinion may be sufficient to justify a restriction to freedom of expression. Subsequently, the question is what are the consequences of hate speech? Also, what interests do restrictions to hate speech precisely protect? A final question then is how can the rationales behind restrictions of hate speech be translated into concrete legal requirements for criminal liability/statutory offences; how can utterances be qualified under those offences?

Generally a distinction could be made between the expression of opinions and conduct consisting of the performance of physical actions. Traditionally, the prohibition of the expression of opinions has been proposed due to a strict connection with contingent subsequent actions by third parties (1.1). A contra position may however propose to prohibit the expression of opinions that amount to hate speech even though they do not have a (strict) connection with subsequent actions, because of the intrinsic properties of hate speech and how it affects the members of a specific target group. This argument may, however, differ little from the argument of what negative effects hate speech may have in the mid-term on its victims; third parties and society at large

(1.2). Some may even envision expressions that amount to hate speech as forms of ‘actions’ and propose to prohibit it on that basis (1.3).

The first approach still underlies the requirement in American free speech doctrine that (hate) speech may only be prohibited if it poses a ‘clear and present danger’ or when it is ‘directed to inciting or producing imminent lawless action and is likely to incite or produce such action’ (1.4). European hate speech bans are, on the other hand, generally grounded in the second approach and therefore normally require a less strict connection with subsequent actions for criminal liability for hate speech (1.5). The paragraph concludes with a synthesis that defines the factor ‘Actions versus Opinions’ for the purpose of the further analysis in this study (1.6).

1.1 The distinction between actions and opinions and a strict connection between opinions and subsequent actions

The free expression of opinions is generally regarded as varying from the general freedom to act, with regard to its value, function, nature and effect. According to the traditional Millian speech and harm-principle, only an expression that very likely causes direct harmful conduct may therefore be prohibited. This principle has formed the rationale for the creation of offences of seditious libel and incitement to crimes.

The general freedom to act, the free expression of opinions and autonomy

In order to determine what the extent of freedom of expression in a democratic society should be, free speech theories generally strictly distinguish the expression of opinions from conduct consisting of the performance of physical actions. The expression of opinions is, like the exercise of all rights, not by definition free from consequences and therefore cannot be absolute.27 However, it has been argued that a ‘free speech principle’ implies that for the restriction of free speech a greater justification is required than for the restriction of other conduct, even when the consequences of speech are just as great as that of other conduct.28 The specific protection by the law of the right to freedom of expression, whether relative or compared to the general freedom to act, is grounded in the particular justifications that apply to the right to freedom of expression in specific. The three arguments that are generally considered to justify the right of freedom of expression in specific are: ‘the argument from truth’ (para. 3.1 infra), ‘the argument from autonomy’ (infra), and ‘the argument from democracy’ (para. 2.1 infra).

In this respect, *autonomy* essentially appears to be an argument for a general freedom to act. It primarily relates to human agency and the capacity to control one’s own destiny and make one’s own choices.\(^{29}\) Autonomous action is a condition of self-expression and self-fulfillment.\(^{30}\) Free expression and communication can be regarded as essential components of autonomy. This primarily applies to the autonomy of the *speaker*. When a person speaks he discloses his views and values to the world and thus chooses how to present himself to others. This is how a person defines himself and takes an autonomous place in society.\(^{31}\)

Furthermore, free expression and communication may also be regarded as an essential component to the autonomy of the *receiver*. If the state does not allow people to receive speech that may influence their beliefs, the state fails to respect people’s autonomy. A person can only be autonomous if he is as fully informed as possible and free to weigh the arguments for or against certain conduct.\(^{32},^{33}\)

*The Millian speech and harm-principle and the concept of the ‘délit d’opinion’*

A premise of liberalism is thus that freedom may only be prohibited on certain limited grounds. In *On Liberty*, first published in 1859, John Stuart Mill explained his harm principle, stating that: ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’\(^{34}\) Mill’s speech theory subsequently holds that only expression that is very likely to cause direct harmful conduct, such as the incitement to violence, justifies state coercion. This theory cannot be understood separately from Mill’s view on the need for state neutrality towards the content of expression in light of the special value attributed by him to the free expression of opinions, true or false, in (scientific) discussion (para. 3.1 *infra*). Mill had much faith in the intellectual exchange of thoughts. This does not signify that for Mill the expression of thoughts would be, contrary to other conduct, harmless to others, but that free discussion must be allowed – *despite* its possibly harmful effects –, because it leads to ultimate goods such as truth. In order for its restriction to be allowed, the opinion thus does not have to be followed by effect, but nevertheless a very strict probable connection must exist


\(^{33}\) Scanlon 1972, p. 204-226.

between an opinion and subsequent contingent harmful conduct.\textsuperscript{35} Mill’s harm principle can therefore be closely linked to the interest in the protection of the public order and the prevention of public disturbances of the peace through violent conflicts.

Likewise, the French 1789 Declaration of the rights of Men and the Citizen cites that ‘La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui’. With regard to freedom of expression, in the nineteenth century, Benjamin Constant expounded an idea similar to that of Mill, according to which the state may not prohibit the expression of an opinion as long as it does not support a criminal or punishable act. If expression produces such actions, it merges with them and must be prohibited on this ground. But the opinion that is separate from the action must remain free.\textsuperscript{36} By these words Constant articulated the French classical concept of the ‘délit d’opinion’. This concept of the ‘délit d’opinion’ thus strictly distinguishes actions from opinions where purposes of the law are concerned. It equally requires a very strict probable connection with subsequent contingent harmful conduct for the restriction of an opinion to be allowed and it thus equally appears to start from a narrow conception of harm to others limited to physical actions that also affect public order.

\textit{Seditious libel and public order}

In former times, harm to public order has formed a ground for the creation of offences of seditious libel that prohibit violent, revolting speech uttered by persons or groups directed against state authorities and offences penalizing for example the ‘incitement to crimes’. On the one hand, the view that the prohibition of such expression is legitimate in order to prevent harm to others is understandable. After all, one could argue that a primary task of the state is to preserve security and stability, because public order is necessary to ensure people’s rights.

On the other hand, the public order argument might afford the state large appreciation to restrict all kinds of speech that criticizes the government and is considered to be disturbing. It has been argued that the old offences of seditious libel could be justified, because at the time of their creation the power of the government was so weak that it had to be protected against public contempt in order to prevent its subversion. However, the prosecution for seditious libel became inappropriate when the government became better organized and its power increased.\textsuperscript{37}

Former offences of seditious libel have been characterized as the oldest form of ‘hate speech’ laws. However this subsumption/assimilation may be criticized. While the former concerned speech directed against the government, the latter concerned speech directed against racial and religious minorities. One

\textsuperscript{35} Mill 1936, p. 67-68.
\textsuperscript{36} See further Chapter 4.
could argue that – other than the state – the position of minorities in society is not so well assured that they are no longer in need of protection against racist attacks.\textsuperscript{38} Moreover, to the extent that the offences of seditious libel covered criticism of the government by the opposition, this is not appropriate in a democracy. This is different with regard to vehement criticism of certain minority groups in society that may sooner be considered as harmful to them.

Some therefore argue that, as far as restrictions to freedom of expression are concerned, the 19\textsuperscript{th} century conception of harm as envisioned by Mill is outdated and has nowadays been superseded by the concept of immaterial harm, such as psychological harm, harm to human dignity, (para. 1.4 infra) and speech act theory (para. 1.5 infra).\textsuperscript{39} However, the prevention of imminent harm to others as envisioned by Mill has not entirely lost its importance, because it still forms a ground for existing offences criminalizing sedition and the incitement to crimes. But it is true that the prevention of imminent harm in the Millian sense does not form the rationale underlying existing hate speech bans. According to the current conception of harm as defined by Feinberg, harm is a setback of one’s interest as the result of a previous wrongful act. Therefore it is a wrong in the sense that it violates one’s rights.\textsuperscript{40} For Feinberg, the prevention of harm to others thus defined is appealing as a justification for restrictions to freedom through criminal law due to its objectiveness.\textsuperscript{41} The questions thus arise: What is the legally relevant notion of harm in hate speech? How does hate speech violate the rights of others?

1.2 Contra position: the \textit{intrinsic} properties of opinions

Next to Free Speech theories based on the Mill inspired traditional distinction between actions and opinions, certain more recent theories have been developed that make a less strict distinction between actions and opinions and rather start from the \textit{intrinsic} properties of opinions. It is then proposed to prohibit hate speech due to its –racist – message alleged to harm the \textit{human dignity} and \textit{equality} of its victims. This argument may, however, differ little from the argument of what negative effects hate speech may have in the mid-term; on the victims, third parties and society at large.

\begin{itemize}
  \item \textsuperscript{38} Waldron 2012, p. 22; 26; 30.
  \item \textsuperscript{40} Feinberg, J., \textit{The moral limits of the criminal law, vol. 1 Harm to Others}, New York: Oxford University Press 1984, p. 36; 216.
  \item \textsuperscript{41} From a liberal perspective, restrictions based on the protection against moral decline (\textit{moral legal paternalism}) or the enforcement of public morality (\textit{legal moralism}) are however not valid. Although \textit{offence} may form a justification of a restriction to freedom under certain conditions. See: Feinberg, J., \textit{The moral limits of the criminal law, vol. 4 Harmless wrongdoing}, New York: Oxford University Press 1990; Feinberg, J., \textit{The moral limits of the criminal law, vol. 2 Offense to Others}, New York: Oxford University Press 1985.
\end{itemize}
Human dignity

The term *human dignity* figures in the preambles of several human rights treaties and constitutions as a ground for fundamental rights and freedoms.\(^{42}\)\(^{43}\) Dignity, thereby, underpins a so-called ‘legal humanism’.\(^{44}\) Dignity is a desirable state, an aspiration, rather than a right as such. The law can at best provide a circumscribing circle of rights, which in some of their effects help to preserve the field for a dignified life.

Different concepts of dignity can however be discerned.\(^{45}\) One concept focuses on *autonomy*. Dignity then concerns the intrinsic worth each individual has simply by virtue of being human. It does not confer any social status or social standing to a person but refers to the minimum dignity that belongs to every human being qua human and which is equal for all humans.\(^{46}\) It relates to human agency and can be associated with negative liberty and freedom from interference.\(^{47}\)

Indeed, the notion of human dignity is often regarded as underpinning freedom of expression. For example, Dworkin argues that a large freedom of

\(^{42}\) The first phrase of the preamble of the Universal Declaration of Human Rights of 1948 reads ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and Article 1 reads ‘All human beings are born free and equal in *dignity* and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*’.\(^{43}\) McCrudden, C., Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law* 2008, vol. 19, no. 4, p. 655-724. McCrudden analyses the historical development of human dignity as a legal concept. It became internationally recognized as such, when it was inserted into the preamble and first article of the Universal Declaration of Human Rights adopted by the UN after WWII in 1948. However, the term owed its success precisely to its neutral character. In fact, the delegates of the different countries could not agree on a theoretical basis for the human rights that the Declaration would list: religion, natural rights, liberal individualism or communitarian ideals. Under the heading of dignity all participants could abide by their own foundations and thus agree on the term without agreeing on its meaning.\(^{44}\) Feldman, D., Human Dignity as a legal value: Part 1, *Public Law* 1999, Winter, p. 682; 687. See also: Feldman, D., Human Dignity as a legal value: Part 2, *Public Law* 2000, Spring, p. 61-76.\(^{45}\) Rao, N., Three concepts of dignity in constitutional law, *Notre Dame Law Review* 2011, vol. 86, p. 183-271. The third concept not further discussed here concerns substantive conceptions of dignity that promote substantive judgments about the good life and can for example be connected to positive social and economic goods for a minimum standard of living.\(^{46}\) Rao 2011, p. 196.\(^{47}\) Rao 2011, p. 200; 203.
expression follows from recognition of the dignity of speakers.\textsuperscript{48} Likewise, the U.S. Supreme Court has considered that a large free public debate ‘will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of \textit{individual dignity} and choice upon which our political system rests.’\textsuperscript{49} This concept of dignity as autonomy thus does not appear to be the most appropriate argument for the regulation of hate speech. Although, the concept might underlie the later discussed idea that hate speech causes the ‘silencing’ of its victims and prevents them from using their free speech rights.

Another concept, however, focuses on dignity as \textit{recognition}. This concept depends upon a conception of the person as an essential part of the community. One can have dignity and a sense of self only through recognition by the broader society.\textsuperscript{50} Individuals must receive respect and recognition both from other individuals, who must recognize each other as citizens and community members, and also from the state, as embodiment of the community’s legal and social norms. The state must require and enforce ‘interpersonal respect’ between citizens, for example through hate speech bans.\textsuperscript{51} Although hate speech might result in discrimination or violence against members of targeted groups, the primary concern is thus how hate speech can damage a person’s sense of dignity by undermining membership within the community for the targeted individuals and groups.\textsuperscript{52}

Based on natural rights law, Heyman argues ‘Recognition is the most fundamental right that individuals have, a right that lies at the basis of all their other rights. At the same time, mutual recognition is the bond that constitutes the political community. For these reasons, individuals have a duty to recognize one another as human beings and citizens. Hate speech violates this duty in a way that profoundly affects both the targets themselves and the society as a whole.’\textsuperscript{53} Heyman considers hate speech to inflict serious injury precisely because of its content.\textsuperscript{54} Such speech is wrongful, because it constitutes a form of \textit{aggression} against others. Therefore it may be regarded as a breach of the peace in and of itself. It signals a condition of mutual hostility and animosity, a


\textsuperscript{50} Rao 2011, p. 244.

\textsuperscript{51} Rao 2011, p. 249.


\textsuperscript{54} Heyman 2008, ch. 6.
condition in which the parties intend to treat one another as enemies. The right to be free from aggression must be regarded as an aspect of personal security.\textsuperscript{55}

From a similar strand of thought, Waldron holds that hate speech expresses the idea that members of another group are unworthy of equal citizenship.\textsuperscript{56} It undermines their basic social standing, the basics of their reputation by associating ascriptive characteristics like ethnicity, race or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing. Hate speech is a calculated affront to the dignity of vulnerable members of society and a calculated assault on the public good of inclusiveness.\textsuperscript{57}

The argument that hate speech must be prohibited, because it violates human dignity as a public good may be criticized for being just as paternalistic and moralistic as the argument that blasphemy or pornography must be prohibited, because it violates public morality. A distinct argument would be that hate speech must be prohibited, because it affects the human dignity of its victims. However this latter argument may differ little from the rationale of the prevention of harm in the sense of the mid-term effects of hate speech.

The notion of human dignity thus may be criticized for being rather vague.\textsuperscript{58} This vagueness could possibly constitute a danger to freedom of expression. On the other hand, one could argue that human dignity may not have an independent significance, but rather be an additional condition for the restriction of expression that amounts to hate speech.\textsuperscript{59}

\textit{Equality}

The notion of equality is closely related to human dignity and often also regarded as underpinning freedom of expression. For example, Dworkin argues that the government must treat people with equal respect and concern and must not constrain liberty on the ground that one person’s conception of the good life is nobler or superior to another’s.\textsuperscript{60} In the context of freedom of expression, equality has been referred to as the ‘equal opportunity to speak and be heard’.\textsuperscript{61} A state may adopt positive measures to realize the equal access for minorities to mass media in order to assure the equal distribution of their ideas and viewpoints next to those of dominant groups.\textsuperscript{62}

\textsuperscript{55} Heyman 2008, p. 142-145.

\textsuperscript{56} Waldron 2012, p. 5; 39.

\textsuperscript{57} Waldron 2012, p. 5; 39.

\textsuperscript{58} McCrudden 2008.

\textsuperscript{59} Then it appears to solve several famous paradoxes; to which extent a liberal democracy should permit illiberal opinions; to which extent it should tolerate intolerant opinions.

\textsuperscript{60} Dworkin 1979, p. 272.

\textsuperscript{61} Sadurski 1999, p. 74.

The notion of equality might also form a ground to limit freedom of expression. Hate speech bans then could be regarded as a form of ‘affirmative action’. The question however arises whether and how hate speech could violate the equality of the victims it targets. Proponents of hate speech bans argue that by allowing racists to express opinions that amount to hate speech, the victims of such speech are prevented from exercising their equal free speech rights. There are two ways in which an unlimited existence of hate speech in society might cause the ‘silencing’ of its victims.

Firstly, hate speech may be very intimidating and it may cause victims to refrain from publicly expressing their views out of fear of receiving racist responses. Assaultive speech may have far reaching consequences for the victims of that type of speech, such as serious psychological and physical harms including fear, stress, withdrawal from society, damaged self-image, lower aspiration and depression, and economic harms including reduced opportunities in life through low performance in employment settings. One may argue that, even though hate speech may have such negative effects on its victims, its racist message does not actually prevent them from speaking.

Secondly, hate speech may have a negative effect on the public, who might experience the points of views of the targeted minorities as of less value, because they are stigmatized and denigrated by such speech. One may argue that hate speech does not necessarily have such negative effects on the entire public, but if so a racist speaker may only have tried to persuade the public to adopt his ideas and should not be responsible for the actions of the public. Moreover, the taking into account of the latter would bring us back to the rationale of the prevention of harm in the sense of the mid-term effects of hate speech. This does not alter the fact that hate speech may undeniably cause a hardening of public debate and also cause a distortion of relations within a community and the dissolution of the norms for mutual respect (dignity).

1.3 Opinions as ‘discriminatory actions’

A particular position is taken by those who advocate hate speech bans, because such expression would constitute discriminatory actions in and of themselves. The vision that hate speech should be prohibited because of its performative power has notably been advanced since the 1990s by the Critical Race Theorists (CRT). Their Theory of Discursive Violence considers the perspective of the victims of assaultive speech and argues that the identity of individuals is defined in

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63 Sadurski 1999, p. 100.
terms of ethnic and cultural bonds, while the life choices and deliberative capabilities of individuals are formed through contact with others.\textsuperscript{66} According to the theory, hate speech does not describe a racial social reality, but rather creates one and maintains racial hierarchy. It teaches minorities ‘their place’. Such racial categorization serves the interests of the dominant group.\textsuperscript{67}

The theory builds on the language philosophy called \textit{Speech Act Theory}. In his language philosophy, Austin distinguishes \textit{locutions} from \textit{illocutions} and \textit{perlocutions}.\textsuperscript{68} Locution is the content of an utterance. Perlocution is the effect of an utterance that consists of its causal consequences. Illocution is an action performed by saying something. An example of the latter is: ‘Muslims are not allowed in this bar’. This speech act constitutes discrimination, not because it causes the hearer to think in a certain way (perlocution), but because as actual conduct it constitutes unequal treatment. Words being illocutions can do many things, including subordinating others.\textsuperscript{69}

For CRT, racist speech in general consists of the structural subordination of a group based on an idea of racial inferiority.\textsuperscript{70} Racist speech acts can subordinate members of a group as follows: it ranks target groups as having inferior worth; it legitimates discriminatory behavior of others; and it deprives target groups of some important powers.\textsuperscript{71} Therefore, three criteria can be formulated to determine whether speech should be prohibited: when the message is of racial inferiority; when the speech is directed against a historically oppressed group; and where the speech is persecutory, hateful and degrading.\textsuperscript{72}

The viewpoint that hate speech \textit{literally} constitutes acts of discrimination is controversial. Firstly, a requirement in speech-act theory is that for a speech act to be effective, it has to be performed by someone who is in a position of authority. A historical example of an illocution that subordinates blacks is as follows: ‘Blacks are not permitted to vote’, which was expressed as an enactment


\textsuperscript{67} Delgado \& Stefancic 2004, p. 32.


\textsuperscript{72} Matsuda 1989, p. 2357-2358.
of apartheid law. But this speech act expressed by the average racist speaker who is has no authority on the matter is bound to fail or ‘misfire’.

Secondly, CRT base their argument on the premise that hate speech can constitute a prohibited form of conduct on the negative effects it has on the victims (severe psychological harms) and on the public who will regard and treat the victims as inferior. One may argue that there is no empirical evidence that the message of racial inferiority causes this kind of ‘silencing’. Moreover, CRT seems to use perlocutionary explanations to draw conclusions in illocutionary terms. Then again we are back to the rationale of the prevention of harm in the sense of the mid-term effects of hate speech.

On the one hand, using the metaphor of hate speech as discriminatory actions nevertheless appears to be a way to bring to the fore just how severely hate speech can actually affect the members of a particular group in society, who may experience such speech as acts of discrimination, and why, according to the CRT, it may be prohibited. Based on the relevant literature, the negative impact of hate speech may not be underestimated. Although the harm in hate speech may not reach the same level as facts that, for example, constitute a violation of one’s physical integrity, the harm inflicted by racist speech may be real and far from trivial.

On the other hand, speech act theory has also articulated the opposite argument that minorities can better resist their verbal subjugation by others by contradicting them in public debate and thereby change the meaning of such words, their force and thereby, their social position. As the (discriminatory) force of words is determined by their social, historical context, the state should not be afforded the authority to a priori criminalize hate speech in abstracto. This cultural analysis and external perspective thus disregards the distinction that – from an internal legal perspective – can be made between, on the one hand the creation of hate speech bans by the state as such, and on the other hand, the application of hate speech bans in concrete cases and the qualification of a specific utterance under a particular hate speech ban by the judge on the basis of a number of contextual factors.

76 Words - such as ‘nigger’ – would have no universal, fixed meaning.

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1.4 The ‘clear and present danger’ and ‘imminent lawlessness’ tests in American free speech doctrine

In certain legal systems the Millian speech and harm principle form the basis for the establishment of factual causation in criminal liability for expressions, as well as those that amount to hate speech. This can be illustrated by the American Free Speech doctrine that generally requires a strict connection between speech and subsequent conduct. A standard test used by American courts requires that speech may only be prohibited if it poses a ‘clear and present danger’. The U.S. Supreme Court has even considered that advocacy of violence or lawlessness is constitutionally protected ‘except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action’. In fact, this standard may be compared with the incitement to crimes. According to the Supreme Court this is not easily the case. Others opine that the evaluation of the imminence and likelihood of such action is a highly contextual matter. These strict tests are said to have been developed in reaction to the ‘bad tendency’ test used for example during WWI, which allowed the state to suppress expression of all kinds of anti-war sentiments as forms of sedition and incitement to violence against state authorities, because it had the ‘tendency’ to cause ‘future’ illegal conduct.

The stricter tests result from the basic principle that it takes a ‘compelling interest’, i.e. an extremely strong governmental interest, to permit restrictions to freedom of expression protected in the First Amendment. This may already be suggested by the text of the First Amendment itself that formulates the freedom as seemingly absolute and does not list the circumstances in which it may be restricted: ‘Congress shall make no law (…) abridging the freedom of speech, or of the press’. The standards of the threat of a clear and present danger or of imminent lawlessness cannot be understood separately from the special value American Free Speech Doctrine attributes to

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78 In Schenck v. United States, 249 U.S. 47 (1919) Justice Oliver Wendell Holmes wrote ‘Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances a to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done.’ P. 249 U.S. 51.


the free expression of opinions in the public debate that must function as a ‘marketplace of ideas’, which legitimizes state authority (the law), thus underpinning democracy. These high standards do not apply outside the context of a public debate; racist epithets when addressed to a citizen and likely to provoke his violent reaction, so called ‘fighting words’, can be prohibited (para. 2.1-2.2 and 3.1 infra).

In fact, the stricter tests express a strong preference for the individual liberty or freedom from state interference of the speaker and receiver. As a result, the state must afford a large freedom of expression and allow much ‘uncivil’ speech even when it violates values of equality or important community values. The criminalization of hate speech not likely to produce imminent lawlessness would be contrary to the First Amendment.84 America has, therefore, not created specific hate speech bans. It has been argued that such expression might be reprehensible, but that freedom of expression should precisely afford the ‘freedom for the thought we hate’.85 As a general principle, the expression of opinions may not rashly be prohibited on account of its content, meaning or message.86

American free speech doctrine is thus based on a strong distrust against government control over the content of expression.87 Content-based restrictions to freedom of expression may not entirely be prohibited, but they call for the strictest scrutiny. Moreover, the government must remain neutral with regard to different contents. It cannot restrict certain viewpoints, while allowing others; this would amount to ‘viewpoint discrimination’.88 The strict tests appear to be very neutral; prohibitions of speech are not based on content but on the consequences consisting of violent or illegal conduct thus ‘objective harms’. It can be argued that one cannot strictly distinguish such conduct from the message or ideas conveyed by the speech; the former may be provoked by the latter.89

For example, the U.S. Supreme Court has considered that public cross burning in the front yard of a black family by white people can signal a threat of violence against those black people, due to the history of cross burning by the KKK. It can thus constitute a ‘true threat’ and therefore, lack the protection of the First Amendment. Contrarily, cross burning during KKK gatherings is allowed

84 Schauer 2005.
87 Schauer, F., Media Law, Media Content, and American Exceptionalism, in: IRIS Special, Political Debate and the Role of the Media, the Fragility of Free Speech, European Audiovisual Observatory, Strasbourg 2004, p. 61-70.
as ‘potent symbols of shared group identity and ideology’; to ban such a
gathering is contrary to the First Amendment.90

The U.S. Supreme Court has even found a march of neo-Nazis carrying
swastikas through a predominantly Jewish neighbourhood permissible, despite
the hostility of its Jewish residents, including Holocaust survivors, to their racist
ideas.91 In this case, the demonstrators, however, might have also wanted to
provoke an angry reaction of the victims.92 In other circumstances, such violent
conduct may be performed by third parties who are incited to assault victims of
hate speech. It has been argued that such harm results from the fact that speech
is ‘mentally mediated’ by listeners. The latter should be solely responsible for
their responses or reactions to certain speech.93 The state, therefore, should only
interfere with the conduct that follows speech and never the speech that
precedes conduct.94

The requirement of a strict connection between opinions and
subsequent actions can be related to the concept of the ‘heckler’s veto’, according
to which the hostility of an ‘uncaptive’ audience against certain ideas cannot
justify the suppression of speech. The audience must impose self-restraint or
even avoid being confronted with, in their opinion, offensive speech. It has been
argued that even in extreme cases the speaker must be protected against an
intolerant audience, not the other way around, because promoting tolerance
against the speaker enhances the capacity for general tolerance in society.95

1.5 European hate speech bans

In European countries, the law generally requires a less strict connection
between speech and subsequent conduct than American doctrine, in order to
justify restrictions to speech.96 This will become apparent in the discussion of

92 Sadurski 1999, p. 197;199-200.
94 Scanlon 1972, p. 204-226. Later he changed this radical view: Scanlon, T., Freedom of
expression and categories of expression, University of Pittsburg Law Review 1979, vol. 40,
no. 3, p. 519-550.
90, no. 4, p. 979-1003.
96 Rosenfeld, M., Hate Speech in Constitutional Jurisprudence, A Comparative Analysis,
24, p.1523-1567; see several contributions to the theme issue ‘Symposium: An Ocean
Apart - Freedom of Expression in Europe and the United States’, Indiana Law Journal 2009,
vol. 84, no. 3, p. 809 et seq. An exception forms Hungary, see: Molnar, P., Towards an
improved law and policy on ‘Hate Speech’ - The clear and present danger test in
French and Dutch hate speech laws. Then, the criminalization of speech of a particular racist content or purpose is not regarded as fundamentally wrong. The offences are the outcome of a balancing act by the legislator of the interest of freedom of expression with other rights, interests and values, such as the respect for the equal human dignity, which have been for example, incorporated into the Constitution. National constitutional provisions protecting freedom of expression – and Article 10 of the European Convention of Human Rights (ECHR) – generally provide for such a balancing act by listing the interests for which the freedom might be curtailed. Freedom of expression then is not regarded as a right that is deserving of ‘exceptional’ treatment, but as one of several constitutional, fundamental rights.

The criminalization of hate speech is partly required by international treaties, such as the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), or certain European conventions. However, international and European institutions may not use the exact same standards. This also applies to different European countries that may criminalize hate speech to varying degrees based on its connection with subsequent acts of discrimination and violence. An important question, therefore, is whether expression may be prohibited as hate speech, because it may lead to intolerance, discriminatory views and possible future discrimination or violence; or whether a clearer connection must exist between speech and subsequent – prohibited – acts of discrimination and violence.

One could imagine a sliding scale of types of speech offences that criminalize particular expressions according to their more or less strict connection with subsequent actions. From the American perspective, with such bans legislators and judges find themselves on a ‘slippery slope’ that may result in censorship of unpopular speech.97 Indeed, a consistent norm must mark a spot somewhere on this gradual scale.

In fact, group defamations and insults and ‘incitement to hatred, discrimination, or violence’ may have the potential or are likely to eventually lead to illegal or violent actions. Therefore, they may be regarded as not directly harmful – in the sense of the Millian-harm principle. Group defamation and hate speech also have a more indirect effect. Such speech may cause a poisoned or even threatening atmosphere, set groups against each other and thereby affect social cohesion.

This notably applies to group defamation and insult laws. These generally aim to protect groups against racial epithets, insults and allegations that violate reputation, good name, honour or dignity based on race or religion and so on. They thereby primarily seem to protect the members of the group

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against mental distress and psychological harm or against devaluation in the eyes of others, rather than to protect against a provoking others to actions that disturb the public order. However, the law may elevate the threshold for liability by requiring that group defamations and insults are uttered with the aim to incite others to hatred against the victims. For example, in England, group insults are only punishable when they consist of ‘abusive, threatening or insulting words intended to stir up racial hatred and the racial hatred is likely to be stirred up thereby’.  

Incitements to hatred, discrimination, or violence may by their very nature be causally closer related to certain actions by others that affect public order than group defamations and insults. However hatred forms a particular attitude, also defined as an ‘extreme form of dislike’ and ‘discrimination’ forms a controversial political concept, not particular illegal actions. The question, therefore, is whether the expression is capable, likely or probable to provoke others to commit acts of discrimination or violence and whether hatred and disorder must actually occur. The public order argument may elevate the threshold for liability under hate speech bans.

However, in the context of hate speech uttered by one citizen or group and directed against another citizen or group, thus between citizens, the notion of public order might take on a different meaning than it does in the context of sedition and incitement to crimes uttered by one citizen or group and directed against state authorities. Public order might have a more substantial significance and refer to the preservation of the social order, an orderly democratic society free from discrimination. It could be argued that if no direct harm is required, then the public order arguments might merge into paternalistic and moral considerations. Another possibility is, however, that the mid-term effects of hate speech are already considered as harmful to society. This therefore concerns a different value conflict and a different notion of harm.

Another question is what kind of utterances may fall under hate speech bans. Must expression, in order to be punishable, explicitly, according to its exact wording, defame a group or incite to particular acts of discrimination or violence against a group or can more disguised forms of defamation and hate speech already be punishable. On the one hand, phrases of a direct and unambiguous discriminatory purport and goal, such as: ‘I urge all café owners to deny Muslims access to their bars’ seem more reprehensible than vague phrases, such as: ‘Stop the Islamization, Islam out of the country’ and: ‘Muslims have a backward culture’. On the other hand, it might be more effective and

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98 Noorloos 2011, p. 253 et seq.
100 According to Malik, ‘Hate speech restriction is a means of rebranding certain, often obnoxious, ideas or arguments as immoral, a way of making certain ideas illegitimate without bothering politically to challenge them, which is dangerous.’ Molnar, P., & Malik, K., Interview with Kenan Malik, in: Herz & Molnar 2012, p. 81,86.
successful for encouraging others to racial discrimination and violence to plant a seed in the mind of others through negative imaging and vague allegations. Therefore, more indirect, disguised forms of hate speech can, given the specific context in which they are uttered, amount to a prohibited form of group defamation or incitement to hatred and discrimination against a particular group.
1.6 Synthesis Actions versus Opinions

There are good reasons for the state to prohibit hate speech by law. Hate speech may be prohibited because of the effect it has on the members of its target group, on third parties and due to the effect it has on society at large. Yet, the primary reason to prohibit hate speech is always the prevention of harm to persons and the protection of their rights. Restrictions to hate speech are, however, not grounded on the classical concept of harm by Mill. In fact, the perceived harm in hate speech is not the direct physical harm resulting from the imminent violent and lawless actions, which such speech – regardless of its content – can produce. This speech must also directly threaten public order.

Rather, hate speech can be considered harmful, because it can cause a poisonous atmosphere, set groups against each other, affect the social climate and form a breeding ground for future acts of discrimination and violence; it is therefore prohibited on account of its mid- and long term effects. Hate speech may then be prohibited precisely because of the racist message or ideas it conveys that are likely to cause such harmful effects. When hate speech is prohibited according to its more or less strict connection with subsequent acts of discrimination or violence, a consistent norm must mark a spot somewhere on this gradual scale.

Hate speech can also be considered harmful, because it affects the dignity of the members of its target group, it is therefore prohibited based on the direct effect it has on its victims (not via actions of third parties against them). The perceived harm in hate speech is that it undermines people’s basic social standing by associating characteristics such as race, ethnicity or religion with attributes that should disqualify someone from being treated as a member of society in good standing. Hate speech may then be prohibited precisely because of the racist message or ideas it conveys that express the idea that members of another group are unworthy of equal citizenship. When hate speech is prohibited because its affects the dignity of its victims, a consistent norm must clarify that ‘dignity’ must not be understood as a ‘public moral’ separate from its harm to persons.

In fact, hate speech that affects the dignity of its victims can have far-reaching consequences for them, such as psychological harms, including fear, stress, low self-esteem, and low esteem by the public and can thereby cause their ‘silencing’. Such hate speech also causes a hardening of public debate and the dissolution of norms for mutual respect. The argument that hate speech may be prohibited to prevent the harm it causes to people’s dignity thus underlies, on a more fundamental legal level, the rationale of the prevention of harm in the sense of the mid-term effects of hate speech. Although these identified types of harm in hate speech must not be underestimated, hate speech does not literally constitute acts of discrimination in and of itself; the law cannot prohibit hate speech on that basis.
2. Contributions to Public Debate versus Other Types of Expression

An important justification for freedom of expression and the free political and public debate is its particular value or function in a democracy (2.1). Scholars, however, disagree on how to define free ‘public discourse’ and to what extent the government may delimit it, because the existence of free public discourse legitimizes state authority and the laws of the state. Whether scholars think hate speech should be either prohibited or allowed in public discourse is, in the end dependent upon their different conceptions of harm and perspectives on the harmful effects of hate speech (2.2). The question arises as to whether an ultimate limit may be reached when contributions to public debate amount to an abuse of the right to freedom of expression (2.3). Subsequently, one may question whether politicians and the media have either a particular freedom to or a particular responsibility in the exercise of the right and whether one can distinguish between different typologies of hate speech offenders (2.4). The paragraph concludes with a synthesis that defines the factor ‘Public Debate versus Other Types of Expression’ for the purpose of the further analysis in this study (2.5).

2.1 Democracy; popular sovereignty and political participation

Freedom of expression is generally regarded as having a particular value or function in a democracy. Freedom of speech is a sine qua non for a democracy, a tool for democratic decision-making by means of public and political debate.\textsuperscript{101} However, the notion of democracy may be interpreted in different ways. One component of democracy is popular sovereignty, i.e. the procedure of decision making that results in the control of a majority of the people over the government.\textsuperscript{102} The commitment to popular sovereignty creates a strong right to freedom of expression. If the people are the ultimate source of political authority, they must be able to speak to each other about all matters within the scope of this authority.\textsuperscript{103}

This protects the interests of the audience as well. Citizens must be exposed to a wide range of views and be provided with enough information to hold government accountable. The commitment to popular sovereignty thus

\textsuperscript{101} Schauer 1982, p. 35 \textit{et seq.}; Barendt 2005, p. 18.
\textsuperscript{102} Meiklejohn’s procedural definition of self-governance in which the people are ultimately responsible for government decisions by means of their direct or indirect decision-making comes close to the term \textit{majoritarianism}. See: Meiklejohn, A., \textit{Political freedom the constitutional powers of the people}, Westport, Conn.: Greenwood Press 1979.
creates a rather narrow right to freedom of expression that is limited to political speech. From this perspective, the right to freedom of expression merely serves – the maintenance of – democracy. One could argue that extreme speech, such as hate speech or the advocacy to overthrow the government, lacks this purpose.

The people may thus, in the exercise of their sovereignty, adopt legislation that restricts such extreme speech. They may freely decide to no longer tolerate certain speech in the future. This may be regarded as undemocratic and illiberal. Moreover, they may even – through a democratic process – abolish the democratic government system, if no mechanisms are put in place to ensure its preservation.

To counter majoritarian tendencies, theorists of democracy often argue that minorities in society should be protected against the ‘tyranny of the majority’ by putting in place mechanisms that ensure equal participation of minorities in the deliberative political process and that legitimize the rules adopted by the majority. Another component of democracy therefore is the individual right to equal political participation, including not only the right to vote but also the right to participate in the discussion by which public opinion is formed.104

This right prevents governments from using their power to exclude speakers from this discussion, just because they disagree with their views. One could argue that extreme speech, such as hate speech and speech challenging the government, must be tolerated in public debate, because the state may not determine the boundaries of that public debate. From this perspective, democracy does not form a foundation for free speech, but the equal right to political participation through the exercise of free speech underpins democracy.105 One could object that hate speech then must still be prohibited in public debate, precisely because it affects this equal right to political participation of its victims.

2.2 Public discourse

Democracy, characterized by popular sovereignty and the right of political participation, is connected with the notion of self-determination of people that forms the basis for self-governance.106 Every citizen has the right to participate in public debate by which the people govern themselves through the formation of public opinion. Another term for this process of public opinion forming is ‘public

104 Weinstein 2009, p. 27.
105 Barendt 2005, p. 20.
discourse’. The question arises as to how to determine whether expression forms part of public discourse. One way would be by focusing on the content of speech. It is generally argued that public discourse is not limited to political speech in the narrow sense of holding government accountable. It includes all ‘speech concerning the organization and culture of society’ or ‘all matters of public concern’ – as opposed to ‘matters of purely private concern’. However, the term ‘matters of public concern’ is open to different interpretations. It could relate to speech about matters that ought to be relevant to democratic self-governance. Criticism of the government, its officials and of public figures falls under this category. But it could also relate to speech about matters that interest large numbers of people, for example speech about celebrities. Interpretations of the term thus risk being either under or over inclusive.

Another way would be by focusing on whether speech is distributed ‘publicly’ through ‘democratic forums’, such as public places and meetings and the media, including newspapers, literature, film, television, the Internet. Such dissemination then supposes that a speaker has intended to contribute to public debate and that his speech reaches a relatively large audience. Speech distributed through media that form part of the ‘structural skeleton’ necessary for democratic self-governance, might be considered part of public discourse, regardless of its content. However, overtly political speech distributed through such media might be regarded as forming part of ‘core’ public discourse. This may include political criticism of public officials or the government’s immigration and integration policy. Contrarily, speech about celebrities, the advertising of products or the proclaiming of a religion and proselytism may not be regarded as core public discourse.

The U.S. Supreme Court combines these approaches. The Court has considered that ‘expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values’ and that speech on matters of ‘public concern’ is ‘entitled to special protection’. Contrarily, commercial speech and indecent speech are afforded less protection. Even less protection is afforded to private, face-to-face, speech consisting of so-called ‘fighting words’, defined by the Court as ‘personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to

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111 Post 1990, p. 675-676.
provoke violent reactions’. Such speech may be categorized as ‘low value speech’ that does not further the core of the First Amendment values. The contours of public discourse may however run straight through the categorization often made by courts in artistic, humoristic, commercial, religious and political speech. It is generally accepted that some of these domains of speech are more valuable than others. Political speech is generally regarded as having the strongest claim to be free from regulation. One could, however, argue that the state must afford equal protection to speech in all of these domains. The distinction between these categories of speech appears difficult, precisely because the government may not delimit the contours of public discourse. Moreover, categories might partly overlap. One could think of politically engaged art and humour or religious advertisements.

Expression that qualifies as hate speech could take any of these forms. For example, a humoristic cartoon depicting the terrorist attack on the WTC in New York with the text ‘everybody has dreamt about it, Hamas did it’ published right after on 9/11; a novel or poems that glorify the Holocaust; a political pamphlet with the text ‘Blacks out of the country, white people first’; the advertisement of Nazi memorabilia; or the religiously motivated proclamation that homosexuality is a sin that must be exterminated may all incite to hatred, discrimination or violence. A different question is whether expression must form a qualitative contribution to a public debate. This appears central to the highly debated question of whether hate speech should be prohibited or allowed in public discourse. Scholars answer this question not only according to what in their view hate speech is and does, but also how they interpret the individual right to equal political participation in the light of their conception of the state as a political entity.

Post strictly distinguishes the domain of community, i.e. the social life governed by shared mores and norms, from the domain of democracy, i.e. the political domain where citizens come to identify with the actions and decisions

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116 Cohen v. California, 403 U.S. 15 (1971). In 1942 the U.S. Supreme Court more broadly defined fighting words as ‘those which by their very utterance inflict injury or tend to incite an immediate breach of the peace’ in: Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

117 Stone 2009, p. 283. Over the years the U.S. Supreme Court has characterized other categories of low value speech, including express incitement of unlawful conduct, threats, fighting words, false statements of fact, obscenity, and commercial advertising.

118 In the American context, a well-known method to evaluate restrictions to speech is the use of different ‘levels of scrutiny’ depending on social value of the speech in question. Then, ‘low value speech’ calls for a ‘lenient scrutiny’, while ‘high level speech’ calls for a ‘strict scrutiny’. Restrictions to the latter will sooner constitute a violation of freedom of expression than restrictions to the former.

119 Post 1990.

of their government through (potential) participation in public discourse (collective self-determination). Of the former domain, the state may prohibit hate speech, because it may conflict with community standards of civility and respect. In the latter domain, the state, itself consisting of different communities, must, however, remain neutral to competing civility rules and the ‘marketplace of communities’. As public discourse must be open to the opinions of all, within public discourse hate speech must be immune from regulation. The ‘paradox of public discourse’ is, however, that public discourse requires rational deliberation, which itself appears to depend on the observance of the civility rules it negates.

According to Post, hate speech must thus be allowed in public debate, not only because public debate is indispensable for democratic decision-making and legitimizes state authority (the law), but also because for Post hate speech merely violates certain personal moral standards, the compliance of which ought to be a purely private matter. Even though hate speech might affect the dignity of its victims or lead to acts of discrimination in the mid- and long term, the wrongfulness of such speech is to be decided in the public debate itself that underpins a democracy. Post’s theory, in the end, rests on a vision of the state as a political entity strictly separate from civil society and a strong public/private divide.

One could argue that a society cannot be strictly divided into different domains. It is contended that the right to freedom of expression, because of its inherent individuality, carries sources of tension that, in the course of exercising the right – which inevitably takes place in the community and before the community – erupt almost unavoidably. A harmonious balance must be created between the exercise of the individual right and the interest of the community. Therefore, freedom of expression is an ideal, an ‘unreachable mirage’ that we are striving to reach, while taking into account certain community considerations.

In the natural rights tradition, the state is envisioned as a ‘social contract’ through which individuals establish a community for the mutual preservation of their rights. This conception of the state still underpins the French Republic (Chapter 3, para. 1.5 infra). Within the state, citizens, therefore, still have the duty to respect each other’s natural rights. They must view and recognize each other as free, equal, rational persons. Such mutual recognition, therefore, may also form a precondition and an integral aspect of public discourse itself; as hate speech denies such recognition, it must be banned within public discourse.

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The same conclusion may be drawn from Habermas’ theory of the ‘Deliberative Democracy’. Habermas argues that the democratic decision-making process consists of an on-going cooperative, rational communication between citizens that is focused on consensus on elementary moral values. One could argue that hate speech does not form rational communication aimed at consensus, but is aimed at subordinating others. Therefore, it may not comply with the presuppositions for the deliberative process, being that no one capable of making a relevant contribution has been excluded; participants have an equal voice; they are free to speak their honest opinion; and the process is free from coercion. Other than Post, these perspectives thus presume that hate speech does not merely contravene morals, but causes actual harm to its victims and violates their rights. The regulation of hate speech in public debate thus is not merely grounded in ‘community standards of civility and respect’. Hate speech then must be prohibited in public debate due to its direct consequential effects and effects in the mid- and long term; by denying the recognition of the equal dignity of the victims, it affects their position in society and also affects their equal participation in public debate (‘silencing’). Such equal participation is indispensable for democratic decision-making focussed on reaching consensus about the law.

However, Mouffe objects that there are limits to consensus in a democracy, because many disagreements exist that cannot be resolved through deliberation and discourse. By attempting to build consensus, democracies precisely oppress differing opinions, races, classes and worldviews. A ‘radical democracy’ must, however, not let particular power relations in society suppress conflicts, but must accept and channel difference and dissent. This is the precise basis for the allowance of extreme speech in public debate to a great extent. The political debate may indeed be characterized as characterized by framing, stereotyping and hostility against political opponents and this may indeed even be considered necessary to bring color to democracy. One may therefore accept these means in order to consolidate or change particular power relations in society. However, one could argue that this still does not justify the use of hate speech in public discourse that causes harm to minorities, for example, through their stigmatization. In the main, scholars seem to agree that freedom of expression and the existence of a free, lively, inclusive public

126 Only then will citizens experience the process and its results as responsive to their ideas and values and will democracies be stable and legitimate.
128 Habermas & Rehg 1996.
discourse is of fundamental importance to the proper functioning of democracy, but in the end their different conceptions of harm and perspectives on the harmful effects of hate speech appear to determine whether they think hate speech should be prohibited or allowed in public debate.

2.3 Abuse of rights

One can nevertheless discern two ways in which freedom of expression and democracy may interrelate. Firstly, citizens have the right to freedom of expression and its free exercise underpins democracy. From this perspective, the prohibition on the utterance of hate speech in public debate may be regarded as ‘undemocratic’. Secondly, freedom of expression exists within democracy. From this perspective, the prohibition on uttering hate speech in public debate may be regarded as necessary to prevent excesses of unlimited democracy. The extent of the freedom to express hateful speech in public debate then, in the end, depends on the particular conception of the constitutional state.

For example, according to the German concept of the ‘wehrhafte or streitbare Demokratie’, the constitutional state has extensive powers and duties to defend the liberal democratic order against those who violate its basic constitutional principles or want to abolish it. In Germany, freedom of expression is colored by the constitutional basic value of the inviolability of human dignity. Different versions of the ‘militant democracy’ are however imaginable. One important common tool may form the prohibition of the abuse of rights, i.e. the use of rights aimed at the destruction of the fundamental rights and freedoms of others.

Hate speech might, under certain circumstances, constitute an abuse of the right to freedom of expression. Hate speech bans may be used, when democracy is at stake. This might be considered the case, for example, when gross criticism on particular minorities uttered in public debate in the course of elections by a populist party, that strives to decrease the rights of such groups,

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133 Grundgesetz [GG] Article 1. Furthermore, the right to freedom of expression must be balanced with the right to personal honor, a constitutional right protected in Article 5(2) of the German Constitution.
finds acceptance with the public and the party tends to obtain a political majority in a country.

The question is, however, to what extent one can distinguish hate speech directed against minorities from speech directed against the government. Insult or hatred against a politician may be interpreted as criticism of the government, when the insult or hatred concerns his public function. Likewise, the insult or hatred against minorities might also be interpreted as criticism of the government, when the insult or hatred concerns, for example, the failure of the government’s minority or immigration policy. Both may be considered part of a free debate on matters of public concern.

Yet, there is a distinction between the two. Some politicians are political officials who bear responsibility for the political acts of the government, whereas other politicians strive to obtain political power. Therefore, harsh criticism on the actions of such politicians must be possible. But the limits to legitimate criticism on the government via gross comments about minorities that are at their expense may be reached earlier.

The question arises as to where to draw the line with regard to far-reaching political and legislative proposals in the context of a vehement political debate on immigration and integration issues that, if they were effectuated, could violate an existing prohibition of discrimination. An example could be the proposal to expel Muslims from the country, purely based on their adherence to Islam. One could argue that democracy requires the allowance of such proposals in political debate, because they may only be realized after a political party that advocates such a proposal has – in a democratic manner – gained enough political power and support. After all, such proposals do not directly incite third parties to commit concrete described acts of discrimination themselves.

Such discriminatory proposals inevitably have a negative effect on the members of the target group. However, a state may assume that free public and political debate is of such vital importance that the harmful effects such discriminatory proposals may have on its victims – the effect on their dignity and on their possibilities to participate in public debate or of being discriminated – must be taken for granted and that the protection of the public debate prevails. Then the question is: what is the ultimate standard for determining if such proposals are excessive?

One could require a strict connection between a political proposal and possible disturbances of the public order by the risk of direct, subsequent acts of discrimination by third parties or violent conflicts between groups in society – which result in imminent lawlessness. Then the state might only take a seemingly neutral position as regards the discriminatory content of expression, because the establishment of such a link might precisely require an evaluation of the content of the proposal concerned and how its purport may be received by the public given the particular social context, in which discrimination and violence against the particular group exists to a certain extent. Moreover, the state – that in first instance may have restricted hate speech to prevent harm to
dignity and harms in the mid- and long term – would fall back on a more narrow conception of harm through direct actions in the Millian sense that does not underlie the regulation of hate speech.

A more appropriate, transparent, substantive standard for excessiveness could, therefore, be whether expression constitutes an abuse of rights. This clearly requires an evaluation of the discriminatory content of a proposal, i.e. whether its aim is the destruction of the fundamental rights of others, which the constitutional state guarantees without distinction based on race or religion. This standard would leave ample room for many far-reaching proposals as a solution for existing problems in society, but the outer line is drawn with the violation of people’s equal fundamental rights. Such expression endangers the ‘public order’ in the sense that it endangers the interest in an orderly democratic society free from discrimination. This, therefore, concerns a different value conflict and a different notion of harm; as may be the case in the previous example of the proposal to expel members of a particular minority group from a country.

It has, however, been argued that discriminatory hate speech must be permitted in public debate in order to legitimate the existence of anti-discrimination laws. Opponents of discrimination laws must not only have the opportunity to vote, but also to voice against them. Through discriminatory hate speech they can express their dissent and ‘blow off steam’, but at the same time respect the anti-discriminations laws, with which they disagree. Generally criticism uttered in the context of a vehement political debate on immigration and integration issues takes a less concrete form than criticism of discrimination laws. It may rather consist of suggestive language through all kinds of negative associations and ‘framing’, for example utterances that connect ‘islamization’ and Muslim-immigration with increased crime rates or economic decline. Such forms of stigmatization harm the dignity of the minorities concerned, while they do not formulate any solutions to the indicated problems. In such cases, should the public debate argument honestly prevail?

2.4 The special position of politicians, the media and a typology of offenders

In principle, the possible special protection of contributions to public debate may apply equally to the contributions of all citizens participating in the debate. The question arises as to whether a distinction may be made between different participants within public debate. It has been argued that hate speech regulation has largely been a reaction to WWII and the hate speech perpetrated in Nazi Germany by the government as part of its official ideology and policy, but that

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nowadays hate speech is primarily used by *opponents* of the government and members of marginalized groups that hope to achieve political power.\(^\text{137}\)

One could argue that notably a politician – of the opposition – must have the opportunity to partake in public debate and criticize the government. This forms the core of a democratic society. Political criticism uttered by a politician pre-eminently qualifies for the protection of freedom of expression, also in the context of immigration and integration issues. One could argue that a politician has a bigger responsibility to weigh his words and to avoid inciting to religious intolerance, hatred, discrimination or violence. Therefore, restrictions on his political speech may be sooner justified. In fact, politicians strive to obtain the support of citizens for their ideas. This is precisely why they may be aware of the effect of their speech. Furthermore, they may be considered to take into account the principles of a democracy, precisely because they strive to obtain political power. The relationship between the special freedom and the special responsibilities of politicians is thus a complex one.

To a certain extent this special protection also applies to journalists or the media in general. They too are regarded as indispensable in a democracy, because of their specific role. On the one hand, they may be entitled to a large freedom of expression, because they provide access to information and thereby ensure that citizens can hold government accountable. On the other hand, they may have a bigger responsibility, because they may influence the shaping of public opinion, the placing of issues on the political agenda and the success of politicians and political parties. A prohibition of the ‘dissemination’ or ‘spreading’ of racist propaganda and all ideas based on hatred may in particular concern the media.

From an anthropological perspective, speakers who use hate speech in public debate could be categorized in different types of offenders. One could for example differentiate between ‘ideologists’, ‘instrumentalists/ activists’ and ‘incidentalists’.\(^\text{138}\) Ideologists consciously – and often structurally – violate hate speech bans, out of pure conviction. The same applies to instrumentalists/activists, who are more calculative; they generally aim to use their criminal prosecutions for their own political purposes. Finally, incidentalists do not, in their own experience, consciously violate the law. They do not form part of radical political parties or groupings and their utterances are less extreme.\(^\text{139}\) For the application of hate speech bans, these types of offenders may not be translatable into particular responsibilities, but may be translated

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\(^{137}\) Despite the general increase of hate speech among mainstream political and social actors in the aftermath of the 9/11 attacks. Furthermore, hate speech may be used by members of groups long victimized by racist policies and rhetoric (blacks) against their perceived racist oppressors (whites). See: Rosenfeld 2012, p. 244.

\(^{138}\) Vrieling 2010, p. 466 *et seq.* This categorization is, however, not confined to contributions to public debate as referred to in this study.

\(^{139}\) Vrieling 2010, p. 467.
into criteria for the determination of the intent of the speaker, the qualification of utterances and the severity of the sanction.
2.5 Synthesis Public Debate versus Other Types of Expression

The existence of a free, lively and inclusive political and public debate is of fundamental importance to the proper functioning of democracy and for the legitimation of state authority (the law). Therefore, the state must set the contours of the political and public debate broadly; it may include speech on all matters of public concern and/or speech distributed publicly through all kinds of democratic forums. Overtly political speech, such as criticism of public officials or government policies, distributed through mass media forms part of ‘core’ public discourse. Given their special value, such contributions to public debate are entitled to a higher level of protection than speech that does not have this purpose.

In principle, many extreme and unpopular political opinions must therefore be allowed in public debate that may be characterized by a certain vehemence and hostility against political opponents and views. Such expression should not be prohibited, merely because it would contravene personal standards of morality, civility or respect. Contrarily, in principle, utterances that amount to hate speech against particular minorities in society do have a special position in public debate and may therefore be prohibited, precisely because of the harm it inflicts on its victims and the social climate, including the effect on the possibilities of its victims to participate on an equal basis in public debate; hence their right to equal political participation.

A state can nevertheless consider that in certain cases free public and political debate is of such vital importance that the harmful effects a particular form of hate speech may have on its victims – the effect on their dignity, on their possibilities to participate in public debate or of being discriminated – must be taken for granted and that the protection of the public debate prevails. This notably applies to discriminatory political proposals by politicians that do not directly incite citizens to commit concrete described acts of discrimination themselves, but if effectuated might violate an existing anti-discrimination law. A consistent norm must then clarify its ultimate standard for determining when such proposals are excessive.

In light of the foregoing, it would be inconsistent to set the outer limits of political proposals with the direct risk of disturbance of the ‘public order’ through violent conflicts between groups in society, thus imminent lawlessness. Then the state would fall back on a conception of harm through direct actions in the Millian sense that does not underlie the regulation of hate speech. A more appropriate standard can be that public debate must leave ample room for far reaching proposals as a solution to existing problems in society. The outer line is drawn, however, when political proposals constitute an abuse of rights, because they violate people’s equal fundamental rights. Such expression endangers the ‘public order’ in that it negatively impacts on the interest in an orderly democratic society free from discrimination. This thereby concerns a different value conflict and a different notion of harm.
3. Allegation of Facts versus Value Judgments

An important justification for free discussion without state interference is the search of truth. The political and public debate is, therefore, also envisioned as the ‘marketplace of ideas’ (3.1). As far as the setting of restrictions to public debate is concerned, free speech doctrine, however, generally distinguishes the expression of value judgments from statements of fact. The distinction between facts and value judgments is notably relevant in the context of defamation law (3.2). The question arises as to whether this distinction may be relevant for determining liability for hate speech uttered in public debate, notably when it consists of group defamation, and if so, whether the distinction is consistently made in the application of hate speech bans (3.3). This also applies in particular to one form of hate speech; Holocaust denial (3.4). If hate speech is prohibited, the question arises whether hate speech bans may be of a criminal and/ or civil nature (3.5). The paragraph concludes with a synthesis that defines the factor ‘Allegation of Facts versus Value judgments’ for the purpose of the further analysis in this study (3.6).

3.1 Truth and the marketplace of ideas

Freedom of expression of opinion is generally regarded to be indispensable for the search for truth.\textsuperscript{140} The search for truth is a way to further knowledge, but also a way for individuals to develop their talents and to reach their potential, that is self-realization. For these reasons, in On Liberty (1859) John Stuart Mill argued that the authorities should not suppress opinions based on their alleged falsity, because silenced opinion may be true. The authorities may deny its truth, but we can never know for certain whether an opinion is true or false. To deny this is to assume our own infallibility.\textsuperscript{141}

It is through the public exchange of different views that truth can be discovered and justified. In a free and open discussion truth-claims can be tested and the truth eventually will prevail.\textsuperscript{142} Even when accepted opinions are in fact true, Mill says it is still good to continuously challenge such opinions because those opinions will only be held stronger. Moreover, accepted opinions will often only be partially true and rejected opinions will only be partially false. Therefore, knowledge will increase if we allow opinions accepted to be true to be refined by opinions accepted to be false.\textsuperscript{143}

\textsuperscript{140} For criticism on the justification of truth see: Barendt 2005, p. 8 et seq.
\textsuperscript{141} Mill 1936, p. 20.
\textsuperscript{142} Mill 1936, p. 42.
\textsuperscript{143} Mill 1936, p. 55; summary of the argument on p. 63-64.
Mill’s speech theory has been criticized for failing to adequately consider the possibility to suppress opinions for reasons other than their alleged falsity – except for the prevention of violence. Mill regards the increase in knowledge as a value that has priority over almost any other good. However, restrictions to speech are often motivated not by epistemic goals, but for other reasons. One could argue that even if a suppressed view were true, losing that truth may be considered a price well worth paying to achieve these other goals.¹⁴⁴

For example, it has been argued that even if there were racial correlated differences in human intelligence, allowing such discourse might be considered undesirable, because it may increase racial discrimination. As we have seen, hate speech bans may aim to protect people’s equal dignity, create a comfortable living environment or lessen the degree of religious or racial tension and discrimination. Hence, there could be a social value in the suppression of a view that would be largely or entirely independent of the truth or falsity of the view.¹⁴⁵ The question is whether Mill’s theory is applicable outside the context of a purely scientific discussion?

Nevertheless, a famous metaphor for the search for truth in the political domain is the concept of the ‘marketplace of ideas’, formulated in American free speech doctrine by U.S. Supreme Court judge Holmes as: ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’.¹⁴⁶ In other words, truth, or at least the best idea, will emerge out of the competition of ideas in a free public discussion.¹⁴⁷ The concept of the marketplace of ideas is based on an analogy to the economic concept of a free market and does not – like Mill does – start from a coherent, objective notion of truth that can actually be discovered, but from a relative, subjective one: truth is the mere outcome of the process of discussion. Therefore, according to American free speech doctrine, in principle even the most extreme or hateful ideas can be allowed in the marketplace of ideas and can legitimately become a ‘political truth’ when a majority opts for them.

One could, however, question whether the marketplace of ideas will always produce the truth or the best idea. The concept may be criticized for overestimating the capacity of individuals to use their own reasoning to distinguish between right and wrong.¹⁴⁸ For example, the question is whether

¹⁴⁸ However, Milton argued that individuals should have unlimited access to the ideas of others in a free and open encounter precisely to properly exercise their reason. See: Milton, J., Areopagitica and other political writings of John Milton, Indianapolis: Liberty Fund 1999.
racist ideologies are susceptible to argument? Moreover, ‘public opinion’ may form a power factor that hinders the critical opinion forming of individuals. In the end not the best idea, but the most popular idea may survive. In fact, which ideas the marketplace of ideas will advance may depend on many social factors, including whether minorities have equal access to and equal opportunities to express their views in the media.

It has been argued that one may prohibit hateful racist views in public or political debate, because the falsity of racial doctrines would no longer be a live issue and an open question in politics, but could be regarded as more or less settled. Therefore, allowing a robust debate about the truth of such views would outweigh the cost of hate speech, i.e. attacks on the dignity of minority groups. However, even if one agrees that the benefits of allowing hate speech do not outweigh the disadvantages, some might nevertheless still oppose that – because to them hate speech merely concerns moral truth claims, i.e. the existence of objective moral truths is controversial and that consensus on moral issues appears nearly impossible. Then it is thought that hate speech may affect people’s dignity, affect the social climate and lead to discrimination in the mid term, but is not wrongful in the sense that it violates people’s rights, because it is not directly harmful in the Millian sense.

Hence, whether one thinks hate speech should be prohibited or allowed in public debate in the end still depends on one’s conception of harm and perspective on the harmful effects of hate speech, as well as one’s perspective on the interrelationship between freedom of expression (public debate) and democracy. Again it can be said that precisely because the public and political debate constitutes a market place of ideas that does not concern universal truth finding, but the formation of power and the laws of the state, political opinions that amount to hate speech against minorities in society do have a special position in public debate and, therefore, may be prohibited if they affect the equal human dignity and are intended to destroy the fundamental rights of the members of the target group (para. 2.2 supra).

3.2 The fact/opinion-distinction and defamation laws

Where Mill’s argument from truth may be applied to both factual and moral propositions equally, the law generally clearly distinguishes statements of fact from statements of opinion for purposes of restricting an expression. This distinction is understandable. Opinions convey value judgments that contain personal evaluations. They are subjective in the sense that they may vary from person to person and are relative in the sense that they might depend on their

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context. By their very nature, opinions cannot ‘be proved true or false’. As the U.S. Supreme Court has stated, ‘Under the First Amendment, there is no such thing as a false idea’. Therefore, the State may not determine whether value judgments are true or false and suppress them based on of their alleged falsity.

In this respect, statements of fact differ from opinions. They are objective in the sense that a fact does not depend on who believes it or who presents it. By their very nature, facts can ‘be proved true or false’. As the U.S. Supreme Court has stated, ‘there is no constitutional value in false statements of fact.’ Therefore, the state may take into account the alleged falsity, when suppressing speech considered harmful. This notably also includes false statements of fact that violate an individual’s reputation, i.e. ‘the esteem in which an individual is generally held within a particular community’, which generally forms the object of defamation laws.

It is outside the scope of this study to deeply delve into the particular differences between defamation law in common law and civil law countries. Generally, defamation laws distinguish defamatory, i.e. the imputation or allegation of a specific fact to a particular person, from insult, i.e. speech about a particular person not concerning a specific fact. It is generally accepted that in defamation cases, a defendant must have the possibility to prove the truth of his factual statement. Other than for insult, the proof of truth would remove liability for defamation. However, strong negative value judgments, such as calling someone a ‘Nazi’, may require a sufficient factual basis in order to escape liability for insult.

The fact/opinion distinction thus may not be razor sharp. Therefore, courts may find difficulty in drawing a consistent distinction between constitutionally protected statements of opinion and prohibited false statements of fact. For example, does calling someone a ‘liar’ or a ‘criminal’ constitute a factual assertion or an opinion? To answer this question several factors may be considered relevant, including the precision or ambiguity of the statement, its verifiability, the literary context and the broader context in which the statement occurred. An opinion could then be defined as a statement that ‘does not contain a factual connotation, which could be proved to be false or cannot

152 Post 1990, p. 655.
156 In common law countries, defamation largely forms the object of tort law. In civil law countries, defamation may form the object of specific statutory criminal and civil prohibitions. Furthermore, defamation may be regulated under the civil norm of the ‘wrongful act’.
reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).\textsuperscript{158}

Defamatory statements of fact that contain falsities may however be made in order to comment on matters of public interest and may, as such, nevertheless be justified. Therefore, in most countries, a defendant or suspect in a defamation case may evoke the defence of ‘reasonable publication’ or an analogous defence based on ‘fair comment’,\textsuperscript{159} ‘due diligence’ or ‘good faith’, which could remove liability for his defamatory statement, if the defendant could demonstrate that he had observed certain standards (fair hearing, absence of animosity, moderate language, aim to inform the public). This right to inform the public on public or political issues ‘in good faith’ is, however, much narrower than the previously discussed right to enter into a free public debate on matters of public concern.\textsuperscript{160} The question arises as to how these two justifications interrelate.

It can be said that over time the notion of the interest of a free political and public debate in society has increased and therefore has superseded the narrower right to inform the public as a justifying ground in defamation cases. Nowadays vehement criticism on conduct, views or government policies of political figures by means of strong allegations can be regarded as forming an integral or even necessary part of the democratic debate, not only in its ability to consolidate or change particular power relations but also to expose forms of power (democratic control). However, this does not signify that minorities in society may be attacked in public debate with the same level of vehemence; direct stigmatizing attacks against minorities in society have very little connection with any of these functions of democratic debate.

3.3 Group defamation

In order to be defamatory, a factual statement must violate a persons’ ‘reputation’. One can distinguish three different concepts of ‘reputation’ that the law of defamation attempts to protect.\textsuperscript{161} Firstly, reputation as property is akin to goodwill, a private interest and the fruit of an individual’s effort and labour in the market society. Secondly, reputation as honour is a persons’ personal

\textsuperscript{159} In common law countries, the fact/opinion-distinction underlies the traditional privilege of ‘fair comment’, a defence in defamation cases that guarantees ‘the freedom of the press to express statements on matters of public interest, as long as the statements are not made with ill will, spite, or with the intent to harm the plaintiff.’ Nowadays – at least in America – the ‘fair comment’-privilege has largely been replaced by the requirement that statements of fact only amount to defamation when they are made with ‘actual malice’.
\textsuperscript{160} Cf. Post 1990, p. 661 et seq.
reflection of the status which society ascribes to his social position; a public good in the deference society. Thirdly, reputation as dignity is the respect that arises from full membership in society, maintained by – from Post’s perspective – ‘rules of civility’ in both the individual and public interest. In order to be defamatory, statements of fact must thus violate one of these three values that underlie the concept of reputation.

Furthermore, defamation laws can only protect individuals or entities against harm to a reputation, which they have or merit. One could argue that objects, such as state- or religious symbols, flags or national insignia, and the state or nation as such do not have a ‘reputation’ and therefore cannot be protected by defamation laws. Likewise, one could question whether racial and religious groups can have a ‘reputation’ and can be protected by defamation laws. Individual defamation and hate speech consisting of group defamation may, however, be thought of as two forms of injuring people’s reputation that raise distinct problems.

Defamation laws can be said to protect the particularity or intricate detail of each individual’s personalized reputation (reputation as property or honour). In this case there must be defamation of a particular identifiable person, or of a group so confined that the allegation descends to particulars. Group defamation laws on the other hand prohibit generalizations that all members of a large group allegedly possess a certain discrediting characteristic. These laws can be said to protect the broad foundations of each person’s reputation or civic dignity. They protect large numbers of people, thought of as a group, against attacks on the fundamental reputation of all persons of that kind.

However, it seems impossible to impute an entire group of having committed one specific fact. As a group cannot have a common reputation based on one specific fact, it seems questionable to prohibit group defamation. But one could also argue that as one cannot impute one specific fact to an entire group, group defamation must be prohibited. For example, it is very hard to sustain that ‘The Muslims’ killed Dutch anti-Islam filmmaker Theo Van Gogh’. Therefore, such an expression can evidently be qualified as group defamation. Group defamations may however often consist of vague allegations and generalizations, such as ‘Muslims are a danger to our society’, and racist epithets, such as ‘Muslims are goat-fuckers’ that are more on the opinion rather than on the fact side. Therefore, group defamation laws may not necessarily distinguish between defamation and insult of – thus facts and opinions about – a group, but could be formulated more broadly and comprise both.

162 Post 1986.
164 Sadurski 1999, p. 194; 216.
165 Waldron 2012, p. 52-53.
One may argue that in the end group defamation laws do not protect the dignity of the group as such, that is a specific group dignity, but protect individuals when defamatory imputations are associated with shared characteristics such as race, ethnicity, religion, gender, sexuality and national origin.\textsuperscript{166} There is no real group involved, because such characteristics should not be used to undermine individual dignity. However, a racist forms certain prejudices by viewing, for example, Arabs or Africans as objectionable groups or communities. As prejudice is contempt of one group for another, it must be countered at that level too: by insisting on the equal dignity of groups as a positive response to the denigration of individuals based on their race.\textsuperscript{167}

The question of whether group defamation laws protect groups qua group or the individual persons belonging to a group, as an aggregate of individuals, is important, because it may determine who may invoke the prohibitions in relation to what kind of utterances. Criminal group defamation laws often do not formulate mere aggravating circumstances to generic offences of defamation and insult, but constitute independent offences that – according to their wording – protect ‘groups’, not individual persons belonging to a group. These offences may therefore cover phrases such as: ‘Muslims are criminals’, but not phrases such as: ‘Ali is a criminal Muslim’. It seems unlikely that generic defamation and insult laws could provide sufficient protection against gross generalizations regarding non-further specified groups.

However, it is sometimes argued that specific group defamation bans are unnecessary, precisely because the law already prohibits or criminalizes defamation and insult of an individual person. Such generic laws would suffice for the protection of individual persons. Indeed, one could argue that the arguments for restricting group defamation are connected with arguments for restricting a larger category such as defamation or insult not necessarily limited to race, religion and so on. The same might be said of incitement to hatred, discrimination or violence in relation to the incitement to illegality. In this sense, hate speech is not an entirely unique category and its alleged harms have potential counter parts apart from this particular domain.\textsuperscript{168}

On the other hand, the harms of group defamation may not necessarily be considered to be the same as those of generic defamation or insult. It is argued that by its very nature group defamation may cause greater aggregated harm than defamation of an individual in general; it inflicts a deeper injury to a

\textsuperscript{166} Waldron 2012, p. 56-57; 60.
\textsuperscript{168} Schauer 2012, p. 142-143.
person qua member of a group than qua individual personally, hurts a greater number of people\textsuperscript{169} and can even cause tensions between groups in society.

Contrarily, others opine that group defamation would be less severe, because the nexus between the defamation and the victim is less certain than in the case of individual libel. This is precisely the reason that, for example, in America a member of a defamed group may not recover unless the defamatory statement can be reasonably understood to refer specifically to that individual.\textsuperscript{170} Another example is that of Germany, where German courts generally regard religious groups such as Protestants, Catholics or Christians to be insufficiently demarcated to be protected by defamation laws. Contrarily, defamation of Jews in general is a defamation of all individual Jews because of the special history of Germany.\textsuperscript{171}

Given the particularity of group defamation bans, the question arises as to whether a defendant or suspect of group defamation must be allowed to prove the truth of his statement.\textsuperscript{172} This seems unlikely both in the event that group defamation is prohibited because racist imputations are regarded as necessarily false and in the event that group defamation is prohibited for reasons that are independent of the truth or falsity of the racist view. But will the extent to which an allegation is true never play a role for the determination of an author’s liability for statements about a group of people in public debate? Imagine that, for example, a politician makes the following statement in the media in the context of the immigration and integration problematics in a country: ‘Moroccans are overrepresented in crime rates; such criminal behaviour is inherent in their religion and culture’. Does this statement constitute a free contribution to the public debate on problems related to immigration and integration or a prohibited form of hate speech against Moroccans based on their religion and ethnic background? What standard can be used to answer that question?

The statement that people of Moroccan descent are overrepresented in crime rates might be true but does this form a sufficient factual basis for the general negative conclusion that such behaviour is inherent to, and thus caused by their religion or culture and that all members of the group are necessarily guilty of such behaviour? In principle, there appears to be nothing wrong with


\textsuperscript{172} It is less disputed that the proof of the truth is irrelevant with regard to the allegation of having incited to racial hatred, discrimination or violence.
serious research into the question of to what extent a person’s religion may play a role in certain reprehensible conduct. However, to simply hold that all Muslims per definition display such behaviour is a different issue, especially when this is followed by the conclusion that the only way to resolve immigration and integration problems is that they must all be expelled from the country. Then, a person’s affiliation with a particular religion or race is presented as a ground to discriminate against them, which violates one’s equal basic dignity. The latter equally applies to hate speech consisting of racist epithets, invectives, and terms of abuse. One could argue that such expression is of little value in public debate, because it does not convey ideas that are actually susceptible to discussion.

In order to consistently distinguish free critical contributions to public debate from prohibited hate speech, a norm must accurately differentiate between factual statements and value judgments, hence different types of utterances. The limit of public debate may be reached with, next to pertinent untrue statements, strong value judgments that lack a sufficient factual basis or in any event are ‘gratuitously offensive’. The question arises as to whether the latter standard concerns the form of expression or style in which it is presented and/ or the substance of expression. It might be difficult to strictly separate the form of expression from its substance; the form may precisely give an utterance its particular – racist – meaning or, vice versa, the substance of an utterance may precisely determine its form. Hence, there is a distinction between the assertions that ‘Muslims are criminal and violent by nature’ and ‘Muslims are overrepresented in crime rates’. The depiction of Muslims as rats or cockroaches or merely calling them silly can also be evaluated differently. The same applies to the imputation ‘The Jews have invented the Holocaust for their own financial gain and the creation of the state of Israel’ and the plea that ‘Historians must be able to freely discuss the events of the Holocaust’.

3.4 Holocaust denial

A particular form of hate speech is the denial of the Holocaust. Holocaust denial generally consists of the negation, trivialization or minimization of historical facts and crimes, which have evidently occurred during the Nazi-regime. In Germany, where there is a special historical connection with World War II, the Holocaust may remain a highly sensitive issue. Therefore, it is understandable that the ‘Auschwitzlügen’ is criminalized in specific offences in the German Criminal Code.\textsuperscript{174}

\textsuperscript{173} Rosier, T., Vrijheid van meningsuiting en discriminatie in Nederland en Amerika, Nijmegen: Ars Aequi Libri 1997, p. 20 et seq.
However, specific Holocaust denial laws exist in many other countries.175 In certain countries, the existence of such laws may be explained as a firm symbolic act of the state to distance itself from relatively recent atrocities committed by the Nazis, in which they may have collaborated. From this perspective, such laws may rather be of a declarative nature than having a practical effect and express the commitment of the state to denounce racism.176 This may equally explain the existence of other genocide denial laws that, for example, prohibit the negation of the Armenian genocide.

In other countries, such ‘memorial laws’ may be regarded as unconstitutional, because the state and the judge, by criminalizing the negation of genocides, establish and proclaim an official fixed historical truth, i.e. ‘government declared truth’. This is contrary to free historical scientific research and opinion on, and interpretation of historical events. The idea of punishing an idea due to its falsity goes to the very heart of the principle of freedom of speech.177

However, the question arises as to whether the statutory wording of specific Holocaust and genocide denial laws correctly reflects their underlying aim. Often revisionist theories and pseudo-scientific research conceal the author’s intention to defame or spread hatred against a particular group. For example, through the minimization of the number of victims of the Holocaust, an author may aim to legitimize and spread Nazi ideology. Holocaust denial laws may aim to counter not the negation as such, but rather its racist purport and intention. They may aim to protect Jews against false allegations and to prevent the spreading of Anti-Semitism or racist ideologies and their adoption by others.

The question arises whether in order to counter such more disguised forms of racist defamation and hatred there is a need for such specific Holocaust and genocide denial laws or whether existing hate speech bans, such as offences of group defamation and incitement to hatred, discrimination or violence, suffice. On the one hand, the latter offences seem to better reflect the core of what is criminalized and why. On the other hand, if one starts to bring such more disguised forms of defamation and hatred under these offences there is a danger that their scope can be stretched endlessly. For example, why would they not include anti-Islam speech that may conceal the author’s intention to defame or spread hatred against Muslims (para. 4 infra)?

175 See: Hennebel & Hochmann 2011.
177 Schauer 2012, p. 130.
3.5 Criminal and/ or civil law

When forms of hate speech are prohibited, the legislator is faced with a choice in relation to the nature of the limitations to freedom of expression that will be implemented, i.e. the creation of specific criminal offences and/or limitations in civil law. More controversy exists in relation to the criminalization of group defamation than, for example, ‘incitement’, such as incitement to violence. Different institutions advocate the abolition of criminal defamation laws and, where necessary, their replacement with appropriate civil defamation laws. The protection of one’s reputation is regarded primarily as a private interest and criminalizing defamatory statements would be unnecessary for the adequate protection of reputation. Furthermore, in certain countries criminal defamation laws are abused by the authorities to limit criticism of government and to stifle public debate, in an effort to maintain public order or to protect public interests other than the right to reputation. It is argued that, at the very minimum, prison sentences or excessive fines should not be available as a sanction for defamation laws.\(^{178}\)

The call for decriminalization in any event concerns defamation of individual persons and state officials.\(^{179}\) Likewise, the question arises as to why the legislator would criminalize group defamation. As discussed previously (para. 3.3 supra), some may regard group defamation as verbal assaults by one person or group to another group, thus between citizens, and therefore form a purely private issue. After all, there seems to be no public issue in relation to the matter that such expression violates the public order by carrying a direct threat of disorder or violence or that it violates public morality, comparable with ‘incitement’ of third parties to action, sedition, obscenity or blasphemy. Therefore, the maxim ‘criminal law forms an ultimum remedium’ is often used as an argument against criminalization.

However, as previously discussed, group defamation can indeed be regarded as a public issue, because such expression violates people’s basic human dignity and human dignity can be considered a public good,\(^{180}\) which may be derived from the fact that it forms a core value in the Constitution. From this perspective, keeping the peace is only one dimension of public order that might comprise an interest in maintaining a proper sense of the basic dignity of

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179 Furthermore, it is advocated to entirely abolish defamation laws that protect individuals or entities that do not have or merit a reputation, such as State- or religious symbols, flags or national insignia, and the State or nation as such. See further para. 3.3 supra.

180 Cf. Waldron 2012.
citizens and the mutual recognition of their equal citizenship. Then the protection of the public order takes on a different meaning in the sense that it maintains an orderly democratic society free from discrimination. This thus concerns a different value conflict and a different notion of harm.

Furthermore, there may be another reason behind the criminalization of group defamation. It can be argued that in a constitutional state based on the separation of powers, a primary task of the legislator is to assure legal certainty for its citizens by creating clearly defined, demarcated norms. The prohibition of group defamation directly interferes with the core of the right to freedom of expression. Creating specific criminal offences may be considered the appropriate means to clearly demarcate such substantive limitations and thereby guarantee freedom of expression.

One could object that the legislator could also create specific civil prohibitions of group defamation. This does not, however, seem to fit in with the system in certain civil law countries, where civil limitations to freedom of expression are determined through the general prohibition of the wrongful act. Even though existing criminal speech offences could function as a guideline for determining civil liability considerations, other factors may play a role that would, in principle, be irrelevant for determining criminal liability, such as: the subjective intentions of the author of expression, due diligence norms, and the protection against the offence of feelings. Such criteria may blur the exact limitations to freedom of expression. In light of legal certainty, it can be argued that expression may only be considered unlawful when it is punishable under a specific speech offence.

The choice for the creation of criminal and/or civil restrictions to hate speech also influences the role of different actors in the practical enforcement of restrictions to hate speech. Although it is primarily the legislator who creates the statutory restrictions to freedom of expression, it is the judge who is confronted with a series of complicated questions in their application. It appears inevitable that the judge, in one way or another, attaches importance to freedom of expression. In principle, with criminal restrictions, primacy is given to the legislator and less room is afforded for judicial interpretation and balancing than with civil restrictions. The question arises as to how the legislator can provide a framework that facilitates consistent judicial adjudication.

Another question is how can the state assure the effective enforcement of hate speech bans? The prosecution of criminal hate speech bans is a task – and often an exclusive right – of the public prosecution. Generally, individual victims and anti-racism associations can initiate civil proceedings against hate speech themselves or join a criminal case initiated by public prosecution as a civil party. It is not common that the law affords civil parties the right to set in motion public prosecutions of hate speech and to make them a prosecuting party to the criminal case. However, collective actions of anti-racism associations may

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181 Waldron 2012, p. 46.
be an important instrument to fight certain types of structural forms of hate speech against vulnerable minority groups.
3.6 Synthesis Facts versus Value Judgments

The search for truth forms an important justification for freedom of expression. The premise is that the state should not prohibit opinions based on their alleged falsity. Rather, the truth or falsity of opinions should be tested in a free and open (scientific) discussion and as a result the universal truth will prevail. However, the political and public debate rather constitutes a ‘marketplace of ideas’ that concerns the formation of power and the laws of the state. Political opinions that amount to hate speech do have a special position in public debate and can therefore be prohibited. The suppression of hate speech in public debate is not motivated by epistemic goals, but by the social value in the protection of people’s equal dignity and the prevention of discrimination.

In order to consistently distinguish free critical contributions to public debate from prohibited hate speech, a norm must, however, accurately differentiate between factual statements and value judgments, i.e. different types of utterances. Hate speech can consist of racist epithets, invectives and terms of abuse, but also of vague allegations and generalizations that associate certain actual or supposed behaviour or practices with people’s race or religion (including forms of Holocaust denial) and subsequently present them as a ground to discriminate against the people concerned. An ultimate limit of public debate may be reached when hate speech consists of pertinent untrue statements and value judgments that lack a sufficient factual basis or are, in any event, gratuitously offensive.

The forms of hate speech described above can have both a defamatory/insulting and an ‘inciting’ character. As far as the creation of specific hate speech bans is concerned, the state can however prohibit, next to ‘incitement to hatred, discrimination or violence’. It can also prohibit ‘group defamation/insult’. After all, defamatory false statements of fact or insulting value judgments about a group associated with its shared characteristics such as race or religion can already harm the individual dignity of the group members. Given the public good in the protection of people’s equal human dignity, group defamation/insult can be prohibited by criminal law offences. Clearly defined statutory offences can afford legal certainty in relation to the rights and interests they protect as well as the extent of freedom of expression.
4. Race versus Religion

As far as the setting of restrictions to hate speech in public debate is concerned, a distinction is generally made between utterances about people’s race and utterances about people’s religion. Hate speech bans are almost by definition directed and used against racist speech (4.1). Less frequently, they also cover hate speech based on religion (4.2). Over the past decade there has been an increase of anti-Islam and anti-Muslim expression. This has brought to the fore the question of whether the same legal restrictions should apply to hate speech on the ground of religion as to hate speech on the ground of race (4.3)? Moreover, a central issue that has been highlighted is how one must consistently distinguish hate speech against people on the ground of their religion from blasphemous expression and the defamation of a religion as such (4.4). Finally, the question is, in which other categories, in addition to race and religion, hate speech bans must be included (4.5)? The paragraph concludes with a synthesis that defines the factor Race versus Religion for the purpose of the further analysis in this study (4.6).

4.1 Race

There exist different notions of ‘race’ as a discriminatory ground. One can discern a narrow definition of race as a biological characteristic from a broader definition that includes ethnicity, nationality and other criteria of ‘otherness’.

Race as a biological characteristic

It can be argued that – other than religious beliefs – race or skin colour are fixed biological and physical characteristics that a person cannot change. Even though the actual existence of different races is disputed and it is objected that race as an unchangeable characteristic only exists in the eyes of the racist, this does not alter the fact that discrimination and hate speech on the basis of unchangeable facts seems particularly unfair. A narrow definition of racism would accordingly be confined to race as a biological characteristic and would consist of views and practices reflecting the belief that human populations are divided into separate races that share certain attributes, which makes certain races, due to their unchangeable, negative characteristics, inferior to others and their differential treatment (discrimination) justified. Many 19th century scientists subscribed to such essentialist ideas of racial superiority. During the 20th century, such ideas have politically and ideologically underpinned racial segregation in the US, European colonization, Apartheid in South Africa and the genocide of the Holocaust executed by the Nazi regime.

182 Sadurski 1999, p. 212.
The International Convention for the Elimination of all forms of Racial Discrimination (ICERD), drafted by the United Nations after World War II, obliged state parties to criminalize the spreading of ideas based on racial superiority. This naturally refers to the spreading of National Socialism as an ideology known to be racist and aimed at the destruction of Jews. More generally, this includes the expression of negative ideas about a particular race, such as: ‘the black race is inferior to the white race’, because such ideas are considered to per definition contain negative conclusions about the people belonging to that race, simply because they cannot abandon this biological characteristic. Hence, no fundamental distinction exists between hateful expression about a particular race and hateful expression about individuals belonging to that race.

Ethnicity

ICERD, however, uses a broad notion of ‘race’: its scope is not limited to discrimination on the grounds of biological characteristics such as race and skin colour, but includes other discriminatory grounds, such as national and ethnic descent. Ethnicity is often assumed to be the cultural identity of a group in a nation state and can include a common ancestry, language or religion. This inclusion in ICERD can be explained by the fact that, like racism and discrimination based on race, racism and discrimination based on ethnicity often also starts from essentialist thinking of the superiority of one culture over another. On the one hand, there seems nothing wrong with the different valuation of cultures. After all, cultures are value systems in themselves and susceptible to change. On the other hand, one must distinguish cultural practices from a person’s descent. People cannot renounce or change their descent, i.e. their personal cultural background and history.

Maybe an author who speaks of the superiority of one culture over another has the same intention as an author who speaks of the superiority of one race over another. To the extent that, for an author of expression, having a different culture is an unchangeable, negative characteristic, expression of negative ideas about a particular culture necessarily contains negative conclusions about the people who share this culture. When this vision leads to an exclusion of the target group and a violation of their fundamental rights, then hate speech based on ethnicity does not necessarily have to differ from hate speech based on race. Moreover, the distinction between race and ethnicity is generally regarded as problematic in itself; it is argued that, as race is rather a social and cultural construct than a biological characteristic, racism always has a cultural component to it.

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Nationality and xenophobia

A similar reasoning can be applied to people’s nationality. If speech combines views on race with views on culture and national territory, it may take the form of ethnic nationalism; the nation state is then defined as a shared heritage, including a common ancestry, language, religion and culture. In the eyes of a nationalist, his own national culture is superior to foreign cultures and must therefore be exclusively preserved within the nation state, even when this violates the fundamental rights of foreign inhabitants of the nation state.

The desire to deny certain rights to persons with a foreign nationality will, however, not always constitute a form of racism. One must distinguish nationality in relation to national descent from nationality in relation to citizenship. National citizenship as a basis for the attribution of certain rights and duties is not in itself discriminatory. One can think of the eligibility to vote or the right to stand for election as a member of parliament. On the other hand, an example of a practice amounting to the making of an unjustified distinction is that of favouring national citizens over people with a foreign nationality in job applications. One could however argue that it must be possible to freely discuss the desirability of such a practice.

Particular forms of racism can manifest themselves through all kind of assumptions, negative stereotyping or prejudice against people based on their race, ethnicity and nationality. The common trait seems to be a general fear, hatred or intolerance against ‘Otherness’. Racist hate speech can therefore be connected with the broader notion of ‘xenophobia’, i.e. expression of an intense and irrational dislike or fear of anything or anyone who is different, strange or foreign. As discussed previously and further on (para. 1.5 supra; Chapter 3), international and European institutions disagree on whether hate speech laws must be so broad that they counter any advocating of fear, hatred and intolerance against people based on all kinds of differences.

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188 Cf. ‘xenophobia’ Oxford online dictionaries; Merriam-Webster online dictionary. Retrieved 12 April 2013.
189 An affirmative answer seems to follow from the broad definition of hate speech in CM CE recommendation 97 (20): ‘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

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4.2 Religion

The notion of religion as a discriminatory ground poses a number of specific problems. It is notably difficult to demarcate a religious group and to make a consistent distinction between the convictions and practices of a religion and persons adhering to a religion. This issue is brought to the fore by an emerging religious intolerance, the phenomena of ‘Islamophobia’ and ‘Defamation of religions’.

Religion as a discriminatory ground

In international law race and religion are equated as discriminatory grounds to a certain extent. For example, Article 20 sub 2 of the International Covenant on Civil and Political Rights (ICCPR) obliges state parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. But the question arises as to how far the analogy between religion and race can go? A religion or belief consists of doctrines and religious rules that its religious adherents assume to be true. A religion therefore forms a guideline for, and partly determines the behaviour of its religious adherents. Furthermore, religion often forms the basis for people’s position on all kinds of social and political issues. Hence, one can criticize people for adhering to a particular religion, but not for belonging to a particular race.

It is therefore understandable why religion as a discriminatory ground was deliberately excluded from the scope of ICERD. It is less imaginable that an international convention would oblige state parties to criminalize the spreading of ideas based on the superiority of a particular religion. After all, the proclamation of the superiority of a particular religion is inherent in many religions and should not be considered punishable but a free exercise of a religion. In fact, such expression can also aim to convert adherents of another religion. One could even imagine a free market place of religions, although the idea of a level playing field for religions may be controversial. To a certain extent a religion thus may be compared with political ideologies such as communism, capitalism or colonialism.

From the perspective of freedom of expression, one must also be free to openly criticize and express disagreement with the tenets, dogmas, doctrines, practices, rituals, offices and institutions of a religion. Such criticism of a particular religion does not necessarily constitute criticism of its religious

expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.’


adherents and does not necessarily contain negative conclusions about the people adhering to that religion. After all, a religion is not an immutable characteristic and a person can change his religion or renounce his beliefs. In principle, a distinction thus can be made between expression about a particular religion and expression about individuals adhering to that religion.

This latter distinction can be diffuse and is notably difficult to make when the criticism concerns the behaviour of and practices exercised by religious adherents. Just as with nationality, ethnicity and culture, having a different religion can also be regarded as an unchangeable, negative characteristic. For an author of expression, all kinds of undesirable, criminal or violent supposed or actual behaviour of persons belonging to a particular religion can be necessarily associated with and caused by their religion and inherent in all members of that group. Gross criticism that at first sight merely targets a religion, such as: ‘Islam is a violent and dangerous religion that must be conquered’, might conceal the intent to defame or spread hatred against the people adhering to that religion. The question, therefore, is whether or not it is unfair to use the argument of personal choice against protection of religious groups against such religious hatred; it is argued that this would amount to imposing a penalty upon people who do not renounce their particular conduct, values, or set of beliefs.

Religion could also be regarded as a central component of ethnic group identity and therefore play an important role in xenophobia, racism, and group hatred. Religious minorities tend to be of a different ethnic and national origin than the majority. For example, in a predominantly Christian European country with an Arab minority that is in large part Muslim, anti-Arab and anti-Muslim hate speech may overlap. Precisely because of the nexus between race and religion, it has been suggested to extend the scope of ICERD to the mixed form of ‘aggravated discrimination’, that is, discrimination on the grounds of race and religion.

Generally, however, religions are not principally connected to a particular people. This applies, for example, to Buddhism, Christianity and

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194 Sadurski 1999, p. 213.
196 Rosenfeld 2012, p. 276-277.
Islam. This implies that anti-Buddhism, anti-Christianity and anti-Islam speech must be distinguished from racism. Contrarily, Judaism is often regarded as a religion that is inextricably connected with the Jewish people. Historically, Anti-Semitism has therefore been grounded on both race and religion.\(^{198}\) A primary reason to insert the discriminatory ground of religion into hate speech bans might precisely have been to deprive authors of Anti-Semitic speech from the defence that their hate speech against Jews is not race-, but religion-based.

**Demarcating a religious group**

The insertion of religion as a distinct discriminatory ground in hate speech bans is controversial. First of all, defining and demarcating a religion or belief for purposes of law is highly complex.\(^{199}\) Generally, a religion or belief is required to consist of a fundamental and coherent set of convictions about the meaning of existence. This does not comprise political convictions.\(^{200}\) But it is argued that due to the process of secularization in the Western European world, people’s religion nowadays constitutes a very limited part of their identity. Gross criticism based on their religion, therefore, does not say anything about their appreciation as a person.

Furthermore, one could argue that due to the individualization of beliefs, religious groups nowadays are too heterogeneous to be protected against vilifications or insults on the basis of a collective identity. Some scholars argue that in order for a religious group to have the moral standing for a claim, it is not required to have a specific identity based on religion as a shared objective feature. A claim can be made if there is a strong intra-group solidarity where individuals feel themselves strongly bound together as members of the group with which they identify and have a shared interest, for example, in protection against hatred or defamation on the basis of their religion. They therefore reject the corporate conception of a group that has moral standing qua group and instead advance a collective conception of a group as an aggregate of individuals.\(^{201}\) But this appears to be an idea that more generally underlies

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198 Rosenfeld 2012, p. 276.
200 Greenawalt 1984.
prohibitions that protect the dignity of individuals against defamatory imputations associated with all kinds of shared characteristics such as race, ethnicity, gender, sexuality, and national origin (para. 3.3 supra). An additional complication connected with religion remains, of course, that a religion is also a set of ideas about the meaning of existence that can be separated from the religious adherents.

Nevertheless, this functional approach to religious group rights fits in particularly well with the idea that religions have regained their function as ‘imagined communities’. For a long time religions functioned as cultural systems and religious institutions as ‘community cults’. When the modern nation state took over this function, religions became embedded in territory. Now globalization has led to both the deterriorization and a revival of old civilizations and world religions. At least it can be argued that in modern European multi-cultural and multi-religious societies the protection of religious ‘identities’ has not entirely lost its importance.

Religious intolerance, ‘Islamophobia’ and ‘Defamation of Religions’
Since 9/11, expressions and acts of religious intolerance and ‘Islamophobia’ have emerged worldwide and notably also in Europe. Although there is not one widely accepted definition of the term, the phenomenon of Islamophobia has become a concept used in social sciences for comparative objectives. One author has defined Islamophobia as ‘indiscriminate negative attitudes or emotions directed at Islam or Muslims’. For purposes of the law, this definition is problematic, because it conflates criticism of Islam with hatred and discrimination against Muslims. ‘Islamophobia’ is indeed a highly contested and politicized concept and, therefore, not an official legal concept under

203 Huntington’s famous thesis of a ‘clash of civilizations’ may be criticized for its essentialism. According to Huntington global conflicts will run along civilization fault lines: western European highly developed Christian civilizations versus eastern less developed Islamic civilizations. This thesis demonstrates a west-centric hegemonic vision that pictures cultures and religions as unchangeable entities and civilizations as territorial units akin to nation states. This analysis denies the fact that globalization implies the deterriorization of all cultural systems, including religion. Huntington, S.F., The clash of civilizations and the remaking of world order, New York: Simon & Schuster 1996.
204 Casanova 2001.
international law. Nevertheless, the term has featured in many policy instruments and reports of international organizations, including the United Nations (UN). The same is true of the notion of ‘defamation of religions’.

Since 1999, on the initiative of the Organization of the Islamic Conference (OIC), a group of Islamic countries within the UN, the Human Rights Council (HRC, formerly the Commission on Human Rights, CHR) and the General Assembly have adopted several resolutions combating the ‘Defamation of religions’. For a considerable time, the OIC had protested against the discrimination of Muslims in Europe and the rest of the world and the negative portrayals of Muslims and their faith in the media. In short, in these resolutions the ‘defamation of religions’ and the ‘negative stereotyping of religions’ are regarded as causes of social disharmony and leading to violations of human rights of the adherents of the target religion. Freedom of speech is regarded as subject to limitations as necessary for the ‘respect for religions and beliefs’. After the Danish Cartoons affair in 2005, the OIC focused its combat on the support of blasphemy laws and the proposal to criminalize the defamation of religions on the basis of Article 20 (2) ICCPR.

The resolutions initially obtained wide support, also from Western countries. Until 2008, in several reports by the UN Special Rapporteur on

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207 The official website of the OIC is www.oic-oci.org.
210 General Assembly Resolution 60/150 of 16 December 2005 Combating defamation of religions; Resolution 61/164 of 19 December 2006; Resolution 62/154 of 18 December 2007; Resolution 63/171 of 18 December 2008.
211 The OIC was established 25 September 1969. According to its present Charter the OIC aims –amongst others – to “Protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilizations and religions”.
contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the UN Special Rapporteur on freedom of religion and belief, the UN High Commissioner for Human Rights and the UN Secretary General, ‘defamation of religions’ is also still considered as a form of incitement to religious and racial hatred and regarded as a new form of racism that demands repression comparable to Anti-Semitism. However, international developments, such as the events of 9-11, the resurgence of the Israel-Palestine conflict and the American intervention in Afghanistan and Iraq, turned Western and Islamic countries into opposite blocks within the UN.

Since 2008, the UN rapporteurs have increasingly stressed the importance of freedom of expression and the legitimacy of criticism of religions. Their recommendations include a shift away from the sociological concept of defamation of religions towards the legal norm of non-incitement to national, racial and religious hatred against persons of Article 20 (2) ICCPR. Subsequently, in the outcome document of the Durban Review Conference, a UN World Conference against Racism in 2009, the concept of defamation of religions was no longer mentioned. Instead reference is made to ‘the global rise and number of incidents of racial or religious intolerance and violence, including Islamophobia, anti-Semitism, Christianophobia and anti-Arabism manifested in particular by the derogatory stereotyping and stigmatization of persons based on their religion or belief’. Likewise, since then, in its resolutions, the HRC has shifted from referring to the negative ‘stereotyping of religions’ towards the ‘stereotyping of vulnerable individuals or groups of individuals’.

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218 Parmar 2009.

219 A/HRC/9/12 of 2 September 2008; A/HRC/12/38 of 1 July 2009; Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, “Freedom of expression and incitement to racial or religious hatred”.

220 In 2009 the Durban Conference Review, Durban II, was held as a follow up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, in 2001.


4.3 Relevance of the distinction for specific hate speech bans

The relevance of the distinction between race and religion as discriminatory grounds can vary depending on the particular form of hate speech, hence per specific hate speech offence. Offences of group defamation or group insult primarily aim to protect the dignity of the members of particular groups. It is a problem to consistently determine whether defamatory or insulting expression concerning people’s religion falls under this scope. In principle, defamatory and insulting expression about a religion or its religious figures may fall outside of this scope and only expression about the religious adherents may fulfil the statutory elements of the offences. This is, in any event, the case when expression explicitly names a religious group (ex. ‘Muslims’). But the question arises as to whether people can never be indirectly insulted or defamed via insulting or defamatory statements about their religion (ex. ‘Islam’). For example, sentences such as ‘Protestantism promotes violence’ or ‘Catholicism leads to paedophilia’ may seem to imply or to be just another way of saying that ‘Protestants are violent’ or ‘Catholics are paedophiles’. This shows the particular difficulty with demarcating lawful from unlawful criticism concerning practices associated with a religion.

The question arises as to whether requiring expression to explicitly name the religious adherents as a group must be the primary determinant factor for liability under religious group defamation and insult laws. In order to consistently demarcate free criticism of religion from prohibited religious group defamation, in principle the criterion that expression must designate a particular group may be a simple helpful tool. In fact, utterances about a religion shall sooner constitute a free value judgment, while utterances about religious adherents shall sooner require a factual basis. This is different with race. But then a norm must clarify whether this signifies that an utterance must explicitly name a group, whether the group must have a certain degree of homogeneity in the sense of a collective identity or whether a negative quality is in fact attributed to all members of the group (supra). With regard to the latter, another criterion may be whether an utterance treats the actual or supposed practices associated with a religion as a central component of people’s ethnic or national descent and identity, thus as an unchangeable characteristic. This may be the case in the following statement: ‘Morroccans are overrepresented in crime rates, because Islam is a violent religion and the problems are inherent in the community itself’.

However, with regard to expression that does not explicitly refer to a particular group, negative utterances about a race may sooner fulfil the statutory elements of offences of group defamation and group insult than such expression about a religion. The dignity of people can sooner be harmed and people can more easily be indirectly insulted or defamed via insulting or defamatory statements about their race than their religion. For example, the statements: ‘the black race is backward and had better be rejected’, and: ‘Islam is backward and
had better be rejected’, have very different purports. Expression that minimizes or denies the Holocaust may take a special position in the sense that it generally has a racist purport given the context in which it is often uttered and therefore amounts to a form of indirect racial defamation or insult or hatred, even though it does not explicitly name Jews as a group or the Jewish race.

The distinction between race and religion may also be relevant to the offence of incitement to hatred, discrimination or violence. In principle, other than for race, it seems possible to distinguish statements that express certain hatred for a particular religion from expression of hatred towards individuals. On the other hand, it seems implausible to comprehend, for example, an incitement to discrimination or violence against Islam as a religion as merely directed against the body of thoughts and not also against the persons who will be the victims of the effectuation of such an incitement. While it is imaginable that gross insults about a religion can at the same time respect the dignity of its adherents, the ‘incitement to discrimination or violence’ against a religion by its very nature seems to be necessarily, also or precisely, directed against its adherents. 223 Nevertheless, expressing the desire to abolish the multi-religious society or to stop the ‘islamization’ of society has a very different purport than expressing the desire to abolish the multi-racial society or to stop the ‘blackening’ of society. The former does not necessarily aim at religious discrimination or violence. It can also be interpreted as criticism on existing religion-state relationships and the place or influence of religions in the public domain.

Forms of hate speech as described above can, depending on the context in which it is uttered, have both a defamatory/insulting and an ‘inciting’ character, and thus fall under both the offence of group defamation/insult and the offence of incitement to hatred, discrimination or violence. A way in which to evaluate the possible racist, essentialist purport of expression and to determine liability under a specific hate speech ban, establishing the intent of the author may play an important role. The difficulty remains, however, that an author’s intent must be objectified to a certain extent and primarily be derived from the expression itself. It was stated previously that in order to consistently distinguish free critical contributions to public debate from prohibited hate speech, a norm must accurately differentiate between factual statements and value judgments, i.e., different types of utterances (para. 3.6 supra); one can differentiate between minor insults, particular gross generalizing vilifications that are unmistakably untrue, insults that lack any factual basis and the denigration of a group by using strong epithets, invectives, abusive or threatening words at their address. For the assessment of liability for expression

on the basis of this standard the fact that expression concerns either people’s race or religion therefore plays a role.

4.4 Demarcation of hate speech from blasphemy

An issue closely related to the demarcation of hate speech based on race from hate speech based on religion forms the demarcation of blasphemy from hate speech on the ground of religion. A distinction between the latter two is that prohibitions of blasphemy are generally based on the protection of religious feelings from offence, while prohibitions on hate speech are generally grounded on the protection of the dignity of persons. Both blasphemy and hate speech on account of religion raise the larger question of the interrelationship of the rights of freedom of religion and freedom of expression.

The offence of Blasphemy

Offences of blasphemy generally prohibit the gross defamation or insult of God’s person. As the idea that God or a religion can truly be protected is, however, contestable, the offence may rather be seen as protecting religious adherents against the intended insult of their sensitivities and feelings. Indeed, the prohibition of blasphemy used to protect the official religion of the Christian majority in a country, because the Christian religion served as a guideline for the moral views of citizens. Historically, the prohibition can be explained by the entanglement of religion and the state. Another rationale of the offence therefore may be the preservation of public morality. Due to the processes of secularism and secularization, in many Western European countries the offence of blasphemy has been abolished. There may be several additional reasons for this development.

Firstly, religious feelings and sensibilities are very subjective. If the state protects people in personal convictions, representations and ideas that they hold to be sacred, it may lose its neutrality towards competing claims about religious truths; it may take a certain side in a religious debate. Secondly, as the offence is tailored to the monotheistic Christian faith, in modern European multicultural and religious societies the offence may be unegalitarian in effect. To the extent that the offence of blasphemy is expected to protect religious truths, in theory a state could try to defend all religious creeds, but in practice this seems impossible because one religious truth often necessarily denies another. Thirdly, a state may find the preservation of the offence of blasphemy as a religious relic useful to at some point control ex crescences of public debate on religious topics (often related to Islam) to maintain public order. This could, however, set false expectations to religious groups about their rights.

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Offence versus dignity

In fact, a primary reason to prohibit blasphemous expression seems to be the protection of people from offence. It may be said that the argument of offence protects citizens from unsuspected confrontation with displeasing views.\(^\text{225}\) The fact that certain opinions are contrary to personal moral convictions and therefore cause emotional problems, i.e., ‘mental harm’, to the hearer may be considered as an insufficient ground for the suppression of speech.\(^\text{226}\) According to Feinberg, other than harm, offence is an unpleasant temporary experience and does not constitute a wrong in the sense that it impedes on a person’s interests and violates his rights.\(^\text{227}\) Although profound offence can form a ground to limit freedom through criminal law, in his eyes, offence through blasphemous expression is not serious enough.\(^\text{228}\)

The prohibition of blasphemy can also be connected to both legal moralism and legal paternalism. If blasphemy is assumed not to harm persons, but to target a religion, a state that nevertheless prohibits it then could consider blasphemy to be immoral, a wrong in itself.\(^\text{229}\) From a liberal perspective, this may not constitute a valid reason to restrict the freedom of individuals. In the context of blasphemy and ‘defamation of religion’, some scholars therefore emphasize the distinction between offence and dignity. However, the argument that severe cases of ‘defamation of a religion’ can cause profound offence to religious adherents may differ little from the argument that the dignity of religious adherents can be affected by serious insulting remarks about their religion and religious practices (para. 4.3 supra). Nevertheless, it can be argued that a denial of a person’s convictions or beliefs does not necessarily signify a denial of his dignity as a person.\(^\text{230}\) Here the distinction between race and religion re-emerges. For example, it seems more plausible that the denial of the Holocaust implies the denial of the dignity of Jews, as a part of the particular history of the Jewish people (para. 3.3-3.4 supra).

Freedom of religion and freedom of expression

It is sometimes argued that blasphemous and other offensive expression about a religion must be prohibited, because it forms a direct violation of the freedom of religion of its religious adherents. This is, however, difficult to imagine. Even though blasphemous speech might indirectly cause some negative effects such

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\(^\text{225}\) Feinberg I 1984, p. 46-49.
\(^\text{226}\) Feinberg I 1984, p. 46-49.
\(^\text{227}\) Feinberg I 1984, p. 46-49.
\(^\text{228}\) Feinberg II 1985, p.53-54. The seriousness of an offense is determined by: the magnitude of the offence (in intensity; duration; extent); the standard of reasonable avoidability; the Volenti maxim (the extent to which the offence is voluntarily incurred); the discounting of abnormal susceptibilities. See: p. 35.
\(^\text{229}\) Cf. Feinberg II, 1985, p. 68.
as offence, it does not evidently prevent believers from holding religious beliefs or exercising their religious freedom by wearing a headscarf, going to church or enjoying religious education. It could influence their beliefs, but here we see benefits from freedom of religion: the outcome of the ‘free market place of religions’ is that religious adherents either hold their thoughts more actively and strongly or they change their beliefs, which would be more difficult when beliefs are not exposed to opposite beliefs or criticism.

For similar reasons, it is also difficult to imagine how group defamation or insults and incitements to hatred, discrimination or violence against a religious group can come into direct conflict with the right to freedom of thought and religion of religious adherents. Although an immanent threat of particular acts of discrimination and violence might refrain believers from freely exercising their religion or induce them to go underground. However, these prohibitions are primarily justified by general principles of equality and non-discrimination. The possible effect on freedom of religion and other fundamental rights may therefore only play an indirect role.  

Nevertheless, the European Court of Human Rights (ECHR) does not principally oppose the existence of offences of blasphemy grounded in national morals and has even considered that freedom of religion comprises the right to respect of religious feelings.  

From this perspective, offensive expression about a particular religion can constitute a direct violation of freedom of religion. This right of respect of religious feelings as an integral part of religious freedom is controversial. It seems to be inspired by the concept of religious toleration that can, however, be considered as underpinning both freedom of religion and freedom of expression. It can be argued that religious toleration relates to the peaceful coexistence of different religious thoughts and practices, but not to the peaceful coexistence of opinions on religious matters; these must clash in an open and free debate, provided that participants are respected as equal persons.

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233 The latter presupposition seems to solve the famous paradox of the limits to toleration. As toleration is a matter of reciprocity, ‘the intolerant cannot be tolerated’. However, the characterization of certain groups and views as intolerant seems to be an arbitrary, one-sided and intolerant act. This is precisely the manner in which in the past toleration of for instance, atheists, heretics or Catholics has been denied. For example Mill, Locke.
Freedom of religion and freedom of expression have a common origin; the inter- and intra-religious wars of the 16th and 17th century and the power struggle between the church and the state. The freedoms could be imagined as ‘twins separated at birth’ and subsequently brought up in the religious domain, respectively the worldly, political domain. A religion can, however, also inspire people’s position on all kinds of social and political issues. Therefore, freedom of religion and freedom of expression can converge.

For example, believers may not only preach and proclaim that homosexuality is a sin, but can also oppose the legalization of gay marriage. They may not only condemn sex before marriage and contraception, but also oppose the legalization of abortion. These appear to be possibly rejectable, but nevertheless permissible contributions to political debate on matters of public concern. In political philosophy, however, disagreement exists whether, and to what extent, believing citizens have the duty to translate their religiously based political views into secular or at least reasonably comprehensible and generally acceptable arguments in order to reach consensus on regulatory matters in public debate.\(^{235}\)

The question arises as to whether more extreme religiously motivated speech, such as: ‘homosexuals and procurers of abortion are criminals’, deserves special protection on the basis of its convergence with freedom of religion. On the one hand, one may consider such special protection to be justifiable by the sincerity or innocence of a suspect’s motive. On the other hand, in light of the principles of equality and state neutrality it seems incomprehensible why religious convictions uttered in public debate must be afforded a higher level of protection than secular political opinions. This also seems to apply to religious fundamentalist speech that advocates the overthrowing of the existing democratic form of government to impose a religious regime, with or without the use of violence.\(^{236}\)

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234 Forst therefore suggests to distinguish between the intolerance of those who exceed the limits of toleration because they deny toleration as a norm in the first place, and the lack of tolerance of those who do not want to tolerate a denial of the norm. Only the first type of intolerance cannot be tolerated, because such views and practices violate the principle of justification of toleration itself. Forst 2003, p. 71-85.


4.5 Hate speech based on other discriminatory grounds: handicap, gender and sexual orientation

Hate speech bans generally protect, in addition to race and religion, other categories, such as handicap, gender and hetero- and homosexual orientation. With regard to the latter, again a distinction can be made between criticism of the sexual praxis and criticism of individuals. More generally, the relative importance of freedom of expression seems to vary per discriminatory ground. For example, the statement: ‘blacks should not be allowed in the army’, may be assessed differently than if the statement concerned seriously disabled persons.

The protection of these groups triggers the question as to whether hate speech bans are not discriminatory in themselves. After all, the laws protect a limitative enumeration of specific groups based on their common characteristic (race, religion, handicap, gender, hetero- or homosexual orientation), but not other groups who are possibly in need of protection.\(^{237}\) It has been argued that ‘once you start group libel laws, every influential body of men will urge that it has an equal claim to be protected by such legislation’.\(^{238}\) But ‘because groups are constantly evolving, the meaning of group identity is ambiguous, and hence there is no natural brake to claims for group protection’.\(^{239}\)

Would it then be better to criminalize hate speech against persons in general, on any ground whatsoever? On the one hand, a limitative enumeration of the most vulnerable groups or historically oppressed communities seems a welcome demarcation of the offences. On the other hand, apart from defamation and insult, there appears to be no general offence in national laws for individuals to fall back on who are victims of incitement to hatred, discrimination or violence, for example, if they are overweight. Nevertheless, they too can form a vulnerable group.

This raises another question: should hate speech bans only protect minorities or should it also protect majorities? The answer seems to depend on whether one sees hate speech bans primarily as part of a broader minority and non-discrimination policy aimed at assuring people’s dignity and equal enjoyment of fundamental rights or as an ultimate means of tempering heated public debates in an effort to preserve the public order. These different rationales may result in the protection of very different groups. From a minority perspective, one could argue that religious majorities, women or heterosexuals are not in need of such protection because they have the ability to handle strong verbal attacks.

On the other hand, a strong reaction by such groups to verbal attacks based on their religion, gender or orientation can have a high impact on the public order, precisely because of the considerable size of the group. But if one would subsequently only counter hate speech against majorities uttered in public debate in the event of a risk of direct violent conflicts between groups in society, thus imminent lawlessness, then one would fall back on a conception of harm through direct actions in the Millian sense that does not underlie the regulation of hate speech. In contrast, one can say that hateful speech against a majority group may be, given its solid position in society, less likely harm the dignity of its group members, affect the social climate or lead to discrimination against them than if it concerned hateful speech against minorities. But this concerns a different value conflict and a different notion of harm (para. 1.6 supra).
4.6 Synthesis Race versus Religion

Free criticism of the convictions and practices of a particular religion in public debate must be allowed. Blasphemous and other religiously offensive expression cannot be prohibited merely because it would violate the feelings of religious adherents. A right to respect of religious feelings does not form an integral part of religious freedom. Religious toleration may relate to the peaceful coexistence of different religious thoughts and practices, but not to the peaceful co-existence of opinions on religious matters; these must clash in an open and free debate, provided that participants are respected as equal persons. One aspect is that religiously motivated and secular opinions uttered in public debate are afforded an equal level of protection.

Another aspect is that when vehement criticism of the convictions and practices of a particular religion amounts to hate speech against its adherents, it can be prohibited in public debate. Criticism of a particular race may, however, sooner amount to a prohibited form of hate speech than criticism of a religion. Other than race, religion is not an immutable characteristic and a person can change his religion or renounce his beliefs. Moreover, a person’s conduct may in fact be inspired by his/her religion and may be criticized on that basis too. Religious criticism can also concern existing religion-state relationships and the place of religion in the public domain. In principle, a distinction can thus be made between expression about a religion and expression about religious adherents.

In order to consistently demarcate free contributions to public debate about religion from prohibited hate speech on the basis of religion, in principle the criterion that expression must designate a particular religious group can be a simple, helpful tool. In fact, utterances about a religion shall sooner constitute a free value judgment, while utterances about religious adherents shall sooner require a factual basis. But then a norm must clarify whether this signifies that an utterance must explicitly name a group, whether the group must have a certain degree of homogeneity in the sense of a collective identity; or whether a negative quality is in fact attributed to all members of the group. A speaker may find that actual or supposed behaviour of persons belonging to a particular religion can be necessarily associated with and caused by their religion and inherent to all members of that group.

In this respect, another criterion to consistently demarcate free contributions to public debate about religion from prohibited hate speech based on religion can be whether an utterance treats the actual or supposed practices associated with a religion as a central component of people’s ethnic or national descent and identity. The essential question remains as to whether an utterance harms people’s equal dignity or is likely to lead to discrimination, which may be sooner the case with hateful speech against the religion of minorities than with majorities. In order to answer this question consistently, it is not only important to differentiate between factual statements and value judgments; proper weight must also be given to whether the expression concerns either people’s race and/or religion.
5. Conclusion

This chapter analysed the difference of opinion in literature about the relationship between freedom of expression and the regulation of hate speech – on the basis of religion – using four factors: actions versus opinions; public debate versus other types of expression; facts versus value judgments; and race versus religion. Every paragraph resulted in a synthesis that provided a description of the factor concerned for further analysis in this study. The analysis showed that a certain overlap and interaction exists in the discussion of the factors. Taken together, the factors thus defined, may result in a final conclusion about the types of problems involved when trying to consistently determine the restrictions to hate speech based on religion uttered in public debate.

Hate speech consists of all kinds of utterances that stigmatize a particular group in society, from literal incitements to commit concrete acts of discrimination and discriminatory political proposals to racist epithets; invectives and terms of abuse; and vague allegations and generalizations that associate certain actual or supposed behavior or practices with people’s race or religion, including forms of holocaust denial or attacks on a religion, and are subsequently presented as a ground to discriminate against a particular group. Such speech may not produce imminent violent and lawless actions that cause direct physical harm and affect the public order; it harms the dignity of the members of the target group, lead to discrimination against them and affect the social climate.

As far as the creation of specific hate speech bans is concerned, it must be clear what interests such restrictions aim to protect; one may question whether a norm that does not clarify which consecutive effects of hate speech form the ground for its prohibition can be consistently applied. Subsequently, rationales behind restrictions of hate speech must be translated into concrete legal requirements for criminal liability/statutory offences that determine their scope. Clearly defined statutory offences should afford legal certainty about the rights and interests they protect as well as the extent of freedom of expression. Finally, for the application of the hate speech bans in concrete cases it must be clear how utterances should be qualified under those offences and what weight is to be given therein to the interest of a free public debate.

Hate speech may be prohibited because its racist message or ideas can lead to hatred, discrimination and violence against its victims in the mid- or long term; a consistent norm then must mark a spot somewhere on this gradual scale. Hate speech may also be prohibited because its racist message or ideas affect the dignity of its victims; a consistent norm then must clarify that ‘dignity’ must not be understood as a ‘public moral’ separate from its harm to persons. Then hate speech that violates human dignity is not prohibited because it contravenes certain standards of ‘morality, civility or respect’, but because the assault on the dignity of victims of hate speech becomes a concrete problem for them (psychic harm, devaluation in the eyes of others). Given the public good in the
prevention of discrimination and the protection of people’s equal human dignity, a state can prohibit the ‘incitement to hatred, discrimination or violence’ as well as ‘group defamation/insult’ as such by criminal law offences.

Whether or not hate speech bans must also be applied to contributions to public debate appears to depend primarily on what the perspectives on the harmful effects of hate speech are and which notion of harm is used in light of the importance that is afforded to that debate to legitimize democracy. The existence of a free, lively, inclusive public discourse is of fundamental importance to the proper functioning of democracy and, therefore, ample room must exist for a free political and public debate; it may include many extreme and unpopular political opinions, also about people’s religion in the context of religion-state relationships or problems related to immigration and integration. Such discussions can, however, culminate in hate speech against a group on account of their religion. It must be borne in mind that the public and political debate is not directed at universal truth finding, but concerns the formation of power and the laws of the state; this is precisely why contributions to public debate that amount to hate speech have a special position and may be prohibited. One can nevertheless consider that the free public and political debate is of such vital importance that the harmful effects of these forms of hate speech must be taken for granted and that the protection of the public debate prevails. Then it must still be clear when hate speech does overstep the outer boundaries of public debate. One may question whether a norm that does not clarify wherein the excessiveness of hate speech uttered in public debate resides, can be consistently applied.

In order to consistently distinguish free critical contributions to public debate from prohibited hate speech, one must accurately differentiate between factual statements and value judgments, hence different types of utterances. In fact, a problem with the demarcation of free critical remarks from racist hate speech is that somewhat inconsistent argumentations are being used that do not clarify to what extent a negative utterance about a group must be substantiated by a sufficient factual basis. The limit to public debate can be reached when hate speech affects people’s dignity because it consists of pertinent untrue statements and value judgments that lack a sufficient factual basis and are gratuitously offensive.

This may sooner be the case with criticism of a particular race than criticism of a particular religion. After all, other than race, certain practices and behavior can actually be grounded in religious prescriptions or motivations that may be freely discussed. This may lead to somewhat inconsistent argumentations that do not clarify how to ‘demarcate a religious group’ in the context of hate speech. One aspect is that it must be observed whether a religion is, or is not treated as a central component of people’s ethnic or national descent and identity.

A norm must also clearly distinguish criticism of government policies from political proposals targeting the fundamental rights of certain minorities.
Then hate speech can constitute an abuse of rights, because it aims at the destruction of people’s equal fundamental rights. Such expression endangers the ‘public order’ in relation to the interest in an orderly democratic society free from discrimination. This concerns a different value conflict and a different notion of harm than disorder through violent actions.

Hence, in order to be able to determine the boundaries of public debate, restrictions to hate speech must appropriately be embedded in a broader conception of the constitutional state. A constitutional provision that declares the respect of the equal human dignity and the equal enjoyment of fundamental rights can function as a compass and a reference point for the setting of clear and well motivated restrictions to hate speech uttered in public debate by the legislator and the judge; this notably applies when the rationales of hate speech bans, the concrete requirements of the statutory offences and the case law on hate speech are itself unclear. Such a constitutional guideline can assure that the substantive balancing act of opposing rights and interests in setting restrictions to hate speech remains within the same value conflict.