Faith in public debate: an inquiry into the relationship between freedom of expression and hate speech pertaining to religion and race in France, the Netherlands and European and international law
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Chapter 5 – THE NETHERLANDS
ABBREVIATIONS

Aant. Comment
BW Dutch Civil Code
CDA Christian Democratic Party
CEDAW UN Women’s Treaty
CGB Equal Treatment Commission
CHU (former) Protestant Party
CU Christian Union
Comm. Commentary
CPH (former) Communist Party
Crim ch. Criminal chamber
D66 Democratic Party
diss. dissertation
ECHR European Convention of Human Rights
ECmHR (former) European Commission of Human Rights
ECTHR European Court of Human Rights
ed./eds. editor/ editors
et al. et alii – and others
et seq. et sequens – and the following
ICERD International Convention on the Elimination of all forms of
Racism and Discrimination
ICCCPR International Covenant on Civil and Political Rights
LJN National jurisprudence number
NJ Nederlandse jurisprudentie
nr. number
p. page
para. paragraph
PvdA Labour Party
PVV Freedom Party
SGP Reformed Protestant Party
Sr Dutch Criminal Code
Stb. Staatsblad – Dutch law gazette
sub subject
Sv Dutch Code of Criminal Procedure
Trb. Treatises gazette
VARA Socialist Broadcasting Company
VVD Liberal Party
WODC Scientific Research and Documentation Centre
WRR Scientific Council for Government Policy

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Introduction

This chapter gives an in-depth examination of the relationship between freedom of expression and restrictions to hate speech in the national law of the Netherlands. The chapter analyses the content and scope of the existing Dutch hate speech bans, their underlying rationales and their relationship with freedom of expression on the basis of their drafting history, their application by the judge, their embedding in Dutch law and on the basis of primarily Dutch literature. Furthermore, particular attention is paid to the interplay between the different actors in the determination of the restrictions to hate speech: the Dutch legislator, the public prosecution, the judge, and the victims of hate speech and anti-racism and other civil society associations. The chapter provides the reference points for the comparison with the French law and the approach under the European Convention of Human Rights (ECHR) in Chapter 6 – on the basis of the four factors of the analytical framework of Chapter 2.

To a certain extent, the current chapter continues with the structure used in the previous chapter on France. That chapter was divided into three parts based on the devise of the French Republic ‘Freedom, Equality, Brotherhood’ that inspires French public law and is also understood to reflect three pillars of the democratic constitutional state. The chosen structure thereby enabled the discussion of the French law on hate speech against the background of the French conception of democracy. Although the Dutch Constitution does not declare a particular device of the Dutch state and the three principles of the French device cannot simply be transposed to Dutch law, the latter may be used as a general model to frame the discussion of the Dutch law on hate speech. Moreover, continuing the structure of the previous chapter is a good way to bring to the fore not only the similarities but also the differences between French and Dutch law on hate speech.

In Dutch law freedom and equality also constitute two fundamental principles and the restrictions on hate speech are also influenced by a certain interpretation of their interrelatedness. The Dutch Constitution, however, does not define the characteristics of the Dutch Constitutional State. The Dutch State is not envisioned as a political bond of brotherhood, a political entity inseparable from civil society consisting of an active participation in civil and political rights and collective power. The fact that the Dutch legislator has afforded the public prosecution the exclusive right to prosecute criminal offences may be placed in this light. This may also explain the limited cooperation and consultation between the public prosecution and anti-racism and other civil society associations concerning the enforcement of the hate speech bans. Criminal justice is considered to be a public interest that should not to be governed by private considerations.

This has not always been the case. In 1811, when the Kingdom of the Netherlands was annexed by Napoleon’s France, the first Dutch Criminal Code Crimineel Wetboek voor het Koninkrijk Holland (1809-1811) was replaced by the
French Code Pénal of 1810. In that same year, the French Code d’ Instruction Criminelle entered into force, which provided for the ‘action civile’, i.e. the right of the victim of a criminal offence to set in motion a public prosecution. After the Netherlands had regained its independence, the civil action was abrogated in 1838, but the French Code Pénal remained in force until the first version of the Dutch Criminal Code was established in 1881 and entered into force in 1886.\footnote{Wet van 15 April 1886, Stb 1886, 64, tot invoering van het Wetboek van Strafrecht.} Given this shared history, the French legal system has undeniably influenced the Dutch legal system – both in relation to its criminal and civil law.\footnote{Cf. Asscher, B.E. & Simons, D., Het nieuwe wetboek van strafrecht vergeleken met den code pénal, Den Haag: Belinfante 1886.} But the precise aim of the Dutch Criminal Code of 1886 was to depart from the system of the French Code Pénal and inspiration was drawn, amongst others, from the Belgian, German and Italian Criminal Codes.\footnote{Smidt, H.J., Geschiedenis van het Wetboek van strafrecht: volledige verzameling van regeringsontwerpen, gewijzede stukken, gevoerde beraadslagingen, Deel 1, Haarlem: Tjeenk Willink 1881, p. 3-4.} This also notably applied to the insertion of certain speech offences.

Dutch free speech doctrine also did not explicitly adopt the French traditional concept of the ‘délit d’opinion’. Dutch and French criminal laws were on the other hand grounded on the same basic principles; the only punishable conduct is conduct that consciously causes direct harm to others and if it has actually caused harm to someone.\footnote{Smidt, H.J., Geschiedenis van het Wetboek van strafrecht: volledige verzameling van regeringsontwerpen, gewijzede stukken, gevoerde beraadslagingen, Deel 3, Haarlem: Tjeenk Willink 1882, p. 364.} Just as with the French Press Act, over time the Dutch Criminal Code has been supplemented with offences that increasingly deviate from its original principles. Certain values were considered so important that the criminalization of the violation thereof was considered to be justified. This also applied to the interests protected by the hate speech bans. However, in the Netherlands the necessity of their existence primarily results from the obligations arising from international treaties and they cannot be said to be a corollary of any basic principles or values set by the Dutch Constitution; given its sober character, the latter functions less as a compass for the organization of society including the parameters of public debate.

Against this background, Part One discusses the central characteristics of the protection of the free expression of opinion in Dutch law. Part Two discusses the hate speech bans as restrictions to the free expression of opinion in Dutch law. Part Three discusses the enforcement of the hate speech bans by the public prosecution in Dutch law and the position of affected parties including anti-racism associations. While the first and third part of the chapter forms an introduction, respectively a complement to the second part, the latter forms the body of the chapter and consists of several paragraphs. The paragraphs are always completed with a conclusion. This is different to the rest of the chapters
as a whole as it does not culminate in a final conclusion. To avoid unnecessary repetition, chapter 6, the last chapter of this study, provides a joint further analysis and synthesis of the consistency of restrictions to hate speech in French and Dutch law, followed by a comparison with the approach under the ECHR, on the basis of the four factors of the analytical framework (Chapter 6, para. 1 infra).
I FREE EXPRESSION OF OPINION IN DUTCH LAW

1. History and fundamentals: free expression of opinion provided the responsibility under the law

The Netherlands is known for its rich history of press freedom (1.1). In the Netherlands, the right to the free expression of an opinion is protected in the Dutch Constitution (1.2) and has both vertical and horizontal effect (1.3). Legal scholars disagree on the exact relationship of the right with the right to freedom of religion also protected in the Constitution (1.4). The restrictions to the right to freedom of expression on the basis of the content of expression are incorporated into the Dutch Criminal and Civil Codes (1.5). They are to a significant extent influenced by the large room for judicial interpretation (1.6), generally in conformity with the international law, notably the case law of the European Court of Human Rights (ECHR) (1.7). The analysis results in a general conclusion about the free expression of opinion in Dutch law (1.8).

1.1 History of freedom of the press

The Netherlands has much less of a theory on freedom of expression than France. During the drafting of the constitutional provisions protecting freedom of expression or the public speech offences that form limitations to this freedom, the Dutch legislator has not dedicated extensive considerations on the principle distinction between actions and opinions or the question as to what constitutes a ‘délit d’opinion’. Subsequently, Dutch legal scholars have equally not developed such notions (para. 1.5.1 infra). This does not signify that the Netherlands does not have a rich history of freedom of expression – to the contrary. France has played a considerable role in the history of freedom of expression in the Netherlands. During the Republic of the Seven United Provinces (1581-1795) a relatively large press freedom existed, which attracted many foreign authors who could freely publish their works that could not be published elsewhere. No systematic censorship was exercised. Although, a licensing system for the printing press and a regime of preliminary authorization, complemented with severe sanctions had to prevent the distribution of placards of a dangerous political or religious nature. This relative freedom has been assigned to the lack of a strong central authority that could

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effectively enforce the regulation in place.\footnote{1488} Hence, French refugees of the Ancien Régime could publish their French-Dutch newspapers, such as the famous \textit{Gazette de Leyde}, primarily destined for France but having an international readership.

At the end of the Eighteenth century the insistence for liberalization of the press increased. With the armed support of the French Republic, the revolution of the Patriots founded the Batavian Republic (1795-1806). Freedom of the press was laid down for the first time in the \textit{Staatsregeling} – the Constitution of 1798 – that was inspired by the French 1789 Declaration.\footnote{1489} The liberal period was however brought to a definitive end, when the ‘client state’ was annexed by the First French Empire and Napoleon reintroduced censorship (1810-1813). After the independence in 1813, the Kingdom of the United Netherlands was created and censorship was abolished by King Willem I.\footnote{1490} The Constitution of 1814 still lacked a provision protecting freedom of the press; as in the Netherlands no censorship had existed except during the French occupation and press freedom thus existed de facto, regulation was regarded as unnecessary.\footnote{1491} However, the merging with Belgium required explicit acknowledgement. Article 227 of the Constitution of 1815 protected freedom of the press and clearly expressed the ideals of the enlightenment by referring to freedom of the press as an ‘effective means to extend knowledge and progress the Enlightenment’.\footnote{1492} Nevertheless, the following years many repressive criminal offences were introduced, amongst others by the Acts that aimed to ‘curb unrest and malice’; the Act of 10 April 1815,\footnote{1493} the Decree of 20 April 1815\footnote{1494} and the

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\begin{tabular}{l}
1489 Article 16 of the \textit{Bataafse Staatsregeling van 1798} reads: ‘iedere burger mag zijn gevoelens uiten en verspreiden, op zoodanige wijze, als hij goedvind, des niet strijdig met het oogmerk der Maatschappij. De vrijheid der Drukpers is heilig, mids de Geschriften met den naam van Uitgever, Drukker, of Schrijver voorzien zijn. Dezen allen zijn, ten allen tijde, aansprakelijk voor alle zoodanige bedrijven, door middel der Drukpers, ten aanzien van afzonderlijke Persoonen, of der gantsche Maatschappij, begaan, die door de Wet als misdaadig erkend zijn.’ \\
1492 Article 227 reads: ‘Het is aan elk geoorloofd om zijn gedachten en gevoelens door de drukpers, als zijnde een doelmatig middel tot uitbreiding van kennis en voortgang van verlichting, te openbaren, zonder eenig voorafgaand verlof daartoe noodig te hebben, blijvende nogtans elk voor hetgeen hij schrijft, drukt, uitgeeft of verspreidt, verantwoordelijk aan de maatschappij of bijzondere personen, voor zoo verre deze regten mogen zijn beleedigd.’ The drafting history furthermore shows the rationales of the assurance of a democratic government system and the prevention of the creation of laws abridging press freedom. De Meij 1996, p. 22. \\
1493 Stb. 1815, 32.
\end{tabular}
\end{flushright}
regulations of 6 March 1818,\textsuperscript{1494} for which a strict prosecution policy was pursued.\textsuperscript{1495} The Act of 10 April criminalized the publication of writings that showed sympathy for foreign occupation or caused dispute and distrust amongst the inhabitants with flogging, branding, imprisonment and even the death penalty. A famous application of the Acts of 1815 and 1818 formed the trial against priest J.B. Buelen, who was convicted to one year of imprisonment for publishing a poem in the magazine ‘The Religion Friend’.\textsuperscript{1496} In 1828 several authors, printers and editors were condemned mostly for criticizing the government or its members. The political resistance against the laws particularly increased in the South; the sanctions were disproportionate, considering the fact that the laws criminalized the purport of writings, not actions. What is more, prosecutions were primarily directed at discourses of Catholic priests, while they could be freely ridiculed in several magazines.\textsuperscript{1497}

On 22 December 1828 the Government proposed a draft act to replace the laws that sought the criminalization, in particular, of the insult of the King, the Royal Family, the States-General, Colleges of State, courts, judges etc. and the insult of one of the Religions protected by the Constitution. The proposal was not agreed upon, due to the fact that it would considerably hinder freedom of criticism. Contrarily, a new draft act that aimed to curb scorn and libel against the King and the Royal Family and other offences against the public authorities and the general peace proposed by the King on 11 December 1829 was adopted, but only after the most contested and vague offence against the agitation of unrest and discord between citizens had been deleted.\textsuperscript{1498} Subsequently, the Act of 3 November 1830 aimed to ‘curb harmful tumults and practices of the evil-minded’ and criminalized amongst others the incitement to revolt by means of writings.\textsuperscript{1499} The Acts to ‘curb unrest and malice’ would be mirrored in Articles 112;113;117;118 and 131 of the Dutch Criminal code of 1881 (para. 1.5.1 infra).

According to Diemer, this period is characterized by a continuous interplay between on the one hand the countering of seditious expression by criminal offences and on the other hand the dissatisfaction on these same criminal offences expressed in a seditious manner. The Government made an effort to adopt laws that would satisfy both parties. This explains why both the adoption of laws to counter seditious expression, and greater freedom of the press were requested. Surprisingly, a possible reform of Article 227 of the 1815 Constitution did not form part of these discussions.\textsuperscript{1500}

\begin{footnotesize}
\item[1494] Journal Officiel, 1815 nr. 10.
\item[1495] Stb. 1818, 11.
\item[1496] Diemer 1937, p. 78-84.
\item[1497] Diemer 1937, p. 79.
\item[1500] Stb. 1830, 75.
\item[1501] Diemer 1937, p. 84.
\end{footnotesize}
With the Constitutional reform of 1848, the constitutional right to freedom of the press protected by Article 8 was included in the terms that have been preserved in current Article 7 paragraph 1 of the current Dutch Constitution, which reads: ‘No one shall require prior permission to publish thoughts or feelings through the press, without prejudice to the responsibility of every person under the law.’ The Dutch legislator did not seek to bring any changes to the scope of the freedom afforded by Article 227 of the 1815 Constitution, but merely aimed to determine the freedom as simply and clearly as possible. The Article prohibits preventive measures and thus denounces prior censorship, which had been exercised by past regimes. Contrarily, the Article does not prohibit repressive measures. After 1848, the repressive criminal offences that date back to the reign of Willem I have, however, been abolished or less frequently applied.

After the abolishment of prior censorship, other than in France, in the Netherlands no specific limitations on the periodical press, such as the requirement of a deposit for possible violations of the law, were introduced. What did exist were the dagblagegel, a special tax on periodical publications, and a tax on advertisements that impeded the development of the press. Under pressure from the liberal movement, the taxes were finally abrogated in 1869, which triggered an acceleration in the flourishing of the press. The Press, however, remained subjected to the existing criminal offences.

In the turbulent political contexts of the rise of national socialism in the thirties and the Cold War in the fifties of the twentieth century, propositions had even been made to submit the periodical press to a special regime and introduce certain prohibitions of publication in order to prevent public agitation; newspapers could have a negative influence on public opinion and undermine state authority. Upon these proposals no legislative action was however taken.

Although the text of the Constitutional provision protecting press freedom has not changed since 1848, the Dutch Supreme Court has interpreted the article in such a manner that next to the ‘publication of thoughts or feelings through the press’ the distribution of writings has certain protection as a ‘connected right’. The Court has further elaborated the exact purport of this freedom to distribute writings in a series of case law (para. 1.2.1 infra).

Until the constitutional reform of 1983, the Constitution contained no reference to no other media than the printed press. Theatre, cinema and

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broadcasting fell outside the scope of the right to freedom of the press. The substantial control of these media was justified, because of their public nature and intrusiveness. However, the needs of modern times required that other media than the printed press were brought under the scope of freedom of the press.

1.2 Constitutional protection of the free expression of opinion

1.2.1 Article 7 of the 1983 Constitution

The 1983 Constitution extended the constitutional protection of freedom of expression provided in Article 7. The Government considered freedom of expression important for inter human contact and individual development, but also indispensable for the participation of citizens in the public cause and the free flow of information, which in its turn is indispensable for a democratic state. The first paragraph of the Article, however, preserves the formulation that has been in existence since 1848 (‘No one shall require prior permission to publish thoughts or feelings through the press, without prejudice to the responsibility of every person under the law’). In this manner, the aim of the government was to preserve the series of case law concerning the distribution of writings, a doctrine that would be difficult to incorporate into Article 7. The article was supplemented with three new paragraphs, two of which inserted media other than the printed press. Other than in France, where Articles 10 and 11 of the 1789 Declaration protect the manifestation and communication of thoughts and opinions, thus the communication process in general, Article 7 of the Dutch Constitution rather protects the communication ‘means’ and provides in a tri-partition with regard to the level of protection afforded to freedom of expression depending on the technical means used.

Article 7 paragraph 1 protects the free publication of thoughts and opinions through the press. The press comprises techniques of multiplication equitable with the press, readable signs and images, paintings, drawings or photos. The Internet or demonstrations, even though they may include texts, do not fall under the scope of this paragraph. ‘No one shall require prior permission’ signifies a prohibition on prior censorship and thus of prior supervision by the

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1508 Theatre and cinema could therefore be subjected to prior supervision and prohibitions with regard to their content and broadcasting was subjected to a licensing system based on the scarcity of frequencies.


1512 Tekst & Commentaar Grondwet, Comm. Bunschoten Art. 7 sub 2, p. 17.
government with regard to the content of the expression that is to be published. This concerns an absolute prohibition for which no restrictions are possible.

Next to the prohibition of prior censorship, the ‘publication’ of thoughts and feelings forms the ‘core’ right of freedom of the press. Other phases in the communication process than this active side of communication, such as the receiving of thoughts and opinions, were not inserted into the article. On the one hand, the government wanted to prevent the creation of a right on government information, on the other hand the government stated that the gathering and receiving certainly partly falls under the scope of publication.\(^\text{1513}\) Subsequently, the freedom to receive information has been elaborated in Dutch case law based on Article 10 ECHR, which is why the scope of Article 7 remains unclear in this respect (para. 1.7 infra).\(^\text{1514}\) Even though pluralism of media is not explicitly guaranteed in the Constitution, the existence of a pluralistic press is regarded as a task of the government and assured by the Dutch Media Act.\(^\text{1515}\)

The terms ‘thoughts and feelings’ are broadly interpreted by the constitutional legislator of 1983 and in case law.\(^\text{1516}\) Although they give the impression that statements of fact fall outside the scope of the article, the constitutional legislator has explicitly assured that this is not the case. Newspaper articles are thus protected by Article 7. What is more, opinions would be inherent to the selection of facts.\(^\text{1517}\) Next, Dutch case law has adopted the distinction made in the case law of the ECtHR between facts or value judgments (para. 1.7 infra). It results from the phrase ‘without prejudice to the responsibility of every person under the law’ that the publication of thoughts and feelings through the press can only be restricted by statutory laws originating from the formal legislator, that is the States-General and the Government.\(^\text{1518}\)

Subordinate to the constitutionally protected core right to publish thoughts and feelings, the Dutch Supreme Court has developed the right to distribute printed matter. This right is generally referred to as a ‘connected’ or ‘peripheral’ right.\(^\text{1519}\) The local government may not entirely prohibit so-called ‘independent means of distribution’, such as the distribution of handbills,

\(^{1515}\) Media Act of 21 April 1987, Stb. 249.
\(^{1516}\) Have been brought under the scope of ‘thoughts and feelings’: a billboard indicating the name of an educational institution ( arrs 24 June 1991, AB 1992, 26) and posters depicting artwork or entertaining posters (Dutch Supreme Court, 21 March 2000, NJ 2000, 482).
\(^{1518}\) Dutch Supreme Court, 28 November 1950, NJ 1951, 137 and Dutch Supreme Court, 28 November 1950, NJ 1951, 138.
\(^{1519}\) Nieuwenhuis 2011, p. 220.
offering of printed works, posting, or the installation of neon signs.\textsuperscript{1520} Other than the right to publish, this right to distribute can be restricted by regulations issued by local authorities, as long as such regulations do not concern the content of the expression, or consist of an entire prohibition to distribute or a licensing system.\textsuperscript{1521} In sum, use of a certain significance of the right to distribute must remain possible.\textsuperscript{1522}

Paragraph two of Article 7 concerns broadcasting. Contrary to the printed press, no absolute prohibition of prior permission applies to broadcasting. In the field of broadcasting, a licensing system is therefore permitted and only prior supervision with regard to the content of specific broadcasts is excluded.\textsuperscript{1523} Paragraph three of Article 7 forms a general guarantee of freedom of expression by means other than the press or broadcast and comprises forms of expression and distribution, such as speaking in public, theatre, cinema and the distribution through new media such as the Internet that cannot be regarded as broadcast. With regard to these media, it prohibits prior approval with regard to the content of expression.\textsuperscript{1524} The prohibition of prior censorship does, however, not apply to performances open to persons younger than sixteen years of age for which the legislator may issue regulations – even by means of delegation – in order to protect good morals. A licensing system is allowed, as long as it does not regard the content of expression. Repressive restrictions concerning the content of expression may only be determined by the formal legislator. Local authorities may issue regulations that do not concern the content of expression. However, case law has set limitations to these regulations comparable to the right to distribute thoughts and opinions through the press.\textsuperscript{1525}

Despite its tri-partition in technical means of communication, a common characteristic of Article 7 paragraphs 1 and 3 thus forms the prohibition of prior

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\begin{enumerate}
\item[1521] Dutch Supreme Court, 28 November 1950, NJ 1951, 137; Dutch Supreme Court, 24 January 1967, NJ 1967, 270.
\item[1522] Dutch Supreme Court, 27 March 1953, NJ 1953, 389.
\item[1523] Article 7 paragraph 2 reads: Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
\item[1524] Article 7 paragraph 3 reads: No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
\item[1525] Tekst & Commentaar Grondwet, Comm. Bunschoten Art. 7 sub 4, p. 18.
\end{enumerate}
\end{footnotesize}
censorship. Besides, the rule that repressive restrictions concerning the content of expression may only be determined by the formal legislator applies to both paragraphs 1 and 3 equally.

Paragraph four of Article 7 excludes commercial expression from the constitutional protection of freedom of expression.\(^\text{1526}\) During the Constitutional reform the government stipulated the intrusive and aggressive nature of commercial expression that did, however, not comprise of advertisements on cultural goods. On the one hand, the government wanted to preserve the possibility of prior supervision on the content of commercial expression, on the other hand the government deemed it impossible to enumerate all restrictions on the content of commercial expression in statutory laws.\(^\text{1527}\) The distinction between commercial expression and idealistic expression can be problematic. The Dutch Supreme Court has, however, afforded protection to commercial expression on the ground of Article 10 ECHR without reference to Article 7 paragraph 4 of the Dutch Constitution.\(^\text{1528}\) The distinction, therefore, has considerably lost its importance.\(^\text{1529}\)

1.2.2 Limitations

Like most fundamental rights in the Constitution, the right of freedom of the press has no absolute nature and its exercise can be limited. Between the fundamental rights protected in the Constitution no hierarchy exists. The right to freedom of the press must be balanced with other rights or interests, for example as regulated in the Dutch Constitution.\(^\text{1530}\) The constitutional legislator has rejected the possibility of general limitations to fundamental rights that cannot be traced back to the clauses of the fundamental rights. The constitutional legislator has equally rejected the doctrine of the core of fundamental rights, according to which restrictions are possible as long as they do not violate the core of a fundamental right.\(^\text{1531}\)

In fact, Article 7 paragraphs 1 and 3 only afford protection against prior censorship. The Article furthermore declares the formal legislator, that is the States-General and the Government, competent to determine restrictions on the content of expression, but – like Article 11 of the 1789 Declaration – it does not indicate the interests these restrictions must protect. The constitutional legislator thought that a reference to the interests that the restrictions on fundamental rights must protect would lead to a long list of policy aims that would hollow

\(^{1526}\) Article 7 paragraph 4 reads: ‘The preceding paragraphs do not apply to commercial advertising’.

\(^{1527}\) Handelingen II, 1976/77, 2196.

\(^{1528}\) Dutch Supreme Court, 13 February 1987, NJ 1987, 899.


\(^{1530}\) Kamerstukken II, 1975/76, 13872, nr. 3, p. 11.

the fundamental rights. The Dutch legal system, however, lacks the possibility to review the constitutionality of statutory laws. The Dutch Constitution even prohibits such constitutional review (para. 1.6 infra). In France, the Constitutional Council exercises such review and as a result of its case law, freedom of communication must be conciliated with the rights of others, the public order and human dignity. Another difference with France is that the Dutch Constitution is ‘non-ideological’ in the sense that it does not determine any constitutional values, such as human dignity or the respect for religious beliefs, from which limitations to freedom of expression could be derived.

The rejection of general limitations to fundamental rights raises the question as to the abuse of fundamental rights. The Dutch Constitution lacks a prohibition of the abuse of rights comparable with Article 17 ECHR. The government thought that the clauses of the fundamental rights afford sufficient possibilities to counter the abuse of fundamental rights. What is more, the introduction of a prohibition of abuse of right would add a strong political component to the question as to the limitations to the freedoms of citizens in the exercise of fundamental rights and the general starting point of the Dutch Constitution was to avoid as much as possible the appreciation of political conflicts with regard to the exercise of fundamental rights by the judge.

Repressive restrictions to freedom of expression must merely comply with the clause in Article 7 ‘without prejudice (…) under the law’. As the clause does not indicate the protected interests and the Dutch constitution has no general limitations and no prohibition of abuse of right, in principle the legislator is competent to determine any restriction with regard to the content of expression, as long as control takes place after and not prior to the publication. Legal scholars have, however, emphasized that the legislator must exercise restraint in the formulation of restrictions. Criminal restrictions to freedom of expression are incorporated into the Dutch Criminal Code (Sr) and civil restrictions to freedom of expression result from the Dutch Civil Code (BW), notably the open formula of the wrongful act of Article 6:162 BW (para. 1.5.2 infra).

1.2.3 Proposals for reform

Since its creation in 1983, Article 7 of the Constitution has received much criticism. The criticism particularly concerns the emphasis of the article on the prohibition of censorship, on the publication of thoughts and feelings and no other phases in the communication process, on the terms ‘thoughts and

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1532 Kortmann 1987, p. 51.
1535 De Meij 1996, p. 147.
feelings’, on the exclusion of commercial expression, on its tri-partition of technical means that causes problems with regard to the integration of new means of communication and on the lack of a reference to interests for the determination of restrictions. In several respects, Article 10 ECHR affords a broader protection to freedom of expression (para. 1.7 infra).

Several proposals for reform have therefore been made. In 1999 the Association of Media and Communication law issued a preliminary report concerning a new text for Articles 7 and 13 of the Constitution that protects the privacy of correspondence.1536 Earlier, Dommering and Asscher had proposed the combination of these two articles.1537 In 2000, the Commission Franken issued the report Fundamental rights in the Digital Age that proposed the reformulation of Article 7 by deleting the tri-partition of technical means and the exclusion of commercial expression and by inserting the right to receive and distribute expression.1538 In 2011, the State Commission on the Constitution equally proposed to reformulate Article 7 by extending the prohibition of censorship to all forms of expression, replacing the term ‘feelings’ by ‘opinions’, inserting the right to receive information and the respect of pluralism of media by the government.1539 1540

Other than previous commissions, the latter State Commission also advised changing the system of restrictions to fundamental rights of the Constitution. It advised the insertion of a general clause declaring that restrictions to fundamental rights must be proportionate to their aims and may not impair the core of fundamental rights.1541 Furthermore, it advised the insertion of a general provision declaring that the Netherlands is a constitutional state and that the government respects and guarantees human dignity and the

1540 Proposed Article 7 reads ‘1. Niemand heeft voorafgaand verlof nodig om gedachten en meningen te openbaren, behoudens ieders verantwoordelijkheid volgens de wet. 2. Het ontvangen van informatie is vrij, behoudens beperkingen bij de wet gesteld. 3. De overheid eerbiedigt de pluriformiteit van de media.’
1541 The proposed article reads ‘1. Beperkingen van grondrechten gaan niet verder dan het doel van de beperking vereist. 2. De kern van grondrechten wordt niet aangetast.’
fundamental rights and principles.\textsuperscript{1542} The articulation of the core values of the constitutional state could be relevant for the promotion of integration and citizenship and function as a reflexion of the Dutch constitutional identity. The provision has a normative character in the sense that it must function as a guideline for the interpretation of (fundamental) rights. Even though the proposal of the Commission does not envision the insertion of a reference to the interests that restrictions to Article 7 must protect, it thus provides for a broader protection in the field of repressive restrictions. This particularly applies since the Commission, similar to the Commission Franken, advised the abrogation of the prohibition of constitutional review (para. 1.6 infra).

However, in reaction to the advice, the Government decided not to adopt these proposals, most notably due to the fact that it wanted to maintain the sober and open character of the Dutch Constitution and also because the proposals are not strictly necessary.\textsuperscript{1543} Subsequently, the Senate adopted two motions, in which the Government was requested to nevertheless develop, next to a provision that assures the right to a fair trial,\textsuperscript{1544} a general provision in the Constitution expressing that the Netherlands is a democratic constitutional state.\textsuperscript{1545} The Government has indicated that it will submit a proposal to that effect in 2014.\textsuperscript{1546} Depending on the exact formulation (including a reference to the inviolability of the human dignity), such a general provision in the Dutch Constitution could – amongst others – serve as a compass for the legislator to set the statutory restrictions to hate speech and for the judge to interpret and apply them in individual cases. Yet, the general criticism remains that the protection of fundamental rights by the Dutch Constitution – notably of freedom of expression – has been superseded by the ECHR (para. 1.6;1.7 infra).

1.3 Vertical and horizontal effect

The right to freedom of expression is primarily directed against the government; against prior censorship exercised by the government, other preventive measures and also repressive measures that hinder freedom of expression. The Constitutional legislator of 1983 has explicitly recognized the horizontal effect of

\textsuperscript{1542} The proposed article reads ‘1. Nederland is een democratische rechtsstaat. 2. De overheid eerbiedigt en waarborgt de menselijke waardigheid, de grondrechten en de fundamentele rechtsbeginselen. 3. Openbaar gezag wordt alleen uitgeoefend krachtens de Grondwet of de wet.’

\textsuperscript{1543} The Government only adopted the proposal to amend Article 13 of the Constitution that – similar to Article 7 – rather protects a limited enumeration of means of correspondence (letter, telephone and telegraph) than the privacy of the correspondence process, which complicates the interpretation of the article in the light of new technical developments. \textit{Kamerstukken II}, 2011-2012, 31570, nr. 20, p. 5-8; 31570, nr. 21.

\textsuperscript{1544} Kamerstukken I, 2013-2014, 31570, C.

\textsuperscript{1545} Kamerstukken I, 2013-2014, 31570, B.

\textsuperscript{1546} Kamerstukken I, 2013-2014, 31570, H en K.
fundamental rights, defined as the legal force of fundamental rights in the mutual relations between citizens.\textsuperscript{1547} As the extent of the effect of fundamental rights in relations between citizens would vary ‘per article, per paragraph, and even per category of cases’, the government did not make any statements with regard to the extent of horizontal effect of any fundamental right in particular. Thus, the question of horizontal effect was reduced to a question of the interpretation of the Constitution that was shifted towards the legislator and the judge.\textsuperscript{1548}

The legislator has attached importance to freedom of expression, when determining the restrictions to freedom of expression. Likewise, the judge increasingly attaches importance to freedom of expression, not only in legal actions between citizens based on the wrongful act (6:162 BW), but also in criminal cases based on public speech offences. The question arises as to whether in these cases one can speak of horizontal effect in the strict sense; while speech offences such as insult or defamation or the civil norm of the wrongful act concern the relations between citizens, these norms originate directly from the legislator.\textsuperscript{1549}

Indeed, in Dutch legal doctrine, the question of to how to comprehend the application of fundamental rights by the judge in relations between citizens is the object of continuous discussion. Some authors argue that fundamental rights only have horizontal effect, if they have ‘full’ effect in the sense that one can invoke them in the same manner against citizens as against the government.\textsuperscript{1550} Others consider that fundamental rights such as freedom of expression play an important role in cases between citizens, because the judge attaches importance to them when interpreting civil notions such as the ‘wrongful’ act in Article 6:162 BW and thus ‘translates’ the fundamental right into a civil right.\textsuperscript{1551} Third parties opine that fundamental rights such as freedom of expression function as general legal principles in both public and private law.\textsuperscript{1552} De Meij considers the discussion to be a matter of legal dogmatism. In any case, freedom of expression is an interest to be weighed in relations between citizens.\textsuperscript{1553} The criminal and the civil judge, as we will see, increasingly apply the statutory restrictions in light of freedom of expression (para. 1.5;5;8;6.4\textit{ infra}).

\textsuperscript{1547} Kamerstukken II, 1975-1976, 13872, nr. 3, p. 15-16.
\textsuperscript{1548} Kamerstukken II, 1975-1976, 13872, nr. 3, p. 15-16.
\textsuperscript{1549} Nieuwenhuis 2011, p. 211.
\textsuperscript{1552} Koekkoek, A.K., De betekenis van grondrechten voor het privaatrecht, WPNR 1985, nr. 5742, 5743 en 5744, p. 406.
\textsuperscript{1553} De Meij 1996, p. 83.
1.4 The relationship to freedom of religion

Other than in France, in the Netherlands the constitutional provision protecting freedom of expression does not explicitly protect religious opinions, nor is the free exercise of religion regulated outside the Constitution in a separate act. Article 6 paragraph 1 of the Dutch Constitution protects the right of any person to freely profess his religion or belief either individually or in community with others, without prejudice to his responsibility under the law.\(^{1554}\) The paragraph forms a general guarantee of the free profession of religion or belief, both inside and outside buildings and enclosed places. Paragraph 2 of Article 6 guarantees the free profession of religion or belief outside buildings and enclosed places in specific. The Article replaces a series of articles in the former Constitution\(^{1555}\) that regulated freedom of religion, comprising the equal protection of denominations and the guarantee of equal civil rights of religious adherents, which nowadays falls under the scope of current Article 1.

The profession of religion or belief comprises the following components: to have, change and not have a conviction, the private and public religious exercise, the religious propagation in education, nurture and preaching and the establishment of organizations.\(^{1556}\) These forms of religious exercise are constitutionally protected. The government did not desire to extend constitutional protection to freedom of conscience.\(^{1557}\) It is plausible that the legislator did not want to unconditionally guarantee the freedom to act according to one’s religion or belief.\(^{1558}\) The Dutch Supreme Court has brought the freedom to act according to one’s religion or belief under the scope of the article in so far as it, according to objective standards, directly gives expression to one’s religion or belief.\(^{1559}\)

The constitutional reform of 1983 inserted the term ‘belief’ into the article in order to equate the profession of a belief, which comprises the freedom to act according to one’s belief,\(^{1560}\) with the profession of a religion. Freedom of belief was not guaranteed in a separate article in order to clarify that carrying out a belief differs from expressing an opinion.\(^{1561}\) A belief thus apparently

\(^{1554}\) Article 6 reads ‘1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. 2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders.’

\(^{1555}\) Entire Chapter 8, consisting of Articles 181-187.

\(^{1556}\) Tekst & Commentaar Grondwet, Comm. Bunschoten Art. 6 sub 3, p. 15.

\(^{1557}\) Kamerstukken II, 1975-1976, 13872, nr. 3, p. 32.


\(^{1559}\) Dutch Supreme Court, 31 October 1986, NJ 1987, 173.

\(^{1560}\) Kamerstukken II, 1975-1976, 13872, nr. 3, p. 29.

\(^{1561}\) Kamerstukken II, 1975-1976, 13872, nr. 3, p. 29.
concerns a principle a strongly anchored conviction, comparable with a religious conviction. The government acknowledged that certain convictions are intertwined with conceptions of the social order to such an extent that the expression of the conviction could fall under the scope of freedom of expression. However, the protection of freedom of belief alongside freedom of religion would function as a guideline for interpretation.\textsuperscript{1562} No further criteria to demarcate convictions stemming from religion or belief from political convictions or other social conceptions were given.

When does the expression of religiously motivated opinions fall under the scope of Article 6 and when does it fall under the scope of Article 7 of the Constitution? When one act falls under different fundamental rights, there is an overlap or competition between fundamental rights.\textsuperscript{1563} In such an event, the judge can apply the fundamental right that is most appropriate to the case or the fundamental right that affords the most protection.\textsuperscript{1564} Strictly speaking, contrary to Article 7, Article 6 does not prohibit prior censorship.\textsuperscript{1565} On the other hand, where former Article 181 only allowed criminal restrictions to freedom of religion, current Article 6 paragraph 1, similar to Article 7 paragraph 1, refers to restrictions determined by the formal legislator.\textsuperscript{1566} In several criminal and civil cases concerning expression of religiously motivated opinions, the Dutch Supreme Court has referred to both the right to freedom of expression and to freedom of religion together. This case law gives the impression of affording opinions based on religion or belief a higher level of protection than opinions in other fields (para. 5.10 infra).

\textsuperscript{1562} Kamerstukken II, 1975-1976, 13872, nr. 3, p. 29.
\textsuperscript{1563} Such competition can notably arise between Article 6, 7 and Article 9 that protects the right of assembly and demonstration. During the drafting of the Constitution, Minister of Internal Affairs de Gaay Fortman declared not to have experienced a public gathering of the Jesus People, where he participated in the signing of Christmas carols led by the Mayor, as the exercise of a religion. However, the gathering could be considered as an assembly or a demonstration or just a form of expression of opinion. See: Handelingen II 1976-1988, p. 2190. The Government considered the use of banners to generally form part of a demonstration. See: Kamerstukken II., 13872, nr. 7, p. 30.
\textsuperscript{1564} De Meij 1996, p. 55-56.
\textsuperscript{1565} This signifies that prior supervision with regard to the content of the exercise of religion and belief is not prohibited. However, as delegation is impossible, the cases in which and the conditions under which such prior supervision can take place must be precisely determined in statutory laws originating from the formal legislator. The creation of such laws is very unlikely.
\textsuperscript{1566} The government thought the extension of possible limitations necessary, because the consequences of the introduction of freedom of belief could not be entirely overseen. Kamerstukken II, 1975-1976, 13872, nr. 3, p. 30.
Dutch legal scholars disagree not only on the scope of freedom of religion or belief, but also on its separate constitutional protection as such.\footnote{See generally Van Ooijen, H.M.A.E., Egmond, L.F., Eijkman, Q.A.M., Olujic, F. & Vos, O.P.G. (eds.), Godsdienstvrijheid: afschaffen of beschermen?, Leiden: Stichting NJCM-Boekerij, 2008.} According to De Beer, Article 6 can be abrogated, because freedom of religion and belief can be sufficiently guaranteed by freedom of expression and freedom of assembly and demonstration protected in the following Articles 7 and 9. If Article 6 affords any other rights to citizens on the ground of their religion or belief that others do not have, this is contrary to the principle of equality and non-discrimination protected in Article 1.\footnote{Beer, P. de, Waarom vrijheid van godsdienst uit de grondwet kan., Socialisme & Democratie 2007 64 (10), p. 23.} Vermeulen argues that the religious dimension of an act or claim can precisely justify a difference in treatment. Furthermore, freedom of religion comprises different actions and opinions than freedom of expression, such as religious dress and ritual slaughtering. An extensive interpretation of this latter freedom merely entails the problem of qualification. Hence, the function of freedom of religion or belief cannot be transferred to freedom of expression and freedom of assembly and demonstration; this deprives certain acts and manifestations from their protected status, which would notably affect religious minorities (para. 5.10 infra).\footnote{Vermeulen, Ben, Waarom de vrijheid van godsdienst in de grondwet moet blijven., Socialisme & Democratie 2008 65 (3), p. 14-26.}

1.5 The relationship between criminal and civil law

1.5.1 Criminal responsibility and speech offences

Unlike France, the Netherlands does not have a specific press act that further regulates freedom of the press protected in Article 7 and lists all existing press offences, i.e. all public speech offences. The criminal restrictions to freedom of expression are incorporated into the Dutch criminal code. Neither does the Dutch criminal code contain a specific section that cites all speech offences. The speech offences are spread out over the entire code and incorporated into different sections. As the Dutch legislator thus does not clearly distinguish the restrictions to actions from the restrictions to opinions, it is difficult to bring the criminal restrictions to freedom of expression under a common denominator.

The former customary term ‘drukpersmisdrijven’, which signifies ‘press offences’, is outdated due to the fact that the speech offences in the criminal code do not distinguish between the media used to express opinions. What is more, while most speech offences require expression to have been uttered publicly, sometimes expression is also punishable when uttered non-publicly, such as insult of an individual. Unlike French law, Dutch law thus does not strictly
categorize public and non-public speech offences. The criminal code refers to ‘offences committed through the press’,\textsuperscript{1570} but only to afford the publisher or printer immunity from prosecution under the condition that the publication indicates the name and residence of the publisher or printer and the author (Articles 53, 54; for liability of providers see Article 54a). The rationale of these articles was to prevent censorship by publishers and printers.\textsuperscript{1571} The Dutch rules regarding the criminal responsibility for press offences thus seems the mirror image of the French ‘responsabilité en cascade’ that holds the publisher liable as a primary author. Another difference with the French Press Act is that the prosecution of the Dutch speech offences are bound by the general rules of Dutch criminal procedure.

Occasionally, criminal restrictions on freedom of expression have been referred to as ‘opiniedelicten’, the Dutch equivalent of ‘délits d’opinion’.\textsuperscript{1572} In this study, I will use the more common, neutral and broader term ‘speech offences’ defined by Janssens and Nieuwenhuis as ‘offences that criminalize expressions on the ground of their content’\textsuperscript{1573}, which has been taken into use by the legislator.\textsuperscript{1574} It is notable that as this definition – unlike the traditional French conception of a press offence – does not require that opinions support a criminal or punishable act, even the criminalization of opinions that do not produce harmful actions, can fall under its scope.

Unlike the French Press Act, the Dutch criminal code criminalizes the expression of opinions and the distribution of those same expressions – by third parties – in separate articles; the latter are criminalized in so-called ‘verspreidingsdelicten’, which means ‘offences of distribution’. In accordance with these latter offences, even a distributor who might not have actual knowledge about the content of expression, but who has reasonable grounds to suspect its punishable nature can be held liable. Given their close connection with the offences penalizing the expression of opinions, these offences of

\textsuperscript{1570} The category ‘offences committed through the press’ is smaller than the category ‘speech offences’. It concerns offences consisting of the publication of a press product that contains illegal content, thus merely offences that criminalize public expression destined for an undetermined public. The so-called offences of distribution are excluded.

\textsuperscript{1571} De Meij et al., De vrije informatiestroom in grondwettelijk perspectief, Derde Druk, Amsterdam: Otto Cramwinckel Uitgever 2000, p. 282. They afford publishers and printers a strong position, a privilege, and protect them from prosecution even if they know the content of a punishable publication. On the other hand, they are liable for anonymous publications that do not indicate the author on the ground of Articles 418 and 419, even if they do not know the content of the publication. Furthermore, they can be liable as an accomplice of a press offence, if their intent with regard to the punishable nature of the publication can be proven.

\textsuperscript{1572} Ellian, A., Enkele overpeinzingen over opiniedelicten en vrijheid., Strafblad, 5 (5) 2007, p. 397-409.


\textsuperscript{1574} Kamerstukken II, 1998/99, 26671, nr. 3, p. 7.
distribution can also be regarded as ‘speech offences’. Contrarily, offences that
criminalize certain conduct that may involve expressions but do not primarily
concern expression, such as extortion or desecration, fall outside the scope of the
term.

The speech offences incorporated into the criminal code include defamation of
an individual (261 sub 1 and 2), slander (262), insult of an individual (266), libel
(268), defamation of a deceased person (270); insult of specific persons, such as
members of the royal family (111 and 112), foreign fellow heads of state or
government members, government officials or bodies (118), a group of persons
on specific discriminatory grounds (137c); blasphemy (147); the publication or
distribution of offensive writings (240), showing audio visual material to the
youth (240a), child pornography (240b); incitement to a criminal offence (131);
incitement to hatred, discrimination or violence against a group of persons on
specific discriminatory grounds (137d); and the accessory offences that
criminalize the distribution of these same expressions.

Most speech offences predate the ratification of the ECHR by the
Netherlands. The government considered that – all – national statutory laws
would be consistent with the convention, because they formed the expression of
‘what a democratic society requires’. The judge would therefore accept the well-
considered decisions made by the legislator. 1575 Subsequently, however, the
legislator has revised several speech offences in light of freedom of expression.

In the seventies, in response to the conviction with regard to the
exclamations ‘Johnson murderer’ and ‘Johnson war criminal’ made during a
demonstration against the American president Johnson and the American war
in Vietnam on the ground of the offence of insult of a foreign fellow head of
state (former 117 Sr),1576 the legislator adapted several articles penalizing forms
of insult or defamation.1577 The insult of a foreign fellow head of state is
punishable only when he is officially staying in the Netherlands (118-119). In the
offence of defamation of an individual the existing justification ground ‘to have
acted in the general interest’ was expanded to comprise a person who could
have supposed in good faith that the stated facts were true (261 sub 3). In the
offence of insult of an individual the justification ground ‘to give an opinion on
the representation of public interests’ that is – put shortly – not gratuitously
offensive was inserted that however was to be interpreted narrowly in the sense
of political criticism (266 sub 2).1578 The two justification grounds thus give a

1575 Kamerstukken II, 1952/53, nr. 5.
1576 Dutch Supreme Court, 7 November 1967, NJ 1968, 44; Dutch Supreme Court, 5
seq.
1578 Kamerstukken II, 1975/76, 11249, nr. 6-8.
more robust protection to expression concerning the democratic institutions of
the state system and therefore are of special social and ‘public’ interest.\(^{1579}\)

The offence of group insult, created in 1934, was replaced in 1971 by
Articles 137c and d Sr that were revised in 1991. The legislator did not insert any
specific justification grounds into these articles comparable with Articles 261 sub
3 and 266 sub 2 Sr. On several occasions, the Dutch Supreme Court has
considered that these specific justifications do not apply to other offences of
insult, such as the offence of group insult of Article 137c Sr.\(^{1580}\)

In the creation of the speech offences, the Dutch legislator has rather
implicitly assumed that the speech offences are compatible with Article 10
ECHR. It has not, however, explicitly considered whether the articles satisfy the
three-step test of its second paragraph.

Originally, the Dutch Supreme Court only marginally tested as to
whether the speech offences were consistent with Article 10 ECHR. For example,
with regard to a conviction on the ground of Article 240 Sr, the Court
determined that the Article: ‘(...) aims to protect morals in the sense of the
second paragraph of the previously mentioned convention article, this purpose
apparently is still considered necessary by the Dutch legislator and does not
exceed the limits of what nowadays can be regarded as necessary in a
democratic society in order to protect that interest.’\(^{1581}\) In another case
concerning a conviction on the ground of Article 137c Sr, the Court considered
that: ‘the conviction (...) does not constitute a violation of Article 10 paragraph 1
ECHR, because the second paragraph of that Article 10 provides in the
possibility of criminal offences as set out in Articles 137c and d Sr.’\(^{1582}\) These
considerations of the Dutch Supreme Court resemble the reasoning by the
French Supreme Court that generally confines itself to affirm that a press offence
or its application has the objective of guaranteeing one of the interests
mentioned in Article 10 (2) ECHR and that its necessity is therefore
incontestable. Similarly to the French Supreme Court, the Dutch Supreme Court
thus rather used to perform an act of conciliation in abstracto not in concreto,
because it did not effectively balance the conflicting norms in every case.

In subsequent cases concerning the application of the speech offences,
the Dutch Supreme Court has increasingly performed a balancing test in

\(^{1579}\) Peters, J.A. *Het primaat van de vrijheid van meningsuiting* (diss.), Nijmegen: Ars Aequi
Libri 1981, p. 66 et seq.

\(^{1580}\) Dutch Supreme Court, 6 December 1983, NJ 1984, 601; Dutch Supreme Court, 19

\(^{1581}\) Dutch Supreme Court, 30 January 1968, NJ 1968, 199. For a similar test see: Dutch

\(^{1582}\) Dutch Supreme Court, 14 March 1989, NJ 1990, 29. For a similar test see the older
judgments – cited in: De Meij 2000, p. 263, footnote 62: Dutch Supreme Court, 16
December 1986, NJ 1987, 534; Dutch Supreme Court, 12 May 1987, NJ 1988, 299; Dutch
Supreme Court, 27 October 1987, NJ 1988, 538.
In a series of case law, the Court has developed a ‘three-step-test’ in order to determine whether insulting expression is punishable in accordance with Article 137c Sr (para. 5.8 infra). Put simply, according to this test, the insulting character of the expression strongly depends on the direct context of the expression and the broader context of the public debate and its punishability finally depends on a proportionality-test, i.e. the question as to whether the expression is gratuitously offensive. In this test, the interest of freedom of expression is thus incorporated into the statutory elements of the offence. The test affords the possibility of accommodating the Article 10 case law of the ECHR. Lower judges have applied a similar test with regard to other speech offences, such as Articles 261 or 137d Sr (para. 6.4 infra).

1.5.2 Civil responsibility and the wrongful act of Article 6:162 BW

The expression of an opinion can constitute a wrongful act under Article 6:162 BW that reads ‘A person who commits an unlawful act towards another which can be imputed to him must repair the damage which the other person suffers as a consequence thereof.’ Subsequently, the article cites the following unlawful acts: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. Civil responsibility for wrongful expression does not defer from civil responsibility for wrongful acts in general. The Dutch civil code lacks provisions similar to Articles 53 and 54 Sr, which afford the publisher and printer immunity from liability. The different regime can be explained, firstly, because from a social viewpoint publishers are responsible for making expression public, and secondly, because due diligence requires publishers to cooperate and take

1584 Janssens & Nieuwenhuis 2011, p. 45 et seq.
1586 Full Article 6:162 reads ‘1) A person who commits an unlawful act toward another which can be imputed to him must repair the damage which the other person suffers as a consequence thereof. 2) Except where there is a ground for justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. 3) An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.’ Translation from Haanappel, P.P.C. & Mackaay, E., New Netherlands Civil Code, Patrimonial Law, Deventer: Kluwer 1990, p. 298.
1587 In the event of a plurality of authors, every author is severally liable and the injured party can choose which author to hold liable.
adequate measures in order to stop an unlawful situation caused by one of his authors.  

In contrast to France, the Dutch speech offences do not take precedence over the general open civil norm of the wrongful act. While Article 6:162 BW forms the legal ground of civil actions, the speech offences, being statutory duties, can form a guideline for its interpretation. Furthermore, civil restrictions can be based on the ‘due-diligence’- norm of 6:162 BW. Other than in France, the criminal and civil restrictions to freedom of expression can thus differ; when expression is not punishable on the ground of the speech offences, it can nevertheless be unlawful on the ground of the due-diligence-norm of Article 6:162 BW.

In the Sunday Times case, the ECHR considered that the law can result from statutory and unwritten law, but in any event must be adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct. Some legal scholars, such as Bieheuvel, question whether the notion ‘a rule of unwritten law pertaining to proper social conduct’ meets this requirement.  

Equally in light of legal certainty, on the occasion of two convictions on the ground of 6:162 BW with regard to religiously motivated expression, commentators have advocated the ‘royal path of criminal law’ by referring to former Article 181 of the Dutch Constitution that protected freedom of religion (para. 5.9 infra).

However, in the Het Parool/Van Gasteren case, the ECHR declared a complaint of a violation of Article 10 ECHR by a Dutch newspaper for being convicted on the ground of former Article 1408 – current Article 6:162 BW – as inadmissible and stated that even though the article might produce problems of interpretation this did not signify that it was too vague and insufficiently precise, given the case law of the Dutch Supreme Court. That case law can be broadly summarized as followed.

In the Gemeenteraadslid case in 1983, the Dutch Supreme Court ruled that the question as to whether certain expression violates a rule of unwritten law pertaining to proper social conduct in accordance with Article 6:162 BW must be answered according to a balancing test between two opposing high social interests, in casu the interest of individuals not to be exposed to reckless imputations in the press and the interest of preventing the persistence of abuses in society caused by a lack of awareness among the general public. In order to perform this balancing test, the Dutch Supreme Court created a ‘checklist’ of

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1588 De Meiij 2000, p. 289.
1589 ECtHR, 26 April 1979, NJ 1980, 146 (Sunday Times/United Kingdom).
1591 ECmHR, 21 October 1998, Mediaforum 1999-1, nr. 3.
relevant factors. The Court has specified that the lower judge has the task of determining which of these factors are relevant in the specific circumstances of the case, which can require the inclusion of other factors, and to determine their relative weight. Next to imputations of a specific fact, the Dutch Supreme Court has applied the balancing test to insulting expression.

In the Gemeenteraadslid case, the Dutch Supreme Court did not, however, refer to the general interest of freedom of expression and did not apply this right as a general justification ground. The Court merely referred to the interest to expose and denounce the existence of abuses. This interest is much more limited in scope and comparable to the ‘legitimate interest to inform the public’ that forms one of the factors to which in France a suspect, in the context of his defence, can appeal in order to demonstrate his good faith. The Court did not, therefore, attribute an independent weight to freedom of expression and did not consider whether the restriction was necessary in a democratic society for the protection of one of the interests enumerated in Article 10(2) ECHR. According to Schuitt, the Court previously rather considered whether a publication is sufficiently important to be published than – as it should have done – whether the restriction complies with the proportionality test of 10(2) ECHR.

The Supreme Court for the first time explicitly referred to the interest of freedom of expression in Article 10 ECHR in the Rails case concerning the admissibility of a rectification with regard to a photo documentary. In the Het Parool/Van Gasteren case, the Supreme Court for the first time applied the three-step-test of Article 10(2) ECHR. The case concerned the admissibility of an adjudication of a claim for damages with regard to a publication that compared an act of resistance with a ‘vulgar murder with robbery’. As a result of these cases, in order to determine the unlawfulness of certain expression the judge must balance two opposing high social interests on the basis of the circumstances of the case. Subsequently, in order for the judge to determine the unlawfulness of the expression and to impose an injunction or adjudicate a

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1593 The checklist comprises the nature of the published imputations and the seriousness of the expected consequences for the person fallen under suspicion; the seriousness of the abuse that the publication aims to expose; the degree to which the imputations were founded in the factual evidence available at the moment of their publication; the presentation of the imputations; degree of likelihood that the pursued aim could have been reached without publication in the press by other means less harmful to the affected party; the chance that the affair would surely become public.

1594 Dutch Supreme Court, 8 March 1985, NJ 1985, 437.


claim for damages, he must decide whether this decision is necessary in a democratic society for the protection of the interests enumerated in Article 10(2) ECHR.

In subsequent cases, this proportionality test increasingly coincides with the balancing test.\textsuperscript{1599} In the second Van Gasteren case, the Supreme Court determined that in the event of two conflicting fundamental rights, \textit{in casu} the right to freedom of expression protected in Article 10 ECHR and the right of privacy protected in Article 8 ECHR, the balancing test must be performed all at once, whereby in a decision where, considering all circumstances of the case, one of the fundamental rights outweighs the other entails the compliance of the infringement of that other right to its second paragraph. The balancing test thus cannot consist of a ‘double’ test that determines firstly, which fundamental right outweighs the other and secondly, whether the second paragraphs of the fundamental rights oppose to the outcome of this first balancing test.\textsuperscript{1600}

It results from this established case law that the Dutch Supreme Court can review whether the restriction of freedom of expression is necessary in a democratic society, a test in which the case law of the ECtHR plays a decisive role.

1.6 The relationship between the legislator and the judge

The central characteristics of freedom of expression in Dutch law can be placed in the light of the constitutional system of the Kingdom of the Netherlands. The Dutch Constitution provides in a division – rather than in a separation – of powers between the legislature, the executive and the judiciary that constitutes a system of checks and balances.\textsuperscript{1601} Within the division, the legislator plays an important role.\textsuperscript{1602} In fact, according to Article 120 of the Dutch Constitution, the legislator is solely competent to determine whether its own legislation is in conformity with the Dutch Constitution, that reads: ‘The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts’. Unlike France, the Dutch legal system thus lacks the possibility of judicial review by a special constitutional court. The prohibition signifies that courts cannot decide as to whether a statutory law is compatible with the Dutch Constitution. In the landmark Harmonisatiewet case in 1989, the Dutch Supreme Court decided that the prohibition of constitutional review also comprises general principles of

\begin{footnotesize}


\textsuperscript{1602} The clauses of the fundamental rights of the Dutch Constitution primarily refer to an Act of Parliament.
\end{footnotesize}
However, as a general rule courts are empowered to review whether any provision other than statutory laws is consistent with a higher rule of law; they thus can review the constitutionality of decrees, administrative or regional regulations.

Article 120 thus suggests that by creating laws and reviewing their constitutionality the Dutch legislator solely determines and decides on major issues concerning the general interest.\(^\text{1604}\) This primacy is grounded in the principle of legal certainty – that in relation to criminal law is assured by Article 16 of the Constitution and Article 1 Sr that assure the legality of criminal offences, which comprises the requirement of accessible and precisely formulated offences.\(^\text{1605}\) This primacy according to constitutional theory is however mitigated by the current legal practice of the legislator and the judge. Firstly, by inserting specific justification grounds into Articles 261 and 266 Sr, the legislator explicitly gives the judge the task not only to ensure compliance with the law by their strict application, but also to determine whether expressions are in the general interest or the interest of the political debate. Explicitly making such a judicial appreciation an inherent part of determining the punishability of certain defamatory or insulting expression on the ground of the offences would not fit into the French legal system.

Furthermore, Dutch civil law has ‘open norms’ such as the norm of due diligence in Article 6:162 BW, precisely in order to enable the judge to ‘color’ the norms to the circumstances and facts of every case. This fits into the vision of the Dutch legal system as an ‘open system’, in which a priori defined abstract legal norms are on their own insufficient in order to ensure justice in every case.\(^\text{1606}\) The judge must therefore not merely strictly apply, but also interpret legal norms using general principles of law. The legislator has recognized a certain ‘law-making role’ for the courts by the inserting current Article 81 into the Judicial Organization Act that considers it a duty of the Supreme Court ‘to secure the uniformity of the law and advance the development of the law’ [curs. EHJ].\(^\text{1607}\) This vision diametrically opposes the French vision of the judge as ‘la bouche de la loi’.

Secondly, the Netherlands has a monist system. Pursuant to Articles 93 and 94 of the Constitution, international law has direct effect in the Netherlands

\(^{1603}\) Dutch Supreme Court, 14 April 1989, NJ 1989, 469. Nevertheless, the Court seemingly addressed the legislator by clearly showing that it considered the Harmonization Act of 1988 in violation with the principle of legal certainty.


\(^{1607}\) Uzman, Barkhuysen & Van Emmerik 2010.
and courts are competent to set aside statutory laws that are in conflict with self-executing provisions of international treaties and to apply a provision of international law instead.\textsuperscript{1608} In the Netherlands treaties thus take precedence over national law, including the Constitution, and the ECHR can be relied upon before all Dutch courts. In order to ensure compliance with the obligations of the treaties to which the Netherlands is a party, the courts may challenge the legislator, under the condition that the international provision is ‘self-executing’ in the sense that it provides a judicially manageable standard for review and the application of a statutory law would be in conflict with that international provision. Due to the ban on constitutional review, since the 1980s the Dutch courts have increasingly applied the ECHR as a judicially enforceable equivalent for the Dutch Constitution or a ‘Bill of Rights for the Netherlands’,\textsuperscript{1609} and instead of setting statutory laws aside, it has interpreted national laws in light of the rights in the ECHR, notably the right to freedom of expression.\textsuperscript{1610} The ban thus signifies that international treaties can afford more robust legal protection than the Dutch Constitution. It is precisely in order to enhance the normative character of the Constitution and to help to actualize and interpret fundamental rights that are sensible to social and technological developments, such as the newly proposed technically neutral formulated right to freedom of expression, that the State Commission, as well as the Commission Franken, has advised the abrogation of Article 120.\textsuperscript{1611}

1.7 Influence of ECtHR case law

The beneficial influence of the ECHR on freedom of expression is apparent in several fields. Next to the previously mentioned example of the protection of commercial expression, in the field of the press, the Supreme Court has acknowledged its function of ‘a public watch dog’ to denounce the existence of abuses – but to observe due diligence when making accusations\textsuperscript{1612} – and acknowledged the protection of sources.\textsuperscript{1613} In particular, the punishability of insulting expression has been significantly curtailed under the influence of the case law of the ECtHR. Insulting expressions less frequently form the object of a prosecution and are less likely to lead to convictions. Hence, in the \textit{Boomsma} case, the Dutch Supreme Court endorsed the acquittal by the lower courts with regard to the expression: ‘[t]hey were not SS men, no, even though they could

\begin{itemize}
\item \textsuperscript{1608} Article 94 reads ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.’
\item \textsuperscript{1609} Uzman, Barkhuysen & Van Emmerik 2010.
\item \textsuperscript{1610} Peters 2005; Nieuwenhuis 2011; Janssens & Nieuwenhuis 2011.
\item \textsuperscript{1611} Report \textit{Statscommissie Grouwdet}, November 2010, \textit{Kamerstukken II} 2010/11, 31 570, nr. 17, bijlage.
\item \textsuperscript{1612} Dutch Supreme Court, 6 January 1995, \textit{NJ} 1995, 422, annotation Dommering.
\item \textsuperscript{1613} Dutch Supreme Court, 10 May 1996, \textit{NJ} 1996, 578.
\end{itemize}
certainly be compared to them on the ground of the things they did.’ concerning
the military intervention of the Netherlands against the Indonesian Republic,
which was proclaimed after the Japanese capitulation in 1945 (1947-1949).1614
The lower courts explicitly referred to Article 10 ECHR and considered that a
conviction was not necessary in a democratic society.1615 Furthermore, the Dutch
Supreme Court has adopted the distinction made by the ECtHR between facts
and value judgments made in public discussions and equally affords the latter
more robust protection. Hence, in the PDA-Grubben case, the Supreme Court
considered that a politician who himself utteres opinions of an extreme right
winged nature, may be referred to as a ‘neo-Nazi’.1616 The question arises as to
whether the accommodation of the standards concerning the general interest of
a public debate set out by the Article 10 case law of the ECtHR in the application
of the speech offences has not rendered the specific justification grounds of
Articles 261 sub 3 and 266 sub 2 Sr void.1617 The Dutch Supreme Court has
answered this question in the negative and decided that when an appeal to
Article 10 ECHR is rejected, the justification ground of Article 261 sub 3 Sr can
have an independent significance.1618

As a possible result of the friendly attitude towards the ECHR, the
Netherlands has in the past been condemned a relatively limited number of
times by the ECtHR for violation of Article 10 ECHR. Between 1959-2012, the
Netherlands has been condemned seven times by the ECtHR for violations of
Article 10 ECHR amongst all members states, with Turkey leading with 215
violations, followed by Austria with 33 violations.1619 It is noteworthy that these
cases rather concern sanctions imposed on the press, for example, the disclosure
of government information and violation of the protection of journalistic
sources.1620 With regard to the existence or the application of the Dutch speech
offences, in 1979, the ECtHR declared the complaint of Glimmerveen and
Hagenbeek, two Dutch politicians of the former NVU, an extreme right winged
political party, inadmissible. While the applicants argued that their conviction
on the ground of article 137e Sr for having distributed discriminatory expression

1614 Dommering, E.J., De Nederlandse publieke discussie en de politieke akties in
Indonesië, NJB 1994, p. 277 et seq.
1615 Groningen District Court, 9 June 1994, Mediaforum 1994-7/8, p. 67; CA Leeuwarden, 26
1617 Janssens & Nieuwenhuis 2011, p.164 et seq.
1618 Dutch Supreme Court, 14 June 2011, LNJ BP0287, NJ 2011, 504, annotation
Dommering.
1620 ECtHR, grand chamber, 14 September 2010, n°38224/03 (Sanoma Uitgevers BV/ the
Netherlands); ECtHR, 22 November 2007, n°64752/01 (Voskuil/ the Netherlands); ECtHR, 30
November 2006, n°10807/04 (Veraart/ the Netherlands); ECtHR, 28 October 2003, n°39657/98
(Steur/ the Netherlands); ECtHR, 9 February 1995, n°16616/90 (Vereniging Weekblad Bluf!/ the
Netherlands).
violated Article 10 ECHR, the ECtHR deprived them of an appeal to the right to freedom of expression on the ground of Article 17 (para. 6.6 infra).\footnote{ECtHR, 10 October 1979, n°8348/78 8406/78, (Glimmerveen and Hagenbeek/ the Netherlands).}

1.8 Conclusion

In Dutch law, freedom of expression is protected pursuant to Article 7 of the 1983 Dutch Constitution that provides a tri-partition with regard to the level of protection depending on the technical means used. The Article does not explicitly protect religious and non-religious opinions on equal footing. Religiously motivated opinions can either fall under Article 7 or Article 6 that protects freedom of religion and case law remains ambiguous as to whether an accumulation of the articles results in a higher level of protection. A general criticism of Article 7 is that it has been superseded by Article 10 ECHR that in several respects affords more robust protection of freedom of expression. Several proposals for reform have therefore been made, upon which, however, no legislative action has been undertaken.

The Dutch legislator has not further regulated the freedom of the press in a separate act and submitted it to a special regime. The Dutch legislator thus does not clearly distinguish the restrictions to actions from the restrictions to opinions. The restrictions are incorporated into the Dutch criminal code and are a result of Article 6:162 BW, which prohibits wrongful acts and legal actions on the grounds of these provisions and are bound by the general rules of criminal and civil liability. A general and neutral term for the criminal restrictions to freedom of expression is that of ‘speech offences’, which can be defined as ‘offences that criminalize expressions on the ground of their content’, which implies that even the criminalization of opinions that do not produce harmful actions can fall under its scope.

In order to conciliate the free expression of opinion with other rights or interests, the Dutch constitutional legislator has afforded the legislator the competence to determine any restriction with regard to the content of expression – regardless of the technical means used – as long as control takes place after, and not prior to the publication. He has not determined in the clause of Article 7 which interests the restrictions must protect. The ban of constitutional review in Article 120 of the Constitution prohibits the judge from reviewing whether these statutory restrictions are consistent with the Dutch Constitution that is moreover non-ideological in the sense that it does not determine any constitutional values from which limitations to fundamental rights could otherwise be derived.

Due to the ban on constitutional review, since the 1980s the Dutch courts, applying Articles 93 and 94 of the Constitution, have increasingly applied the ECHR as a judicially enforceable equivalent for the Dutch Constitution and – instead of setting them aside – interpreted the statutory
restrictions, both the speech offences and Article 6:162 BW, in light of Article 10 ECHR. The Dutch Supreme Court has shifted from balancing the statutory restrictions in abstracto with freedom of expression to effectively balancing the conflicting rights to freedom of expression and rights and interests that oppose to its free exercise in concreto in every case. This practice has facilitated the importation or ‘accommodation’ by the judge of the Article 10 case law of the ECHR that sets standards concerning the general interest of a public debate, the influence of which is undeniable. Where the courts used to merely take into account the interest to inform the public about the existence of abuses, they increasingly take into account the general interest of a public debate.

This practice might seem at odds with the primacy of the legislator in law-making or the primacy of politics in deciding on major issues concerning the general interest suggested by Article 120 and grounded in the principle of legal certainty in relation to criminal law assured by Article 16 of the Constitution and Article 1 Sr. However, it fits well into the Dutch ‘open’ legal system that has broadly formulated open civil norms, such as 6:162 BW, precisely in order to enable the judge to ‘color’ the norms to the circumstances and facts of every case using general principles of law.
II

THE DUTCH HATE SPEECH BANS

This section begins with a characterization of the Dutch notion of equality as it results from relevant Dutch law and policies (2). Next, the preservation of the offence of blasphemy in Dutch law for over eighty years and the final abolition of the offence in 2013 is discussed (3). Against this background, the implementation of ICERD with the introduction of the main hate speech bans into Dutch law, is examined (4). Subsequently, the two following paragraphs analyse the main Dutch hate speech bans and their application by the Dutch judge, respectively the offences of ‘group insult’ (5); and ‘incitement to hatred, discrimination or violence’ (6) – also with regard to the issue of Holocaust denial. The section ends with a discussion of the modifications of the hate speech bans since their adoption (7).

2. The Dutch notion of equality

In the Netherlands, equality is a fundamental principle incorporated into the Dutch Constitution (2.1). The traditional structure of Dutch society by the system of ‘pillarization’ explains the recognition of minorities under Dutch law and has influenced Dutch immigration and integration policy for a long time (2.2). Pillarization can also be connected with the Dutch conception of separation of Church and State, also known as ‘inclusive neutrality’, that allows for the accommodation of religious practices in the public domain (2.3). The analysis results in a general conclusion about the Dutch notion of equality (2.4).

2.1 Equality in the Constitution of the Kingdom of the Netherlands

Unlike the French Constitutions of 1946 and 1958 or the 1789 Declaration, the Dutch Constitution lacks a preamble that refers to the principle of human dignity, the sovereignty of the state, its attachment to human rights and its common values on which its institutions are founded, or that in order to mark a new beginning denounces previous historic events and – under the auspices of a ‘neutral’ Supreme Being – enumerates its aims. Nor does the Dutch Constitution contain a general provision that defines the central characteristics of the Kingdom of the Netherlands, comparable to Article 1 of the French 1958 Constitution. The Dutch Constitution is thus ‘non-ideological’\(^{1622}\) and does not provide, in a general normative framework, for the interpretation of the fundamental rights listed in its first chapter. This has not always been the case. The \textit{Staatsregeling} of 1798, strongly inspired by the 1789 Declaration, contained a preamble.\(^{1623}\) However, the Dutch Constitution traditionally has a relatively

\(^{1622}\) Kortmann 1987.
\(^{1623}\) The preamble read: ‘Het Bataafsche volk zig vormende tot eenen ondeelbaren staat en bezeffende,
sober, purely legal character and the Netherlands takes a rather pragmatic approach to fundamental rights. During the Constitutional reform of 1983, the reference to human dignity and certain fundamental rights were not inserted into the 1983 Constitution, because the Dutch Constitution only played a subsidiary role compared to the ECHR that already protected these rights.  

However, Article 1 of the Dutch Constitution that proclaims the principle of equality can be regarded as expressing a fundamental principle that underlies Dutch law. The Constitutional reform of 1983 inserted the right of non-discrimination into the Article, which reads: ‘All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.’ Its insertion in Article 1 does not signify any priority of the principle over other fundamental rights. The legislator or the judge must balance the opposing rights or interests in specific cases. As the prohibition of constitutional review equally applies to Article 1, the Article, however, has a somewhat symbolic significance. The principle of equality is further specified in Article 3 of the Dutch Constitution that protects the equal eligibility for the appointment to public services and is further elaborated in concrete statutory laws. The principle primarily applies in the relationship between the government and individuals; the government must assure that rules apply equally to every individual and are not discriminatory. Besides, the principle applies to the relation between individuals; the Equal Treatment Act assures the equal treatment in the field of labour, professions and the offering of services. Compliance with the act is monitored by the Equal Treatment Commission (CGB) that judges in concrete cases (non-binding) and issues advisory opinions in social matters (para. 2.3 infra). Finally, the principle is of interest to the hate speech bans in Articles 137c-e 5r (para. 5-6 infra).

dat het voornaame bederf van alle regeringen gelegen is in de miskennin der natuurlyke en geheiligde regten van den mensch in maatschappy, verklaart de navolgende stellingen als de wettigen grondslag waarop het zyne staatsregeling vestigt en als zoow vele regels, waaraan het zyne burgerlyke en staatkundige betrekkingen wil hebben gewyzigd.’

1624 The right to life, the prohibition of torture, the right to a fair trial and access to the judge.
1626 Koekkoek 2000, p. 64.
1628 Koekkoek 2000, p. 69.

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Unequal treatment is only prohibited when it constitutes discrimination. The Government has, however, not provided a fixed definition of discrimination, but has described the purport of the prohibition as: ‘to interdict the distinction on the ground of people’s features or characteristics that are reasonably irrelevant for the determination of entitlements and duties in certain fields of social life.’ Discrimination has a pejorative signification and suggests the making of a distinction that is offensive. Minister of Internal Affairs, De Gaay Fortman, considered that: ‘discrimination is treating another person in such a manner as to make him understand that he regards him as deficient in these aspects of his human being.’ It must be assumed that discrimination concerns unequal treatment on the ground of characteristics that are fundamental to one’s personality. Article 1 does not, however, give a limitative list of discriminatory grounds, but its scope is extended to ‘any other grounds whatsoever’, which diminish the determination of the article.

Not all forms of discrimination are prohibited, only unjustified equal treatment. The Government considered that affirmative action, thus preferential treatment of subordinated minority groups, is allowed, as long as it is temporary and necessary to eliminate an actual disadvantage.

2.2 ‘Pillarization’ and minority policy

The Netherlands has traditionally been a country consisting of minorities and known for a large religious and cultural diversity. Contrary to France, Dutch law specifically recognizes minorities and facilitates groups defined by a common origin, religion or culture on the grounds of their common characteristics. Unlike France, the Netherlands has not made an exemption to Article 27 ICCPR that refers to minorities and has signed and ratified the European Charter for Regional or Minority Languages that recognizes the right to use a regional language both in the private and the public sphere and has designated the Friesians as a national minority.

The Dutch notion of equality and approach towards minority groups can be understood in light of the traditional structure of Dutch society by the

1631 Kamerstukken II, 1981/82, 16905-16938, nr. 5, p. 16.
1633 Koekkoek 2000, p. 66.
1634 The Equal Treatment Act explicitly determines that with regard to certain professions making a distinction can be allowed, for example the distinction on the ground of political convictions with regard to administrative functions, or the distinction on the ground of religion or belief with regard to religious offices.
system of ‘pillarization’, which dates back to 1917 (para. 2.3 infra).\textsuperscript{1638} Under this structure, different religious and ideological communities (notably Protestants, Catholics and socialists) have their own political and social institutions, such as schools, hospitals, newspapers, political parties, trade unions, social support agencies and radio and television broadcasting agencies. These institutions, assembled in so-called ‘pillars’, are largely paid for by the state that remains neutral by treating all communities in the same manner. The communities have, according to a Protestant maxim, ‘sovereignty in one’s own circle’\textsuperscript{1639} or ‘sphere sovereignty’\textsuperscript{1640} which can be translated with ‘living apart together’, signifying that they can make their own arrangements and thereby preserve their own identity and emancipate their own members. This group-orientated system that focuses on separate facilities based on community identities can be characterized as ‘institutionalized multiculturalism’.\textsuperscript{1641}

Within this institutionalized diversity, several factors provided for unity and social cohesion. While Dutch citizens were active within their respective pillars, they normally obeyed their paternalistic leaders. National politics were left to the elite, who represented the pillars and regularly met to discuss common interests and build coalitions. They thus constituted the ‘common roof’ that supported the pillars and conducted a ‘consociational democracy’, a consensus and co-operation orientated form of democracy or politics of ‘social engineering’.\textsuperscript{1642} The Dutch population also shared the dominant existing Christian moral values across the pillars.\textsuperscript{1643} In the 1960s, due to secularization and increased schooling of the population, pillarization, however, started to decrease in the Netherlands. Nowadays, only orthodox religious communities strictly abide by pillarization. The concept of pillarization was, however, for a long time maintained in the Dutch minority policy.

Until the 1970s, immigration to this ‘pillarized’ Netherlands – of the Molluccans in the 1950s, the so-called ‘guestworkers’ from the Mediterranean in the 1960s and people of Suriname in the 1970s after it had become an

\textsuperscript{1639} Entzinger, H., ‘Changing the rules while the game is on; From multiculturalism to assimilation in the Netherlands’, in: Michal Bodemann, Y. & Gökçe Yurdakul (eds.), Migration, Citizenship, Ethnos: Incorporation Regimes in Germany, Western Europe and North America, New York: Palgrave MacMillan 2006, p. 121-144.
\textsuperscript{1643} Lijphart 1975.
independent Republic in 1975 – was regarded as temporary. In order to facilitate the return of migrants to their countries of origin, a policy of ‘integration with the retention of one’s own identity’ was pursued, which was comprised of the education of children in their mother tongue and original culture and the facilitation of own associations and consultative bodies. An exception to this policy was the ‘repatriates’ from the Dutch East Indies after it had become the independent Republic of Indonesia in 1945, whose assimilation into Dutch society was encouraged. When the immigration increased and the temporality of the residence of immigrants became unclear, the government pursued a ‘two-track policy’ that aimed at stimulating next to re-migration, integration into Dutch society along the lines of the pillar system by means of a specific, categorical policy.\textsuperscript{1644}

At the end of the 1970s, the economy and the social economic backlogs of immigrants had worsened. In 1979, the Scientific Council for Government Policy (WRR) issued the report \textit{Ethnic minorities} that advised the pursual of a more coordinated policy for those migrants that were here to stay.\textsuperscript{1645} The \textit{Minority Policy} of 1983 introduced such a general policy for ‘ethnic minorities’ that focused on the reduction of their social economic backlogs; their participation, emancipation and enjoyment of their cultural identities; and an intensified fight against their discrimination, comprising of an active prosecution policy with regard to offences penalizing discrimination, such as the hate speech bans (para. 8.1 \textit{infra}).\textsuperscript{1646} The government enumerated the target groups of the policy, being people from Suriname and the Caribbean, Moluccans, foreign workers, refugees, gypsies and caravan dwellers, for whom the creation of separate institutions supported by public funds in line with the pillarization continued in order to preserve and enjoy their culture. The Government thus actively promoted the multicultural society. This differential policy making on the basis of ethnicity was largely supported, but criticised by some for its possible opposite effect of ‘ethnicization or minorization’, signifying a further marginalization of minority groups.\textsuperscript{1647}

This new policy could not prevent unemployment from increasing disproportionately among minority groups. In 1989, the Scientific Council for Government Policy issued the report \textit{Foreigners Policy} that advised taking a different approach and to acknowledge that the Netherlands had \textit{de facto} become an immigration country and therefore to focus on the actual integration of

\begin{itemize}
\item \textsuperscript{1646}Ministerie van Binnenlandse Zaken, \textit{Minderhedennota}, Tweede Kamer 1982-1983, nr. 21.
\item \textsuperscript{1647}Rath, J., \textit{Minorisering: de sociale constructie van ‘ethnische minderheden’}, Amsterdam: Sua 1991.
\end{itemize}
immigrants through labour, education and the schooling of adults, and to consider the preservation of their culture a private matter.\textsuperscript{1648} The Government partly adopted this advice and connected it to its Social Innovation Policy of 1990 that precluded the reduction of the minority policy to a policy against social backlogs.\textsuperscript{1649} The Government, however, did not alter its policy of accommodation of cultural identities at this time.

For a long time, openly pointing out existing problems related to immigration and the integration of minorities and questioning the public policy on such matters was considered to be ‘politically incorrect’ or even racist. The absence of a harsh and critical public and political debate on matters of public concern has been attributed to the specific Dutch pillar system, in which a fragmented media only covered news considered to be relevant to the pillar’s members and where the dissemination of dissenting opinions would only disturb the ‘pacification politics’ of the elites.\textsuperscript{1650} In 1991, politician and at that time leader of the Liberal Party (VVD) Frits Bolkestein, however, triggered a national debate with his statement in a national newspaper that the integration of minority groups had to be tackled with guts.\textsuperscript{1651} In the media discussion arose as to the desirability of Islamic schools, segregation in education and crime rates among young immigrants. Subsequently in 1992, a ‘public debate on the integration of minorities’ was organized, comprising of the subject of the future of young immigrants in the fields of labour, education and security, which did not, however, lead to new policy measures.\textsuperscript{1652}

The so-called Contours Policy of 1994, in which the Government renamed the Minority Policy ‘Integration Policy’, did express the vision that integration is a reciprocal process of acceptance and required efforts from all parties in society, with all the associated rights and duties.\textsuperscript{1655} On the one hand, the criminal prosecution of discrimination was considered as an appropriate measure to clearly mark the norm of non-discrimination and to afford victims redress. The Public Prosecution therefore had to pursue an active prosecution policy with

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regard to expressions of racism and discrimination (para. 8.1 infra). Besides, the Equal Treatment Act of 1994 enabled discriminated groups to engage collective actions themselves. On the other hand, minority groups were no longer seen as ‘categories of care’ and the preservation of their culture was no longer seen as a task for the government, but as a private matter. A key principle formed the notion of ‘citizenship’ that expressed the primary aim of the policy to realize an active citizenship of members of ethnic groups. This mandatory civic integration notably comprised mandatory language courses. The statutory basis for this policy was created by the ‘Newcomers’ Integration Act of 1998 (WIN). 1654

Hence, over time the focus of the minority policy shifted from multiculturalism to civic integration, from groups to individuals. 1655 The report The Netherlands as immigration country of the Scientific Council for Government Policy of 1998 shifted the emphasis on the responsibility of individuals even further. It primarily focussed on a restrictive admission policy for new immigrants instead of the integration of minorities already present in Dutch society. Furthermore, it stressed the limited role for the government in the integration process, in particular existing of mandatory integration courses. 1656 The Integration Policy of 1999-2002 adopted this approach. 1657 The government considered that an active citizenship required an active participation of migrants in society, their personal responsibility or self-reliance and the organization by local governments and civil society of the ‘encountering’ between migrants and the native population. In line with this focus on communication was the Media and Minorities Policy that aimed – next to increase the offering of specific programs for minority groups by the public broadcasting service – to make the public broadcasting service an accurate reflexion of the different ethnic groups in society, because of its special binding function. 1658 In the Integration Policy of 2011, the Government finally explicitly endorsed the criticism of the multicultural society, renounced its relativism and envisioned a strict

1655 Fermin 1997.
immigration policy and compulsory integration through a generic policy based on ‘citizenship, participation and self-reliance’.1659

The increasingly compulsory integration policy was prompted by an unprecedentedly critical and harsh public and political debate on integration and immigration.1660 In 2000, the historian and member of the Labour Party (PvdA) Paul Scheffer published the article The Multicultural Tragedy in a national newspaper in which he argued that Dutch multiculturalism had failed.1661 Subsequently, a series of events flamed an anti-immigrant and anti-Muslim discourse and paved the way for the so-called ‘new politics’.1662 After the terrorist attacks of 9/11, the populist politician Pim Fortuyn, leader of the populist party Leefbaar Nederland and subsequently of the List Pim Fortuyn, voiced the general dissatisfaction of the electorate with the ‘left-right’ coalition, accusing it of having refused to face the socio-economic problems caused by Muslim-immigration and the threat of Islam to western liberal values.1663 After the political assassin of Fortuyn in 2002 by an animal rights activist, populist politician Geert Wilders, leader of the populist Freedom Party (PVV) further radicalized the public and political debate about multiculturalism (para. 6.7 infra).

In the light of traditional Dutch institutionalized multiculturalism, the principle of non-discrimination can be understood as affording people the right to enjoy their cultural identities rather than – according to the French vision – of indifference towards their common characteristics. However, pillarization is criticized not to have generated the religious tolerance for which the Netherlands is famous, but rather the indifference of groups in society towards each other, and to have served as a means of excluding immigrants from

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1659 Ministerie van Binnenlandse Zaken, Integratiebeleid, Tweede Kamer 2010-2011, 32824, nr. 1.
1660 This has been explained as an intensive reaction to and breach with the decent and rational public debate existent during the pillarization. Van Noorloos 2011, p. 192.
1661 Scheffer, P., Het multiculturalie drama., NRC Handelsblad, 29 januari 2000. Scheffer argued that cultural relativism and the respect for cultural differences had created a growing ethnic underclass, notably consisting of Moroccan and Turkish Muslims, that did not adhere to western values and the principles of liberal democracy and was unable and unwilling to integrate into Dutch culture and society. Only a ‘civilisation offensive’, consisting of a more compulsory integration policy emphasising on Dutch culture and history, could counter further segregation and preserve social cohesion and the functioning of the democratic state.
1663 Among his controversial statements were ‘The Netherlands is full’ and ‘Islam is a backward culture’ and his proposal to abrogate the prohibition of discrimination in Article 1 of the Dutch Constitution in order to allow the expression of discriminatory statements in: Pim Fortuyn op heraling: ‘De islam is een achterlijke cultuur.’, Interview met Pim Fortuyn, De Volkskrant, 9 februari 2002.

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mainstream society. Hirsch Ballin has objected to this stating that ‘[m]ulticulturalism is a fact, but if its acceptance results in an isolated co-existence of cultural traditions, it indeed works counterproductive.’

2.3 The separation between State and Church

The pillarization and the recognition of minorities in Dutch law can be connected with the Dutch vision on the separation of the church and the state and the accommodation by the Dutch State of religions and cults. Unlike the situation in France, the Dutch Constitution lacks a provision that explicitly proclaims the principle of the separation of church and state as a characteristic of the Dutch State. The principle forms a rule of unwritten law that is expressed through a set of provisions, notably the constitutional rights of non-discrimination in Article 1, freedom of religion in Article 6, and freedom of education in Article 23. As a result of this, the principle is not often referred to and is not further elaborated in case law. Legal scholars, therefore, fundamentally disagree on its exact purport.

Historically, religious freedom originates in the religious developments of the sixteenth and seventeenth century. The Government prevented the outbreak of religious civil wars by affording individual citizens the right to exercise their religion in the private sphere. One of the first constitutional acknowledgements of religious freedom was Article XIII of the Union of Utrecht of 1579, the alliance of defence between several Dutch Provinces against Spain. The scope of the freedom was, however, limited. Outside the domestic sphere the government had the competency to regulate religion, which it did by privileging the dominant Calvinist religion; the right of public religious exercise was reserved to Calvinists, who were solely eligible for public functions. The Calvinist Church was financed by the State that in its turn felt free to intervene in its internal religious affairs. Nevertheless, compared to the cruelties to which religious minorities were subjected in other countries, a practice of religious tolerance existed.

In 1795, the French formally abolished the privileged status of the Calvinist Church and afforded all religions equal status. The ties between

1664 Entzinger 2006.
1668 Koekkoek 2000, p. 93.
religion and state were however not entirely cut. The Staatsregeling of 1789 underlined the importance of religion for the morals and unity of the state consisting of a shared Christian identity; public education formed an essential instrument to transmit enlightened Christen values.\textsuperscript{1670} The State kept financing the Calvinist Church. During the nineteenth century, the privileging and paternalism of the Calvinist Church and the discrimination and repression of other religions decreased. The Act on denominations of 1853 acknowledged the freedom of denominational organizations. The Act of 7 December 1983 finally discontinued the financial ties between the State and several designated churches.\textsuperscript{1671}

Strictly speaking, the principle of separation of state and church thus signifies that in the relationship between state and church there can be no institutional or direct substantive control on both sides. On the one hand, churches cannot have a formal position in political decision-making nor can government action be based on religious standards. On the other hand, the government cannot influence the doctrine and internal organization of churches.\textsuperscript{1672} The freedom of religious organization is further elaborated in Article 2:2 BW and assured by the exclusion of the application of the Equal Treatment Act to churches and religious services.

Like other laws and royal Decrees, the preamble of the Criminal Code still refers to ‘the Grace of God’ in order to express the vision that the legislator derives its authority to create laws from God, and thus acts according to divine authority or even as a representative of God on earth.\textsuperscript{1673} As the words express a connection between the state and God, they are at odds with the principle of the separation of state and church in the strict sense. The words, however, have no legal significance and are a recollection to the past. Subsequently, the Criminal code cites several offences that specifically protect the free – collective – exercise of a religion.\textsuperscript{1674} Articles 147 sub 2 and 3 Sr criminalize the ridiculing of a clergyman in the lawful observation of his service, respectively the scoffing of objects devoted to a service, during the lawful practice of a service. Articles 145 and 146 Sr criminalize the impediment, respectively the disturbance of lawful public gatherings for the profession of a religion or belief or of lawful religious or philosophical ceremonies. Churches, religious servants or adherents may however not violate the – criminal – law. Article 449 of the Dutch Criminal Code, which prohibits religious marriage without a previous civil marriage, is the only article that explicitly restricts the religious exercise.\textsuperscript{1675}

\textsuperscript{1670} Vermeulen 2007, p. 6.
\textsuperscript{1671} Koekkoek 2000, p. 94.
\textsuperscript{1672} Bijsterveld 2006, p. 248.
\textsuperscript{1675} Van Kempen 2011, p. 175.
In its strict interpretation, the principle does not, however, entirely describe the relationship between the state and religion. Similar to France, the process of disentanglement of the Dutch state and religion focussed in particular on education, but had the opposite outcome of the accommodation of religion. The ‘battle on education’ was at the basis of the pillarization and the forming of political parties based on religious or ideological convictions. During the French occupation, education had become a state affair and public schools were directed not to lay too much emphasis on religion. The Constitution of 1848 – founded by liberal leader Thorbecke – affirmed the principle of separation of state and church and enhanced freedom of religion and education; it enabled the establishment of private denominational and confessional schools separate from the government, but only by private funding. However, most Protestants and Roman Catholics considered religious education primarily as a task for parents and wanted their schools to receive financing equal to that received by public schools, while maintaining their freedom in, for example, curriculum policy and teacher appointments. Contrarily, the liberals tried to protect the privileged financial position of public schools. The ‘pacification’ of 1917 equated private and public education financially. Since then, Article 23 of the Constitution assures complete state funding for denominational and confessional schools.

This right to ‘special education’ forms the key to the Dutch vision on state neutrality towards religions that has been characterized as ‘inclusive neutrality’ or ‘pluralistic cooperation’. These notions signify that, contrary to France, in the Netherlands religion has a place in the private and the public sphere, including the domain of public institutions and services. In specific laws, the government guarantees equal denominational or confessional participation in the access to and the supply of public services, comprising next to education, the public broadcasting system and health care. The Act on Social Support forms an example of the cooperation between the government and religious organizations in the realization of civil and social aims.

‘Inclusive neutrality’ has been the subject of further interpretation since 1917. It has increasingly come under pressure in public and political debates that obviously focus on the accommodation of practices of the Islamic faith, in which the concepts of the separation of state and church and state neutrality and the scope of freedom of religion are confusingly mixed. Subsequently, a series of

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1677 Koekkoek 2000, p. 245 et seq.
1678 Van der Burg, W., Het ideaal van de neutrale staat, inclusieve, exclusieve en compenserende visies op godsdienst en cultuur, Erasmus Law Lectures 18, Den Haag, Boom Juridische Uitgevers 2009, p. 40.
1680 Wet van 29 Juni 2006 houdende nieuwe regels betreffende maatschappelijke ondersteuning (Wet maatschappelijke ondersteuning), Stb. 2006, 351.
government reports has explored the place of religion in the public sphere and fundamental rights in a multicultural society that, however, did not advise to adopt a fundamentally different approach to possible conflicting claims concerning notably the rights of freedom of expression, religion and non-discrimination.\textsuperscript{1681} With regard to the possibility of wearing religious dress in public, gradually the view has established – in the judgments and opinions of the CGB, the judicial decisions and politics – that a distinction must be made between the different institutions in society.

With regard to schools, in principle public schools cannot prohibit the wearing of headscarves and veils by teachers or students.\textsuperscript{1682} Contrarily, private schools can apply specific religious dress codes and refuse teachers or students unwilling to comply with them in order to realize their religious or ideological foundations, as long as policies are carried out consistently.\textsuperscript{1683} When educational institutions however refuse students or teachers on the ground of seemingly neutral dress codes that in practice notably target religious adherents, there must be an objective justification. Furthermore, although religious schools may set special requirements for the function of a teacher in order to realize their religious foundations, a school may not fire a teacher on the sole ground of his homosexuality and the fact that he has a relationship or lives together with his partner.\textsuperscript{1684}

With regard to the workplace, private companies cannot easily prohibit their employees from wearing religious symbols and dressing on the ground of representativeness.\textsuperscript{1685} This is different for the public authorities. Public institutions and services, such as the police in the light of its specific and special


\textsuperscript{1682} CGB Advies/2003/01, 16 April 2003.

\textsuperscript{1683} As the judge uses a more flexible ‘necessity-test’ than the CGB, he can reach a different outcome in one case. For example, the Amsterdam Court of Appeal considered that the Catholic Bosco College had not acted inconsistently by refusing one of its Islamic students, when one day she appeared at school wearing a scarf, even though the school lacked a policy in this field, because previously none of their students had worn a headscarf. What is more, the school had the right to change its policy. CA Amsterdam, 6 September 2011, \textit{L/J} BR6764. Contrarily, the CGB considered that the Catholic Bosco College had made it insufficiently clear that its headscarf policy aimed to realize its Catholic foundation. The policy therefore constituted an unjustified distinction on the ground of religion. CGB 7 January 2011, Decision 2011-02.


\textsuperscript{1685} CGB Advies/2004/06, 12 August 2004.
task\textsuperscript{1686} and to a lesser extent the Immigration and Naturalization Service (IND),\textsuperscript{1687} can require such neutral representation of their officials as long as dress codes are formulated in neutral terms.\textsuperscript{1688} In 2001 the CGB decided that the rejection by the Zwolle tribunal of an Islamic candidate soliciting to the function of interim clerk on the ground of her wearing a headscarf constituted discrimination on the ground of religion. According to the CGB, the prohibition on wearing a headscarf formed a disproportional measure and the argument of neutrality was deemed to be an insufficient justification, considering the nature of the function. However, the aim of the prohibition – the expression of the independence and impartiality of the judiciary – was legitimate and not discriminatory. The prohibition served an important interest.\textsuperscript{1689}

Several legislative proposals aimed to introduce a general criminal prohibition to wear religious dress in public or in the exercise of public functions. In 2007, the Freedom Party initiated a draft that proposed to specifically prohibit the wearing of a burqa and niqab in all public places on the ground of their incompatibility with Western fundamental constitutional values, the emancipation and integration of women and for security reasons.\textsuperscript{1690} The Council of State considered that the criminal prohibition formed an absolute limitation of freedom of religion that could not be justified by security reasons. The draft did not demonstrate that the wearing of such dress constituted a danger to the constitutional state. Furthermore, the prohibition was discriminatory, because it only targeted a limited religious group.\textsuperscript{1691} Subsequently, the Liberal Party proposed to prohibit the covering of the face in general for security reasons,\textsuperscript{1692} which would, however, in effect function as a prohibition of the burqa.\textsuperscript{1693}

In 2012, a draft was submitted that proposed the prohibition of the covering of the face in public places, publicly accessible buildings, educational institutions, non-residential areas within health care institutions and public transport that was grounded this time on the protection of the social order by eliminating obstacles in open communication – a freedom that the government, however, had not wanted to explicitly protect in Article 7 of the Dutch

\textsuperscript{1686} CGB Advies/2007/08, November 2007.
\textsuperscript{1687} CGB Advies/2012/01, 6 April 2012.
\textsuperscript{1688} For example, the Amsterdam Court of Appeal has decided that the municipal transport service of Amsterdam could suspend a Coptic tram conductor for violation of the company dress code by wearing a golden crucifix on his chest, because the aim of the dress code to realize a neutral and more professional representation could be objectively justified. CA Amsterdam, 15 June 2010, LJN BM7410.
\textsuperscript{1689} CGB 22 June 2001, AB 2001, 308, annotation Vermeulen.
\textsuperscript{1690} Kamerstukken II, 2007/08, 31108, nr. 7.
\textsuperscript{1691} Advies Raad van State, 21 September 2007, W03.07.0219/II; Kamerstukken II, 2007/08, 31108, nr. 4.
\textsuperscript{1692} Kamerstukken II, 2007/08, 31331.
\textsuperscript{1693} Advies Raad van State, 6 May 2008, W03.08.0028/II.
Constitution (para. 1.2 *supra*) – and by ensuring full and equal participation of women in society. The Council of State considered that the criminal prohibition violated freedom of religion, because the wearing of religious dress is a personal choice and subjective feelings of insecurity cannot form a sufficient, independent justification for such a measure. The draft did not demonstrate why a general criminal prohibition provided a pressing social need and why existing specific prohibitions and competences did not suffice or could be complemented.

Another issue is that of ritual slaughtering. In 2007 the Animal Party initiated a draft that proposed the prohibition of ritual slaughtering. The Council of State considered that the absolute prohibition would have the effect of preventing Jewish and Islamic adherents from consuming religiously slaughtered meat and therefore violated freedom of religion. The draft finally perished in the Senate in 2011.

The polemic concerning Dutch multiculturalism is, however, not limited to practices of the Islamic faith, which can be illustrated by the affair of the conscience objections of civil servants and the SGP-case. Traditionally, Dutch municipalities afford civil servants the right to refuse to perform same-sex marriages on the ground of their conscience and religion, a right readily used in municipalities predominantly populated by orthodox Christians. In 2008, the CGB had already opined that this possibility violated the principle of equality. By offering this possibility, municipalities allowed civil servants to discriminate against a statutorily protected group. In 2012, the Democratic Party (D66) presented a draft that proposed the amendment of the appointment criteria for registrars in Article I:16 BW in order to abolish this possibility. According to the Council of State, the proposal, however, violates the principle of equality and the right to equal eligibility in public functions, because it categorically excludes persons with religious or philosophical objections against same sex marriage from the public function of registrar. The Council advocated a more pragmatic approach, in which municipalities must carefully strike a balance in individual cases.

In 2010, the Dutch Supreme Court considered that the policy of the Reformed Protestant Party (SGP), whose political opinions are grounded on the bible, not to afford women full membership (including representative functions

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1694 Kamerstukken II, 2011/1012, 33165, nrs. 1-3.
1695 Advies Raad van State, 28 November 2011, W04.11.0379/I; Kamerstukken II, 2011/1012, 33165, nr. 4.
1699 Kamerstukken II, 2011-2012, 33344, nr. 2.
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in political organs\textsuperscript{1701} violated Article 7 sub c of the UN Women’s Treaty (CEDAW). The Article obliges the State to effectively ensure that women can fully participate in political parties and therefore also to ensure that women can stand as candidates of political parties. According to the Supreme Court, the State therefore has to take measures that ensure that the SGP actually affords women the right to stand for election, but at the same time interfere the least with the fundamental rights of the SGP.\textsuperscript{1702} Like the Court of Appeal, the Supreme Court upheld the decision of the Council of State that the CEDAW does not require the discontinuation of the public funding of the SGP, but did not specify what exact measures are to be taken instead.

Notably, the Supreme Court considered that the SGP has the right to continue to proclaim its opinion that women should not be allowed on the election list, but cannot transpose this opinion into policy and thus put it into practice.\textsuperscript{1703} This distinction signifies that freedom of expression or religion – of purely verbal expression – has a larger extent than the freedom to convert this opinion or religion into actions (para. 6.7 infra).

The SGP filed a complaint to the ECtHR arguing that the decision of the Supreme Court violated its freedom of religion, expression and association protected in Articles 9, 10 and 11 ECHR. On 10 July 2012, the ECtHR however declared the complaint inadmissible in remarkably strong terms. Firstly, only very weighty reasons would make a difference to treatment on the ground of sex compatible with the Convention. Moreover, the advancement of the equality of sexes prevents the State from supporting views of the man’s role as primordial and the woman’s as secondary. Finally, not only did the decision of the Supreme Court not violate Articles 9, 10 and 11 ECHR, in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol no. 1 that assures free elections, together with Article 14 ECHR.\textsuperscript{1704}

The separation of state and church equally influences the extent of the freedom to manifest and express religious convictions. Although the existence of the offence of blasphemy in Dutch law is not a feature exclusive to the Dutch ‘inclusive pluralistic’ State, the creation and indefinite preservation of the offence can notably be attributed to the Christian political parties that traditionally had a large backing and have often participated in the government coalitions.\textsuperscript{1705} Unlike France, according to the Dutch legislator the repression of

\textsuperscript{1701} For an historical overview of the ideas of the SGP on women’s right to vote and the position of women in the SGP see: Post, H., \textit{In strijd met de roeping der vrouw: de Staatkundig Gereformeerde Partij en het vrouwenkiesrecht}, Heerlen: Groen 2009.


\textsuperscript{1703} Dutch Supreme Court, 9 April 2010, [IN] BK4549; BK4547, para. 4.5.5.

\textsuperscript{1704} ECtHR, 10 July 2012, n°58369/10, (SGP/ the Netherlands).

\textsuperscript{1705} Kort-van Welzen 1994, p. 187 et seq.
blasphemy does not suppose a specific conception of God by the State, it does not constitute unequal treatment by the Dutch State of religious and other philosophical convictions, nor does it violate freedom of conscience, expression and religion. To the contrary, the offence of blasphemy was established precisely to prevent abuses of freedom of expression that could impair freedom of religion. Nevertheless, the offence has been highly controversial from the outset (para. 3.1 infra).

2.4 Conclusion

Despite the ‘non-ideological’ nature of the Dutch Constitution, Article 1 of the Dutch Constitution, which proclaims the principle of equality and assures the right of non-discrimination, can be regarded as expressing a fundamental principle that underlies Dutch law. The principle primarily assures the equality of all individuals before the law. The further elaboration of the principle is indissolubly linked to the traditional structure of Dutch society by the ‘pillarization’ that dates back to 1917. It consists of a group-orientated system that focusses on separate publicly funded facilities based on community identities that can be characterized as ‘institutionalized multiculturalism’. Dutch law therefore precisely recognizes minorities and facilitates the enjoyment of the specific identities of groups defined by a common origin, religion or culture on the ground of their common characteristics.

Due to depillarization, a persistent immigration and increased socioeconomic problems, since the 1970s, the focus of the minority policy has shifted from ‘multiculturalism’ to ‘civic integration’, from groups to individuals, but comprised an active prosecution policy with regard to expressions of racism and discrimination. In the light of traditional Dutch institutionalized multiculturalism, the principle of non-discrimination can be understood to afford people the right to enjoy their cultural identities rather than – according to the French vision – of indifference towards their common characteristics.

The pillarization and the recognition of minorities in Dutch law can be connected with the Dutch vision on the principle of the separation of the church and the state and the accommodation by the Dutch State of religions and cults. The principle forms a rule of unwritten law that is notably expressed through the constitutional rights of non-discrimination in Article 1, freedom of religion in Article 6 and freedom of education in Article 23. Article 23 affords the right to ‘special education’ and resulted from the ‘battle of education’ in 1917 that formed the basis of the pillarization. The Article forms the key to the Dutch vision on state neutrality towards religions that has been characterized as ‘inclusive neutrality’. This notion signifies that in the Netherlands religion has a place in the private and the public sphere, including the domain of public institutions and services. In specific laws, the government guarantees equal denominational or confessional participation in the access to and the supply of
public services, comprising next to education, the public broadcasting system and health care.

Nowadays, the public and political debate concerning the place of religion in the public sphere is not limited to, but focuses on the accommodation of practices of the Islamic faith, notably the possibilities to wear religious symbols and dress in public. Gradually, the view has established that a distinction must be made between the different institutions in society, being schools, the workplace and public authorities. The Council of State has generally opined that legislative proposals to introduce absolute criminal prohibitions to wear religious symbols and dress in public institutions and areas violated the principle of equality and freedom of religion.

The separation of state and church equally influences the extent of the freedom to manifest and express religious convictions. Although the existence of the offence of blasphemy in Dutch law is not a feature exclusive to the Dutch State, such an offence fits into its ‘inclusive neutrality’ and does not – according to the Dutch legislator – violate freedom of expression or religion. The creation and indefinite preservation of the offence that has nevertheless been highly controversial from the outset can be attributed to the political influence of the Christian parties.

3. The long preservation and final abolition of the offence of blasphemy – Article 147 Sr

The punishment of blasphemy dates back to the Middles Ages, but the offence of blasphemy was introduced into modern Dutch law in the early 1930s (3.1). Given the problems involved in the legal prohibition of the offence to God, the legislator has chosen a particular wording of the offence (3.2) that has been applied for the last time in the 1960s in the famous Donkey-trial against Dutch author Gerard van het Reve (3.3). Subsequently, several proposals to revive or abolish the offence have been made before it was finally abolished in 2013 (3.4). The analysis results in a general conclusion about the rise and fall of the offence of blasphemy in Dutch law (3.5).

3.1 History

In Europe throughout the Middles Ages and during the Reformation, blasphemy formed a topic of inter-confessional and intra-confessional conflicts. In practice, blasphemy was severely punished by means of the piercing or cutting of the tongue, chopping off of the hand, branding, the death penalty or expulsion. As far as the Netherlands is concerned, the early modern discourse of religious tolerance in the 17th century did not foresee that the offence of blasphemy would exist for a long time. In 1811, during the French

1706 Van Stokkum, Sackers & Wils 2006, p. 35-48, p. 82-90.
occupation, the French Criminal code was introduced, which lacked an offence of blasphemy. From then onwards, the offence of blasphemy did no longer form part of Dutch law.

The Dutch Criminal Code of 1881\(^{1707}\) that entered into force in 1886 originally, equally did not comprise an offence of blasphemy. According to Minister for Justice Modderman, the criminal legislator had to protect the rights of society, not the rights of God, who would be indefinitely better at this job Himself.\(^{1708}\) The prohibition on the impediment or disturbance of religious gatherings in Articles 145 and 146 Sr was criminalized, merely because in the mind of the nation the violation of religious gatherings was differently perceived than the disturbance of other gatherings, not because it gave offence to a religion.\(^{1709}\) The criminalization of the ridiculing of a clergyman during the lawful observation of his service and the scoffing of objects devoted to a service, during the lawful practice of a service in Article 147 Sr protected the right of citizens not to be disturbed in their religious exercise (para. 2.3 supra).\(^{1710}\)

Similar to other municipalities, the municipality of Wonseradeel had filled this lacuna by penalizing the public defamation of God in a scornful and libellous manner in a local regulation that became the object of a political debate in 1924.\(^{1711}\) Several representatives requested the Minister for Internal Affairs to cooperate in the annulment of the regulation. The minister, however, refused to do so, because the regulation aimed to protect the public morals and therefore complied with Article 135 of the Municipality Act.\(^{1712}\) Slotemaker de Bruine, representative of the Protestant Party (CHU), strongly criticized this restriction of freedom of conscience by counting the religious domain as part of the moral domain. The propaganda of atheism and materialism – against which the regulation was used – had to be countered by the moral and intellectual forces within the population, not by the government.\(^{1713}\) This passionate speech did not convince the minister, who considered that the regulation did not violate freedom of opinion and expression in private, because it merely prohibited the public defamation of God.\(^{1714}\)

During the affair, the idea of criminalizing blasphemy had hardly ever been brought to the fore. Several years later the frequent publication of anti-religious propaganda did provoke this desire among part of the population, the

\(^{1707}\) Wet van 3 Maart 1881, Stb. 35.
\(^{1708}\) Handelingen II, 1880-1881, p. 102.
\(^{1710}\) Handelingen II, 1880-1881, p. 100-102.
\(^{1712}\) Handelingen I, 1923-1924, p. 529.
\(^{1713}\) Handelingen I, 1923-1924, p. 552-555.
\(^{1714}\) Handelingen I, 1923-1924, p. 567.
parliament and the government.\textsuperscript{1715} In the early thirties of the twentieth century, the distribution of the pamphlet ‘God is Evil’ by the association \textit{De Dageraad} arose much indignation. Furthermore, several publications in the newspaper of the Communist Party (CPH) \textit{The Tribune} caused the Minister of Education, Arts and Sciences to remove the newspaper from the publicly funded reading rooms and to discontinue their funding if they continued to provide it. The National Railway Company decided not to sell the newspaper any longer in its bookshops. Controversial publications by \textit{The Tribune} comprised the headline ‘Eliminate Christmas’, the song ‘Christ to the dung heap! The Holy Virgin in the stable! The Holy Fathers to Hell! Long live the voice of the canon – the canon of the proletarian revolution!’ and the cartoon depicting God as the inventor of a new poisonous gas for the destruction of the entire population of the Soviet Union. The measure led to the motion of Communist representative Wijnkoop, who accused the minister of trying to censure the Communists, which was, however, finally rejected.\textsuperscript{1716}

On 25 April 1931, the Dutch government introduced a bill that proposed to criminalize ‘public expression that is offensive to religious feelings by means of ‘scornful’ blasphemy’ in a new Article 147 sub 1 Sr and ‘the display of blasphemous expression visible from the public road’ in Article 429bis Sr.\textsuperscript{1717} According to the explanatory memorandum, in order not to interfere excessively with the free expression of opinion, Minister for Justice Donner had decided to merely criminalize the scornful form of expression that injured religious feelings. The criminalization of all expression hurtful to religious feelings would go too far. Cursing or swearing, thoughtless remarks or scientific expression of honest convictions fell outside the scope of the offence.\textsuperscript{1718} The offence did not affect the contestation of a religion as such, as long as the form of the expression did not exceed a certain limit. Freedom of religion was considered as the fruit of historic development. What was to be prevented was, however, the abuse of freedom of conscience that leads to lawlessness.\textsuperscript{1719}

The bill was discussed in great detail in the House of Representatives\textsuperscript{1720} and the Senate.\textsuperscript{1721} Many representatives, both proponents and opponents,
objected to the ambivalent wording of the offence. The statutory elements of the
offence criminalized on the one hand ‘scornful blasphemy’ and on the other
hand ‘the offence to religious feelings’: what was the exact rationale and scope
of the offence? While some desired the criminalization of the sin of blasphemy as
such thus the offence to Gods Person, others desired the criminalization of the
offence to religious feelings of religious adherents. Opinions diverged not only
between the confessional and non-confessional parties, but also between the
different confessional parties.\footnote{1722} Several arguments were put forward against the introduction of the
offence.\footnote{1723} Firstly, as anti-religious propaganda was not a new phenomenon
and previous publications such as ‘The Red Devil’ and ‘Bible amusant’ had not
resulted in immediate legislative action, the bill constituted ad hoc legislation –
which especially in the field of criminal law was to be rejected – against
publications in The Tribune that surely did not have a very large impact.
Secondly, the recognition of God by the State was not to lead to the unequal
protection of religious and other philosophical convictions. Anti-religious
propaganda was to be countered by word, by anti-religious propaganda, and
not by criminal law that could not completely repress the offence to religious
feelings, but rather fuel more anti-religious propaganda. In any case, religious
adherents had themselves fueled the anti-religious propaganda due to the fact
that many war atrocities had been defended in the name of religion and scornful
expression against socialistic principles was often made from the religious side.

A first rationale of the offence formed the protection of the public order.
Anti-religious expression had become a persistent problem. Proponents feared
that the anti-religious propaganda from the Communist side would provoke
strong reactions and reprisals on the religious side, mainly from the orthodox
Christian youth, and would therefore cause problems with the public order.
However, the Minister rejected the suggestion to model the offence after Article
156 of the Criminal Code of the (former) Dutch East Indies that prohibited
scornful or offensive expression of feelings of hostility, hatred or disdain against
one or more religious groups of the population. The situation in the Netherlands
could not be compared with the large religious diversity in the Dutch East
Indies. The offence of blasphemy did not regard the expression of feelings of
hostility, hatred or disdain against groups, but the expression of feelings of
hostility, hatred or disdain against God.\footnote{1724}

According to the Minister, the State openly acknowledged the existence
of God, public authority was exercised by the grace of God and, despite the
broadest recognition of freedom of religion, the State was not an ‘État athée’.
Hence, the State had to clear from the public sphere expression that directly

\footnote{1722}{For an analysis see: Kort-Van Welzen 1994, p. 197 et seq.}
\footnote{1723}{For an overview see: Kamerstukken II, 1930-1931, 348, nr. 4.}
\footnote{1724}{Kamerstukken II, 1930-1931, 348, nr. 4, p. 7; Kamerstukken II, 1931-1932, 34, nr. 1, p. 4.}
defamed God. The construction of God as part of the legal order was considered by some to be a somewhat artificial attempt to justify the criminalization of the sin of blasphemy as such. The Minister, however, strongly opposed such an offence for the protection of God or a Religion, which belonged to God’s domain and not to the domain of the State. A more practical argument was that such an offence would require an awareness of the true existence of God with the offender, while he who blasphemes as a general rule does not believe in God’s existence.

A second rationale for the offence was the protection of the religious feelings as they existed in society. The Minister argued that the direct defamation of God in a scornful manner offends one of the most elementary and general moments of the religious feeling. A parallel could therefore be drawn with the existing prohibitions of Article 147 Sr that criminalized the ridiculing of a clergyman or the scoffing of an object only at the location where the service is held, in other words within another person’s domain. Likewise, he who blasphemes accepts the religious representations of others and enters into their sphere or domain to subsequently commit the offence.

The minister rejected the amendment presented by Slotemaker de Bruine who proposed the criminalization of the offence to religious feelings ‘in an intolerable manner’, thus in more neutral terms than ‘by means of scornful blasphemy’. The minister had precisely avoided the use of such general terms in order to limit the scope of the offence that could apply to the phrase ‘God is Evil’, but certainly not to phrases such as ‘Religion is opium to the people’ or ‘Disbelief is a plague’. As the offence used an objective conception of God – a Supreme Being – that could be determined by the State or the judge independently from personal convictions, it did not constitute a discriminatory protection of freedom of religion of a religious majority; other religions or beliefs did not have a comparable conception that was left unprotected. The minister disputed that the offence violated freedom of expression, because Article 7 of the Dutch Constitution merely prohibited prior censorship and thus reserved the possibility to secure the public order (para. 1.2.2 supra). It merely required that the form of expression that contests another religion does full justice to what is sacred within that religion.

The bill was eventually adopted on 1 June 1932 by the House of Representatives with 49 against 44 votes. Subsequently, the bill was adopted

1728 Ibid., p. 2.
1729 Kamerstukken II, 1931-1932, 34, nr. 3.
1732 Handelingen II, 1931-1932, p. 2654. Among the 44 representatives who voted against the bill were 21 Social-Democrats; 8 Liberals; 7 Liberal Protestant-Democrats; 3 Reformed
by the Senate with 28 against 18 votes\textsuperscript{1733} and published in the law gazette as the Act of 4 November 1932.\textsuperscript{1734} The offence was included in Book II Section V of the Dutch Criminal Code concerning ‘crimes against the public order’, which according to its explanatory memorandum are acts that constitute a danger to social life and the natural order of society.\textsuperscript{1735} In 1934, the Dutch Criminal Code was supplemented with Article 147a Sr that criminalizes the distribution of expression that is offensive to religious feelings by means of scornful blasphemy.

3.2 Elements of the offence

The wording of the offence of blasphemy in Article 147 sub 1 Sr has remained unchanged since its introduction in the 1930s and stated that ‘any person who publicly, orally, in writing or by means of portrayal, expresses himself in a manner insulting for religious feelings by means of scornful blasphemy’ was liable to an imprisonment up to three months or a fine up to €3,800. Blasphemy signifies the insult of God’s Person or the Supreme Being.\textsuperscript{1736} Although the offence originated in the outburst of anti-Christian propaganda, its wording thus did not limit its application to the Christian religion. The offence was tailored to religions with one Supreme Being, such as the Christian (God), Jewish (JHWH) and Islamic (Allah) faith, and was therefore difficult to apply to polytheistic religions. With regard to the Christian religion, the Supreme Being comprises all persons of the Holy Trinity, i.e. Christ and even the Eucharist, but other religious figures, such as Maria, and rituals or practices were excluded.\textsuperscript{1737} The offence thus offered a smaller scope of protection to monotheistic religions other than the Christian religion by lack of the concept of the Holy Trinity.

The offence furthermore required blasphemy to be \textit{scornful}. The term expresses a high standard of intent that limited the scope of the offence to forms of expression that have the intention to deeply scoff, ridicule, or disparage God's Person.\textsuperscript{1738} The element ‘in a manner insulting for religious feelings’ enabled to bring under the scope of the article an offender who does not believe in God himself, but abuses the representations of God as held by others in society. However, it had no independent significance in the sense that proof of the fact

Protestants; 2 Communists; 1 representative of the Centre Party for City and Country and 2 of the Protestant Party (CHU).
\textsuperscript{1733} Handelingen I, 1932-1933, p. 49. It were the Roman-Catholics; the Anti-Revolutionists and the Protestants of the CHU, who voted in favour of the bill.
\textsuperscript{1734} Sib. 1932, 524.
\textsuperscript{1736} Janssens & Nieuwenhuis 2011, p. 200.
\textsuperscript{1737} Kamerstukken II, 1931-1932, 34, nr. 1, p. 4.
\textsuperscript{1738} Kamerstukken II, 1930-1931, 348, nr. 3, p. 2; Kamerstukken II, 1931-1932, 34, nr. 1, p. 3.
that expression has actually resulted in the offence of the religious feelings of others was not required.\textsuperscript{1739}

3.3 Application: the Donkey trial

The offence of blasphemy could be applied on the initiative of the public prosecution, on indication by the Minister of Justice, or in reaction to a complaint. The prosecution of the offence thus did not depend on a prior complaint by an interested party. The application of the offence of blasphemy has been limited. Between 1932 and 1968 there have been 9 convictions and 3 dismissals on the basis of Article 147 sub 1 Sr.\textsuperscript{1740} On certain occasions the courts have used a rather extensive interpretation of ‘scornful blasphemy’; convictions comprised not only the exclamation ‘A God, who has invented the bacillus of tuberculosis, is not a God, but a criminal’ by a radical socialist,\textsuperscript{1741} but also a publication that questioned the virtue of Mary\textsuperscript{1742} and the mere ridiculing of Christ for being a ‘demagogue, faith healer, Savior/gynecologist, Champion-surf-rider and amateur-ombudsman’.\textsuperscript{1743}

The last blasphemy-case formed the famous ‘Donkey trial’ in 1968.\textsuperscript{1744} The case concerned the publication of a letter by the Dutch author Gerard Kornelis van het Reve in Dialoog, a magazine for homosexuality and society, and the publication of the book ‘Nearer to Thee’ by the same author in 1965. Both publications comprised passages that described how the author has sexual intercourse with God who has taken the form of a donkey. After representatives of the SGP had raised questions about the blasphemous nature of the publications, the Minister for Justice instructed the Public Prosecution to institute criminal proceedings.

The case revolved around the question as to whether ‘scornful’ blasphemy required that an offender must have had a ‘subjective’ intention to

\textsuperscript{1739} Ibid.
\textsuperscript{1741} Dordrecht District Court, crim.ch., 15 January 1934, (unpublished).
\textsuperscript{1742} Haarlem District Court, crim.ch., 19 May 1938, (unpublished).
\textsuperscript{1743} Amsterdam District Court, crim.ch., 23 June 1965, NJ 1965, 282.
deeply offend God’s Person, or an intention to do so according to ‘objective’ standards. The question resulted from Reve’s defence that, being a faithful Catholic, he had merely intended to express his religious beliefs and not to offend God. The author was baptized just before the trial, which had been exhaustively reported in the media. According to Reve, the case therefore concerned ‘a religious dispute that he had not intended to start, in which one conception of God was placed above the other.’ The offence was indeed modeled in such a manner that it was directed against propaganda from the non-religious side; religious propaganda was not foreseen.

In literature, Reve’s defence is considered to have played a weighty role in the decision by the Court of Appeal to acquit him. The Supreme Court endorsed the decision and considered that ‘the term scornful comprises the subjective element, the intention of he who disparages the highest Supreme Being, presented as real; the term scornful thus does not merely have the function to describe a certain form of expression that is offensive to religious feelings; for these reasons an author is not already affected by the offence, if he has the intention to express himself in such a form that others must be offended in their religious feelings.’ The Supreme Court thus set a very high standard of proof and threshold for criminal liability, which is in keeping with the aim of the legislator to limit the scope of the offence.

As the Donkey-trial took place in the early stages of the ‘ECHR-era’, unsurprisingly, the courts did not explicitly balance the application of the offence of blasphemy with the right to freedom of expression or religion. The case therefore leaves the question as to whether religious opinions are afforded a higher level of protection than other opinions undecided. The judges left the act of balancing between the different interests to the legislator and the Public Prosecutor. The Public Prosecutor considered that, after having balanced the interest of the community, the suspect, freedom of expression, the satisfaction of people who felt offended in their religious feelings, and of the requirement of tolerance, he wished to request no more than 100 Dutch Guilders.

The decision of the Supreme Court was criticized for making the offence of blasphemy unapplicable. This criticism has proved to be justified. After the Donkey-trial, the public prosecution has structurally dismissed complaints against blasphemous expression and courts of appeal have structurally affirmed these decisions on the ground that the author’s intent could not be proven. Likewise, in 2001 the Amsterdam District Court rejected the request in summary

1745 De Roo 1970, p. 121.
1746 Dutch Supreme Court, crim.ch, 2 April 1968, NJ 1968, 373, annotation Brinkhorst.
1747 Plooy 1986, p. 75.
1748 Annotation Brinkhorst at: Dutch Supreme Court, crim.ch, 2 April 1968, NJ 1968, 373; De Hullu 1984, p. 560; Plooy 1986, p. 77.

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proceedings of Hindoes that the Company Shiva Entertainment must stop bringing pornographic videos on the market under the name of the Supreme Being, because the company did not have the intention to use the name of Shiva in a scornful manner.1750

Complaints were notably filed by the Bond tegen Vloeken (Association against Cursing) against satirical programs of the socialist broadcasting company (VARA).1751 In 1979-1980, the rejection of the complaint against the screening of the film The Life of Brian even raised questions in the House of Representatives.1752 The Christian parties argued that the structural dismissals and rejections of appeals signified the erosion of the offence of blasphemy and demanded the Minister for Justice to undertake action. The Minister has, however, consistently held – in 1996 with regard to the display on the public road of the advertisement poster of the film The people versus Larry Flint1753 and in 2008 with regard to the crucifixion-act of Madonna during her Confessions Tour1754 – that interference is outside of his competence.

3.4 Political developments and proposals of abolition

In 1989 the Minister for Justice, however, took the initiative to examine whether criminal proceedings could be instituted against the publication of the Dutch translation of the novel Satanic Verses by Salman Rushdie on the ground of the offence of blasphemy. In a heated debate in Parliament, the Minister was criticized for giving in to the violent threat posed by Islamic fundamentalists and was accused of censorship. The Minister objected to this criticism stating that he had merely examined whether the offence afforded equal protection to adherents of Islam.1755

In 2004, Dutch cineaste Theo Van Gogh known for his film Submission was brutally slaughtered by Muslim fundamentalist Mohammed Bouyeri.1756 The killing of Van Gogh triggered a countrywide series of assaults against Muslim institutions. In response to the murder, the minister for justice announced the examination of whether the offence of blasphemy was to be revived and used to channel the public debate concerning Islam in order to prevent Muslim radicalization1757 and the intentional harm and offence of

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1750 Amsterdam District Court, summary proceedings, 2 August 2001, Lijn AB3067.
1757 Kamerstukken II, 2004-2005, 29854, nr. 3.
people in their beliefs or religion.\textsuperscript{1758} Subsequently, the motion of representative of the Democratic Party (D66) Van der Laan proposed to abolish the offence of blasphemy.\textsuperscript{1759} The motion was, however, considered to be inconvenient in light of the political tensions at the time and was therefore rejected. The minister announced the initiation of an investigation into the criminalization of blasphemy.\textsuperscript{1760} In 2007, the Scientific Research and Documentation Centre of the Ministry of Justice (WODC) published the report ‘Blasphemy, discriminatory expression on the ground of religion and hate speech’.\textsuperscript{1761} One of its main findings was that the offence of blasphemy could not be considered to be a dead letter, but merely that it has led a dormant existence; it still had an independent function and value next to the other speech offences. However, its wording did create an inequality before the law between adherents of monotheistic religions and adherents of other beliefs.

The government decided to preserve the offence of blasphemy on the basis of its standard setting character\textsuperscript{1762} and the minister for justice announced the initiation of an investigation into the possibility to broaden the scope of the offence in order to afford equal protection to all religious and philosophical beliefs.\textsuperscript{1763} Subsequently, the Dutch Supreme Court, in its case law, gave a restrictive interpretation of Article 137c, the offence of insult of a group on the ground of their religion, in that it does not include religious offence and considered that in order to constitute punishable group insult, expression must \textit{unmistakably} concern a group characterized by a religion (para. 5.7 infra). This development caused the Minister to change his position several times, which raised much criticism in Parliament.\textsuperscript{1764} After the proposal to abolish the offence of blasphemy but to broaden the offence of group insult,\textsuperscript{1765} the Minister finally renounced his plans altogether in 2009.\textsuperscript{1766}

In response to the decision of the Minister to preserve the offence of blasphemy, the Motion of representative of the Democratic Party (D66) Van der Ham that proposed to abolish the offence was widely supported and adopted.\textsuperscript{1767} In reaction to the decision of the government to prepare a bill for the abolishment, the Motion of representative of the Reformed Protestant Party (SGP) Van der Staaij proposed to preserve the offence based on its standard setting function, but the Motion was rejected.\textsuperscript{1768} In the Motion, Van der Ham

\textsuperscript{1758} Handelingen II, 2004-2005, nr. 23, p. 1335-1342.
\textsuperscript{1759} Kamerstukken II, 2004-2005, 29800 VI, nr. 52.
\textsuperscript{1760} Kamerstukken II, 2004-2005, 29800 VI, nr. 41.
\textsuperscript{1761} Kamerstukken II, 2006-2007, 30800 VI, nr. 38.
\textsuperscript{1762} Kamerstukken II, 2007-2008, 31200 VI, nr. 8.
\textsuperscript{1763} Kamerstukken II, 2007-2008, 31200 VI, nr. 130.
\textsuperscript{1764} Kamerstukken II, 2008-2009, 31700 VI, nr. 104.
\textsuperscript{1765} Kamerstukken II, 2008-2009, 31700 VI, nr. 33.
\textsuperscript{1766} Kamerstukken II, 2008-2009, 31700 VI, nr. 128.
\textsuperscript{1767} Kamerstukken II, 2008-2009, 31700 VI, nr. 94.
\textsuperscript{1768} Kamerstukken II, 2008-2009, 31700 VI, nr. 99.
strongly emphasized the interest of freedom of expression and the importance of a profound public debate on philosophical questions. The offence of blasphemy afforded an unequal protection of monotheistic and non-monotheistic religions and constituted unequal treatment of religious and non-religious convictions. What is more, as freedom of religion formed a classically negative fundamental right, the offence to religious feelings did not constitute an interference with this freedom. Finally, the offence had primary been motivated by the protection of the public order, but its preservation was both unnecessary and undesirable, because other existing speech offences sufficed for this purpose.\textsuperscript{1769}

The Council of State opined that a provision that affords protection to a facet of religion that does not have an equivalent in non-religious convictions cannot be considered to constitute unequal treatment of equal cases. Furthermore, the offence did not merely aim to protect the public order, but was founded on freedom of religion and the task of the government to protect ‘freedom of conscience’ and religious feelings. The Council of State concluded that the question of the preservation of the offence could not be answered according to strict Constitutional boundaries concerning the right to freedom of expression, freedom of religion and the principle of equality; this applied both to the Constitution and the ECHR. Determinent for the issue were aspects of criminal policy, public considerations and factors, and the views of other member states of the Council of Europe. The Council therefore advised the placing of the abolishment of the offence in a broader context and emphasized a number of possible –negative – legal and social consequences; the abolishment of the offence might lead to tensions in society and the loss of its preventive and normative function and the remaining speech offences might not be sufficient for an adequate protection of religious minorities against insults of their religion.\textsuperscript{1770}

The reservations made by the Council of State did not convince the initiators of the bill, who in essence attached more importance to the right to freedom of expression and placed the bill in the context of international developments; only eight of the 47 member states of the Council of Europe still have an offence of blasphemy and institutions of the Council of Europe have expressed their opposition to blasphemy laws. These developments can be connected to, on the one hand, the processes of secularism and secularization and, on the other hand, the increasingly diverse population. The offence is grounded on a connection between the State and God, between the public order and public morality, which can be historically explained, but is nowadays difficult to legitimize.\textsuperscript{1771} The plurality of religions and differences between their

\textsuperscript{1769} Kamerstukken II, 2009-2010, 32203, nr. 2-3.
\textsuperscript{1770} Kamerstukken II, 2009-2010, 32203, nr. 4.
\textsuperscript{1771} For a discussion about the desirability of the offence see notably the contributions to: Thema Omtrent Van Gogh, NJB 17 December 2004, nr. 45-46; De Blois, M., Van der Poll.
adherents, rather calls for the criminalization of expression against religious groups than expression against God.

On 16 April 2013, the proposal to abolish the offence of blasphemy was adopted by the Parliament. All parties voted in favor of the proposal, except the three confessional parties (SGP, Christenunie, CDA). According to the initiators and the majority, the fact that the offence of blasphemy had an independent value (the protection of religious feelings) next to the hate speech bans of Article 137 did not signify that it also had an added value; the hate speech bans offered sufficient protection of all persons against insults, hatred and discrimination on the grounds of their religion or belief equally. Only this expression overstepped the limits to freedom of expression. On 3 December 2013, the proposal was adopted in the Senate with 49:21 votes. Next to the three confessional parties, seven members of the Liberal Party (VVD) voted against it. In the Senat, more emphasis was placed on the connection between the offence of blasphemy and the protection of freedom of religion. In line with the reservations put forward by the Council of State, the senators questioned whether the offence of blasphemy could have any residual value and whether its abolishment would not amount to an insufficient protection of religious minorities against insults of their religion. In fact, the debates in Parliament and the Senat had insufficiently clarified the exact relationship between the offence of blasphemy in Article 147 and the hate speech bans in Artice 137.

The Senat therefore adopted the motion by senator Schrijver that requested the government to examine the possible amendment of the hate speech bans of Article 137 of the Dutch Criminal Code ‘in order to assure that this article affords a sufficient protection against a serious perceived insult of citizens through insult of a religion, without unduly restricting freedom of expression’. Such an examination cannot concern a possible broadening of the offence of group insult in order to criminalize the offence to religious feelings, because this would be contrary to the restrictive interpretation of the offence of group insult given by the Supreme Court. Such an examination can, however, concern and shed light on the question of when exactly insulting remarks about religious convictions and practices can amount to a punishable form of group insult or incitement to hatred, discrimination or violence on the ground of religion. In fact, as we will see later on, the consideration of the Supreme Court that expression must unmistakably concern a group characterized by a religion –


1772 Handelingen II, 2012-2013, nr.75, item 18.

1773 Kamerstukken II, 2010-2011, 32203, nr. 5; Kamerstukken II, 2011-2012, 32203, nr. 7; Handelingen II, 2012-2013, nr.64, item 9.


in lower case law also applied with regard to incitement to hatred or discrimination – needs further precision (para. 5.7 infra).

3.5 Conclusion

Originally, the Dutch Criminal code of 1886 did not comprise of an offence of blasphemy, because the criminalization of blasphemy belonged to the domain of God. In 1932 the offence of blasphemy was, however, introduced in order to counter the outburst of anti-religious propaganda from the Communist side. The primary rationale of the offence was the protection of the public order. This notion however had a broad significance; as the State was not an ‘État athée’ and acknowledged the existence of God, it had the obligation to remove expression that defamed God from the public sphere. Another rationale was the protection of the religious feelings of religious adherents, because he who blasphemes enters into their domain of religious representations and thus interferes with their freedom of conscience and religion. As the offence used an objective notion of God, it was not considered as discriminatory between religions and beliefs. Nor would it violate freedom of expression, because Article 7 of the Dutch Constitution merely prohibited prior censorship and thus reserved the possibility to secure the public order.

The ambivalent wording of the offence that criminalized, on the one hand ‘scornful blasphemy’, and on the other hand ‘the offence to religious feelings’ formed the object of a heated debate not only between confessional and non-confessional parties but also between the different confessional parties. The Minister, however, limited the scope of the offence to forms of expression that have the intention to deeply scoff, ridicule or disparage God’s Person in order not to interfere excessively with freedom of expression and has criminalized an offender who does not believe in God himself, but abuses the representations of God as held by others in society.

In the famous Donkey-trial in 1968 the Supreme Court set a high standard of proof by requiring the ‘subjective’ intention of the author to defame God. The offence has not been applied ever since. After the murder of Van Gogh in 2004, the minister announced his plan to use the offence to channel the excesses of the public debate concerning Islam and to prevent further Muslim radicalization. After several proposals to modify the offence, the minister finally decided to preserve the offence in its existent form. In 2009, a widely supported motion that proposed to abolish the offence was however adopted, which emphasized the interest of freedom of expression, the discriminatory character of the offence and that its preservation was unnecessary for the protection of the public order. The Council of State advised that abolishment of the offence be placed in a broader context, including the normative and preventive power of the offence. The proposal was, however, adopted in both the Parliament and the Senat. After existing in Dutch law for 80 years and being preserved due to the continued support of the confessional parties, the offence of blasphemy was
finally abolished in 2013. This can be considered a welcome development; the processes of secularism and secularization and the increasing religious diversity among the population make the offence difficult to legitimize.

4. Implementation of ICERD

The Netherlands implemented the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) in 1971 (4.1). Before the implementation, hate speech was regulated by several speech offences primarily aimed at the protection of the public order (4.2). With the implementation of ICERD a number of new prohibitions of forms of hate speech and discrimination were introduced that were more particularly aimed at the protection of persons against discrimination (4.3). The analysis results in a general conclusion about the background and merit of the implementation of ICERD into Dutch law (4.4).

4.1 Adhesions to ICERD

On 13 September 1968, the Dutch Government introduced a bill to adopt ICERD\textsuperscript{1776}, together with a bill to implement the convention. The bills were discussed in great detail both in the House of Representatives\textsuperscript{1777} and in the Senate.\textsuperscript{1778} While the former was adopted unanimously in Parliament and in the Senate, the latter was adopted unanimously in Parliament and in the Senate with 44 against 21 votes. ICERD was finally adopted by the Act of 18 February 1971\textsuperscript{1779} and ratified on 10 December 1971.

Unlike France, the Netherlands did not make any reservations to the convention. However, similar to France, the Dutch Government was of the opinion that the significance of ICERD for the Netherlands would be limited, because racial discrimination simply did not exist: ‘the Dutch public authorities and institutions neither exercised nor promoted any form of racial discrimination’\textsuperscript{1780}. The Government thus reasoned from a rather limited conception of discrimination; only the Government or institutions and groups of comparable influence could discriminate against citizens.\textsuperscript{1781} ICERD did not concern discrimination between citizens in private, i.e. all kind of social relations, but discrimination in public life. The purport of the convention closely connected to the public life existent in the Netherlands and thus there was no need for radical law reform. Besides, ICERD would not affect the institution of

\textsuperscript{1776} Kamerstukken II 1967-1968, 9724, nr. 1-2.
\textsuperscript{1778} Kamerstukken I, 1970-71, 9724, nr. 22; 22a.
\textsuperscript{1779} The Act of 18 February 1971, Stb. 1971, 96.
\textsuperscript{1780} Kamerstukken II, 9723 (R 663), nr. 3, p. 3; 5.
\textsuperscript{1781} Kamerstukken II, 9724, nr. 3, p. 5.
civil actions concerning discrimination by citizens in the private sphere based on Article 6:162 BW separate from ICERD.\textsuperscript{1782}

The Dutch Parliament, however, stipulated that future acts of discrimination were not excluded.\textsuperscript{1783} In the Government’s vision, ICERD did not have direct effect and did not create rights for citizens and thus could not be directly relied upon before the courts. Hence, the creation of national provisions was required.\textsuperscript{1784} According to the Minister for Justice, the legislative proposals would largely comply with the convention obligations that were however considered as quite obscure, notably Article 5 ICERD.\textsuperscript{1785} According to Van der Neut\textsuperscript{1786} and Swart,\textsuperscript{1787} the adaptations of the Dutch law would certainly not have been made if ICERD had not existed.

4.2 The situation before the implementation of ICERD

The original Dutch Criminal Code of 1886 did not comprise of any speech offences with a racial character. Until 1934, only the insult of an individual was criminalized. The Act of 19 July 1934 ‘concerning the protection of the public order’ introduced an important reform to the criminalization of insult. The Act introduced four new Articles (137a-d Sr) penalizing the insult of public authority, public institutions, public bodies (137a-b) and groups of people that formed part of the Dutch population (137c-d). The Act aimed to protect public authority and the public order against the increasingly common malicious expression of extreme right and extreme left groupings that could develop into objectionable movements, considering related phenomena abroad. With articles 137c and d Sr, the Act particularly aimed to counter the excesses of anti-Semitism, such as the public anti-Semitic expression of the Dutch fascist political organization ‘De Bezem’ (The Broom) that had gained a certain ‘epidemic character’.\textsuperscript{1788} The existing offences were considered insufficient to counter such abuses of freedom of the press.\textsuperscript{1789}

The offences were incorporated into Book II section V of the Dutch Criminal Code concerning the protection of the public order, because ‘they are primarily destined to protect the public order, in addition to protecting the honour and reputation of institutions and groups and – only in third instance and indirectly – also protect the individual persons, who, at a certain moment more or less coincidentally form those institutions and groups.’\textsuperscript{1790} Indeed, the

\textsuperscript{1782} Kamerstukken II, 9724, nr. 6, p. 1.
\textsuperscript{1783} Kamerstukken II, 9723 (R 663), nr. 4, p. 1.
\textsuperscript{1784} Kamerstukken II, 9724, nr. 22a, p. 3.
\textsuperscript{1785} Handelingen II, 27 August 1970, p. 4347-4348.
\textsuperscript{1786} Van der Neut 1986, p. 33.
\textsuperscript{1788} Handelingen II, 1933-34, 237, nr. 3, p. 2-3.
\textsuperscript{1789} Kort-van Welzen 1994, p. 214.
\textsuperscript{1790} Kamerstukken II, 1933-34, 237, nr. 5, p. 16.
offences did not protect the individual government official or individual person of a certain race or religion against insults. During the drafting, the question was raised as to whether it would be better to incorporate the offences into the section XVI of the Dutch Criminal Code concerning insult. The strong emphasis on the rationale of the public order could be relevant for civil cases concerning insult of collectivities; the civil judge could reject claims based on – current – Article 6:162 BW, if the infringed norm was not created to protect the plaintiff. According to the Minister for Justice, violation of the offences certainly constituted a wrongful act in accordance with Article 6:162 BW. However, as only institutions and groups could form an insulted party, individual persons forming part of these collectivities could never claim damages on their own account. Furthermore, the collectivities had to have legal personality and demonstrate concrete damages.

Article 137c Sr criminalized he who ‘expresses himself intentionally in an insulting form about a group of the population or a group of persons that partly belonged to the population’. Article 137d Sr criminalized the dissemination of such expression. According to the Government, the denigration of certain groups in society without cause violated Christian charity and national traditions, was unethical and formed a danger to solidarity within the nation. All persons in the Kingdom of the Netherlands were entitled to the protection of their person and goods; their honour and reputation formed an integral part of their personality. Besides, insulting expression formed a direct threat to the public order. In fact, the structural offence of a part of the population had already led to disturbances of the public order at certain locations.

Article 137c Sr thus protected all groups of the population without distinction. During the parliamentary debates, the Article was, however, criticized for being primarily aimed at protecting Jews, pastors and the Roman Catholic clergy, thus racial and religious groups, while not explicitly referring to the discriminatory grounds of race or religion. And it was feared that the offence interfered with, for example, the freedom of orthodox Protestants to call the

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1791 Kamerstukken II, 1933-34, 237, nr. 4, p. 9.
1792 Kamerstukken II, 1933-34, 237, nr. 5, p. 16.
1793 Article 137c Sr read: ‘Hij, die zich in het openbaar, mondeling of bij geschrift of afbeelding, opzettelijk in beleedigenden vorm uitlaat over eene groep van de bevolking of over eene ten deele tot de bevolking behorende groep van personen, wordt gestraft met gevangenisstraf van ten hoogste een jaar of geldboete van ten hoogste zeshonderd gulden.’
1794 Article 137d Sr read: ‘Hij die een geschrift of afbeelding, waarin eene uitlating in beleedigenden vorm over eene groep van de bevolking of over eene ten deele tot de bevolking behorende groep van personen voorkomt, verspreidt; openlijk ten toonstelt of aanslaat of, om verspreid, openlijk tentoongesteld of aangeslagen te worden, in voorraad heft, wordt, indien hij weet of ernstige reden heft om te vermoeden, dat in het geschrift of de afbeelding zoodanige uitlating voorkomt, gestraft met gevangenisstraf van ten hoogste zes maanden of geldboete van ten hoogste zeshonderd gulden. Met dezelfde straf wordt gestraft hij die, met gelijke wetenschap of een gelijke reden tot vermoeden, den inhoud van een zoodanig geschrift openlijk ten gehore brengt.’
1795 Kamerstukken II, 1933-34, 237, nr. 3, p. 4.
Roman-Catholic faith ‘adangerous superstition’. According to the Minister for Justice, the article did not prevent all criticism of all negative characteristics of a certain group. Moreover, the category of persons was not limited to groups that could be distinguished on the grounds of a common religion, race, language, political or ideological conviction, but was extended to every category of persons brought under a common characteristic or indication by the insulting expression. This included Jews, pastors and the Roman Catholic clergy, but also ‘opponents of alcohol’ or ‘foreigners’, as expression against their person could equally endanger the public order. Furthermore, the offence was not limited to groups that were entirely located in the Netherlands, because many groups, such as ‘the Jews’ or ‘the Roman Catholics’, were international and only partly resided in the Netherlands.\footnote{Handelingen II, 1933-34, p. 1832-1833. Eventually all representatives of the Christian parties voted in favour of the bill.}

The wording of Article 137c Sr confined the offence to expression that was insulting in its form. The specific chosen words and terms thus determined to an important extent the punishable character of the insulting expression. According to the Government, as factual criticism did not fall under the scope of the article, it did not unnecessarily interfere with the right to freedom of expression. Expression of an insulting form was socially undesirable and could never be justified;\footnote{Kamerstukken II, 1933-34, 237, nr. 5, p. 15.} after all it could lead to sentiments of hatred.\footnote{Kamerstukken II, 1933-34, 237, nr. 5, p. 15.} Contrary to the former French offence of group insult, Article 137c Sr did not, however, require proof of the fact that the expression had the aim of inciting hatred or that it had actually led to such feelings among the population. Similarly to the drafting of the offence of blasphemy, the Minister rejected the suggestion to model the offence of group insult after Article 156 of the Criminal code of the (former) Dutch East Indies that prohibited scornful or offensive expression of feelings of hostility, hatred or disdain against one or more religious groups of the population. This latter offence did not only prohibit expression uttered in a certain \textit{form}, but also constituted a far-reaching interference with the \textit{substantive} freedom of expression, thus the \textit{content} of expression. The existence of such an offence could be explained by the needs of a colonial society, but was certainly not to be adopted for the Netherlands.\footnote{Handelingen II, 1933-34, 2 May 1934, p. 1852 R.}

Former Article 137c Sr thus merely criminalized the form of insulting expression. According to the Government, if the content of insulting expression was criminalized, a suspect had to be allowed to appeal to the public interest and the proof of the truth of his statements. If a suspect was prosecuted for vague rousing of public sentiment against and stigmatization of groups, he had to be allowed to prove that he merely expressed legitimate criticism. In political
cases this would lead to scandalous trials that would afford smart racists a forum to utter their opinions. An appeal to a statutory free speech clause comparable to those in Articles 261 and 266 Sr was therefore excluded. However, such a limitation to express political criticism was unacceptable from a democratic perspective. The introduction of the formal insult formed a practical solution to this problem.  

Given its general character, the offence has been applied to insulting expression against a wide variety of groups, religious servers, the Catholic clergy, members of the neo-Malthusian union and even ‘the planters in the Dutch East Indies’, because part of this group resided in the Netherlands. In 1940, the Dutch Supreme Court decided that the reference to the international Jewry as a ‘parasite on the labour market’ formed a gratuitously offensive qualification and therefore constituted an expression in an insulting form for the purposes of article 137c Sr. The offence thus comprised expression that could not possibly be qualified as a term of abuse, but was nevertheless gratuitously offensive. Contrarily, in the 1950s, the prosecution of the Dutch author W.F. Hermans with regard to the statement that Catholics reproduce themselves like rabbits uttered by the protagonist in one of his novels resulted in an acquittal, precisely because the expression lacked an insulting form. Since this affair, the article has been scarcely applied.

4.3 The merit of the implementation of ICERD

4.3.1 The hate speech bans

Similar to France, the Dutch act implementing ICERD did not create, for the implementation of article 4 ICERD, an independent offence that criminalized the ‘diffusion of ideas based on racial superiority or hatred’. In its explanatory memorandum, the Dutch Government recalled the discussion that this prohibition had raised during the drafting of Article 4 ICERD with regard to its compatibility with freedom of information, expression, and sciences on race related questions and that had led to the introduction of the clause of Article 5 ICERD. The Government assured that the amendments brought by the bill to Articles 137c-d Sr did not violate these freedoms. The bill amended the

1801 Rosier 1997.
1803 Dutch Supreme Court, 4 March 1940, NJ 1940, 830.
1804 Dutch Supreme Court, 29 April 1940, NJ 1940, 831.
1805 Rotterdam District Court, 16 July 1937, NJ 1938, 736.
1806 Dutch Supreme Court, 17 April 1939, NJ 1939, 927.
1807 Dutch Supreme Court, 19 February 1940, NJ 1940, 754.
1809 Van der Neut 1986, p. 29.
offence of ‘group insult’ in Article 137c Sr, created the new offence of ‘incitement to discrimination, hatred and violence’ in Article 137d Sr and criminalized the distribution of expression punishable in accordance with Articles 137c-d Sr in Article 137e Sr.

As the Government considered existing Articles 137c-d Sr to be insufficient for the implementation of ICERD, new Articles 137c-e Sr were broadly formulated. Although ICERD did not oblige States to criminalize the insult of groups on the ground of race, the Dutch Government thought this necessary to fully comply with the obligations of ICERD. The offence of ‘formal insult’ was changed into the offence of ‘substantive insult’, which signified an extension of its scope: not only the form but also the content of expression became punishable.

During the parliamentary debates, several representatives argued that this alteration constituted an undesirable extension of the scope of the offence, which conflicted with freedom of expression. Representative of the Democratic Party (D66) Goudsmit brought under discussion the translation of an English article entitled ‘News from Poland’, which accused Polish Jews of several political, economic and criminal offences and of neglecting their official duties. Although the expression was clearly anti-Semitic, such expression in decent language was not to be criminalized. The Minister for Justice twisted this line of reasoning and defended the alteration by arguing that the simple soul who resorts to nasty abusive words fell under the scope of the former offences, but the clever man who expresses himself in a neat manner but at the same time utters grave insults, was left unpunished. Moreover, the distinction between formal insults and substantive insults would be difficult to make. The Amendment of Goudsmit that proposed to preserve the formal insult was rejected.

New Article 137c Sr no longer required that at least a part of the group formed part of the Dutch population. On the other hand, new Article 137c Sr was confined to insults of racial and religious groups. Although some representatives supported the inclusion of other groups, it was argued that noticeably vulnerable groups that lacked the means of defence needed protection by criminal law. Groups such as ‘guestworkers’ would not fall under the scope of the articles. Unlike France, the Dutch provisions implementing ICERD simply refer to the term ‘race’ and do not adopt the entire

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1811 Ibid.
1814 Ibid., p. 4348-4349.
1816 Kamerstukken II, 1969-70, 9724, nr. 10.
1817 Kamerstukken II, 1967-68, 9724, nr. 3.
1818 Kamerstukken II, 1969-70, 9724, nr. 6, p. 3.
1819 Kamerstukken II, 9724, nr. 6, p. 3.
list of discriminatory grounds of Article 1 ICERD. According to the Government, such an enumeration is more suitable for an international political document than for national provisions directed to citizens.\textsuperscript{1820} The terms could easily be given a meaning that is not in keeping with the aim of the convention. The judge had to interpret the term ‘race’ according to the purport of the enumeration in Article 1 ICERD.\textsuperscript{1821} Nationality in the sense of national citizenship did, however, not fall under the term ‘national origin’ used in Article 1 ICERD and therefore it neither fell under the term ‘race’ (para. 5.4.6.3 infra).\textsuperscript{1822}

Although ICERD merely obliged States to criminalize forms of discrimination on the ground of race, the Dutch Government equally introduced the discriminatory ground of religion or belief in order to anticipate the establishment of the international convention on the elimination of all forms of religious intolerance and discrimination, which at the time was under preparation at the United Nations.\textsuperscript{1823} The government considered it important to stress the norm of tolerance, also in the field of religion and belief, as a standard in the present philosophically and religiously differentiated Dutch society.\textsuperscript{1824} The discriminatory ground of ‘belief’ afforded equal protection to adherents of non-religious, fundamental convictions, such as atheists.\textsuperscript{1825} 1826

Besides, as religious groups were already protected under existing Article 137c Sr, the government did not establish their protection, but did not abolish it either.

During the parliamentary debates, the discriminatory grounds of religion and belief raised more criticism than it did in France. Firstly, religious groups could not be considered as vulnerable and had sufficient means of defence. Secondly, all criticism of religion and belief would be hindered, which conflicted with freedom of expression. The Minister, however, stressed that the offences did not form a general protection of the conduct of religious or philosophical institutions or organizations in society and did not affect criticism of such institutions or organizations, even when it concerned their deepest convictions. Criticism of convictions or conduct, in whatever form, fell outside their scope. The articles criminalized the offence on points that were beyond discussion. Such protection was of fundamental value for human existence. Criticism of a religion or belief becomes punishable, ‘when it degenerates into injuring the honor and good name of a group or into incitement to hatred and discrimination against it for the mere fact that its members adhere to a religion

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\textsuperscript{1820} \textit{Kamerstukken II}, 9724, nr. 3, p. 4.  \\
\textsuperscript{1821} \textit{Ibid.}  \\
\textsuperscript{1822} \textit{Kamerstukken I}, 1970-71, 9724, nr. 22a, p. 3.  \\
\textsuperscript{1823} \textit{Kamerstukken II}, 1967-68, 9724, nr. 3, p. 4.  \\
\textsuperscript{1824} \textit{Kamerstukken I}, 1970-71, 9724, nr. 22a, p. 4.  \\
\textsuperscript{1825} \textit{Kamerstukken II}, 1967-68, 9724, nr. 3, p. 5.  \\
\textsuperscript{1826} \textit{Kamerstukken II}, 1969-70, 9724, nr. 7.
\end{flushleft}
or belief. Against such expression no defence exists, no matter how strong the social position of the group is.\textsuperscript{1827}

But would an insulting attack on a conviction \textit{eo ipso} constitute an attack on the people who adhere to and identify themselves with that conviction? The Minister considered that insulting qualifications of a conviction can only constitute an insult of people, if conclusions are drawn about those people.\textsuperscript{1828} Subsequently, representative of the Anti-Revolutionary Party (ARP) Boertien questioned: Suppose that a theologian, after a discussion on an imaginary sect, draws the following conclusion: ‘This sect is so foolish that only the mentally disturbed can be a joyful member.’ Does this impair the self-esteem of that group? Is this insulting criticism? Is it punishable or not?\textsuperscript{1829} According to the Minister for Justice, the key question was whether the theologian intended to judge that the members were idiots or that the conviction was idiotic.\textsuperscript{1830}

Notably in this area, a reserved prosecution policy was to be pursued; such cases could easily become an advertisement for the conviction. More generally, the contribution brought by criminal law to solutions to tensions in society was considered to be restricted. Its application was to be carefully thought through, because it could even intensify conflicts.

The amendment by representative of the Labour Party (PvdA) Roethof that proposed to preserve the offence of formal insult and to only create an offence penalizing the incitement to hatred and discrimination against a group on the ground of \textit{race} was rejected.\textsuperscript{1831} It was feared that the absence of the discriminatory ground of religion would leave the incitement against Jews unpunished, because an offender could argue that the incitement was aimed at the Jewish religion and not the Jewish race.\textsuperscript{1832} Under the new Articles expression against Jews would fall under the ground of either race or religion.\textsuperscript{1833}

The creation of Article 137d Sr penalizing the incitement to discrimination, hatred or violence raised surprisingly less criticism, in fact no criticism at all. The term discrimination had to be interpreted according to the definition in Article 90quater Sr (para. 4.3.3 \textit{infra}). The Dutch legislator, however, did stress that although the rationale of Articles 137c-d Sr was the prevention of discrimination, expression punishable on the ground of these articles do not constitute acts of discrimination; ‘The factual element of subordination entails that oral expression, writings and portrayals cannot

\textsuperscript{1827} \textit{Kamerstukken I}, 1970-71, 9724, nr. 22a, p. 3; \textit{Kamerstukken I}, 1970-71, 9724, nr. 22, p. 2;
\textit{Kamerstukken II}, 1969-70, 9724, nr. 6, p. 4.
\textsuperscript{1828} \textit{Kamerstukken I}, 1970-71, 9724, nr. 22a, p. 4.
\textsuperscript{1830} \textit{Ibid.}, p. 4350.
\textsuperscript{1831} \textit{Kamerstukken II}, 1969-70, 9724, nr. 9.
\textsuperscript{1833} \textit{Ibid.}, p. 4351.
contain discrimination in the sense of the definition. The legislator thus strictly distinguished between discriminatory actions and discriminatory opinions.

Article 137e Sr criminalized the distribution of discriminatory expression that could not be considered as the provision of factual information. While articles 137c-d Sr merely criminalized discriminatory expression uttered in public, strictly speaking Article 137e Sr is not confined thereto.

4.3.2 Rationale

While the rationale of the existing Articles 137c-d Sr had primarily been the protection of the public order, the implementation of ICERD added more emphasis on the norm of equality and non-discrimination; after all the rationale of this convention was the elimination of all forms of racial discrimination. During the parliamentary debates, representative of the Communist Party (CPN) Bakker recalled that racial discrimination has always originated in existing social differences or attempts to establish such differences. Anti-discrimination policy concerned the realization of the social dimension of the fundamental right to equal treatment.

Articles 137c-e Sr were, however, inserted – or maintained – in Book II section V of the Dutch Criminal Code concerning offences against the public order that criminalized ‘conduct that forms a danger to social life and the natural order of society’. The prohibition of incitement to violence fits perfectly into this section and the incitement to hatred and discrimination to a lesser extent. Racial insults can be considered to prelude racial hatred, which can lead to discrimination and violence on the ground of race. The connection between the expression and a possible disturbance of the public order, however, seems to be weaker than with the incitement.

Given this categorization, more than France, the Dutch Government connected the norm of equality and non-discrimination to the protection of the public order. Noorloos concludes that the term public order did no longer merely cover the prevention of violence or disturbances of the peace, but included the ‘preservation of a decent society without discrimination’. But even given this supposed coloration of the term public order by the Dutch legislator, from the categorization of Articles 137c-d Sr as offences against the public order legal scholars such as Van Kempen and Van Stokkum conclude that the application of Articles 137c-d Sr should be limited to those situations in which

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1834 Kamerstukken II, 1969-70, 9724, nr. 6, p. 4.
1837 Noorloos 2011, p. 211.
a real risk to the disturbance of the public order exists.\textsuperscript{1838} Moreover, in the Wilders case the question even arose as to whether the existence of the risk of violent conflicts forms an element of the offence of incitement to hatred that had to be proven (para. 6.7 infra). In my opinion, the categorization of the offence should not be confused with the elements of the offence, because ‘Rubrica non est lex’. The public order can nevertheless form a relevant factor in the appreciation of the expression in light of its context and all circumstances of the case, thus at a different level (para. 6.4; 6.7 infra).

Compared to the French drafting history, the Dutch legislator indeed placed less emphasis on the independent value of the protection of the human dignity of individual citizens and more emphasis on the protection of the public order by the prevention of disharmony between groups. This notably also follows from the fact that unlike in France, Articles 137c-e Sr do not protect next to groups, individual persons belonging to a racial or religious group. Another feature of 137c-e Sr connected to the rationale of the public order is that although the vulnerability of minority groups formed an important argument for their protection, racial and religious majorities are equally protected under the articles.

4.3.3 The criminalization of discrimination

The act implementing ICERD created Article 90quater Sr that defined discrimination as ‘any form of distinction, any exclusion, restriction or preference, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. The article was thus inspired by Article 1 ICERD, but lacked a reference to any of the discriminatory grounds of race, colour, descent or national or ethnic origin. The definition therefore comprised any discrimination, regardless of the discriminatory ground. Considering such a broad definition to be unnecessary and too far reaching, representatives Van der Spek and Roethof proposed to insert the discriminatory ground of ‘race, color, descent and national or ethnic origin’.\textsuperscript{1839} Their amendment was, however, rejected.\textsuperscript{1840} The Minister advocated the very general definition of discrimination that would certainly comprise Anti-Semitism, but to the question ‘what is racial discrimination’ he answered ‘The judge can and must explain what it is.’\textsuperscript{1841}

Article 90quater Sr was incorporated into section IX, which explains the terms used in the Dutch Criminal Code. The article thus did not concern a general criminal prohibition of discrimination in the economic, social or cultural

\textsuperscript{1838} Van Kempen 2011, p.193; Van Stokkum 2006.
\textsuperscript{1839} Kamerstukken II, 1969-70, 9724, nr. 8.
\textsuperscript{1840} Handelingen II, 1969-70, 2 September 1970, p. 4379.
\textsuperscript{1841} Handelingen II, 27 August 1970, p. 4349-4352.
domain, because it would be too vague for the Public Prosecutor to initiate criminal proceedings and for the judge to decide upon.\footnote{Handelingen II, 1969-70, 27 Augustus 1970, p. 4350.} Furthermore, the Minister wanted to avoid the difficult question of the third party effect on fundamental rights.\footnote{Ibid.} Discrimination concerned the impairment of fundamental rights, although ICERD and subsequently the implementation act did not specify the rights and freedoms concerned. Article 5 ICERD therefore had to serve as a guideline.\footnote{Kamerstukken II, 1967-68, 9724, nr. 3.} Although some representatives argued that Article 5 ICERD actually ensured the rights and freedoms it enumerated,\footnote{Handelingen II, 1969-70, 27 Augustus 1970, p. 4337.} the Minister maintained that it merely afforded protection against discrimination on racial grounds in the areas there referred to.\footnote{Ibid., p. 4348.}

Two new petty offences in Articles 429ter and 429quater Sr criminalized specific forms of discrimination; the participation in or the financial or other material support of activities aimed at racial discrimination, respectively the distinction between people on the ground of their race in the professional offer of one’s goods and services. These articles lacked the discriminatory ground of religion or belief; in this field the legislator did not want to anticipate the establishment of a convention on religious intolerance and discrimination.\footnote{Kamerstukken II, 1967-68, 9724, nr. 3, p. 4.} Besides, new Articles 1 of the Collective Agreement Act and 9a of the Economic Competition Act, provided that a condition in a collective agreement or a competition regulation of a discriminatory purport is null or non-binding.

Since 1971, the Dutch legislator has amended the provisions concerning discrimination several times, after the Dutch courts signaled that their scope and purport were too limited in the light of the convention obligations.\footnote{For a comprehensive analysis see: Woltjer 2002.} Besides, they have been supplemented with other discriminatory categories. The constitutional reform of 1983 introduced the general prohibition on discrimination in Article 1 of the Constitution (para. 2.1 supra). Article 429quater Sr was amended in several respects. It had been difficult to bring the common practice of Dutch companies to sign ‘non-Jewish-declarations’ under the scope of the article. This condition set by Arab countries for economic trade formed part of the larger Arab boycott of products coming from Israel. As this ‘internal’ economic practice did not concern ‘public life’, in the 1980s the scope of the article was broadened to incorporate all ‘social-economic trade’, which also included the labor and housing market.\footnote{Kamerstukken II, 1979-80, 16115, nr. 3, p. 3-4.} Furthermore, it was difficult to
demonstrate that the economic boycott resulted in the actual discrimination of Jews. The term ‘subordination’ was therefore replaced by ‘distinction’.1850

Although the legislator had opined that the subordination of Jews constituted a form of anti-Semitism proscribed by the term ‘race’, it was thought that this kind of distinction was probably rather connected to religion or belief.1851 In the 1990s, Article 429quater Sr was therefore supplemented with the discriminatory grounds of religion or belief.1852 The term distinction was replaced by ‘discrimination’, which expressed the pejorative element, comprised indirect forms of discrimination and was more consistent with ICERD.1853 Furthermore, discrimination by government officials was prohibited. Finally, all criminal provisions concerning discrimination were classified as felonies. The petty offences of Articles 429ter and 429quater were classified as felonies in Articles 137f and g.1854

From the same strand of thought, in the 1990s in Article 90quater Sr the term ‘public order’ was replaced by ‘societal order’.1855 The definition of discrimination was no longer confined to public life, but extended to all sections in society and the relationship between citizens. However, the public hate speech bans were preserved, because of ‘how reprehensible racist expression may be, there is no use in penalizing them, if they are strictly uttered in the private sphere.’1856 Article 137e Sr was, on the other hand, extended to the unsolicited sending of expression, which is not carried out in public.1857

Unlike France, Dutch law does not have so called ‘hate crimes’, being criminal offences that stipulate a suspect’s racist motive as an aggravating circumstance and element of the offence. However, the current policy of the Dutch public prosecution requires a 50-100 per cent increase in the penalty for ‘generic offences’ that are motivated by discrimination or hatred. It also requires that the discriminatory background of the offence be announced in the prosecutor’s closing statement (para. 8.1 infra). Other than ‘hate crimes’, this policy does not oblige the judge to establish the racist motive of a suspect and attach importance to it in determining the penalty. Since 1 March 2010, Article

1850 Kamerstukken II, 1979-80, 16115, nr. 3, p. 3-4.
1851 Henceforth, making a distinction on the ground of religion was considered as a form of direct distinction and no longer a form of indirect distinction for which an objective justification could exist.
1852 Kamerstukken II, 1988-89, 20239, nr. 5, p. 20; nr. 6.
1853 Kamerstukken II, 1987-88, 20239, nr. 3. For a critical analysis see: Van der Neut 1986, p. 39-44. Van der Neut argues that the non-Jewish declarations constituted rather a disguised form of discrimination than indirect discrimination.
1854 With regard to Article 429quater, this only concerned the discriminatory ground of race. Article 429quater was maintained as a petty offence with regard to the other discriminatory grounds.
1855 Kamerstukken II, 1989-90, 20239, nr. 15, p. 3.
1856 Kamerstukken II, 1987-88, 20239, nr. 3, p. 3.
137h Sr provides that he, who commits one of the offences of 131-134, 137c-137g and 147a Sr in the exercise of his profession, can be put out of his profession. The article thus does not form an independent offence and does not merely apply to the specific anti-discrimination offences of 137c-g and 429quater Sr.

4.3.4 The prohibition of associations violating the public order

Complementary to the provisions prohibiting acts of discrimination, the act implementing ICERD supplemented Article 3 of the Act on Assembly and Association of 1855 with a provision that enabled the proscription by the judge at the instance of the public prosecutor of associations that engage in, preserve or promote racial discrimination.\textsuperscript{1858} In 1976, these provisions were inserted into Book II of the Dutch Civil Code that prohibited legal persons with aims or activities that violated ‘the public order or good morals’. The possibility for the Public Prosecution to request a prohibition that had existed since 1939 was thereby cancelled. Only the civil judge could pronounce the illegal character of an association on the ground of Article 2:15 BW and could subsequently dissolve the association in question on the ground of Article 2:16 BW. As the judge was not obliged to dissolve an association that he nevertheless had proscribed, a prohibited association could however continue to function and engage in activities that violated Article 4 ICERD. Moreover, the articles lacked a reference to the proscription ground of ‘the engagement, preservation or promotion of racial discrimination’.

Taking action on the grounds of these articles against extreme right winged political parties such as the Dutch Popular Party (NVU) and later the Centre Party (CP\textsuperscript{86}) appeared to be rather difficult, because, although their factual activities – such as the spreading of election pamphlets that incited to racial hatred – gave rise to request their dissolution, in 1978 the Amsterdam District Court only saw reasons to prohibit the NVU and not to dissolve it; the latter would have no effect given the existence of an adjoining foundation.\textsuperscript{1859} The Court considered that the prohibition of the party would however certainly have legal effect in the sense that it would enable the prosecution of its members on the ground of 130 Sr that criminalized participation in a criminal organization and that it would hinder the running of the party in the elections.\textsuperscript{1860} In 1979, the Dutch Supreme Court endorsed the rejection by the Court of Appeal of the appeal against the decision of the Amsterdam District

\textsuperscript{1858} Article 3 of the Act of 22 April 1855, \textit{Stb.}32.
\textsuperscript{1860} Amsterdam District Court, 8 March 1978, \textit{NJ} 1978 281, annotation Maeijer.

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Court, but considered that the latter did not have legal effect.\textsuperscript{1861} The prohibition thus had a non-binding nature.

In the 1990s, the articles were therefore replaced by new Article 2:20 BW.\textsuperscript{1862} According to the article the judge, after having concluded that the activities of an association violate the public order or good morals, must proscribe and dissolve the association in question. When the goals of an association do violate the public order or good morals, but its activities do not, the judge can dissolve the association in question, but cannot proscribe it. It is striking that unlike France, the Dutch legislator did not explicitly stress the prohibition ground of racial discrimination. The preservation of the prohibition ground of ‘the public order and good morals’ was criticized for being on the one hand too broad and on the other hand not directly connected to the prohibition of racial discrimination.\textsuperscript{1863} According to the Minister, the term ‘public order’ was, however, not to be interpreted broadly in the sense of ‘undesirable from a social perspective’; it merely comprised ‘acts violating the fundamentals of the legal system, the unjustified impairment of the freedom of others or human dignity, the use of violence or the threat of violence against the authorities of people and racial or other prohibited forms of discrimination’.\textsuperscript{1864} It was assumed that consensus existed about the fact that racial discrimination violated the public order. Referring to racial discrimination separately was therefore unnecessary.\textsuperscript{1865}

Furthermore, the proposal to prohibit associations on the grounds of their racial, national-socialistic or fascist aspirations in a separate article was rejected.\textsuperscript{1866} The same goes for the proposal to regulate the prohibition of political parties in a separate article, in light of their special function in a constitutional state, freedom of expression and freedom of assembly. According to the Minister, the prohibition ground of the public order had to apply equally to political parties. The interpretation of the term ‘public order’ would eventually become a task of the judge.\textsuperscript{1867}

One had to wait until 1998 before CP’86 was finally prohibited and dissolved by the Amsterdam District Court. The court referred to the multiple condemnations of the party and its leaders on the ground of Articles 137c and d

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\textsuperscript{1861} Dutch Supreme Court, 9 March 1979, NJ 1979, 363, annotation Maeijer. The judgment did not prevent local polling stations from refusing to registrar NVU representatives. The ECmHR declared the complaint filed by NVU that this practice violated Article 3, Protocol no. 1 to ECHR manifestly ill-founded; given the illegal character of the association, there was an abuse of rights in the sense of Article 17 ECHR. ECmHR, 11 October 1979, n°8348/840678, NJ 1980, 525, annotation Alkema.


\textsuperscript{1863} Kamerstukken II, 1982-83, 17476, nr. 4, p. 16-21.

\textsuperscript{1864} Kamerstukken II, 1982-83, 17476, nr. 5, p. 13.

\textsuperscript{1865} Kamerstukken II, 1982-83, 17476, nr. 5, p. 17; Kamerstukken II, 1982-83, 17476, nr. 12, p. 2.

\textsuperscript{1866} Wolter 2002, p. 456.

\textsuperscript{1867} Kamerstukken II, 1982-83, 17476, nr. 5, p. 11-12.
\end{footnotesize}
Sr (para. 6.6 *infra*) and considered that the prohibition ground of the public order certainly covered the repeated incitement, provocation and propagation to discrimination, even in a very strict interpretation of the term.\textsuperscript{1868}

4.4 Conclusion

ICERD was adopted by the Act of 18 February 1971. Although the Netherlands did not make any reservations to ICERD, it did not criminalize the diffusion of ideas based on racial superiority or hatred and recalled the controversy about the compatibility of such an offence with freedom of expression. The implementation of ICERD signified a reinforcement of the laws protecting the public order that were primarily aimed at preventing disturbances of the peace, not the human dignity and the equality of all individual Dutch citizens. The norm of equality and non-discrimination was subsumed in the notion of the public order. The merit of the implementation act was threefold. Firstly, it altered the offence of formal insult into substantive insult and created the new offence of incitement to racial discrimination, hatred or violence. A leitmotiv in the drafting of the offences formed the question as to the compatibility of the prohibition of content of expression and the discriminatory ground of religion with the right to freedom of expression. The rationale of the offences was rather to prevent than to prohibit discrimination. Secondly, it prohibited acts of discrimination. The Dutch Government did not understand the prohibition of discrimination as an absolute prohibition that applies to all sections of society. While the conception of discrimination was originally confined to public life, it was however later extended to societal life. Thirdly, it prohibited associations that engage in, preserve or promote racial discrimination. This prohibition was later merged into the prohibition of associations that violate the public order and good morals. The Dutch legislator has thus rather formulated the repression of racial discrimination in terms of public order than stressed the norm of non-discrimination independently to assure the equal human dignity of all citizens.

5. Group insult – Article 137c Sr

Dutch law criminalizes insult of an individual person (5.1) and group insult (5.2) in separate offences. Group insult is characterized by a number of elements, being – next to insult – intent thereto (5.3) and the designation of a group on the ground of race (5.4) or religion (5.6). Indirect forms of racial insult, such as Holocaust denial, can also be punishable (5.5). In principle, this does not apply to indirect insult of people via offensive speech about their religion (5.7). The Dutch judge balances the application of the offence with the right to freedom of expression by means of a contextual review (5.8) and sometimes also with the right to freedom of religion (5.10). Civil liability for group insult may already

\textsuperscript{1868} Amsterdam District Court, 18 November 1998, NJ 1999, 377.
exist with the offence to feelings (5.9). Even though a higher threshold exists for criminal liability, the criminality of group insult is controversial (5.11). The analysis results in a general conclusion about the offence of group insult in Dutch law (5.12).

5.1 The criminalization of insult to an individual person

Until the nineteenth century, Dutch cities had their own criminal codes. The regulation of punishable insults thus differed from place to place. The Criminal Code for the Kingdom of Holland of 1809 included offences of insult in Articles 164-166, but the Code remained in force for only two years.\(^{1869}\) In 1811, the French Penal Code entered into force.\(^{1870}\) The Code used a tri-partition in the offences of insult. Article 367 criminalized the imputation of a criminal act or a concrete fact that incites contempt and hatred (calomnie). Article 375 criminalized the imputation of a vice or a not further elaborated, non-concrete fact (expression outragante). Articles376 j 471 sub 11 criminalized abusive words and invectives concerning ‘minor vices’. The Dutch Criminal Code of 1881 that entered into force in 1886 replaced these French provisions that were considered to be out-dated. Moreover, the regulation of insults was inconveniently arranged, because many complementary offences of specific forms of insult were spread out over the entire code. The new offences were based on the Italian Criminal Code of 1868 that distinguished defamation and libel/slander from insult.\(^{1871}\) This dichotomy still exists today – in amended version (para. 1.5.1 supra and 5.2 infra).

Article 261 sub 1 Sr criminalizes as defamation ‘the intentional assault of another person’s honour or good name by the imputation of a specific fact, uttered with the apparent aim of publicity’.\(^{1872}\) A difference with the French offence of defamation is that Article 261 Sr does not include a collectivity (corps) in its definition of a victim. Furthermore, the offence even criminalizes defamation in secret or private, provided that it is expressed with the apparent aim of publicity. Article 261 sub 2 Sr criminalizes libel, i.e. defamation in writing, as an aggravated form of defamation.\(^{1873}\) Other than former Article 367 of the French Penal Code, Article 261 Sr does not attach importance to the question as to whether the posed facts are true. Furthermore, Article 262 Sr criminalizes ‘he who imputes a specific fact, while knowing that it is untrue’ as a

\(^{1870}\) Besluit van 11 December 1813, S. 10.
\(^{1872}\) Article 261 sanctions defamation with an imprisonment of maximum six months or a fine up to 7800, - euros.
\(^{1873}\) Article 261 sub 2 sanctions libel with an imprisonment of maximum one year or a fine up to 7800, - euros.
qualified form of defamation/libel. In French law, an equivalent to this offence no longer exists.

Article 266 Sr criminalizes as insult ‘every intentional insulting expression that does not constitute defamation or libel’. The offence does not only concern public, but also non-public expression, because publicity was not considered as the core of the offence that equally covers sent or handed letters. Other than former Article 375 of the French Penal Code and the current French offence of insult, this offence criminalizes – next to insulting opinions – insults ‘by facts’. This encompasses annoying insulting acts, such as spitting in a person’s face or kissing an honourable woman. With regard to the insult of an individual, the legislator has not thus distinctly distinguished actions from opinions. Although Article 266 Sr demarcates insult from defamation, it does not actually define insult as it is for example defined in French law ‘all offensive expression, terms of contempt and inverteves’, which however could serve as a useful guideline for the Dutch judge when qualifying expression as an insult. The Dutch Supreme Court considers expression to be insulting on the ground of Article 266 Sr ‘when it has the purport to discredit another person with the public and to assault him in his honor or good name’. It falls outside the scope of this research to give a comprehensive overview of expression that has been found to constitute a punishable insult of individuals. Examples include terms of abuse, such as ‘bitch’ and ‘bastard’ or ‘fascistic dogs’ and vague allegations and other insinuations, such as the statement that the policy of local authorities is hypocritical and corrupt or the statement that a judge ‘fits into a National-Socialistic legal system’.

In the 1970s, the desirability of the criminalization of insult of an individual was brought under discussion in the light of freedom of expression (para. 1.5.1 supra). The Government agreed with the Parliamentary Commission Langemeijer that had examined the criminalization of insult that the offences of insult were to be preserved, not abrogated. The criminal prohibition of insult would prevent vengeance by the victim and repetition by the offender and was preferable to the time-consuming civil procedure. Preservation of the offence

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1874 Violation of Article 262 is sanctioned with an imprisonment of maximum two years or a fine up to 19,500, - euros.
1875 Article 266 sanctions insult with an imprisonment of maximum three months or a fine up to 3900, - euros.
1877 Other acts could be qualified as assaults, if they are not performed ‘animo injuriandi’, See: Janssens 1998, p. 46.
1879 See generally: Janssens & Nieuwenhuis 2011, p. 98 et seq.
would prevent an undesirable hardening of political and social morals. Subsequently, a report of WODC on the criminalization of insult concluded that the offence formed a ground for police assistance and its abolishment would remove its signal function for the police with regard to other problems. The government decided to preserve the offence, because it considered the criminal sanction to be the most appropriate means for enforcement and the civil procedure to be ‘too problematic’.\textsuperscript{1884} The discussion finally resulted in the introduction of the free speech clauses of 261 sub 3, 266 sub 2 and 267 sub 3 Sr (para. 1.5.1 supra).

5.2 The criminalization of group insult

It is striking that in the seventies the criminalization of insult of an individual was put up for discussion, whereas at the same time one insisted on the introduction of an offence of group insult.

Article 137c Sr criminalizes ‘any person who, publicly – orally, in writing or by means of portrayal – and intentionally, expresses himself in an insulting manner about a group of persons on the ground of their race, religion or belief, hetero- or homosexual orientation or physical, psychical or mental handicap’ with an imprisonment of a maximum of one year or a fine up to €7,800.\textsuperscript{1885} Unlike in France, the article does not formulate an aggravated circumstance to the offence of insult of an individual in Article 266 Sr and does not protect – next to groups – individual persons, but forms an independent offence. Article 137c Sr thus does not form a \textit{lex specialis} to Article 266 Sr as a \textit{lex generalis}.\textsuperscript{1886}

Although the offence of group insult thus requires that expression concerns a plurality of persons, it does not indicate as to whether or not a group must be explicitly named in the expression. In 1984, the Dutch Supreme Court considered expression about ‘a German Jewish woman who apparently had not been gassed’ to constitute the offence of 137c Sr, because ‘it was clear for every normal reader that the expression was insulting to the Jewish population’.\textsuperscript{1887} As a result, expression concerning one person in particular can be insulting to a group at the same time. However, it must be possible to connect the group characteristic used to insult an individual to the group. Otherwise, insult of an individual is punishable on the ground of Article 266 Sr.

\textsuperscript{1885} Article 137c sub 2 criminalizes as an aggravating circumstance he who structurally commits the offence as a habit or in the exercise of his profession with an imprisonment of maximum two years or a fine up to 19,500 EUR.
\textsuperscript{1886} Vgl. Brants, Kool, & Rignalda 2007, p. 58.
\textsuperscript{1887} Dutch Supreme Court, crim. Ch., 26 June 1984, NJ 1985, 40.
The question of the insult of a group or an individual is connected with the objectivation of a suspect’s intent; what was evidently his intention? In order for a racist insult to constitute the offence of 266 Sr, it must publicly violate a person’s honor by referring to his race, religion etc. The difference with a group insult resides in the lack of a group connotation. A discriminatory insult of a group, in the sense of 137c Sr, thus does not imply the insult of an individual, in the sense of 266 Sr, per se. This would require that aside from the insult of a group, a connection can be made with the individual, who files a complaint as a victim of an insult against his person.

Article 137c Sr, however, does share some characteristics with Article 266 Sr. With regard to the term ‘insulting’, the drafting history of Article 137c Sr refers to the signification of the term in Article 266 Sr; expression about a group is insulting, if it impairs the self-esteem or honor of the group or discredits the group, because it belongs to a particular race, religion or belief. The article thus protects the group targeted by the insult against the effect that the insult has on third parties; after all, the honor and good name and the (dis)credit of the group exist in the eyes of others. In addition, the article can be considered to protect the group against the effect of the insulting expression on the group itself (self-esteem).

This latter idea is controversial among legal scholars. Rosier criticizes the tendency to equate the assault of one’s honor with other forms of impairment of the person as a person. He distinguishes the insult from the mere offence to feelings. Insult concerns a particular form of impairment of one’s personality; expression containing the message that another person is or may be disparaged, disregarded or despised. The criminalization of such insulting expression is primarily aimed at protecting one’s honor, which can be defined as ‘the special status that assures the lack of circumstances that would degrade one’s respectability.’ According to Janssens & Nieuwenhuis, the offences of insult protect the moral integrity to which every person in society is entitled.

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1888 Hence, the phrase ‘Fucking Turks, I’m sick of your mess. You always make a mess, you make a mess of the entire Netherlands.’ exclaimed against a suspect’s neighbours could be understood as a group insult, because the latter sentence could only be understood as an attack of all Turks as a group. Contrarily, the phrase ‘You are dirty fagots, I hate that like poison.’ equally exclaimed against a suspect’s neighbours could not be understood as a group insult, because the suspect later declared ‘I’m not concerned about all homosexuals, I just hate them.’ See: Brants, Kool & Ringnalda 2007, p. 65-66.

1890 Tekst & Commentaar, Wetboek van Strafrecht, Artikel 137c, Ten Voorde, Aant. 8c; Noyon, Langemeijer & Remmelink, Wetboek van Strafrecht, Tweede boek, Artikel 137c, Fokkens, Aant. 10.

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This moral integrity is externally perceivable in the sense that it concerns one’s honor in the eyes of others. The offences cannot protect one’s personal honor, self-esteem or self-respect, because such internal feelings are difficult for the judge to appreciate. This distinction thus equally enables the demarcation of the offence of insult with the offence of feelings, which is not punishable.\(^{1893}\) According to Van Bemmelen, Articles 137c-e Sr criminalizes certain conduct mainly because of its immorality and the moral indignation such conduct can raise; as a result people could take justice into their own hands.\(^{1894}\) This vision is, however, generally rejected by other legal scholars.

Examples of expression found punishable on the ground of 137c Sr form abusive terms, such as ‘dirty cancer Jews, dirty Nazi swines and dirty rotten Jews’,\(^{1895}\) the slogan often used by football supporters ‘Hamas, Hamas, Jews to the gas’,\(^{1896}\) or calling Muslims ‘the rat population’.\(^{1897}\) It results from case law that next to abusive terms and value judgments, more factual statements can be punishable on the ground of 137c Sr. Other than for the insult and defamation of an individual person (261; 266), Dutch law does not distinguish between group insult and group defamation. Strictly speaking, Article 137c Sr does not refer to and therefore does not concern defamation for the purposes of Article 261 Sr. Unlike France, Dutch law does not have a separate offence of group defamation. However, in practice, Article 137c Sr thus functions as a broad generic offence of group insult that comprises forms of defamation and insult. Due to the lack of an offence of group defamation, unlike the situation in France, the problem of the absorption of the offence of group insult by the offence of group defamation does not exist for 137c Sr.\(^{1898}\)

The question as to whether a group qua group is capable of having a reputation is, however, debatable. Janssens argues that the notion of reputation

\(^{1893}\) Another requirement could be that one’s moral integrity is not merely ‘disregarded’, but ‘assaulted’ or ‘violated’. These thresholds for punishability fit into the vision of the legislator that the offence of group insult protects the dignity of groups in society in the light of the prevention of possible subsequent disturbances of the peace. See: Janssens & Nieuwenhuis 2011, p. 43-44.


\(^{1895}\) Amsterdam District Court, Crim. Ch., 27 January 2005, Ljn AS4126.


\(^{1897}\) Haarlem District Court, Crim. Ch., 3 May 2005, Ljn BC6780.

\(^{1898}\) As insult of an individual is defined negatively in relation to defamation of an individual, it is beyond doubt that one fact cannot constitute defamation and insult of an individual at the same time. Like in France, a cumulative qualification of one fact under 261 and 266 is therefore impossible. However, if a certain text contains multiple allegations that contain both defamatory words and insulting words an accumulation of qualifications remains possible and a suspect can be declared punishable on the ground of both defamation and insult. See: Janssens & Nieuwenhuis 2011, p. 97.
of Article 261 Sr is not suitable for groups of people. Reputation is connected to concrete persons, not to non-further specified groups on the ground of race. What is more, the imputation of a specific fact to a person on the ground of his or her race is difficult to imagine, because one’s reputation is not derived from certain group characteristics. Reputation on the ground of race is therefore difficult to imagine. One could, however, argue that it is precisely because groups cannot have a common group reputation, certainly not one based on their race, that defamation of a group of people on the ground of its race must be prohibited. An additional argument can therefore be that reputation concerns not only concrete persons, but also concrete facts. It is difficult to imagine that a non-further specified group can as a group commit and be held liable for one specific, concrete fact.

But if groups cannot have a common group reputation for the purposes of 261 Sr, can they have a common group honor, i.e. dignity, for the purposes of 266 Sr? According to Janssens, Article 137c Sr does not concern a specific group dignity, because this would imply that this specific group dignity is limited to the dignity connected to race etc. This would violate the idea that every person has an inherent, basic dignity and therefore deserves the acknowledgement of a full position in society, regardless of class, origin or position. The fact that the denial of that dignity has a specific reason is a different issue; with regard to Article 137c Sr the reason is connected with one of the discriminatory grounds. Janssens argues that racial insults for the purposes of 137c Sr do not, therefore, have to concern a group per se. An individual can be denied in his or her dignity on the ground of specific common group characteristics and therefore be insulted in accordance with Article 137c Sr.

From this perspective, Article 137c Sr protects the honor of the group to the extent that it concerns the individual members of the group. Then the signification of the term insulting in Article 137c Sr differs little from the term in Article 266 Sr. The higher penalty is grounded on the reasons to insult that are connected to specific group characteristics. In this vision, Article 137c Sr can thus be understood as a lex specialis to Article 266 Sr. Given this relationship with 266 Sr made by the Dutch legislator himself, the question arises as to whether the criminalization of racial insults can rather better protect – next to groups – individual persons and be categorized in Book II section XVI of the Dutch Criminal Code concerning insults, as is the case in France where racial grounds form an aggravating ground to the offence of insult of an individual. Thus the offence of group insult would lose its explicit connection with the preservation of the public order, which could be justified by the relatively remote direct effect racial insults have on the public order.

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As 137c Sr however does not form such a *lex specialis* to 266 Sr, the regime of Article 137c Sr can *defer* from the system of Article 266 Sr in several respects. Firstly, Article 137c Sr is confined to public expression, which can be explained in the light of its rationale of the preservation of the public order. Furthermore, Article 137c Sr does not criminalize insult ‘by facts’. According to the drafting history, discriminatory opinions cannot constitute discriminatory actions (for the purposes of 90quater), by lack of a factual element (para. 4.3.1 *supra*). According to Janssens, it is plausible that the legislator assumed that the manifestation of such insulting acts would require a direct presence of the victim and the specific public character of the offence would render their criminalization difficult. Another possibility is that the legislator considered insulting acts on the ground of race to be unlikely.¹⁹⁰¹ In 1986, the Dutch Supreme Court found that the action of the Hitler salute during a demonstration formed an ‘offending gesture’, but that it did not constitute a fixed ‘image’, such as a photographic image, a print or plate, for the purposes of Article 137c Sr.¹⁹⁰² The action of the Hitler salute could however constitute a punishable insult under Article 266 Sr, if done in the presence of another person. Van der Neut argues that the aggressive use of symbols that evoke recollections of the Nazi-regime should be criminalized in a specific, separate offence.¹⁹⁰³

Secondly, the free speech-clause in Article 266 sub 2 Sr does not apply to Article 137c Sr (para. 1.5.1 *supra*). The original proposal to criminalize group insult in 1971 comprised a free speech clause comparable to 266 sub 2 Sr that excluded expression aimed at giving an opinion on matters of public interest that is not gratuitously offensive. The proposal was rejected, because insults on the ground of race could not easily be considered as expression in the public interest.¹⁹⁰⁴ Hence, in balancing the principle of non-discrimination with freedom of expression, the Dutch legislator has given a certain priority to the principle of non-discrimination with regard to the discrimination ground of race.

But how does Article 137c Sr relate to Article 137d Sr? It is not required that the author of an insult has the intention to incite hatred, that an insult can have this possible effect on third parties or is actually followed by this effect. Van der Neut questions whether a specific need exists for Article 137c Sr, since in

¹⁹⁰³ Van der Neut 1986, p. 72.
practice concurrence with Article 137d Sr would almost always exist.\footnote{1905} Sometimes, the Dutch judge indeed seems not to distinguish group insult from incitement to racial discrimination, hatred or violence very strictly. For example, the Haarlem District Court decided in a few words that a whole set of expressions – amongst others – the statements ‘I agree with the prohibition to breed, which would be a good solution to exterminate Islam in our country’ and ‘In any case gays should not exist, it is an illness that must be exterminated’ could be qualified and were punishable under both 137c Sr and 137d Sr.\footnote{1906}

Janssens argues that both articles prohibit related conduct, but not the same conduct; incitement to hatred can under certain circumstances be insulting, but not every insult incites to hatred \textit{per se.}\footnote{1907} This equally results from the case law. Like in France, one fact can be prosecuted at the same time on the ground of group insult and incitement to racial discrimination, hatred or violence. When expression cannot be qualified as group insult, this, however, does not hinder its qualification as an incitement to racial discrimination, hatred or violence and vice versa. For example, the Dutch Supreme Court confirmed the conviction on the ground of 137d Sr, but the acquittal on the ground of 137c Sr of a Dutch politician with regard to his statement ‘As soon as we get the possibility and the power, we abolish the multicultural society.’\footnote{1908} Likewise, the Utrecht District Court considered that a poster with the drawing of a burning church with the text ‘burn the’ could be interpreted by third parties as an incitement to violence thus punishable on the ground of 137d Sr, but was not insulting in the sense of 137c Sr.\footnote{1909} The courts generally consider expression that denies or minimizes the Holocaust rather to constitute the offence of 137c Sr than 137d Sr (para. 5.5.3 \textit{infra}).

Unlike the situation in France, there needs to be no fear of choosing the wrong qualification, because it is permitted that the indictment contains both cumulative and alternative qualifications with regard to all speech offences.\footnote{1910} In this manner, possible uncertainties about the application of 137c Sr or 266 Sr thus can equally be overcome.

5.3 Intent

Article 137c Sr explicitly requires that an offender must have the intention to insult. Unlike in France, an author’s intention or bad faith is not presumed, but forms a constituent element of the offence that must be explicitly established. The intent can be characterized by every possible degree: even the

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‘voorwaardelijk opzet’ applies, i.e. the situation in which an offender willingly and consciously accepted the considerable risk that his or her expression would insult a group on one of the discriminatory grounds.\textsuperscript{1911} For example, according to the District Court Leeuwarden the intent of a person to insult for the purposes of 137c Sr with regard to his expression ‘If you were Jewish, I would have killed you.’ uttered during a police control out of dissatisfaction with the police action was established, because he had ‘willingly and consciously accepted the considerable risk that his expression would insult people with a Jewish background.’\textsuperscript{1912} The subjective intention of the author is irrelevant; an offender who does not have the personal aim to insult can thus still be liable on the ground of 137c Sr.\textsuperscript{1913} For example, the Arnhem Court of Appeal found an ‘Auschwitz cartoon’ published by the Arabic European League (AEL) on the Internet that insinuated that the Jews exaggerated the Holocaust to constitute an insult of Jews on the ground of their race. The court notably considered the argument that the subjective intention of its author was to put into question the ‘doubles standards’ in the appreciation of expression against Muslims and expression by Muslims not to be decisive for its punishability.\textsuperscript{1914}

The intention of the offender must relate not only to the insulting character of the expression, but also to its public nature and the insulted person. The Dutch judge generally objectifies the intent and derives the proof of an author’s intent from the content, manner and context of the expression.\textsuperscript{1915} The question arises as to whether on this point much difference actually exists between Dutch law and French law, where the French judge takes the intention of the author of an insult into account, not to establish its presence or absence, but to determine the actual sense and purport of the expression. Differences rather seem to follow from the French rigid versus the Dutch broad application of justifications (para. 5.8;6.4 \textit{infra}).

5.4 Designation of a racial group

A group must be insulted – amongst others – ‘on the ground of its race’. The Dutch Supreme Court uses a broad interpretation of the term ‘race’ based on the enumeration in Article 1 ICERD that includes national and ethnic background, skin colour and origin, but not nationality in the sense of national citizenship (para. 4.3.1 \textit{supra}). For example, in 1976 the Dutch Supreme Court found the electoral pamphlets by the NVU comprising the phrase ‘The Hague must remain white and safe. Out with the people from Suriname and the Antilles, who

\textsuperscript{1911} Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 137 c, Aant. 7.
\textsuperscript{1912} Leeuwarden District Court, crim. ch., 19 January 2010, \textit{LJN} BL1747.
\textsuperscript{1913} Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 137 c, Aant. 7.
\textsuperscript{1914} Arnhem Court of Appeal, crim. ch., 19 August 2010, \textit{LJN} BN4204, \textit{NJFS} 2010, 294, para. 4.3; 4.4.
\textsuperscript{1915} Janssens & Nieuwenhuis 2011, p. 115-117.
sponge off our labor and prosperity (…) to constitute an insult of a group on the
ground of its race. According to the Court, the indictment clearly concerned
‘non-white’ people from Suriname and the Antilles, thus a group on the ground
of its race, which included skin-colour next to national and ethnic background
and origin, and not its nationality. As the expression merely concerned those
non-white people who came from Suriname and the Antilles, it equally results
that, similar to France, in order for the offence of group insult to be constituted it
is not a requirement that the defamatory expression be aimed at the racial group
in its entirety; it will suffice if the expression is aimed at a group of people
regardless of its size on the ground of its race.

It is precisely in order to determine whether expression concerns people
of either a certain nationality or a certain national or ethnic background that the
Dutch Supreme Court takes into account the context of the expression.
Expression about non-racial groups uttered in the context of expression about
racial groups can therefore be punishable on the ground of 137c Sr. For example,
in 1983 the Dutch Supreme Court considered expressions about ‘guest workers,
people from Suriname, Hindu, Creoles, Moroccans, Jews and Turks’ insulting on
the ground of race. In 1990, the Dutch Supreme Court found expression about
‘foreigners, Turks, Moroccans and others from Africa’ to constitute expression
about groups of ‘a certain ethnic background’ and therefore about groups on the
ground of their ‘race’, considering the connection and context in which it was
uttered. Likewise, in 2003 the Dutch Supreme Court considered the
designation of foreigners, in specific asylum seekers and refugees, as ‘tyrants,
thieves, murderers, severe condemned men and rapists’ in the context of the
entire publication to constitute an insult of asylum seekers and refugees the
ground of their race.

Strictly speaking, without a ‘racist context’ expression about foreigners,
guest workers and groups of a particular nationality, such as Moroccans and
Turks, is not punishable on the ground of 137c Sr. The same holds true for
caravan dwellers. Contrarily, gypsies can be considered as a ‘race’. Often,
on the basis of a contextual interpretation insult on the ground of nationality can
be construed as an insult on the ground of race. The question arises as to
whether it is desirable to supplement the discriminatory grounds of 137c-e Sr
with the discriminatory ground of ‘nationality’. Van der Neut argues that
although it might be inevitable to make a distinction on the basis of nationality

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1916 Dutch Supreme Court, crim. Ch., 24 June 1975, NJ 1975, 450, annotation Mulder;
1921 Van der Neut 1986, p. 61-62.
with regard to many statutory laws, insult grounded on nationality should be criminalized just as much as insult grounded on national descent.  

Several Dutch legal scholars consider it possible that national minorities, such as the Friesians can constitute a ‘race’, thus a group protected against discrimination and insult. More generally, every cultural minority could fall under the term ‘race’. A less far-reaching interpretation would be to include cases where a nexus exists between culture and religion or belief. A broad interpretation of the term would, however, fit into the traditional Dutch policy of accommodation of cultural identities that fundamentally differs with the French approach of indifference towards common characteristics of national communities, from which it results that Corsicans and Harkis do not constitute a group on the ground of their national or ethnic background protected by the offences of group defamation and insult.

Compared to the French Supreme Court, with regard to the offence of group insult the Dutch Supreme Court has thus given a broader interpretation of the discriminatory ground of race. Furthermore, the Dutch Supreme Court uses a less restrictive requirement of the designation of a group on the ground of its race. This is a result of the fact that the Court has brought several forms of indirect insult on the ground of race under its scope.

5.5 Indirect insult on the ground of race

5.5.1 Nazi propaganda

On several occasions the Dutch Supreme Court has found Nazi propaganda by using swastikas and other Nazi symbols to constitute a punishable insult of Jews on the ground of their race in accordance with Article 137c or e Sr. In 2010, the Dutch Supreme Court rejected an appeal against a condemnation by the Court of Appeal on the ground of Article 137e Sr of a suspect for hanging a flag depicting the swastika in his house in such a manner that it was clearly visible from the public road. The flag constituted an insult to people of the Jewish race or religion, because it injured the honor and dignity of this group and showed a lack of respect for them and their history connected to their race/religion. Furthermore the flag had a character that shocked the legal order and caused feelings of social unrest in society.

In 1995, the Dutch Supreme Court rejected an appeal against a conviction by the Court of Appeal on the ground of Article 137c Sr of a member

1922 Van der Neut 1986, p. 59-60.
1924 Dutch Supreme Court, Crim. Ch., 21 September 2010, LJN BM2483.
1925 Amsterdam Court of Appeal, Crim.Ch., 16 July 2008, LJN BO1540.

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of a neo fascist group for having publicly worn a swastika on a red armlet during a demonstration.  

According to the Court, the overall majority of the Dutch population interpreted the wearing of a black swastika in public as a propagation of the ideas of National Socialism. It was a ‘generally known fact’ that the national socialist ideology is pre-eminently characterized by racial doctrine and anti-Semitism. The same applied to the fact that in the Second World War, on the ground of that ideology, the Jews in Europe had been prosecuted and murdered on large scale. Hence, publicly wearing the swastika was insulting to Jews on the ground of their race.  

In order for the expression to be punishable, it was unnecessary that the swastika was accompanied by an explicit reference to Jews.

In his annotation, Schalken concludes that the use of the swastika forms an indirect form of discrimination because of its ‘association’ with the Nazi ideology. The connection between the swastika and the Nazi regime is so compelling that the true intentions of its user are crystal clear. A suspect’s defence that symbolic expression is multi-interpretable is therefore generally rejected. However, the question arises as to whether the use of a swastika can be regarded as a group insult per se and whether the use of Nazi symbols in general can be exclusively reduced to the aspect of the prosecution of Jews and be regarded as an expression of racial discrimination per se.  

According to Schalken, the punishability of expression must always be determined in the light of its context and the circumstances of the case. When the power of the imagination can activate criminal liability, this is generally not without risk when it comes to political preferences. As a result of a decision of the Dutch Supreme Court in 2011, it cannot be assumed as ‘a generally known fact’ that the symbol ‘ACAB’ signifies ‘All Cops Are Bastards’.

The Dutch Supreme Court has generally held the distribution of Mein Kampf by Adolf Hitler punishable on the ground of Article 137e 5r, even if the suspect did not have the subjective intention of propagating the Nazi ideology. In 1987, the Dutch Supreme Court considered with regard to the sale of a Dutch

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1928 Conclusion Jörg, para.17-21 at: Dutch Supreme Court, Crim. Ch., 5 November 2002, LJN AE8821.
1929 If the swastika is used in the broader context of expression about for example Turks or Moroccans, it can hardly constitute an insult of Jews on the ground of their race. Moreover, the association with the massive extermination in the Second World War seems in principle to be absent with regard to Turks and Moroccans.
translation of Mein Kampf in the window of a second-hand shop that ‘to commit the fact as described in Article 137e Sr, (...) it is not necessary that the object (...) is offered in a provocative or offensive manner or that it has been found that the offender had any political or discriminatory motive.’\footnote{1932} In his annotation, Melai argues that a bookseller who aims to sell a copy of Mein Kampf to a person for his or her historical or political interest is already liable.\footnote{1933 Indeed, two market vendors, who had offered Mein Kampf for sale at their a market stalls, one of which concerned historical literature about the Second World War, have subsequently been convicted on the ground of Article 137e Sr.\footnote{1934}}

5.5.2 Political criticism of the State of Israel

In 1983, the Dutch Supreme Court upheld a conviction by the The Hague Court of Appeal on the ground of Article 137e Sr with regard to the political action of the Palestina-Committee to spread pamphlets that depicted angry soldiers wearing helmets with the caption ‘Israel’ and the sign of a swastika. According to the Court of Appeal, the image constituted an insult of Jews on the ground of their race, because it strongly criticized the foreign politics of the State of Israel with regard to the Palestinians and associated it with the extermination of the Jews in the Second World War and a strong connection existed between the Jews and the State of Israel.\footnote{1935 The Attorney General agreed before the Supreme Court with the decision of the Court of Appeal that the identification of the Jews with a system that is hostile to them (the Nazi-system) constitutes an insult to Jews on the ground of their race. Such a comparison was not only gross, but also repugnant towards Jews in general. This form of criticism of the State of Israel therefore was and could be felt by Jews as insulting against their person and was not protected by the right to freedom of expression.\footnote{1936 The Supreme Court finally rejected the appeal on formal grounds.}} In his annotation, Mulder agrees with the decision and considers the image to be an annoying example of anti-Semitism. According to Mulder, the term Israel is used as a collective name for all descendants of Israel, i.e. patriarch Jacob, together and thus for the nation, the people, the community of Israelites. The term Israel has not lost these significations because of the creation of the State of Israel. The identification of Israel with SS is therefore insulting to Jews

\footnote{1935 The Hague Court of Appeal, 22 September 1982, \textit{NJ} 1984, 600.}
on the ground of their national or ethnic origin'. The possible political purport of the image does not alter this.\(^{1937}\)

Contrarily, many legal scholars have criticized the decision. Van der Neut complains that the condemnation resounds the aftermath of the once widespread idea that he, who criticizes Israel or does not unconditionally support its politics, is automatically anti-Semitic. At worst, the image constitutes an insult of the State of Israel or its residents with an Israeli nationality, but not of Jews on the ground of their race. The latter would only be the case, if – quod non – in the image a direct connection would be made between the violent practices of the Israeli army and the fact that the authors of these atrocities are Jewish. Articles 137c-e Sr should not criminalize over-simplified criticism of a country, of which an important amount of inhabitants share a common race, religion or belief, because such expression does not automatically constitute an insult on the ground of race, religion or belief.\(^{1938}\) Likewise, Janssens argues that severe criticism of the State of Israel, for example, with regard to the treatment of the Palestinians, can offend Israeli citizens, sympathizers or Jews in the Diaspora, in their personal feelings of honour. This does not signify that the criticism constitutes an expression of the inferiority of group members on the ground of their race.\(^{1939}\) Indeed, nowadays expression about the politics of Israel, however gross it may be, is not punishable, unless it equally constitutes discriminatory expression about Jews.\(^{1940}\)

In the French case law, several cases can be found concerning similar criticism of the State of Israel. It is striking that the expressions were, however, found punishable on the ground of the offence of incitement to hatred, discrimination or violence, not on the ground of the offences of group defamation or group insult. This can be explained by the fact that in French case law it is generally not required that the group being the victim of a racial provocation is identified with the same precision that is required with regard to the offences of racial defamation and racial insult.

5.5.3 Holocaust denial as a subset of group insult

Unlike France, Dutch law does not have a specific offence that criminalizes Holocaust denial. In the absence of such a specific offence, revisionist expression, i.e. expression that puts up for discussion the history of the Second World War and tends to deny or minimize the genocide of the Jews by the Nazis, can only be prosecuted on the grounds of the hate speech bans of Articles

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\(^{1937}\) Annotation Mulder, para. 4-5, at: Dutch Supreme Court, crim. ch., 6 December 1983, NJ 1984, 601.


137c-e Sr. Predominantly, the Dutch courts have found the ridiculing, denial or minimization of the Second World War and the Holocaust to constitute an indirect form of punishable group insult of Jews on the ground of their race or religion for the purposes of 137c or e Sr. Although in the wording of the expression the Jews were not always explicitly designated as a group, the expression was nevertheless insulting to them, because the expression concerned a topic with which the group identified itself or because the expression brought to mind certain associations with the Nazi-ideology. Such insulting expression was found punishable, notably because it ‘offended the feelings of the group’.

On several occasions, the Dutch Supreme Court has upheld a conviction by the Court of Appeal with regard to expression that denied the Holocaust. In 1985, the Dutch Supreme Court upheld a conviction of the notorious ‘widow Rost van Tonningen’ on the ground of 137e Sr for having in stock the publication ‘Sechs Millionen Juden vergast-verbrannt?’ that denied the fact that millions of Jews have been murdered in concentration camps during the Second World War. Its punishable character was as a result of the specific words used. Solicitor-General Meijers argued that the element in the offence of Article 137e Sr that exempts from punishability expression ‘for the purpose of objective reporting’ is connected to the distribution or stocking of the expression. The defence used by Van Tonningen, i.e. that his aim was to enter into a free scientific historical debate cannot be considered to form an appeal to this exemption, because this defence concerns an appeal to a justifying ground connected to the content of expression. In his annotation, Veen agreed on this point: the content of Rost van Tonningen’s expression however missed the scientific character. In 1997, the Dutch Supreme Court upheld a conviction of Verbeke, a notorious Belgian revisionist, on the ground of Articles 137c and e Sr for the spreading of pamphlets, in which the Holocaust was denied and Jews were accused of maintaining this ‘myth’ for their own financial gain, and for similar expression uttered in court during a civil law suit.

Although in these cases the Dutch Supreme Court itself did not decide on the punishability of the expression, the cases are generally interpreted in such

1941 Florrie Rost van Tonningen, alias ‘the Black Widow’, was the widow of Meinoud Rost van Tonningen, an infamous Dutch leader of National Socialism during the Second World War. After the Second World War, Rost van Tonningen has defended the Nazi-ideology of her husband uncompromisingly in the media. In 1986, the fact that she received a surviving relatives’ pension by the Dutch State, because her husband had been a member of parliament, caused a public debate. However, the Government continued to pay the pension until her death in 2007.

a way that the Supreme Court has implicitly recognized the punishable character of Holocaust denial. However, the Supreme Court has not yet decided on the question as to whether the sole denial of Holocaust is punishable as such. It results from the case law by lower courts that the denial of the Holocaust generally constitutes an insult to Jews on the ground of their race or religion, because it is uttered in the broader context of anti-Semitic expression, the proclamation of racial doctrines or the support of the Nazi-ideology. The fact that cases often concern the distribution or stocking of multiple expressions might reinforce the gratuitously offensive character of the denial of the Holocaust to Jews. In 2002, the Dutch Supreme Court upheld the decision of a District Court to allow a request for extradition by Germany of a suspect, who was under suspicion for having in stock fifteen CD’s comprising the song ‘Wir wollen Beweise’, in which the Holocaust was denied, and CD covers, books and sheets showing Nazi flags and swastikas. The suspect had also participated in a demonstration in Berlin against the memorial of the Holocaust, with his head decorated with a tattoo of a SS-skull.

The minimization of the Holocaust can however also constitute a punishable group insult of Jews on the ground of their race or religion, when such expression does not – aim to – propagate the Nazi-ideology. Hence, in 1988 the Dutch Supreme Court annulled the acquittal on the ground of Article 137e Sr by the Court of Appeal of Mr and Mrs Goeree with regard to publications in an evangelist magazine ‘Evan’. In these publications the evangelist couple claimed that the Jews have themselves to blame for all that had happened to them since 33 AD, especially the prosecution and assassination of 6 million Jews by the Nazi regime, because of the choice of the Jewish people, at the time of the trial of Jesus, to release Barrabas and to crucify Jesus. The publications also comprised images of concentration camps. According to the Court of Appeal, the intentions of the Goeree couple were unmistakably pure and in the light of the entire articles it was not self-evident that the writings had an insulting purport characterized by anti-Semitism or racism. Besides, for the suspects the verb ‘to blame’ referred to the rejection by the Jews of Jesus as Messias, a fundamental aspect in their religious convictions, not to an ethnic or social ground of being a Jew.

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1949 Dutch Supreme Court, crim. ch., 5 November 2002, Lijn AE8821.
The Supreme Court rejected this focus on the subjective intention of the authors, the animus injurandi, considering that the insulting character of the expression depended on its nature and not on the intent of the suspect. Punishability under Article 137c Sr had to be determined independently from the reasons as to why a suspect is of the opinion that ‘it is all their [the Jews’] own fault’. In his annotation, Mulder describes the dilemma of the case as the polarity within the right to freedom of religion: on the one hand the unhindered experience and exercise of one’s own religion and on the other hand the freedom to propagate personal religious convictions and challenge those of others. If done with respect for the convictions and feelings of others, such religious propaganda must not be restricted.1951

Furthermore, the mere ridiculing of the Holocaust can constitute a punishable group insult of Jews on the ground of their race for the purposes of Article 137c or e Sr. In 1990, the Dutch Supreme Court rejected an appeal against a conviction on the ground of 137c Sr by the Court of Appeal of cineaste Van Gogh with regard to a column, in which he ridiculed the practice of gas chambers and the diary of Anne Frank during the Second World War. The column was comprised of comments about ‘an animation film about two copulating yellow stars in a gas chamber’ and the phrase ‘It smells like Caramel here. Today, they only burn the diabetic Jews.’ The Court rejected the defence that the column was intended as a ‘literary insult’ of another filmmaker who had used his Jewish identity to promote his film and thus had ‘advertised with 6 million deceased people’. The passages did not lose their insulting character in the alleged artistic context of the column. The Court did not have to express an opinion on the question as to whether the column had to be regarded as art.1952 However, in a subsequent case, Van Gogh was acquitted with regard to the same ‘sick jokes’, this time published in a book, because the judge had to use restraint when deciding on the question as to whether expression is ‘unmistakably entirely unnecessary and gratuitously offensive.’1953

Contrarily, in 2012 the Dutch Supreme Court endorsed the conviction on the ground of Articles 137c and e Sr by the Court of Appeal with regard to the publication of an ‘Auschwitz cartoon’ by the AEL on the Internet.1954 The cartoon depicted two Jewish men examining corpses under a notice ‘Auschwitz’. The one says ‘I don’t think they are Jews’. The other responds ‘We have to get to the 6.000.000 somehow.’ The Court of Appeal considered that the Holocaust is a pitch-black page in the history of human kind. The suggestion that it would be made up or exaggerated, nota bene by the victims, is extremely offending to the

1953 For a detailed analysis of the cases, see: Beekman, K., Grüttemeier, R., De wet van de letter Literatuur en rechtspraak, Athenaeum – Polak & Van Gennep: Amsterdam 2005, p. 104 et seq.
victims and their relatives. The subjective intention of the suspect to raise a
public debate about the double standards with regard to Articles 137c-e Sr that
were applied to sensitive issues in the secular western society such as the
Holocaust, but not applied to sensitive issues for Muslims such as cartoons
about Mohammed, was not decisive. This aim could have been reached in
another way.\footnote{Arnhem Court of Appeal, crim. ch., 19 August 2010, Lijn BN4204; NJFS 2010, 294. In
first instance, the suspect had been acquitted: Utrecht District Court, crim. ch., 22 April

Rosier highly criticizes the extension in case law of the scope of the offence of
group insult to opinions on sensitive issues, such as the Holocaust, in order to
protect the feelings of a particular group: ‘And so a special group with a special
history obtained a special protection.’\footnote{Rosier 1997, p. 54-56.} According to Peters, notably the
application of vague criteria such as the ‘gratuitously offensive’ character of
expression would disregard the essence of freedom of expression.\footnote{Peters 1981, p. 214-215; 220-221.}
Likewise, Janssens & Nieuwenhuis argue that in the light of the requirement of legality of
criminal offences in Article 1 Sr, the denial or minimization of the Holocaust can
only be punishable on the ground of Article 137c Sr, if the expression constitutes an
insult.\footnote{Janssens & Nieuwenhuis 2011, p. 237.} The question arises as to whether it is desirable to create a separate
offence that criminalizes the sole denial of the Holocaust.

Janssens considers the creation of such an offence undesirable for four
reasons. Firstly, the sole denial of the Holocaust causes insufficient harm, because
it merely offends the personal inner feelings of surviving relatives or causes
moral indignation by others. It does not constitute an insult, because it does not
deny the honour or dignity or constitutes an outward show of disrespect of
Jews. Moreover, in the Dutch context, it is unlikely that a large amount of
revisionist literature will be produced that could violate the public order.
Secondly, as a principle freedom of expression protects expression regardless of
content; nonsense or lies must be falsified in public debate. Thirdly,
criminalization is ineffective, because it will not convince revisionists to change
opinion, and counter-productive, because it will create martyrdom and generate
attention for revisionist ideas. Fourthly, criminalization paves the way to the
comparison of suffering with surviving relatives of other genocides, which is
immoral.\footnote{Janssens, A.L.J., De loochnaars van Auschwitz: de ongewenstheid van
straftaasting, Ontmoetingen : Voordrachtenreeks van het Lutje Psychiatrisch-Juridisch
Gezelschap, 1999, nr. 5.} And yet, in 2006 a bill was introduced that proposed the
criminalization of the denial of genocides, notably the Holocaust, in a separate
offence.
5.5.4 Proposal to create an offence penalizing the denial of genocides

On 1 June 2006, a draft act was proposed on the initiative of Huizinga-Heringa, representative of the Christian Union in Parliament that proposed to criminalize ‘negationism’. Article 1 of the Act sought – after an amendment made in reaction to the advice of the Council of State – the insertion into the Dutch Criminal Code right after existing Article 137d Sr of a new Article 137da Sr that sanctioned, he, who publicly – orally, in writing or by portrayal – denies or minimizes, approves or justifies genocides in a gross manner, either with the malicious intent to incite to hatred, discrimination or violence against persons or property on the ground of their race, religion or belief, gender or homosexual orientation or physical, psychical or mental handicap (137da sub 1), or with the knowledge or reasonable suspicion that he thereby insults a group of people on those same discriminatory grounds (137da sub 2), with an imprisonment of maximum one year or a fine of up to €7,800. Article 137da sub 4 Sr declared Article 137e Sr applicable to these offences.

The deposer of the draft rejected the use of the term ‘revisionism’, because this would include legal scientific historical research that aims to revise history on the basis of new facts and more precise information. The term ‘negationism’ on the other hand was more suitable, because it concerned expression that aims to promote extreme opinions as an acceptable political movement and thus can create a climate in which discrimination becomes a negotiable option. The term encompassed the denial of the crimes of the Nazi-regime, but also of genocide and crimes against humanity in general. These crimes had been committed against persons on the basis of their race. Subsequently, the denial of these crimes was therefore deeply offensive to the victims of these crimes or their relatives. Negationist expression was reprehensible, precisely because the denial is uttered intentionally, while knowing exactly that the crimes in question have taken place, thus with the aim to dismiss, insult, discriminate, or marginalize the victims of these crimes or their relatives. This obvious discriminatory aim made negationist expression punishable as a matter of principle.

In short, according to the explanatory memorandum, the explicit criminalization of negationism was thus necessary, because persons and groups deserved to be protected against such punishable facts. A democracy had to take

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1964 Furthermore Article 137da sub 3 elevated the sanctions to these facts, if committed by a person who makes a profession or habit out of it or by two or more organized persons to an imprisonment of maximum two years or a fine of up to 19.500 euros.
a firm position against negationism. The explicit criminalization of such expression formed a powerful signal to potential victims and offenders. Besides, many European countries had comparable offences. Moreover, the Protocol concerning the criminalization of racist and xenophobic acts via computer systems comprised the possibility of such an explicit criminalization in national law, which had to be interpreted as an incentive to do so.\footnote{1966}

Although the Dutch Criminal Code did not provide the criminalization of negationism, as a result of the case law Holocaust denial can be punishable under certain circumstances. In principle, Dutch law therefore sufficiently complied with the international treaties comprising norms concerning the criminalization of racist and xenophobic acts.\footnote{1967} However, the norm existent in jurisprudence had to be codified, because an explicit statutory foundation was preferable. The aim of the draft was to explicitly and separately criminalize negationism in the light of an effective fight against racist and xenophobic acts and thereby to contribute to a clear and consistent regulation in this field.\footnote{1968} The draft thus constituted an addition to the existing speech offences, but was not to be considered as an extension of the existing law.\footnote{1969}

Although Huizinga-Heringa and her successor Voordewind received high praise for their thorough preparatory work, the bill was severely criticized by the Council of State and in Parliament. In fact, no parliamentary party, except for the Christian Union and to a lesser extent the SGP, supported the bill and during the Parliamentary debates most parties declared in advance to vote against it.\footnote{1970} Firstly, the Council of State doubted the necessity of the explicit criminalization of negationism. As a result of the case law of Articles 137c and d Sr, these articles already sufficed for the purposes of the proposed Article 137da Sr; as this latter offence required that an offender must have the malicious intent to incite to hatred, discrimination or violence or that a suspicion exists that the expression is insulting, the scope of the draft seemed to fall entirely under the existing Articles 137c and d Sr. Codification of the case law concerning Holocaust denial seemed unnecessary, because it was based on sufficiently clear and broad offences that provided sufficient legal foundation. Moreover, the explanatory memorandum did not give any example of punishable expression that would fall under new Article 137da Sr, but could not fall under the scope of Articles 137c or d Sr.\footnote{1971} The parliamentary parties therefore opined that the draft would merely have a symbolic value.\footnote{1972}

\footnotetext{1966}{Kamerstukken II, 2005-2006, 30579, nr. 3, p. 6.}
\footnotetext{1967}{Kamerstukken II, 2005-2006, 30579, nr. 3, p. 11.}
\footnotetext{1968}{Kamerstukken II, 2005-2006, 30579, nr. 3, p. 1-3.}
\footnotetext{1969}{Kamerstukken II, 2008-2009, 30579, nr. 7, p. 4.}
\footnotetext{1970}{Handelingen II, 13 September 2011, 105-15, p. 52-64.}
\footnotetext{1971}{Kamerstukken II, 2008-2009, 30579, nr. 5, p. 2.}
\footnotetext{1972}{Kamerstukken II, 2009-2010, 30579, nr. 8, p.10.}
The reaction in Parliament is in keeping with the vision of the Dutch legal system as an ‘open system’ with ‘open norms’ in order to enable the judge to ‘colour’ the norms to the circumstances and facts of every case. During the debates, the socialist group stated: ‘the strength of current Articles 137c-e Sr lies precisely in the fact that these form open norms that must be further interpreted by judges. Indeed, it would be practically impossible to precisely describe every act or punishable expression. Does this [new Article 137da] not entail the risk that the more specific actions or opinions are determined, the more is ‘forgotten’? If the denial of genocides is determined so specifically and with such precision, does the fact that another expression deserving of punishment is not specified in the code not form a signal that it is not punishable? In other words, having open norms has advantages, it is impossible to specify every conduct or expression in such a manner that it captures every conduct or expression worthy of punishment.’1973 Likewise, the social democrats stated that ‘[i]n the Netherlands, we have a generic, general criminalization of insult. To arbitrarily single out one form of insult in a specific criminal provision is not only unnecessary, but also incorrect in light of the system of the law.’1974

Secondly, much doubt was raised as to whether the draft would actually reach its aim to establish a clear legal norm that would enhance legal certainty. It was anticipated that several statutory elements of Article 137da Sr would be difficult to prove. The Council of State anticipated that the requirement that an offender must have the malicious intent to incite to hatred, discrimination or violence would be difficult to prove, which is why prosecutors would exercise restraint in their prosecutions.1975 Several members of parliament supported this view, referring to the offence of blasphemy that led a dormant existence since the Dutch Supreme Court had required the malicious intent to deeply offend God’s Person.1976 It is recalled that in French law the former offence of racial defamation and insult of persons with the aim to incite to hatred between citizens was abrogated in 1972, precisely because it appeared to be impossible to prove the author’s malicious intent to incite to hatred.

Furthermore, the proposed Article 137da Sr originally criminalized the denial of both genocides and crimes against humanity ‘as defined in Articles 6 and 7 of the Statute of Rome concerning the International Court of Justice’.1977 This signified that in the absence of case law by the ICJ or other relevant tribunals, the Dutch judge had to decide on the question as to whether certain acts constituted genocides or crimes against humanities. In order to prevent this, the Council of State had proposed to limit the scope of the offence to those genocides or crimes against humanities that have been acknowledged as such by

1973 Kamerstukken II, 2009-2010, 30579, nr. 8, p. 11-12.
1976 Handelingen II, 13 September 2011, 105-15, p. 64.
a final decision of an acknowledged international tribunal – which would be more comparable to the French offence of Holocaust denial.\footnote{Kamerstukken II, 2008-2009, 30579, nr. 5, p. 5.}

The drafter however rejected this limitation, considering it inopportune to exclude historical events that never had been or could not have been brought before the court. Instead, the elements ‘crimes against humanity’ and ‘as defined in Articles 6 and 7 of the Statute of Rome concerning the International Court of Justice’ were deleted. Article 137da Sr was thus amended so that it simply criminalized the denial of ‘genocides’. Other than the denial of genocides, the denial of crimes against humanities would not always have a negationist, i.e. racist, purport. Furthermore, for the interpretation of whether an event constituted a ‘genocide’ now the Dutch judge could be inspired not only by Article 6 of the Statute of Rome, but also the case law of the ICJ or institutions, such as the tribunal of Neurenberg, Tokyo, Rwanda and Yugoslavia, and even the ‘communis opinio’ on the subject as it results from authoritative scientific publications or declarations from national parliaments or the European Parliament.\footnote{Kamerstukken II, 2008-2009, 30579, nr. 7, p. 7-8.}

Most parties highly criticized this vague circumscription of the offence that entailed a possibly boundless scope. The Social Democrats cynically recalled a page in Dutch history: ‘[c]an the denial of the massacre in 1621 of almost the entire population of the Banda-Islands on the orders of Jan Pieterszoon Coen, Governor-General of The Dutch East India Company (VOC), be punishable under the offence, because of its offensive character for the current inhabitants of those Islands?’\footnote{Kamerstukken II, 2009-2010, 30579, nr. 8, p. 3.} According to the drafter, the event could indeed be qualified as genocide pursuant to the article, but the expression would most likely lack the malicious intent to offend or discriminate.\footnote{Kamerstukken II, 2010-2011, 30579, nr. 9, p. 3.} The Christian Democrats were highly opposed to the possibility for a Dutch judge to base his decision on the acknowledgement of certain genocides by national parliaments or the European Parliament: ‘(...) Parliaments are political institutions par excellence. History is not a matter of absolute truths. A particular genocide can be acknowledged by one parliament, but at the same time denied by another parliament. It is undesirable that the denial of a particular genocide is punishable in one country, when precisely its acknowledgement is punishable in another country.’\footnote{Handelingen II, 13 September 2011, 105-15, p. 64.} This vision is in line with the decision of the French Constitutional Council, in which it found the offence of the denial of genocides unconstitutional, precisely because it referred to a declaration from the French National Assembly, which violated the separation of powers.

Thirdly, most parliamentary parties considered the criminalization of the denial of genocides undesirable on principled grounds. The Green Left Party

\footnote{Kamerstukken II, 2008-2009, 30579, nr. 5, p. 5.}
made a fundamental distinction between discriminatory actions and discriminatory opinions and the consequences connected to them. The basic assumption of the Dutch Criminal Code of 1886 had been to merely criminalize those acts that intentionally cause concrete harm to others. Since its creation, the Code had, however, been supplemented with offences that are remote from this principle. This development could be explained as a clear political signal of the Dutch legislator that some values are so precious that their violation deserves to be sanctioned. A fundamental objection to this trend was, however, that Dutch law gradually shifts towards the criminalization of thoughts, a state of mind or a motive, not concrete consequences. Contrarily, Dutch law was to adopt the American approach and thus return to its own principles of the Nineteenth century; only situations that form a clear and present danger to others had to be punishable. The defence of the historic truth was a task for education, not criminal law. Negationism was sickening, but did not constitute a clear and present danger as physical discrimination and incitement to hatred and violence did.\textsuperscript{1983} The SGP was, however, strongly opposed to such a strict distinction between physical discrimination and opinions, considering: ‘[c]an words not be more offensive and far-reaching than certain acts?\textsuperscript{1984}’

The drafter of the proposal feared that in the absence of a specific offence in the future Holocaust denial would no longer be punishable on the ground of the current case law, because with the passing of time no surviving victims and their relatives would remain. However, in the eyes of the drafter, negationist expression aimed to offend the entire Jewish population.\textsuperscript{1985} The criticism of the opponents of the draft nevertheless seemed to be a result of its apparent emphasis to protect the surviving victims and their relatives of the Holocaust against offence to their feelings. The Democrats considered the criteria of offence too subjective. This triggered a comparison of the proposed offence of the denial of genocides with the offence of blasphemy; the preservation of the latter for the protection of certain religious feelings against offence was equally considered to be untenable.\textsuperscript{1986} Precisely because Holocaust denial served a political aim, the socialist group considered that these opinions had to be countered in the political arena.\textsuperscript{1987}

5.6 Designation of a religious group

In order to be punishable, an insult concerning a religious group must be made against a group ‘on the ground of its religion or belief’. The discriminatory ground of ‘religion or belief’ has a core demarcation similar to the

\textsuperscript{1983} Handelingen II, 13 September 2011, 105-15, p. 56.
\textsuperscript{1984} Handelingen II, 13 September 2011, 105-15, p. 57.
\textsuperscript{1985} Kamerstukken II, 2010-2011, 30579, nr. 9, p. 12.
\textsuperscript{1986} Handelingen II, 13 September 2011, 105-15, p. 58 et seq.
\textsuperscript{1987} Handelingen II, 13 September 2011, 105-15, p. 64.
discriminatory ground of race. A line is crossed when expression explicitly targets a determined, designated group exclusively on the ground of its religion. In order to determine whether this is the case, the Dutch judge takes into account the context of the entire publication. As a result, expression about a group of a particular nationality can, in a broader context, be punishable as expression about a religious group. It equally results that in order for the offence of group insult to be constituted it is not required that the defamatory expression is aimed at the religious group in its entirety; it suffices that the expression is aimed at a group of people regardless of its size on the ground of its religion or belief. The insulting expression does not explicitly and with so many words have to attribute the – negative – qualities to the group on the basis of its religion; this follows from the designation of the religious group itself.

A good illustration of an application of these criteria is a decision of 26 June 2012 of the Dutch Supreme Court. The Court rejected an appeal against a conviction by the Court of Appeal with regard to several publications on a website in which Muslims, Turks and immigrants were compared with ‘berber-monkeys, cockroaches, rats and rapists’, were said to have been treated as worthy guests ‘[a]t least, until they started to rape our blonds.’ and were urged to ‘stay in your desert and go have it off once again with one of your camels.’ According to the Court of Appeal, the expressions, regarded both in isolation and in the context of the articles, were unmistakably insulting about groups on the ground of their race or religion. Although certain paragraphs merely spoke of ‘radicals, terrorists, racists and extremists’, it was obvious that every time Muslims (and Turks) were addressed as a collectivity. This could notably be derived from the fact that the publications indicated the amount of Muslims in the Netherlands (one million). The expression, as the suspect must have known, denied the dignity of the group in question. According to the Supreme Court, the court could have considered that the expression concerned ‘persons of non-western origin who adhere to Islam’ and was insulting to Muslims on the ground of their religion or to immigrants on the ground of their race.

5.7 Indirect insult on the ground of religion: the Cancer called Islam case

On several occasions, the Dutch Supreme Court has demarcated the punishable insult of a religious group from the free opinion concerning religious convictions

1989 Amsterdam Court of Appeal, Crim. Ch., 11 October 2010, LJN BO0041. Contrarily, the Haarlem District Court had acquitted the suspect on the ground of 137c. See: Haarlem District Court, Crim. Ch., 7 April 2009, LJN BI0374.
1990 The Supreme Court rejected the argument that Muslims could neither be offended by the epithets because these did not concern their religion nor be offended on the ground of their race and that immigrants could not be regarded as a collectivity of a particular race or religion. See: Dutch Supreme Court, 26 June 2012, NJ 2012, 415.
or practices that might hurt religious feelings. In 1986, the Dutch Supreme Court rejected an appeal against the acquittal on the ground of 137e Sr by the Court of Appeal of an editor with regard to a critical publication on Israel in the weekly ‘Bazuin’ which included the passage: ‘It shows that closed religious communities, ‘chosen people’ are characterized by the fact that religion is turned into legislation and regulations and that the outside world is almost automatically wished and helped to hell. Such a ‘religion’ deserves to be abolished.’ According to the court, the editors’ intent to insult could not be proven.¹⁹⁹¹ In his annotation, Mulder disagrees with the decision, arguing that the expression constituted an insult to Jews on the ground of their religion, precisely because it concerned their religion. If their religion had to be abolished, then what had to be done with their ‘religious community’?¹⁹⁹²

Twenty-three years later, the Dutch Supreme Court, however, made a fundamental distinction between expression about a religion and expression about a group on the ground of its religion. In a decision of 10 March 2009, the Supreme Court considered that, given the fact that the Dutch legislator had foreseen a limited scope of Article 137c Sr, in order to be punishable an expression must unmistakably concern a group of people that is characterized by their religion.¹⁹⁹³ The case concerned a poster placed behind a window of a house facing the public road with the text: ‘Stop the cancer called Islam (…)’.¹⁹⁹⁴ The poster depicted no Muslims at all. Nevertheless, both the District Court and the Court of Appeal considered the poster to be insulting to adherents of Islam, ‘considering the connection between Islam and its adherents’, and convicted the suspect. Contrarily, the Dutch Supreme Court acquitted the suspect, because ‘the mere fact that offensive expression concerning a religion equally offends its adherents formed an insufficient ground to equate it to expression about the adherents, thus about a group of people on the ground of their religion.’¹⁹⁹⁵ The Supreme Court explicitly left open the question as to whether the distinction between criticism of a religion and criticism of religious adherents would equally apply to the discriminatory ground of race (para. 6.5 infra).

In essence, the Dutch Supreme Court confirmed the vision of the Dutch legislator that criticism of religious convictions or practices that offend religious

¹⁹⁹³ ‘s-Hertogenbosch District Court, Crim. Ch., 19 July 2005, LJN AT9494; ‘s-
Hertogenbosch Court of Appeal, Crim. Ch., 10 November 2006, LJN BH3383; Dutch
Supreme Court, Crim. Ch., 10 March 2009, LJN BF0655; NJ 2010, 19, annotation Mevis; NS
2009, 139; RevW 2009, 414.
¹⁹⁹⁴ The text continues: ‘Theo died for us, who will be next? Resist NOW! National Alliance, we
do not bow to Allah. Join us! N.A. P.O Box (001) (place) .. http://www.nationalealiantie.com.’
¹⁹⁹⁵ Dutch Supreme Court, Crim. Ch., 10 March 2009, LJN BF0655, NJ 2010, 19 annotation
Mevis; NS 2009, 139; RevW 2009, 414, para. 2.5.1-2.5.2.
feelings do not fall under the scope of Article 137c Sr (para. 4.3.1 supra). The ratio of the offence to religious feelings merely applies to the offence of blasphemy in Article 147 Sr and is limited to the category of expressions that deeply disparage God’s Person. Hence, the Dutch Supreme Court has notably demarcated the offence of group insult from the offence of blasphemy. After this decision by the Supreme Court, the Minister for Justice renounced his plan to ‘clarify’ the scope of the offence of group insult by inserting the words ‘direct and indirect’ insult and at the same time abolish the much criticized offence of blasphemy that had, since the ‘Donkey trial’, led a dormant existence and merely had a symbolic function (para. 3.4 supra). The plan thus apparently aimed to create the possibility to criminalize expression about a religion that offends religious feelings under Article 137c Sr and thus to ‘transfer’ the function of Article 147 Sr to 137c Sr. However, the decision of the Supreme Court in 2009 left no room for this transfer.1997

Several Dutch legal scholars have criticized the above decision of the Supreme Court. Vermeulen argues that the distinction between a religion and its adherents made by the Supreme Court presupposes a secularized vision on mankind, according to which people’s religion forms a very limited part of their identity; criticism on a religion would therefore say little about their appreciation as a person. This vision (secularization) however does insufficient justice to people who deeply believe and often concern vulnerable orthodox religious minorities.1998 One can object that even the offence of the feelings of adherents of orthodox religions cannot form an independent ground for liability under Articles 137c-e Sr. After all, this can result in the protection of personal religious convictions of certain religions against – harsh – criticism, which is contrary to freedom of expression, freedom of religion and the principle of equality. The distinction made by the Supreme Court thus does spring from a vision on the – neutral – position of the state towards religions and the inter-relationship between these latter fundamental rights (secularism).

The criterion that expression must ‘unmistakably’ concern a group on the ground of its religion cannot in so many words be traced back in the drafting history. It was acknowledged that hybrid expressions existed for which it was necessary to determine whether the author aimed to target and draw conclusions about a religion or its adherents (para. 4.3.1 supra). Precisely because of the possible amalgam of a religion and its adherents, the consideration of the

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2011, p. 653-666.

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Dutch legislator and the Supreme Court that criticism of religious convictions and practices is not punishable needs further explanation. After all, if all criticism on the behaviour of a group attributed to it on account of its religion would be free, the discriminatory ground of religion would lose its signification. A workable method could be to determine whether behaviour and practices can reasonably be connected to a religion.

According to the drafting history, the key criterion is whether expression concerns ‘points that are beyond discussion’ (para. 4.3.1 supra). Does this concern generally known factual behaviour, or drawing a possible connection between a religion and antisocial behaviour? Eventually, of overriding importance is the question of whether expression constitutes an insulting value judgment or is simply untrue. For example, in this manner a distinction can be made between permissible criticism on ritual slaughtering or religious circumcision by Muslims and the impermissible attribution of an inherent criminal nature to Muslims.

In his annotation, Mevis criticizes the decision for treating the question as to whether expression ‘unmistakably concerns a group on the ground of its religion’ as a preliminary question. The Supreme Court has dictated a new sequence in the determination by the judge as to whether the elements of the offence of 137c Sr are established. As a result, the focus shifts from the core question of whether the expression has an insulting character to the question of whether it concerns a group on the ground of its religion. If the answer to the latter question is negative, the former question needs no further examination. Mevis questions as to whether the boundary between permissible and impermissible expression is correctly drawn; a clever man can escape liability by formulating his words in such a manner that they do not unmistakably concern a group on the ground of its religion at first sight.1999

From a same strand of thought, Veraart argues that this new sequence can result in a very abstract test on the basis of the literal wording of the expression, whereby this text is not placed in its specific textual and social context. The Supreme Court did not take this context into account. The Solicitor-General did, but endorsed the defence of the suspect that the poster constituted a political opinion on the increasing influence of Islam in the Netherlands and a call to the people to become a member of a political movement. Veraart objects that it concerned an expression of an extreme right winged movement uttered in a time of increasing acts of discrimination and violence against Muslims in Dutch society. This formed a relevant context that had to be taken into account.2000

The approach of the Supreme Court has subsequently been applied in case law.\textsuperscript{2001} For example in the Wilders case, the District Court found that Wilders’ equations of Islam with Nazism did not unmistakably concern Muslims, but concerned Islam.\textsuperscript{2002} With regard to Fitna, one could object that although the expression charged only concerned ‘islamization’, the rest of the film did depict and gave a negative image of Muslims. The criticism on the Cancer called Islam case seems justified; a strict application of the distinction between a religion and its adherents can result in a very abstract test based on the literal text. Then the precise charge by the prosecution becomes very important (para. 6.7.8.2.2 \textit{infra}).

When the ‘unmistakably’ criterion is strictly applied, only direct insults by means of degrading disqualifications or terms of abuse against explicitly designated religious groups seem to be punishable on the ground of 137c Sr. It is submitted that this can be undesirable; more disguised forms of the rousing of public sentiment against and the stigmatizing of a religious group, such as the depiction of Islam as a criminal religion, are not punishable under 137c Sr, while they can equally discredit Muslims on the basis of their religion. Even though such expression discredits people, it equally cannot constitute a punishable insult of an individual in the sense of Article 266 Sr, because the expression does not aim at one particular person.

Hence, in order to better determine whether expression about a religion violates the honour and good name of a group on the basis of its religion for the purposes of 137c Sr, it must firstly be clarified whether religious practices and behaviour can reasonably be connected to a religion and secondly, whether expression constitutes an insulting value judgment or is simply untrue. To this end, the expression must be interpreted in its specific textual and social context.

5.8 Contextual review

For the determination of the punishability of expression under Article 137c Sr, the judge begins by placing the expression in its direct textual context. The judge

\textsuperscript{2001} For example: Utrecht District Court, Crim. Ch., 26 April 2010, \textit{LJN} BM8138, \textit{NJFS} 2010, 231. The Utrecht District Court acquitted a suspect on the ground of Article 137c in relation to several posters he had placed behind the window of his house facing the public road, depicting a Christian cross, the equal-sign and a swastika; a burning church with the text ‘burn the’; and a Christian cross covered by a prohibition sign with the text ‘Bad Religion’, because these symbols and texts did not concern Christian adherents, but exclusively concerned the Christian religion.

\textsuperscript{2002} The public prosecution charged Wilders with three expressions in a newspaper article ‘Enough is enough: prohibit the Islam.’, in which Wilders compared Islam with Nazism and the Quran with Mein Kampf, and one expression in the film Fitna: ‘Islam wants to predominate and subject and aims to destroy our civilization. In 1945 Europe conquered Nazism. In 1989 Europe conquered Communism. Now, the Islamic ideology must be conquered. Stop the islamization. Defend our freedom.’ See: Closing speech Public Prosecution 25 May 2011, p. 31.
can attach importance to a suspect’s freedom of expression by setting strict requirements to the elements of the offence of 137c Sr – as is the case for the designation of a religious group (para. 5.7 supra). If expression can be qualified as a group insult for the purposes of 137c Sr, the judge subsequently balances the application of the speech offence with the right of freedom of expression. It is notably at this stage that the judge attaches importance to freedom of expression; thus when the judge determines whether the application of 137c Sr is proportional. To this purpose, in three decisions in 2001 and 2003, the Dutch Supreme Court has developed a method of contextual review consisting of a ‘three-step-test’. The cases all concerned the question of whether expression about homosexuals based on a religious conviction uttered in public debate constituted a punishable group insult. The first step of the test concerns the question of whether expression taken in isolation and its direct textual context, thus according to its nature and purport, is insulting. The second step concerns the question of whether the broader context – being to enter into a public debate by proclaiming a religious conviction – can remove the punishable insulting character of the expression. The third step concerns the question of whether the expression, despite its broader context of proclaiming a religious conviction in a public debate, is gratuitously offensive and therefore nevertheless punishable.\footnote{2003}

In the first case in 2001, the Supreme Court rejected an appeal against the acquittal by the Court of Appeal on the ground of 137c and e Sr of clergyman and politician Van Dijke with regard to his statement during an interview published in a Dutch magazine ‘Yes, why would a practicing homosexual be better than a thief?’ The Court of Appeal had firstly considered that this equation of practicing homosexuals with criminal offenders violated the dignity of homosexuals; as the homosexual practice is strongly connected to their identity, the rejection thereof implied the rejection of their particular identity. However, the court continued that ‘the expression in question was no more than an illustration that clarified a religious conviction.’ and this rhetorical question therefore ‘did not impair the dignity of practicing homosexuals’. According to the Supreme Court, the court had interpreted the term insulting correctly by considering that the expression was ‘evidently directly connected to the suspect’s religious conviction and as such was of importance to him in the public debate.’\footnote{2004} In the second case in 2001, on similar grounds the Supreme Court rejected an appeal against the acquittal by the Court of Appeal on the ground of 137c Sr of a police officer with regard to similar statements\footnote{2005} made in

\begin{itemize}
\item \footnote{2004} Dutch Supreme Court, Crim. Ch., 9 January 2001, \textit{NJ} 2001, 203, annotation De Hullu.
\item \footnote{2005} The police officer stated ‘Homosexuality is equated with heterosexuality. That is much the same as equating theft with gift tax or assault with nursing.’
\end{itemize}
a (public) policy magazine in reaction to the plan of the government to open marriage to homosexuals.\footnote{2006}

In the third case in 2003, the Dutch Supreme Court confirmed these two decisions by rejecting an appeal against the acquittal by the Court of Appeal on the ground of 137c Sr of Reverend Herbig for having called homosexuality a ‘filthy and vile sin’ in a letter published in a regional newspaper. The Supreme Court considered again that the court had interpreted the term insulting correctly by deciding that ‘the expression, regarded in its context, is evidently directly connected to the suspect’s religious conviction and his intent to warn humankind is clear, which is why for the suspect the expression is of importance to a public debate.’ and that the terminology used was not gratuitously offensive, because ‘in the Bible homophilia is regarded as an ‘atrocity’ or a ‘horrible sin’.\footnote{2007}

This three-step-test equally applies to the situation in which a suspect expresses an opinion in a public debate that is not based on a religious conviction. This results from another case before the Dutch Supreme Court in 2003. The Supreme Court rejected an appeal against the conviction by the Court of Appeal on the ground of 137c Sr with regard to a letter published in a regional newspaper in which asylum seekers and refugees were called ‘tyrants, thieves, murderers, criminals and rapists’. Even in the context of a public debate on a never resolved murder-case and the unrest this case had caused in society, the use of such terms was gratuitously offensive.\footnote{2008}

Even though lower courts of law on occasion deviate from this three-step-test,\footnote{2009} they often explicitly refer to the Herbig case and apply it as their general framework.\footnote{2010} The judge merges the second and third step into one step, when he considers that the context of a public debate does not remove the insulting character of the expression and that it is gratuitously offensive.\footnote{2011} Generally, the context of a public debate, however, seems to rather easily remove the insulting character of expression that taken in isolation is insulting. As Mevis points out in his annotation of the Herbig case, the context of a public debate forms a very easily ‘exculpating factor’ to expression that taken in

\footnote{2008} Dutch Supreme Court, crim. ch., 15 April 2003, NJ 2003, 334.
\footnote{2009} For example, the judge did not apply the second and third step in: Havana, Amsterdam District Court, Crim. Ch., 2 June 2008, L/N BD2957. The case concerned the acquittal on the ground of Article 137c with regard to a column in a university magazine containing aggressive criticism of Jews. The Amsterdam Court of Appeal upheld that judgment in: Amsterdam Court of Appeal, 17 February 2010, L/N BL4528.
\footnote{2010} For example in the case: Arnhem Court of Appeal, Crim. Ch., 19 August 2010, L/N BN4204; NFJS 2010, 294, para. 4.1.
\footnote{2011} An example forms: Amsterdam Court of Appeal, Crim. Ch., 11 October 2010, L/N BO0041.
isolation is insulting. Expression uttered in the context of a public debate must be very heated and fierce before it is gratuitously offensive and therefore nevertheless punishable. What is more, the approach seems to prevent the possibility of setting any requirement to contributions to public debate, for example, to have a certain level of serenity.\textsuperscript{2012} It is not required that an expression forms an \textit{actual substantial contribution} to a public debate.\textsuperscript{2013} An expression must on the other hand have a \textit{function} in a public debate.\textsuperscript{2014} This does not signify that a suspect could have formulated his expression in another manner. An expression must merely not be more offensive than can be justified by the suspect’s aim.\textsuperscript{2015}

This method of a contextual review by means of a three-step-test thus ensures that the judge does not determine \textit{in abstracto}, but \textit{in concreto} as to whether expression can be qualified as a group insult in the sense of 137c Sr. The judge explicitly balances the application of the offence with a suspect’s right to freedom of expression in the light of all circumstances of the case. However, no objective criteria exist for striking the right balance between 137c Sr and freedom of expression. The judge must, to a certain degree, seek a connection with what the group concerned can reasonably experience as insulting. Wortel discerns three manners, in which the judge could attach importance to a suspect’s right to freedom of expression: by the establishment of a suspect’s \textit{intent} to insult, by the determination of the insulting \textit{character} of the expression, or by applying it as an unwritten free speech clause or justifying fact (mitigating circumstances), after and independent from establishing liability under 137c Sr.\textsuperscript{2016}

As a result of the previously discussed case law, freedom of expression generally forms a factor to be weighed in the determination of the insulting character of the expression. This approach has the advantage that the success of a suspect’s appeal to his right to freedom of expression always depends on the nature and content of the expression itself. A suspect of gratuitously offensive expression that can reasonably be considered as insulting cannot object that by using provocative language he has intended to contribute to a public debate. However, courts sometimes rather attach importance to a suspect’s motive, which can result in a very ‘subjective’ explanation of a suspect’s expression (para. 6.7 \textit{infra}). Treating freedom of expression as an unwritten justifying fact has the disadvantage that the motivation on the punishable character of the

\textsuperscript{2012} Annotation Mevis at: Dutch Supreme Court, Crim. Ch., 14 January 2003, NJ 2003, 261.
\textsuperscript{2013} Conclusion Solicitor-General Machielse, para. 3.10, at: Dutch Supreme Court, Crim. Ch., 10 March 2009, NJ 2010, 19, annotation Mevis.
\textsuperscript{2014} Amsterdam Court of Appeal, 23 November 2009, L\textsc{J}N BK4139, \textit{Mediaforum} 2010-1, p. 24, annotation Nieuwenhuis.
\textsuperscript{2015} Arnhem Court of Appeal, Crim. Ch., 19 August 2010, L\textsc{J}N BN4204, \textit{N\textsc{J}}\textsc{S} 2010, 294.
\textsuperscript{2016} Conclusion Solicitor-General Wortel, para.15 \textit{et seq.} at: Dutch Supreme Court, Crim. Ch., 15 April 2003, NJ 2003, 334.

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expression by the judge can become incomprehensible. For example, in the Polinco case, the District Court firstly considered that the designation of immigrants as ‘rats’ and Jews as ‘ riffraff, scum and paranoid schizophrenics’ on an Internet website was evidently punishable under 137c Sr, but finally concluded that it was not punishable on the ground of an abstract, separate consideration on the basis of Article 10 ECHR.2017

The contextual review ensures that the interest of freedom of expression is incorporated into the statutory elements of the offence.2018 The three-step-test affords the possibility for the judge to accommodate the Article 10 case law of the ECtHR that has developed norms concerning the permissibility of restrictions to a free political and public debate2019 and of gratuitously offensive expression.2020 As Article 120 of the Dutch Constitution prohibits constitutional review, the judge does not test Article 137c Sr against Article 7 of the Constitution, but applies it in light of the Article 10 ECHR, thus ‘in conformity with the treaty’ (para. 1.6 supra).2021

This is precisely where Dutch law differs from French law. In France, the press offences in the 1881 Press Act are generally thought to, in themselves, strike the right balance between freedom of expression and other rights and interests. French courts do not explicitly balance the press offences with the right to freedom of expression in concreto in every case. They rather strictly apply them in abstracto and only implicitly attach importance to freedom of expression when establishing whether the elements of the offence are met. Other than in France, the Dutch judge precisely colours the statutory norms to the circumstances of the case, but has not developed in case law a detailed closed national system of specific justifications connected to specific speech offences that complicates the accommodation of the Article 10 case law of the ECtHR.

Dutch legal scholars notably criticize the application of the criterion that expression must not be gratuitously offensive, because it concerns an opinion on the proportionality of the expression. The ECtHR uses the term, but in order to determine the proportionality of a restriction of freedom of expression. Determining the proportionality of expression would on the other hand have a chilling effect on freedom of expression (para. 1.5.2 infra). One must however

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2017 Amsterdam District Court, 2 June 2008, LJN BD2977. However the suspect was convicted in appeal. See: Amsterdam Court of Appeal, 23 November 2009, LJN BK4139, Mediatorum 2010-1, p. 22-24, annotation Nieuwenhuis.
2018 Janssens & Nieuwenhuis 2011, p. 45 et seq.
2020 For example in: Arnhem Court of Appeal, Crim. Ch., 19 August 2010, LJN BN4204; NJFS 2010, 294.
keep in mind that, before the judge determines the gratuitously offensive character of expression, he first determines whether expression constitutes an insult in the sense of 137c Sr, thus whether its discredits a group and violates its moral integrity. Consistently determining the gratuitously offensive character of expression as a final objective subsidiarity test is important, because otherwise the punishable insulting character of expression can be simply cancelled out by the – suspect’s – interest – to contribute – to a public debate. The gratuitously offensive character of expression can reside in both the content and the form of the expression, but seems to notably depend on the intemperance and the terms used.

Next to the context of a public debate, the religious context (para. 5.10 infra) or artistic context of an expression can also be important for the determination of liability under 137c Sr. In 2001, the Dutch Supreme Court endorsed the acquittal by the Court of Appeal on the ground of 137c Sr of the author of the novel ‘Dancing lessons’ with regard to the criticism made by a fictional character in the novel on the city council of the Dutch city of Zandvoort that notably concerned the Jewish mayor: ‘Well, what do you want, with a Jew in command?’ According to the Supreme Court, an author must not abuse his artistic freedom in order to utter insults. The fact that expression is uttered by a novel character does not signify that the author cannot be liable under Article 137c Sr. However, the question as to whether a ‘literary insult’ concerns an actual, real person or official must be answered objectively and does not depend on whether that person or official can identify him or herself. The nature and purport of the passages were hilarious and not based on reality; in the context of the entire novel the expression was not insulting. In his annotation, De Hullu argues that the Supreme Court has given the signal that cases concerning artistic expression should not to be settled through criminal law. This latter vision can equally be derived from several decisions by lower courts of law. In 1951, the Dutch author W.F. Hermans was acquitted on the ground of 137c Sr with regard to the statement made by a novel character in his novel that ‘Catholics reproduce like rabbits’. In 1995, the Dutch author Holman was acquitted on the ground of 137c Sr with regard to the use of the term ‘Christian dogs’ in a column. However, the previously discussed Van Gogh case in 1991 shows that freedom of humoristic or artistic expression is not unlimited (para. 5.5.3 supra).

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2022 Amsterdam Court of Appeal, 23 November 2009, LJN BK4139, Mediaforum 2010-1, p. 24, annotation Nieuwenhuis; Amsterdam Court of Appeal, Crim. Ch., 11 October 2010, LJN BO0041.
2024 Annotation De Hullu para. 3 at: Dutch Supreme Court, Crim. Ch., 9 October 2001, NJ 2002, 76.
5.9 The special case of the protection of feelings in civil cases

The two civil Goeree cases in 1987 and 1991 concerned the rejection by the Supreme Court of an appeal against the prohibition by the Court of Appeal for Mr and Mrs Goeree, an evangelist couple, to disseminate two publications of an evangelist magazine ‘Evan’. These publications claimed that the Jews have themselves to blame for the Holocaust, that the existence of AIDS was caused by homosexuals and that their death as a consequence of homosexual praxis served them right. The Court of Appeal considered these expressions to be gratuitously offensive to the feelings of Jews, respectively homosexuals and therefore violated the rule of unwritten law pertaining to proper social conduct for the purposes of Article 6:162 BW. In both cases neither the Supreme Court nor the Court of Appeal referred to any violation of a speech offence and the restrictions to the proclamation of a religious conviction were entirely justified by the offence of the feelings of a particular group.\footnote{2026} In a criminal case in 1988, the Dutch Supreme Court annulled the acquittal on the ground of Article 137e Sr by the Court of Appeal of the Goeree couple with regard to the same publication concerning Jews and the Holocaust (para. 5.5.3 supra). Expression on the sensitive issue of the Holocaust that offends the feelings of Jews can thus be prohibited according to both criminal and civil law.

Vermeulen argues that in these civil cases the Supreme Court should not have accepted without reserve that the norm of due diligence can set restrictions to the free proclamation of religious convictions. Only in highly exceptional cases the proclamation of one’s faith must be declared impermissible towards third parties on account of its content and therefore prohibited. It is the legislator, not the judge, who has the task to judge such complex, philosophical and often politically sensitive questions. The restrictive legislation by the formal legislator must therefore be sufficiently precise, otherwise the judge has too much margin of appreciation to impose prohibitions.\footnote{2027}

According to Vermeulen, the norm of due diligence of Article 6:162 BW does not meet this criteria. To the contrary, it constitutes the most general, open, civil norm that must be concretised by the judge. In this process of judicial interpretation, freedom of expression or religion is reduced to a ‘factor to be weighted’. The proclamation of religious convictions must therefore only be unlawful on the basis of its content, if it violates a norm of criminal law, i.e. a

\footnote{2026} Dutch Supreme Court, civ. ch., 5 June 1987, N/ 1988, 702, annotation Alkema; Dutch Supreme Court, civ. ch., 2 February 1990, N/ 1991, 289. Although, in the second case the Court of Appeal specified that Article 6:162 BW afforded protection against ‘insulting, offensive and discriminatory expression’, which formed a permissible restriction of fundamental rights.

\footnote{2027} Koekkoek 2000, p. 107-108.
speech offence. The Goeree couple however could have been convicted on the ground of 6:162 BW by reference to Article 137c Sr.2028

Indeed, the speech offences form limitations to the content of expression and therefore form direct limitations to freedom of expression or religion that interfere with their core. There is a democratic thought behind the principle that restrictions to the content of expression require an explicit expression of the will of the formal legislator.2029 The speech offences can express this will more precisely than the open norm of Article 6:162 BW. The vision that insulting, offensive and discriminatory expression can only be unlawful if it violates a criminal speech offence fits in with the situation in France, where the press offences take priority over the general civil norm of the wrongful act of 1382 CC and form the legal grounds in civil cases, which can be explained in the light of the French emphasis on legal certainty and the separation of powers.

In his annotation, Alkema argues that a reference to criminal law would have provided for a certain objectification; now the restriction to religious freedom is notably justified by the feelings of certain persons and groups. Moreover, by choosing the ‘royal path of criminal law’ one avoids the ‘trouble of horizontal effect’, to which both the plaintiff (prohibition of discrimination) and the defendant (freedom of expression) could appeal. On the other hand, it just might not be as awful that in civil cases conflicting fundamental rights require an explicit judicial balancing.2030 The question arises as to whether the requirement that in order to be unlawful pursuant to 6:162 BW, the expression must violate a speech offence will not provide for a better framework in civil cases. After all, in this framework nowadays – other than in France – not only the speech offence, but also the method of contextual review as established by the Supreme Court will apply in civil cases. This could precisely ensure that the civil judge will explicitly balance conflicting fundamental rights (one of the specified norms of non-discrimination in Articles 137c-e Sr with the right to freedom of expression in 10 ECHR) and that the notion of ‘gratuitously offensiveness’ remains a final subsidiarity-test. Within this contextual review, due diligence considerations can equally play a role.

In the Netherlands, in theory the criteria for civil liability under the due-diligence norm of 6:162 BW can thus be less strict than the criteria for criminal liability under 137c-e Sr. However, just as expression on the sensitive issue of the Holocaust that offends the feelings of Jews is prohibited according to both

2028 Koekkoek 2000, p. 108.
2029 This does not apply to restrictions to the form in which religious convictions are proclaimed. For example Article 6 of the Constitution allows for the delegation of the regulation of religious manifestations such as processions and Article 7 of the Constitution allows for the delegation of the regulation of the distribution of expression (para. 1.2.1 supra).
criminal and civil law, the mere offence to religious feelings forms an insufficient ground for liability under 6:162 BW just as under 137c-e Sr.

In 2005, the summary judge found several strong opinions about Islam made by Hirsi Ali and the film entitled Submission made by her and Van Gogh, not to be unlawful and rejected the request to prohibit them. The judge determined the case in the light of Article 10-2 ECHR and considered that Hirsi Ali had not overstepped the boundaries of the acceptable and the requirements of proportionality and subsidiarity. In his annotation Schuijt nevertheless criticizes the reasoning of the judge for having a chilling effect on freedom of expression; it is the restriction that must be proportionate, not the expression itself.\footnote{The Hague District Court, summary judgment, 15 March 2005, Mediaforum 2005-4, p. 178-180, annotation Schuijt.}

In two following cases, the judge explicitly considered that the fact that citizens experience certain opinions as shocking or offensive does not in itself make that expression unlawful. In 2006, the civil judge, therefore, considered the phrase: ‘In the thirties, the elite looked way from the rise of the Nazis, now the same happens with islamization’ uttered by the political leader of EenNL, a former nationalist political party, during an election broadcast, not to be unlawful.\footnote{Rotterdam District Court, summary judgment, 21 November 2006, Lijn AZ3031.} Likewise, in 2008 the civil judge considered several expressions by politician Geert Wilders, in which he compared the Quran with Mein Kampf, called it fascist and called Mohammed a barbarian, not to be unlawful. Later on, the criminal prosecution of Wilders on the ground of 137c-e Sr with regard to similar expression equally failed (para. 6.7 infra).\footnote{The Hague District Court, summary judgment, 7 April 2008, Lijn BC8732.}

In these cases, the judge notably attached importance to the fact that the expression did not explicitly designate adherents of Islam, but concerned ‘Islamization’ as a social phenomenon. Although in the above cases the civil judge did not refer to Article 137c Sr, his motivation nevertheless seemed to be inspired by the norms established in the criminal case law based on 137c Sr. In practice, no fundamental differences seem to exist between the restrictions to offensive expression as set out in criminal and civil case law.

5.10 Concurrence between freedom of religion and freedom of expression

In the Netherlands, religiously motivated opinions can either fall under freedom of expression protected in Article 7 of the Dutch Constitution or freedom of religion protected in Article 6 of the Dutch Constitution (para. 1.4 supra). As both fundamental rights have the same system of repressive restrictions, at first sight it seems irrelevant whether the judge determines the permissibility of religiously motivated opinions in the light of freedom of expression or freedom of religion. However, the judge can attach importance to a suspect’s religious motivation and weigh it as a factor when applying the method of contextual review.
As a result of the case law, the judge does not make a conscious motivated choice between the two fundamental rights in the event that they overlap. In the two civil Goeree cases, it remained ambiguous as to whether the Goeree couple’s freedom of expression or religion was at stake.\footnote{2034} In the three criminal cases concerning expression about homosexuals based on a religious conviction uttered in public debate in 2001 and 2003, the Supreme Court considered both the suspects’ freedom of religion and freedom of expression an important factor for the determination of liability under 137c Sr.\footnote{2035} Explicitly referring to the cases of 2001, in 2002 the Rotterdam District Court and the Hague Court of Appeal acquitted imam El Moummni on the ground of 137c and d Sr with regard to the statement he made during a Dutch television program that homosexuality is a contagious disease and harmful to society, because it formed a direct expression of religious convictions that are protected by freedom of religion.\footnote{2036}

Vlemminx criticizes the approach because it would afford a higher level of protection to religiously motivated expression than to secular expression.\footnote{2037} Contrarily, De Haseth, Starreveld and Loof argue that in this case law the suspect’s religious conviction only partly colors the context, but forms no independent justification. This is only different, if expression is not aimed at the participation in a public debate, but at the contribution to a theological debate in a somewhat private circle.\footnote{2038}

Likewise, according to Nieuwenhuis, the case law of the Supreme Court might seem to afford a higher level of protection to religiously motivated expression than to secular expression on the ground of a suspects’ freedom of religion, but because of the Supreme Court’s emphasis on the public debate, the entire justifying fact forms ‘a suspect’s religious conviction in the context of (his contribution to) a public debate’.\footnote{2039} Mevis objects that such a subjective interpretation of the insulting character of expression very easily accommodates religious convictions, but on the other hand reduces the role of criminal law to the benefit of reactions in public debate and, in the event of a criminal

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\footnote{2037} Vlemminx, F.M.C., ‘Mogen sympathieën zwaarder wegen dan constitutionele zuiverheid?’, NJB 2002, p. 1696-1699.

\footnote{2038} Annotation De Haseth, Starreveld & Loof at: Rotterdam District Court, Crim. Ch., 8 April 2002, NJCM-Bulletin, jrg.27 (2002) nr.8, p. 1016-1019.

prosecution, prevents the judge from having to decide upon the correctness of a religious conviction. Vermeulen argues that a higher level of protection for the proclamation of religious convictions than expression in other fields can be justified by the sincerity or innocence of a suspect’s motive. Such a special protection for religiously motivated expression would fit in with the Dutch tradition of the accommodation of people’s specific religious identities.

Dutch scholars thus disagree on the question of whether this case law affords religiously motivated opinions a higher level of protection than secular opinions per se. In certain decisions the judge, however, tends to rather equate the regime of religious and political convictions. In 2003, the Dutch Supreme Court applied the method of contextual review to a situation in which a suspect expressed an opinion in a public debate that was not based on a religious conviction (para. 5.8 supra). In 2012, the Amsterdam District Court explicitly applied the Supreme Court’s three-step-test to the political opinions on Islam uttered by politician Geert Wilders (however in relation to Article 137d Sr – para. 6.7 infra). The court acquitted the politician, because in Wilders’ perspective his expressions were necessary to expose social problems. The court thus equated the regime of religious and political convictions. This fits in with the situation in France, where Articles 10 j 11 of the 1789 Declaration protect religious and non-religious opinions on equal footing, which can be understood in the light of the French notions of equality and laïcité. The equation seems justified, because it is incomprehensible why religious convictions uttered in public debate must be afforded a higher level of protection than political opinions.

5.11 Desirability of the criminalization of group insult

The desirability of the criminalization of group insult is an idea not shared by all Dutch legal scholars. Legal scholars disagree with 1) the creation of the offence as such; 2) the broadening of the scope of the offence by the insertion of new


\[2042\] Amsterdam District Court, 23 June 2011, Mediaforum 2011, p. 280-282, annotation Van Noorloos; Ars Aequi 2012, p. 288-289, annotation Rozemond; p. 290-294, annotation Schutgens. Previously, in its review of the decision by the public prosecution not to prosecute Wilders, the Amsterdam Court of Appeal had considered that the three-step test concerned religious convictions and could not be applied by analogy to political opinions. See: Amsterdam Court of Appeal, 21 January 2009, NJ 2009, 191, annotation Buruma, Strafblad 2009, p. 198-208, annotation Fennema, Mediaforum 2009, 8, annotation Nieuwenhuis.


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discriminatory grounds since its creation; or 3) its alleged broad application in case law. These objections will be discussed in this order.

Van der Neut states that racial group insults are annoying for the persons concerned yet are not harmful per se. He questions whether a specific need exists for Article 137c Sr, since in practice concurrence with Article 137d Sr would almost always exist. A broad interpretation of Articles 137c-e Sr by the courts is notably undesirable. If Article 137c Sr would be abrogated and Articles 137d-e Sr maintained and Dutch law would still comply with ICERD.2044 Peters goes even further. Inspired by American free speech doctrine, he advocates a preferred position of the freedom of public debate with regard to other rights and interests and thus a hierarchy between fundamental rights.2045 Because of the importance of freedom of expression, the concurreing interests must be very important. The legislator must indicate the importance of other interests and the judge must balance them in concreto. This signifies that the judge must start from the presumption of the unconstitutionality of offences that constitute direct limitations to freedom of expression. The judge has an active role in the appreciation of restrictions, because he has the task of preserving the channels of democratic decision-making. According to Peters, the Dutch legislator has acknowledged the preferred position of a free public debate by the insertion of a free speech clause in Articles 266 and 267 Sr. Contrarily, the criminalization of discriminatory expression in Articles 137c-e Sr does not fit into this more consequent acceptance of the primacy of a free public debate, which is why the offences should be abrogated. The preferred position of a free public debate should only yield to incitement to violence that constitutes a clear and present danger.2046

In the vision of Peters, discriminatory expression is thus only punishable, if it constitutes defamation or insult of an individual person or an incitement to violence or criminal offences for the purposes of 261, 266 and 131 Sr. In my opinion, this vision disregards the fact that discriminatory expression precisely often does not aim to target one concrete designated person in particular, but any person or all persons belonging to a group characterized by a common race or religion (para. 7.3 infra). On the other hand, discriminatory expression could still be unlawful under 6:162 BW. But if Articles 137c-e Sr are abrogated, then what will the guideline for determining the (un)lawfulness of expression be? It should certainly not only be the ‘vague criterion of its gratuitously offensive character’ (para. 5.5.3 supra).

2044 Van der Neut 1986, p. 81-82; 137.
2045 For this purpose, Peters distinguishes ‘public speech’, which forms part of a public discussion on matters of public concern, from ‘private speech’, such as commercial advertising.
Sackers argues that the Dutch legislator, with the creation of 137c Sr, originally aimed to counter anti-Semitism, but by the insertion of new discriminatory grounds has turned the offence into a 'container concept'. We therefore have lost sight of the rationale of the offence; the protection against the risks of disturbances of the public order. Likewise, Van Stokkum considers the protection of the public order to be the primary rationale of the offence. Van Kempen concludes that the scope of Articles 137c-d Sr should be limited to those situations in which a real risk to the disturbance of the public order exists.

Rosier and Janssens criticize the very broad application of 137c Sr by the judge to opinions on sensitive issues such as the Holocaust or religious convictions in order to protect the feelings of a particular group, but both authors see the value of Article 137c Sr. Rosier argues that to publicly discredit groups on the ground of their race, their negative imaging by insults, causes harm; their loss of status, and the denial of their equal dignity as individuals. Insult of minority groups hinders their healthy social functioning. Moreover, insults can lead to the casting out of minority groups and even to genocide. The criminalization of group insult contributes to the preservation of the moral climate of the society. Janssens argues that Article 137c Sr rightly criminalizes group insult, because racial insults evidently cause harm to minority groups, who must be protected by criminal law because of their vulnerable position in society. Rosier draws a parallel between the offence of group insult and the offences of defamation, libel and insult of an individual. These latter offences do not prohibit opinions on sensitive issues in order to protect the feelings of an individual. They protect citizens against the effects of misleading expression about individuals. They assure that citizens can in a good environment shape their personal convictions about another individual free from the rousing of public sentiment against his person. Likewise, the offence of racial group insult protects citizens against undesirable effects of racist expression. It assures that citizens can, in a good climate, shape an adequate impression of the status or peculiarities of an attacked group free from the rousing of public sentiment against it.

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2048 Van der Neut 1986, p. 327.
2051 Rosier 1997, p. 286; 295; 308.
2052 Janssens 1998, p. 76; 400-401.
2054 See also: Janssens 1998, p. 392-393.

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Rosier suggests limiting the scope of the offence to attacks on the human dignity of groups on the ground of their race. This not only comprises direct declarations of inferiority of particular designated groups, but every expression that unambiguously expresses the opinion that others on account of their race do not deserve the care and respect people are entitled to. The insertion of the discriminatory ground of religion would, however, be unnecessary, because in the Netherlands religious groups are not under a systematic attack by insults at their address.\(^{2056}\) Since 9/11 Muslims have, however, increasingly become the victim of negative imaging in public debate.

The Dutch Supreme Court has met this criticism in the broad application and interpretation of 137c Sr, firstly by nowadays actively balancing the application of Article 137c Sr \textit{in concreto} with the interest of a free public debate through the method of a contextual review and second by a restrictive interpretation of the discriminatory ground of religion and belief. This accommodating case law that increasingly attaches importance to the interest of freedom of expression is connected to the social developments of the past decennia. It appears to be a reaction to the climate of political correctness of the eighties and nineties, in which harsh criticism of ethnic and religious minorities and the multi-cultural society easily amounted to social and criminal convictions. After events such as 9/11 and the assassinations of Fortuyn and Van Gogh, people increasingly wear their heart on their sleeves. Criticism on social problems related to immigration, integration of minorities and the multi-cultural society less frequently amounted to social and criminal convictions (para. 2.2 \textit{supra}/ para. 6.7 \textit{infra}). This shift in case law, which is nevertheless based on precisely the same offences, has caused uncertainty about their interpretation and application.

In legal literature, no consensus exists on the ‘sense and nonsense’ of the speech offences.\(^{2057}\) This uncertainty also notably exists in cases concerning the religion of a particular group. Mixed reactions followed the proposition to simply abrogate the discriminatory ground of religion and belief in Article 137c Sr.\(^{2058}\) The legislator could meet the objections to the discriminatory ground of religion or belief by the insertion in Article 137c Sr of a free speech clause clarifying that expression that evidently solely aims to criticize convictions and practices that can reasonably be connected to a religion (para. 7.2 \textit{infra}).


\(2058\) See the contributions to: Stelling ‘De woorden ‘godsdienst of levensovertuiging’ in artikel 137c Wetboek van Strafrecht dienen geschrept te worden’, \textit{NJ} 2003-16, 18 April 2003, p. 829-834.
question however remains as to whether such a specification would fit in with the Dutch system of ‘open norms’ in general that precisely enables further judicial interpretation and balancing in concrete cases and in the system of hate speech bans in specific; other discriminatory grounds, such as sexual preference, might equally qualify for similar specifications (para. 7.1 infra).

The legislative proposals to modify Articles 137c-e Sr were rather aimed at the entire abrogation of Article 137c Sr or the insertion of a free speech clause that exempts from liability under 137c-d Sr the contributor to a public debate, which could partly meet Peter’s ‘preferred position’ of ‘public expression’ (para. 7.3 infra).

5.12 Conclusion

Article 137c Sr concerns a generic offence of group defamation/insult and criminalizes he who willingly and consciously accepts the considerable risk that his expression may impair the self-esteem or honor of a group or discredit a group, because it belongs to a particular race, religion or belief etc. With regard to Article 137c Sr, the Dutch legislator has not made a distinction between facts and value judgments. Both the insulting character of the expression and a suspect's intent to insult must be proven and can be derived from the nature, purport and context of the expression. The discriminatory ground of race is broadly interpreted; national minorities, such as the Frisians, can form a group in the sense of Article 137c Sr. Moreover, in certain contexts expression about foreigners and persons of a particular nationality can be understood as expression about persons on the ground of their race. A racial group does not have to be precisely designated; Nazi propaganda and the denial, minimization or ridiculing of the Holocaust can constitute a punishable insult of Jews on the ground of their race, even though such expression does not explicitly designate Jews. Associations with the Nazi ideology have as a ‘generally known fact’ an ‘evidently’ racist purport. Under certain circumstances, criticism of the State of Israel can equally constitute a punishable racial insult about Jews. Even expression about a mere part of a group in accordance with 137c Sr can be punishable. In Dutch legal doctrine, the criminalization of group insult is highly controversial, notably because of its broad interpretation by the judge of opinions on sensitive issues such as the Holocaust or religious convictions in order to protect the feelings of a particular group. In order to demarcate the punishable insult of a religious group from the free opinion concerning religious convictions or practices that might hurt religious feelings, the Dutch Supreme Court has however required that expression must unmistakably concern a group of people that is characterized by their religion.

If expression can be qualified as a group insult for the purposes of 137c Sr, the judge subsequently balances the application of the speech offence with the right of freedom of expression by means of the method of contextual review consisting of a ‘three-step-test’ in order to determine as to whether expression
that in the context of a public debate has lost its insulting character nevertheless is gratuitously offensive. Next to the context of a public debate, the religious or artistic context can remove the insulting character of expression. This method of a contextual review ensures that the interest is incorporated into the elements of the offence and the judge determines in concreto as to whether expression can be qualified as a group insult for the purposes of 137c Sr. The method equally affords the possibility for the judge to accommodate the Article 10 case law of the ECtHR that has developed norms concerning a free public debate. Although the judge can attach special importance to a suspect’s religious motivation and weigh it as a factor when applying the method of contextual review, in case law the regime of religious and political convictions tends to be equated. In theory the criteria for civil liability under the due-diligence norm of 6:162 BW can be less strict than the criteria for criminal liability pursuant to 137c-e Sr, but in practice no fundamental differences seem to exist between the restrictions to offensive expression set in criminal and civil case law.

6. Incitement to hatred, discrimination or violence – Article 137d Sr

The offence of racial provocation is characterized by a number of elements, being provocation and intent thereto (6.1), discrimination, hatred or violence (6.2) and the designation of persons (6.3). In the application of the offence of incitement, the Dutch judge also attaches importance to the right to freedom of expression and exercises a contextual review (6.4). The Dutch Supreme Court has, to a certain extent, clarified the limits to Nazi-propaganda (6.5) and the public debate on the immigration and integration of foreigners (6.6) and, in the famous case against Dutch politician Geert Wilders, the judge has set a number of criteria for the limits to the public debate on the immigration and integration of Muslims (6.7). The analysis results in a general conclusion about the offence of incitement to hatred, discrimination or violence in Dutch law (6.8).

6.1 Incitement and intent

Article 137d Sr criminalizes ‘any person who, publicly – orally, in writing or by means of portrayal – incites to hatred against or discrimination of persons or violence against persons or property on the ground of their race, religion or belief, gender, hetero- or homosexual orientation or physical, psychical or mental handicap’ with an imprisonment of maximum one year or a fine up to €7,800. The Article does not give a definition of ‘incitement’. The drafting history neither clarifies how one incites third parties to discrimination, hatred or violence. It is assumed that ‘to incite’ signifies ‘to urge’ someone to do

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2059 Article 137d sub 2 criminalizes as an aggravating circumstance he who structurally commits the offence as a habit or in the exercise of his profession with an imprisonment of maximum two years or a fine up to 19.500 EUR.
something.\footnote{Noyon, Langemeijer & Remmelink, Wetboek van Strafrecht, Fokkens, Article 131, Aant. 1.} Incitement is broader than to ‘provoke’ in the sense of to ‘abet’ an act, because one can incite a person for the purposes of 137d Sr, if he himself has already taken the initiative to act in the desired manner.\footnote{Noyon, Langemeijer & Remmelink, Wetboek van Strafrecht, Fokkens, Artikel 137d, Aant. 2; Dutch Supreme Court, 18 March 1895, W. 6636.} In other words, one can add fuel to the fire. It results from the case law on 137d Sr of the Dutch Supreme Court that expression that does not constitute an explicit call to act, but more implicitly incites others to discrimination, hatred or violence can equally constitute an ‘incitement’ in accordance with 137d Sr, because of the ‘associations’ such expression can evoke with a racist ideology (para. 6.5 infra).

Article 137d Sr is to a certain level akin to Article 131 Sr that criminalizes the incitement to criminal offences, but cannot be equated with it. Contrary to 131 Sr, the statutory elements of 137d Sr do not require that a suspect incites others to commit a determined, punishable act under Dutch law. Similar to 131 Sr, 137d Sr, however, merely criminalizes the utterance of expression and does not require that the incitement is followed by effect. The question as to whether the intended effect of the expression has subsequently set in, is irrelevant. The term ‘incitement’ contains the author’s intent.\footnote{Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 137 d , Aant. 7.} Similar to Article 137c Sr, even the Dutch ‘voorwaardelijk opzet’ can apply, which in the context of 137d Sr consists of willingly and consciously accepting the considerable risk that expression incites third parties to discrimination, hatred or violence.\footnote{Utrecht District Court, Crim. Ch., 26 April 2010, L/JN B18138, NJFS 2010, 231.} Hence, strictly speaking the determination of the link between expression and the consequence of the existence of discrimination, hatred or violence is not a question of causality.

In the Wilders case, the question however arose as to whether expression must be merely likely, sensible, capable or suitable to incite to discrimination, or to actually be aimed at having that effect. According to the public prosecution, the Dutch ‘voorwaardelijk opzet’ should not apply, because a speaker does not have to take into account ‘how the frustrated, the prejudiced and butheads could be expected to interpret his expression’. Expression must be actually aimed at factual discrimination.\footnote{Closing speech Public Prosecution 25 May 2011, p. 57-58; p. 66-68. The public prosecution here cites Rosier, who critically analyzes Dutch free speech doctrine in the light of a comparison with American free speech doctrine. See: Rosier 1997, p. 105. As the prosecution used Rosier’s dissertation as a primary source. one could argue that its closing speech was inspired by (a comparison with) American free speech doctrine.}

Likewise, the Amsterdam District Court considered, for example, with regard to Wilders’ film Fitna concerning the bad influence of Islam in Dutch society that neither the entire film, nor any expression or image in it, was aimed

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\footnotetext{2060}{Noyon, Langemeijer & Remmelink, Wetboek van Strafrecht, Fokkens, Article 131, Aant. 1.}
\footnotetext{2061}{Noyon, Langemeijer & Remmelink, Wetboek van Strafrecht, Fokkens, Artikel 137d, Aant. 2; Dutch Supreme Court, 18 March 1895, W. 6636.}
\footnotetext{2062}{Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 137 d , Aant. 7.}
\footnotetext{2063}{Utrecht District Court, Crim. Ch., 26 April 2010, L/JN B18138, NJFS 2010, 231.}
\footnotetext{2064}{Closing speech Public Prosecution 25 May 2011, p. 57-58; p. 66-68. The public prosecution here cites Rosier, who critically analyzes Dutch free speech doctrine in the light of a comparison with American free speech doctrine. See: Rosier 1997, p. 105. As the prosecution used Rosier’s dissertation as a primary source. one could argue that its closing speech was inspired by (a comparison with) American free speech doctrine.}
at evoking the idea that third parties should discriminate against Muslims.\textsuperscript{2065}
The prosecution and the court thus used a stricter level of intent.

6.2 Hatred, discrimination or violence

Article 137c Sr criminalizes the violation of an interest: people’s honor and good name. Article 137d Sr on the other hand criminalizes – and indicates – the threat of the violation of an interest: hatred, discrimination and violence. Where 137c Sr thus directly protects the interest in non-discrimination in the sense of insult, Article 137d Sr thus prevents discrimination in the sense of factual subordination in the exercise of fundamental rights.\textsuperscript{2066}

The term hatred is derived from ICERD. However, strictly speaking, Article 4a ICERD does not oblige states to criminalize the ‘incitement to hatred’, but the ‘dissemination of ideas based on hatred’. This obligation was incorporated in ICERD, because it was thought that the existence of racial hatred can prelude racial discrimination and racial violence.\textsuperscript{2067} The term hatred is neither defined nor criminalized in Dutch law. This is understandable, because hatred forms rather a feeling than an act. In common parlance, hatred signifies ‘a feeling of profound aversion against someone and the desire to see him decline, whether with the desire to harm him or not.’\textsuperscript{2068} In literature, incitement to hatred has been defined as ‘agitation by means of the public expression of hostility or gross contempt’.\textsuperscript{2069} A legal definition of incitement to hatred can be found in Dutch case law. In 2002, the Dutch Supreme Court rejected an appeal against the conviction of a town councilor of Dordrecht with regard to a speech held in the town hall. The speech depicted the ‘average citizen’ as an ignorant victim of the government policy on the acceptance of immigrants in the Netherlands that would lead to the predomination of foreigners of a certain ethnic descent, notably Muslims. The ‘average citizen’ had to fear not only for his chances on the labor market and the curtailing of his fundamental rights, but also for his safety and prosperity. According to the Court, these words set a group against ‘the average, native citizen’, thus the rest of the population in order to discredit it and to incite to hatred against it, which leads to an ‘intrinsic conflicting dichotomy’ in society.\textsuperscript{2070}

The question arises as to whether the criterion that expression must set groups against each other and incite to an ‘intrinsic conflicting dichotomy’ in

\begin{footnotesize}
\textsuperscript{2065} Amsterdam District Court, 23 June 2011, \textit{LJN} BQ9001, para. 4.2.
\textsuperscript{2066} Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 137 d , Aant. 1.
\textsuperscript{2068} Van Dale Groot Woordenboek van de Nederlandse Taal, 14e Editie, Utrecht: Van Dale 2010.
\textsuperscript{2069} Van Stokkum, Sackers & Wils 2006, p. 76.
\textsuperscript{2070} Dutch Supreme Court, Crim. Ch., 2 April 2002, \textit{LJN} AD8693, \textit{NJ} 2002, 421, annotation Mevis, para. 3.4.
\end{footnotesize}
society signifies that the incitement to feelings of hatred is punishable in itself, or only if the hatred is aimed at the exclusion of a group from society by the consequence of acts of discrimination or violence against it as a result of that hatred. Requiring such a link between the incitement to racial hatred and the consequence of the existence of racial discrimination and violence seems to be in line with the rationale of ICERD that the existence of racial hatred can prelude racial discrimination and racial violence.\textsuperscript{2071} More generally, the question concerns the interpretation of Article 137d Sr as a prohibition of the broader ‘spreading of ideas based on hatred and discrimination’, or of the more narrow ‘incitement to hatred or discrimination’.

This latter issue seems to be the assumption in the Wilders case, where the District Court set high requirements for incitement to hatred. It somewhat equated ‘incitement’ to hatred in accordance with 137d Sr to incitement in accordance with 131 Sr and required that expression must comprise a seditious, ‘reinforcing element’. Only two expressions met this requirement: the statement ‘There is a battle going on and we need to defend ourselves.’ had such seditious character, partly due to its strong terms. The film Fitna equally had a seditious form, because it showed images of the Netherlands as a country increasingly populated by Muslims in combination with threatening music. The mere incitement to intolerance of certain religious groups in society thus cannot be considered to be punishable under 137d Sr. Other than the prosecution, the District Court did not also require as an element of the offence that the hatred, i.e. dichotomy, to which the expression incites, can lead to severe and violent conflicts. By requiring the existence of such a threat of the disturbance of the public order, the prosecution limited the scope of the offence in a manner that would not comply with ICERD.\textsuperscript{2072}

Article 137d Sr furthermore criminalizes incitement to discrimination. The term discrimination must be interpreted according to the definition in Article 90quater Sr. Article 90quater Sr does not concern all forms of distinction, but only distinctions that are unjustified.\textsuperscript{2073} This broad definition supposes a further act of balancing in more concrete cases. It is therefore understandable that the Dutch Criminal Code does not criminalize discrimination in general, but only specific discriminatory acts (para. 4.3.3 supra). Incitement to these acts certainly falls under the scope of 137d Sr. However given the broad definition of discrimination, discussion about the signification of incitement to discrimination is possible, just as with incitement to hatred. In 1996, the Dutch Supreme Court, however, rejected an appeal against a conviction of the extreme right winged political party Centre Democrats (CD) on the ground of 137c-d Sr considering

\textsuperscript{2071} Janssens & Nieuwenhuis 2011, p. 219.
\textsuperscript{2072} Closing speech Public Prosecution 25 May 2011, p. 54.
\textsuperscript{2073} Kamerstukken I, 1990-1991, 20239, 76a, p. 2.
that Articles 137c et seq. Sr are formulated with sufficient precision in order for the citizen to attune his behavior. 2074

In light of the rationale of ICERD, it is obvious that 137d Sr would comprise of not only expression that directly incites third parties to commit concrete described discriminatory acts against a designated group, but also expression that in more general terms incites to the adoption – by the legislator – of discriminatory laws or that propagates an ideology grounded on racial discrimination. After all, ICERD precisely aimed to counter the dissemination of racist political opinions in light of the elimination of all forms of racial discrimination. Hence, in several cases in the 1970-90s against the extreme right winged political parties NVU, CP’86, CD and/or its leaders, the Dutch Supreme Court upheld a conviction on the ground of 137d Sr with regard to their political pamphlets and statements that solicited to the voters’ favor by criticizing the government policy on immigration and expressing the intention to expel guest workers or to abolish the multicultural society after gaining political power (para. 6.6 infra).

However, in relation to the Dutch Constitution, Article 137d Sr does not necessarily prohibit the incitement to law reform that – if implemented and enforced – would constitute a prohibited form of discrimination for the purposes of Article 1 of the Constitution. As a matter of fact, contrary to the French Constitution, the Dutch Constitution is ‘non-ideological’ and does not determine the fundamental principles or values of the Dutch Constitutional State. Nor does it have a provision that prohibits the abuse of rights, because this would burden the judge with political matters, which was considered as undesirable with regard to legal certainty (para. 1.2.2 supra). In other words, the Constitution does not afford any protection against anti-democratic tendencies and laws; it does not provide for a ‘lock’ on acquired, constitutional rights. Political proposals to change the Constitution, such as the proposal to abrogate Article 1 of the Dutch Constitution, or to adopt discriminatory laws are not punishable per se.

The lack of any constitutional guidance, however, precisely seems to afford the judge a broad margin for the interpretation of 137d Sr and to notably, in political issues, render its application questionable. After the political correctness was cast off in the public debate on immigration, integration of minorities and the multi-cultural society since 9/11, in the Wilders case, the District Court required that the advocating of political proposals in order to be punishable under 137d Sr more or less directly and explicitly incite to discrimination against Muslims on account of their religion (para. 6.7 infra). Therefore, only expression that incited to concrete described measures and acts of discrimination against Muslims could qualify as incitement to discrimination for the purposes of 137d Sr, such as ‘Everybody assimilates to our dominant culture. Whoever refuses to do so, will not be here in twenty years. He will be

2074 Dutch Supreme Court, Crim. Ch., 16 April 1996, NJ 1996, 527, para. 7.5.
expelled.’ and ‘We have plenty ideas. The borders closed, no more Muslims to the Netherlands, many Muslims out of the Netherlands, denaturalization of Islamic criminals (…)’.2075 This strict interpretation of 137d certainly deviates from the broad interpretation of 137d Sr in certain previous cases against NVU, CP’86 and CD in the 1970-90s (para. 6.6 infra).

Finally, Article 137d Sr criminalizes incitement to violence against persons or property. Compared with the incitement to hatred or discrimination, the connection with the disturbance of the public order is most obvious with the incitement to violence. Incitement to violence is therefore equally most akin to the offence of incitement to criminal offences or violence against the public authorities in Article 131 Sr. Incitement to violence in accordance with 137d Sr criminalizes the incitement to all kinds of violent behaviour that – if effectuated – could constitute a criminal offence. Incitement to violence in accordance with 137d Sr will therefore most likely also constitute incitement to a criminal offence for the purposes of 131 Sr. Article 131 Sr is broader in the sense that it criminalizes the incitement to all criminal offences and 137d Sr prohibits only the incitement to violence on the ground of race etc. On the other hand, Article 131 Sr is limited to the incitement to violence against the public authorities.

Although the incitement to a criminal offence for the purposes of 131 Sr concerns the incitement to a specific criminal act, in order to be punishable under 131 Sr, the expression does not in so many words have to describe that offence; it must be derived from the circumstances of the case whether it is sufficiently clear that the incited facts would constitute a criminal offence.2076 Hence more implicit forms of incitement to criminal acts can constitute the offence of 131 Sr. This does not comprise of mere criticism on public institutions and authorities or the propagation to alter the form of government as such. In 2006, in Parliament the question was raised as to whether the scope of Article 131 Sr should be broadened in order to criminalize the incitement against the democratic constitutional state, but the Minister replied that 131 Sr constituted an offence against the public order, which is why importance must be attached to the public character of expression.2077

In 2010, the Utrecht District Court convicted a suspect on the ground of 137d Sr with regard to several posters placed behind the windows of a house facing the public road. The posters depicted a drawing of a Christian cross, followed by the so-called ‘equal-sign’ (=) and a swastika; a drawing of a burning church with the text ‘burn the’; and two images of a Christian cross covered by a prohibition sign with the text ‘Bad Religion’. The court considered that the suspect had

2075 Amsterdam District Court, 23 June 2011, L/N BQ9001.
2076 Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 131, Aant. 9d.
2077 Kamerstukken II 2006/07, 30 449, nr. 5, p. 28; Kamerstukken II 2009/10, 32 123 XVIII, nr. 57, p. 3; Tekst & Commentaar, Wetboek van Strafrecht, Ten Voorde, Artikel 131, Aant. 1.
consciously accepted the considerable risk that others could interpret the images as an actual incitement to burn a Church; the suspect had stated that he was aware of the fact that in other countries Satanists had burned churches. The court therefore rejected the defence that the posters formed symbolic expression that merely criticized the church as an institution.  

The Hofstadgroep case concerned a group of Muslim fundamentalists that were accused of constituting a terrorist cell that propagated the violent jihad during meetings and distributed radical fundamentalist writings, mostly written by group member Mohammed Bouyeri – the murderer of Van Gogh. In 2006, the members were prosecuted for participation in a criminal organization (140-140a Sr) that – amongst others – had the aim to incite to criminal offences and violence against the public authorities for the purposes of 131-132 Sr and to incite to hatred and violence against disbelievers pursuant to 137d Sr.  

In 2008, The Hague Court of Appeal considered that adhering to a radical fundamentalist ideology does not necessarily lead to the use of violence. One is free to proclaim the opinion that only God should be acknowledged as the sovereign power, democracy is incompatible with Islam and must therefore be rejected and replaced by a system founded on the Sharia. It therefore found that the writings that pointed out the obligation to hate disbelievers and to show hostility towards them or the obligation of true Muslims to distance themselves from them were not punishable. Contrarily, the writings that glorified or incited to the jihad were punishable under 137d or 131 Sr. The Hague Court thus strictly distinguished lawful opinions that reject the constitutional state and democracy, but do not contain a threat of violence, from the punishable advocacy of a violent subversion of the constitutional state and democracy that constitutes a real risk.  

According to the Supreme Court, The Hague Court had wrongly considered that ‘disbelievers’ did not constitute a protected group under 137d Sr (para. 6.3 infra). After referral, the Amsterdam Court therefore considered that pointing out the obligation to show hostility towards disbelievers, to loathe and dislike them and to fight them, dead or alive, equally constituted an

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2078 Utrecht District Court, Crim. Ch., 26 April 2010, LJN BM8138, NJFS 2010, 231.
2079 The case started before the Rotterdam District Court: Rotterdam District Court, Crim. Ch., 10 March 2006, LJN AV5108, 10/000322-04;10/000328-04;10/000396-04;10/000393-04;1000325-04;10/000323-04;10/000395-04.
2082 For a thorough analysis of the decision of The Hague Court of Appeal, see: Van Noorloos, M., De ‘Hofstadgroep’ voor het Haagse hof: over de vrijheid van radicale uitingen in het publieke debat, DD 2008, 34, p. 475-498; Noorloos 2011, p. 244-246.
2083 Dutch Supreme Court, Crim. Ch., 2 February 2010, BKS172/ 5174 / 5175 / 5182 / 5189 / 5193 / 5196.
incitement to hatred and violence against disbelievers punishable under 137d Sr.\textsuperscript{2084}

6.3 Designation of persons

Article 137d Sr criminalizes incitement to hatred or discrimination against ‘people’ or to violence against ‘persons’ or their goods. Unlike Article 137c Sr, 137d Sr thus does not refer to a ‘group’. The question arises as to whether Article 137d, similar to 137c Sr, only protects groups or also individual persons, who belong to a particular group characterized by a common race, religion etc. Noyon, Langemeijer & Remmelink argue that the term ‘persons’ signifies the plural and not also the singular, because of the connection of Article 137d Sr with previous Article 137c Sr. In other words, if the expression aims at one person in particular, Article 137d Sr does not apply, except when ‘the hatred or discrimination reflect on the group to which the individual belongs’.\textsuperscript{2085} Likewise, Janssens & Nieuwenhuis argue that if expression names and is directed against one person in particular, it cannot be punishable under 137d Sr, but can be punishable under Article 131 or 285 Sr. But if such expression has the purport to incite to hatred, discrimination and violence against several persons, Article 137d Sr applies.\textsuperscript{2086} Contrarily, Mevis emphasizes the different characteristics of 137c and d Sr. If expression is not ‘about a group’, it is not punishable under 137c Sr. Other than with 137c Sr, 137d Sr concerns the possible effect of the incitement on individual persons and not to the effect (of insult) on a group qua group. The plural in 137d Sr is therefore irrelevant. The incitement must precisely threaten people individually, not collectively, even though the incitement must origin in negative feelings with regard to the characteristics that unite these people (race, religion etc.).\textsuperscript{2087} This latter vision fits in with the situation in France, where the French equivalent of 137d Sr criminalizes incitement to hatred, discrimination or violence against ‘a person or a group’, similar to the French offences of racial defamation and insult.

Expression must incite to hatred, discrimination or violence against a group – amongst others – ‘on the ground of its race’. With regard to 137d Sr, the judge uses the same broad interpretation of the term ‘race’ as with 137c Sr, which comprises national and ethnic background, skin colour and origin, but not nationality in the sense of national citizenship. Again, the discriminatory

\textsuperscript{2084} Amsterdam Court of Appeal 17 December 2010, L/N BO07690 / 8032 / 9014 / 9015 / 9016 / 9017 / 9018. The conviction of the Amsterdam Court became final after the Dutch Supreme Court rejected an appeal against it in 2012. See:Dutch Supreme Court, crim. Ch., 3 July 2012, L/N BW5121/ 5132 / 5136 / 5161 / 5178, NS 2012, 296, RcvW 2012, 1021.
\textsuperscript{2085} Noyon, Langemeijer & Remmelink, Wetboek van Strafrecht, Fokkens, Artikel 137d, Aant. 6.; Brants, Kool & Ringnalda 2007, p. 72-73.
\textsuperscript{2086} Janssens & Nieuwenhuis 2011, p. 217.
\textsuperscript{2087} Annotation Mevis, para. 15 at: Amsterdam District Court, 23 June 2011, L/N BQ9001, NJ 2012, 370.

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ground of race is broadly interpreted; national minorities, such as the Friesians, and cultural minorities can form a group in the sense of Article 137d Sr. Moreover, in certain contexts expression about foreigners and persons of a particular nationality can be understood as expression about persons on the ground of their race. Unlike in France, the Dutch Supreme Court does not as a principle use different criteria for the identification of a racial group being the victim of 137d or 137c Sr. Similar to 137c Sr, a racial group does not have to be precisely designated and even expression about part of a group in the sense of 137d Sr can be punishable.

Other than for 137c Sr, with regard to 137d Sr the Dutch Supreme Court has not decided that in order to be punishable an expression must unmistakably concern a group of people characterized by their religion. This question was raised in the Wilders case. The District Court applied the distinction made by the Supreme Court between a religion and its adherents with regard to 137c Sr to 137d Sr and found that most of Wilders’ expression concerned Islam and not Muslims.2088 However, the court interpreted the scope of the discriminatory ground very restrictively, because even the attribution of the fact that one out of five Moroccan youngsters are registered as a suspect by the police to their religion and culture, because Islam is a violent religion and the problems thus originate in the community itself, constituted pure criticism of Islam.

One could object that this expression according to its wording clearly concerns the group of Moroccans on the basis of their religion. Even if it might be true that Moroccans are overrepresented in crime rates, a problem that must be possible to freely discuss, the imputation of an inherent criminal nature to them on the basis of their religion constitutes the drawing of negative conclusions about them on the basis of their religion; this is precisely what 137c-d Sr according to the drafting history prohibits. Does such a negative value judgment need the demonstration of a sufficient factual basis? It seems that Article 137c Sr must be distinguished from 137d Sr; such a defence seems relevant with regard to insult or defamation of a group rather than with regard to incitement to hatred, discrimination and violence against persons. Moreover, proving ‘the true tenets of a religion’ for this purpose seems to be impossible (para. 6.7 infra). In previous cases, courts had convicted suspects on the ground of 137d Sr with regard to similar expression, in which Muslims were depicted as criminal, such as ‘[i]f the Muslims had not come here, or in any event would not reproduce themselves as much as they do, the Netherlands would not be what it is now: a criminal mess.’2089

2089 Amsterdam Court of Appeal, 11 September 2003, LJN AK8302. See for a similar expression concerning race: The Hague District Court, 12 May 2011, LJN BQ4301, concerning the phrase ‘If you look at it objectively, Moroccans and people from the Antilles cause most of the trouble. These are the most criminal races.’
In his annotation to the Wilders case, Mevis argues that the distinction made by the Supreme Court between a religion and its adherents with regard to 137c Sr does not apply to 137d Sr, because 137d Sr concerns incitements that are threatening to individual persons that share a common race or religion – comprising of indirect incitements via expression about a religion – and does not concern insults about a group qua group. Likewise, Vermeulen argues that the distinction made by the Supreme Court between a religion and its adherents with regard to 137c Sr should not be applied with regard to 137d/e Sr. While in principle insulting criticism about a religion can at the same time respect the dignity of its adherents, this does not apply to the incitement to hatred and discrimination against persons. As a result of the nature of the matter, incitement to hatred, discrimination or violence against the tenets of a religion also targets its adherents, precisely because they will be the victims of the effectuation of such incitements.

In my opinion, in principle a distinction can be made between, on the one hand expression that pictures religious convictions and practices as entirely reprehensible and hateful, and on the other hand expression about persons. It would be odd, if the Supreme Court decided that the legislator had intended for 137c Sr to leave sufficient room for harsh criticism, but that such criticism could fall under the scope of 137d Sr. However, it must still be further clarified when practices and behaviour of a religious group can fall under the discriminatory ground of religion. Eventually the determinant factor is the question of whether the expression incites to hatred or discrimination.

Another question is whether Article 137d Sr merely protects minorities or also majorities of a particular race or religion against incitement to hatred, discrimination or violence. This question arose in the Hofstadgroep case. According to the Hague Court of Appeal, Article 137d Sr merely protects certain minority groups on the ground of religion or belief, because of their vulnerability. ‘Disbelievers’ could hardly be considered as a vulnerable group. The Supreme Court annulled this decision, because it neither resulted from the wording of the offence nor its drafting history that Article 137d Sr was confined to protect vulnerable minorities. Indeed, the provision protects, for example, heterosexuals next to homosexuals. Religious majorities such as disbelievers can thus also constitute a group for the purposes of 137d Sr.

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2090 Annotation Mevis, para. 15 at: Amsterdam District Court, 23 June 2011, L/N BQ9001, NJ 2012, 370.
2091 Likewise, incitement to hatred against and fight God or Allah could therefore be interpreted as incitement to its believers and 137d could take over the function of the offence of blasphemy in 147. Vermeulen 2011, p. 663-664.
2092 Janssen & Nieuwenhuis 2012, p. 188.
2094 Dutch Supreme Court, Crim. Ch., 2 February 2010, L/N BK5193, para. 5.3.
2095 Amsterdam Court of Appeal 17 December 2010, L/N BO8032, para. 3.2.2.
6.4 Contextual review

Similarly to 137c Sr, for the determination of the punishability of expression under Article 137d Sr, the context and circumstances in which expression is uttered is of importance. This naturally applies to its direct context. Expression that in itself is not punishable can nevertheless be qualified as incitement to discrimination. For example, in 1999 the Dutch Supreme Court endorsed the condemnation on the ground of 137d Sr of Dutch politician Janmaat, leader of the former extreme right winged party Centre Democrats (CD), with regard to expression that was not punishable in itself but in the context of expressions of others nevertheless incited to discrimination (para. 6.6 infra). Contrarily, the direct context of expression can also remove its punishable character. For example, in the Wilders case, the court considered that although one statement by Wilder together with his film Fitna that criticized Islam and gave a negative image of Muslims constituted an incitement to hatred regarded in isolation. These expressions were nevertheless not punishable because Wilders had repeatedly stated that Islam should be rejected and not Muslims.

With regard to 137d Sr, the judge can attach importance to a suspect’s freedom of expression by setting strict requirements to the elements of the offence of 137d Sr. If expression can be qualified as an incitement for the purposes of 137d Sr, can the judge subsequently balance the application of the speech offence with the right of freedom of expression? Can the context of a public or political debate remove the punishable character of expression that incites to hatred, discrimination or violence in the sense of 137d Sr? In other words, can the method of contextual review established by the Supreme Court for 137c Sr be applied to 137d Sr by analogy?

Although the Dutch Supreme Court with regard to 137d Sr attaches importance to the context of expression, the Court has not explicitly developed a similar three-step-test. The introduction of such a test for 137d Sr is not self-evident. It is recalled that in 1971 the Dutch Government thought that it would go against the spirit of ICERD to introduce a clause that excluded from liability under 137c-d Sr expression aimed at giving an opinion on matters of public interest that is not gratuitously offensive. It is difficult to imagine that once expression has been found to incite to hatred, discrimination or violence, the context of a public debate can nevertheless justify such a threat. Notably, it is difficult to imagine that the incitement to violence must be tolerated as a side effect of a public debate. This applies to a lesser extent to the incitement to hatred or discrimination. Furthermore, the criterion that expression should not be gratuitously offensive seems unsuitable with regard to 137d Sr, because 137d

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2097 Amsterdam District Court, 23 June 2011, LdN BQ9001, para. 4.3.1.
2098 Janssens & Nieuwenhuis 2011, p. 208.
2099 Nieuwenhuis & Janssen 2011, p. 100.
Sr does not criminalize racial insults that are offensive but prevents the existence of factual discrimination and violence. The weight due to freedom of expression thus can depend on whether expression incites to either hatred, or discrimination or violence.

It is striking that the method of contextual review was explicitly applied in the Hofstadgroep case by the Hague Court of Appeal with regard to fundamentalist writings that incited to violence and criminal offences. However, the Hague Court considered that the suspect had explicitly stated that he did not have the intention to contribute to or to start any public debate, which is why ‘the expression was not of importance for the suspect of a public debate.’

Subsequently, the Court nevertheless applied the criteria the ECHR had set in the Gündüz case with regard to similar expression against the democratic order uttered in public debate (requirement that the expression incited to violence and contained an actual risk of violence).

In the Wilders case, the District Court for the first time explicitly applied the method of contextual review to 137d Sr with regard to incitement to discrimination. The four expressions that in first instance qualified as incitement to discrimination all lost their punishable character, because they were uttered in the context of the free political and public debate concerning the multicultural society, immigration and Islam. Subsequently, the court introduced a new term comparable to the term ‘gratuitously offensive’ for 137c Sr: despite its broader context of a public debate, expression is nevertheless punishable under 137d Sr, if it is ‘exceeding’. The court, however, did not apply this final proportionality test to all expressions and did not clarify why Wilders’ expressions were finally not ‘exceeding’ nor did it provide any further explanation of the term. It rather seemed to trade off the discriminatory character of Wilders’ expression with the interest of freedom of expression.

6.5 Nazi propaganda: the Combat 18 case

In a set of established case law, the Dutch Supreme Court has not only consistently ruled that the propagation of racist ideologies through the distribution of Nazi-symbols constitutes a punishable insult of Jews for the purposes of Article 137c/e Sr (para. 5.5.1 supra), but also that it constitutes a punishable form of incitement to hatred and discrimination against Jews on the ground of their race in accordance with 137d/e Sr. Such expression did not

2101 Amsterdam District Court, 23 June 2011, L/JN BQ9001, para. 3.2.1.
2102 Dutch Supreme Court, 6 December 1983, NJ 1984, 601, annotation Mulder; Dutch Supreme Court, 11 March 1986, NJ 1987, 462, annotation Mulder; Dutch Supreme Court, 22 March1988, RR 1995, p. 297, annotation Pattipawae; Dutch Supreme Court, 21
more or less directly incite third parties to a well-circumscribed act or feeling unmistakably aimed at the Jewish population, but the expression did incite to hatred against that group because of the associations it evoked with Nazism, the Second World War and the Holocaust. Here, it was the historical context that influenced the punishable character of expression; the context of Nazism does not remove but rather attributes a punishable character to expression that might not evidently have a racist purport.

The Combat 18 case of 2010 fits with this line of case law. The case revolved around the question of whether several t-shirts with the text ‘Combat 18’, ‘whatever it takes’ and ‘support’ were punishable under 137e Sr. Combat 18 is the name of a racist movement in England that originates from the extreme right winged group Blood & Honour. The numbers refer to the first and eighth letter of the alphabet, A and H, the initials of Adolf Hitler. The Hague Court of Appeal acquitted the suspect because the expression regarded ‘in isolation’ could not be considered as an incitement to hatred and discrimination. The Supreme Court annulled the acquittal of the Hague Court, because the meaning of the expression had to be determined ‘in the light of the circumstances of the case and the possible associations it evokes’.2103

The question arises as to how the Combat 18 case, according to which ‘associative expression’ can be punishable, relates to the Cancer called Islam case, according to which expression must ‘unmistakably concern a particular group’. In my opinion, the difference between the two cases resides in the discriminatory ground of race and religion respectively. Suggestive criticism of a religion should not be too easily equated with racist propaganda that evokes associations with Nazism, the Second World War or the Holocaust. In principle, expression about Islam and islamization lacks an association with such a racist ideology. When such associations are too easily attributed to expression, this has a chilling effect on freedom of expression.

More generally, the question arises as to which differences exist between the discriminatory grounds of race and religion. It is understandable that ICERD obliges the criminalization of the spreading of ideas based on racial superiority; expression about a particular race per definition constitutes expression about the persons belonging to that race to the extent that a speaker considers race an unalterable characteristic. The spreading of ideas based on the superiority of a particular religion should on the other hand fall under the scope of freedom of religion; such expression can have the aim of converting adherents to another religion. More generally, one can abandon one’s religion.2104

2103 Dutch Supreme Court, crim. ch., 23 November 2010, L/N BM9135.
6.6 The political discussion about immigration: the cases against the NVU, CP’86 and CD

On several occasions, the Dutch Supreme Court has upheld a conviction on the ground of 137d/e Sr (and/or 137c) with regard to criticism on the government policy on immigration and on foreigners uttered by political parties and/or its leaders. In several cases the question brought before the Supreme Court concerned the question of whether expression about foreigners and non-Dutch residents referred to their nationality in the sense of citizenship and therefore could not be punishable under 137c-e Sr or to their national or ethnic descent and therefore could be punishable under 137c-e Sr (para. 5.4 supra).\footnote{Wolttjer considers this a question of whether a \textit{direct distinction} on the ground of \textit{nationality} can at the same time constitute an \textit{indirect distinction} on the ground of \textit{race}. See: Wolttjer 2002, p. 389.} In 1995, the Dutch Supreme Court upheld a conviction for group insult and incitement to racial hatred or discrimination on the ground of 137e Sr with regard to 154 folders by CP’86 about a ‘multiracial hotchpot’. According to the Court, the term ‘multiracial hotchpot’ regarded in the context of the other words used in the folders such as ‘illegal foreigners’, ‘asylum frauds’ and ‘uncontrollable crime rates’ was aimed at the group of ethnic minorities residing in the Netherlands.\footnote{Dutch Supreme Court, crim. Ch., 2 May 1995, NJ 1995, 621, para. 5.3.} Likewise, in 1996, the Dutch Supreme Court annulled an acquittal for group insult and incitement to racial hatred or discrimination on the ground of 137c-d Sr with regard to several statements made by the leader and members of the CD during television shows that had the following purport: the Dutch society and population had to be protected against the youth gangs of, mixed race marriages with and affirmative action to the benefit of ‘foreigners, minorities and asylum seekers’. According to the Court, liability under 137c-e Sr does not depend on the question of whether the expression about these latter groups explicitly refers to their race, but on the nature and context of the expression.\footnote{Dutch Supreme Court, crim. ch., 16 April 1996, NJ 1996, 527, para. 6.4.}

In other cases the central question brought before the Supreme Court concerned the question of whether 137d Sr is comprised of only direct incitements of third parties to hate or discriminate a particular group, or whether it also encompasses attempts to gain votes in order to create discriminatory laws. In 1978, the Dutch Supreme Court endorsed a conviction for incitement to discrimination on the ground of 137e Sr with regard to electoral pamphlets by the NVU comprising the phrase ‘As soon as the NVU has obtained the political power in our country, it will restore order, starting by expelling all people from Surinamerie and Turkey and other so-called guest workers from the Netherlands.’ The Court rejected the plea made by the NVU that the party only wanted to realize the desired distinction, if that was possible.

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in a lawful manner and therefore did not incite to discrimination for the purposes of 137e and 90quater Sr.\textsuperscript{2108}

Likewise, in 1999, the Dutch Supreme Court confirmed the conviction on the ground of 137d Sr of politician Janmaat, leader of the CD with regard to his statement ‘As soon as we get the possibility and the power, we abolish the multicultural society.’ uttered during a demonstration. According to the Court of Appeal, a ‘multicultural society’ consists of different communities, amongst others ethnic minorities’. The expression thus concerned ethnic, thus racial groups, even though it did not explicitly refer to them. The expression was not punishable in itself, but had to be interpreted in the context of exclamations by other participants in the demonstration, such as ‘The Netherlands for the Dutch’, ‘Our people first’ and ‘Full is full’. In this context, Janmaat’s statement could be not be considered in any other way than aiming to remove ethnic minorities from the Dutch society. The expressions taken as a whole had the purport to incite to hatred and discrimination of ethnic minorities. In casu, Janmaat had not addressed himself to the legislator and simply criticized the government. Janmaat had no parliamentary immunity, because this only applied to expression made in Parliament. He had to act with reserve and caution, because of the influence of public opinion and the bad language generally connected with demonstrations. Co-citizens are entitled to protection against the rousing of public sentiment that impairs their human dignity on the ground of Articles 137c-e Sr.\textsuperscript{2109}

In his annotation, Hart objects that multiculturalism is often defined as the co-existence of multiple value systems that are based on multiple ethnic and religious traditions. The fight against such diversity on a normative level therefore does not necessarily form a fight against the existence of ethnic minorities in a society.\textsuperscript{2110} Indeed, it seems unlikely that nowadays advocating the abolishment of the multicultural society as such will be punishable under one of the offences of 137c-e Sr. What is more, the present minority policy of the government appears to be precisely aimed at realizing this (para. 2.2 supra). This does not signify that the Janmaat case of 1999 could be revised, because ‘at that time the Court of Appeal was unaware of the fact that the expressed desire was shared by many classes of society.’ In 2003, the Dutch Supreme Court therefore rejected this request by the widow of Janmaat.\textsuperscript{2111}

\textsuperscript{2108} Dutch Supreme Court, crim. ch., 14 March 1978, \textit{LJN} AC3463, \textit{NJ} 1978, 664.
\textsuperscript{2109} Dutch Supreme Court, Crim. Ch., 18 May 1999, \textit{NJ} 1999, 634, annotation ‘t Hart.
\textsuperscript{2110} Annotation ‘t Hart at: Dutch Supreme Court, Crim. Ch., 18 May 1999, \textit{NJ} 1999, 634.
\textsuperscript{2111} Dutch Supreme Court, crim. ch., 6 May 2003, \textit{LJN} AF7895.
6.7 The Wilders case: a controversial acquittal for hate speech uttered in the context of a political and public debate about Islam, ‘islamization’ and Muslim-immigration

It results from the previous paragraphs that in the Wilders case many central questions about the interpretation and application of 137d Sr were raised and on several points the decision of the District Court deviated from previous case law. The Wilders case encompassed around five years (2007-2011) and formed a significant media-event.\(^{2112}\) The case concerned several expressions concerning Islam, islamization and Muslims uttered by politician Geert Wilders, leader of the popular nationalist Freedom Party (PVV), in interviews and writings in the media and his film Fitna, which was published on the Internet.

After receiving many complaints about Wilders’ expression starting 2007, the public prosecution dismissed the case in 2008, because in the vision of the public prosecution Wilders’ expression was not punishable.\(^{2113}\) Eight affected parties appealed this decision before the Amsterdam Court of Appeal in a so-called Article 12 Sv-procedure (para. 8.2.1 infra). In 2009, the Amsterdam Court ordered the public prosecution to prosecute Wilders after all for incitement to hatred and discrimination and group insult.\(^{2114}\) The public prosecution however persisted in its view that Wilders could not be held liable under 137c-d Sr and requested a complete acquittal.\(^{2115}\) The affected parties, comprising of many anti-racism, Muslim and other minority associations, constituted as a civil party. Their position in the trial will be discussed in a following paragraph (para. 8.2.2 infra). Finally, the Amsterdam District Court acquitted Wilders with regard to all facts charged and rejected the civil claims in 2011.\(^{2116}\)

\(^{2112}\) Most of the case files were published on the Internet and the audiences before the court were broadcasted live on national television. The case proceeded turbulently, was extensively reported in the media and the following public discussion notably focussed on the (im)partiality of the judge in a ‘political trial’ and the proof concerning ‘the truth about Islam’. The public discussion focussed on a diner, during which a judge of the Amsterdam Court of Appeal that had ordered Wilders’ prosecution had justified this court order before an expert witness on Islam on the side of the defence, who was equally present at the diner. The Amsterdam District Court had instructed the investigating judge to hear this expert in the Wilders-case about the core tenets of Islam; in this manner Wilders tried to prove his innocence.

\(^{2113}\) Letter of dismissal of the complaints against Wilders, 28 June 2008, Public Prosecution, unpublished.


\(^{2115}\) Closing speeches of 12 and 15 October 2010, Wilders-case, no. 13/425046-09, Public Prosecutors P. Velleman and B. van Roesssel; Closing speech 25 May 2011, Wilders-case, no. 13/425046-09, Public Prosecutors P. Velleman and B. van Roesssel.

The different instances strongly disagreed on the exact rationale of 137c-d Sr and the values that these offences aim to protect. According to the public prosecution, the legislator of 1971 aimed to prevent negative imaging of certain groups with third parties, because these third parties could put ideas into action and start to discriminate and neglect those groups. 137c-d Sr was inserted into the section concerning offences against the public order not without reason: they aimed to protect 'first the public order, second the honour and good name of certain groups and third – and only indirect – the individual persons forming part of these groups'. In fact, here the public prosecution fell back on a consideration that originated in the drafting history of the former offences of insult of the public authorities, institutions and groups of the population (137a-d), which were indeed primarily introduced in the 1930s to prevent the disturbance of the peace.

Contrarily, in the eyes of the Amsterdam Court of Appeal, the offences were precisely aimed at preventing the existence of discriminatory expression in itself because of its negative effect on the individual persons forming part of the group targeted in the expression, not on third parties. Wilders' expression raised such a barrier in the public debate that in effect Muslims were excluded from participating in that debate, solely due to their religion. He who excludes another person from the public debate also places him outside the democratic constitutional order. Hence, while the prosecution opined that opinions are solely punishable on account of their close consecutive connection with possible subsequent actions as an effectuation of those opinions, because only these subsequent actions could violate the public order, The Amsterdam Court of Appeal considered certain expression uttered in public debate thus qualitate qua as an actual disturbance of the public order.

The different interpretation by the instances of 137d Sr as a prohibition of the more narrow notion of 'incitement to hatred and discrimination' or of the broader notion of 'spreading hatred and discrimination' clearly shows from the discussion about extent to which the different expressions by Wilders must be regarded in their interrelationship in order to determine liability under 137d Sr. The Court of Appeal had considered that Wilders' expressions uttered on different data, regarded in their interrelationship, together were suitable to spread hatred and incite to discrimination. The prosecution objected that it was principally incorrect to lift certain expression from its direct textual context in order to construe a connection with expression from another publication. The juridical relevant context of one expression was confined to one book, interview or gathering: the mere repetition of an expression that does not incite to hatred

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2117 Closing speech Public Prosecution 25 May 2011, p. 15-18; 34-36.
2118 Amsterdam Court of Appeal 21 January 2009, L/N BH0496, para. 13.2.
2119 Amsterdam Court of Appeal, 21 January 2009, L/N BH0496, para. 12.1.2.
or discrimination in this context cannot render it punishable after all.2120 The Amsterdam District Court chose a middle ground and considered the context of all expression by Wilders included in the case files partly relevant to the question whether Wilders’ separate expressions incite to hatred and discrimination.2121 Wilders’ expressions thus had to be interpreted in the light of his political discourse on Islam and Muslim-immigration.

The Amsterdam Court of Appeal had found that Wilders’ expressions constituted a punishable form of incitement to hatred, not only on the basis of their content, but also because of their presentation in a peremptory, militant style, characterized by biased and strongly generalizing formulations with a radical purport, a constant repetition and increasing fervour. They thus did not lack a seditious element. In Fitna, the selection of images and information contained the barely concealed suggestion that Islam must be equated with Muslim extremism and that a connection existed between the growing number of Muslims in the Netherlands and the increasing crime rates in general.2122

As discussed in previous paragraphs, the District Court on the other hand, on the whole following the analysis by the prosecution, set strict requirements to the elements of 137d Sr. It required that expression must unmistakably concern a group on the basis of its religion and thus strictly distinguished criticism of Islam from criticism of Muslims. With regard to incitement to hatred it required that expression must include a seditious, ‘reinforcing element’ and thereby brought 137d Sr close to 131 Sr. With regard to incitement to discrimination it required that expression more or less directly and explicitly incite to concrete forms of discrimination. Most of Wilders’ expressions did not meet these requirements and their punishability failed for not meeting the elements of the offence. This equally applied to the phrase ‘We must stop the tsunami of the islamization.’ The fact that it was preceded by ‘I’m talking about what comes to the Netherlands and breeds here. If you look at the statistics and its development (...) Muslims will migrate from cities to the countryside.’ did not alter this.

Subsequently, with regard to expression that did qualify as incitement to discrimination for the purposes of 137d Sr, the District Court applied the method of contextual review and placed Wilders’ expression in the broader context of the public debate on Islam, immigration and the multicultural society.2123 At this stage the court thus reviewed the proportional application of the offence in the light of freedom of expression and the circumstances of the case. Following the example of the ‘context-decisions’ of the Supreme Court, the court

2120 Closing speech Public Prosecution 25 May 2011, p. 43-45; 48-49.
2121 Amsterdam District Court, 23 June 2011, L/N BQ9001, para. 4.3.1.
2122 Amsterdam Court of Appeal, 21 January 2009, L/N BH0496, para. 12.1.2.
2123 Amsterdam District Court, 23 June 2011, L/N BQ9001, para. 3.2.1.
gave a very ‘subjective interpretation’ of Wilders’ expression and attached much importance to the perspective of Wilders, who considers his expression necessary to expose social problems. The question arises of whether this manner of attaching importance to freedom of expression does not amount to the requirement of a very high standard for a speaker’s intent.

The Court considered Wilders’ expression as criticism of government policy or as political proposals that he hopes to realize after he has gained political power in a democratic manner. Concrete political measures that – if effectuated – could violate a statutory prohibition of discrimination are thus not punishable per se. On this point, the decision of the court is difficult to reconcile with previous case law. In her annotation, Noorloos argues that the court, in its interpretation of incitement to discrimination, abandoned the ‘militant democracy’ idea that would spring from this previous case law.\(^{2124}\) Finally, the court introduced a new term comparable to the term ‘gratuitously offensive’ for 137c Sr: despite its broader context of a public debate, expression is nevertheless punishable under 137d Sr, if it is ‘exceeding’.

Likewise, the prosecution – in my opinion wrongly (para. 6.2 supra) – argued that the term discrimination in Article 137d Sr comprised justified forms of making a distinction; incitement to justified distinctions should however not be punishable. In order to correct this, the judge had to make a further balance with the freedom of expression. However, according to the prosecution, the judge did not have to determine whether the proposed measures – if effectuated – would constitute a prohibited form of discrimination, but only whether they were not ‘excessive’ in relation to the underlying social problem.\(^{2125}\)

Both the prosecution and the court thus seemed reluctant to give any appreciation of the discriminatory content of the expression. But what is the standard for determining whether expression is ‘exceeding’ or ‘excessive’? One could think of the possible disturbance of the public order or the risk of violent conflicts. In my opinion, this would signify a shift from giving an appreciation of the discriminatory content of the expression to a kind of ‘clear-and-present-danger-test’. This would require to not only – as the court and the prosecution did – taking into account the direct textual context and the context of a public debate, but also to take into account the broader social context, in which discrimination and violence against a particular group exists to a greater or lesser extent.

In his annotation, Mevis remarks that the District Court first found the elements ‘incitement’ against ‘people’ a useful handle to attribute a specific signification to Article 137d Sr, but subsequently softened these criteria with the review in the context of the public debate. However, as this review did not draw a clear line between lawful and unlawful expression, the court should have


\(^{2125}\) Closing speech Public Prosecution 25 May 2011, p. 61-63.
better determined punishability under 137d Sr on the basis of the element of ‘incitement’ that forms the core of 137d Sr and a useful handle for its interpretation. This would also clearly distinguish the group insult of 137c Sr from the incitement to hatred, discrimination or violence of 137d Sr, a distinction to which the Supreme Court had hinted in its Cancer called Islam decision.\textsuperscript{2126} From this perspective it results that incitements to hatred, discrimination or violence – other than group insults – cannot be tolerated even in the context of a public debate.

Another difference between 137c and d Sr concerns the demonstration of the existence of a sufficient factual basis for negative value judgments. At Wilders’ request, the District Court had instructed the examining judge to hear certain expert-witnesses about the ‘true core of Islam’\textsuperscript{2127}. In this manner, Wilders tried to prove his innocence. It is striking that the District Court did not finally include Wilders’ furnishing of proof by means of testimonies about Islam in its motivation. Other than for insult and defamation of a group for the purposes of 137c Sr, in principle the proof of the truth of certain statements does not seem to be a legitimate justification in the field of incitement to hatred, discrimination or violence against persons in the sense of 137d Sr. What matters is whether or not expression constitutes an ‘incitement’. Moreover, proving ‘the true tenets of a religion’ seems to be simply impossible.

The instances strongly disagreed on the question whether Wilders’ expression, notably Fitna, could be qualified as ‘associative expression’ in relation to – amongst others – the Combat 18 case. The Amsterdam Court of Appeal had found that the association in Wilders’ expression of Islam with Muslims made it not only expression about Muslims, but also a punishable disguised form of incitement to hatred and discrimination. Contrarily, the public prosecution held that ‘associative expression’ must refer to something that exists outside the expression and the term should not apply to suggestive (visual) language within expression. The Combat 18 case therefore did not apply to Wilders’ expression.\textsuperscript{2128} However, the District Court considered that Wilders’ expression must not be regarded in isolation and that the associations it evoked formed a relevant context with regard to the question of whether it incited to hatred.\textsuperscript{2129}

In my opinion, this case law concerning racist propaganda by means of Nazi symbols that evoke associations with Nazism, the Second World War or

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\textsuperscript{2126} Annotation Mevis, para. 23-24, at: Amsterdam District Court, 23 June 2011, L/N BQ9001.
\textsuperscript{2127} Amsterdam District Court, 3 February 2010, L/N BL1868.
\textsuperscript{2128} Closing speech Public Prosecution 25 May 2011, p. 46-49.
\textsuperscript{2129} Unfortunately, the District Court subsequently omitted to take this context into account in its motivation of its appreciation of the expressions, which is why the exact significance of the reference by the court to the Combat 18-case remains unclear. See: Amsterdam District Court, 23 June 2011, L/N BQ9001, para. 4.3.1.
\end{flushright}
the Holocaust should undoubtedly not be applicable to the Wilders case that for a large part concerned suggestive criticism of a religion. In principle, Wilders’ expression about Islam and islamization lacks an association with such a racist ideology, or at least has a different character. Nazi symbols evoke associations with a racist ideology that forms an actual threat to Jews. In racist propaganda, by means of Nazi symbols Jews are perceived from a Nazi-perspective. Wilders on the other hand compares two books, the Quran and Mein Kampf, and thereby suggests the existence of a resemblance between Muslims and Nazis. This association of Islam with Nazism does not contain an inherent threat to Muslims, because they are not perceived from a Nazi-perspective.

The District Court limited its reference to the Article 10-case law of the ECtHR to the consideration that freedom of expression equally applies to opinions that ‘offend, shock or disturb’. It did not delve into the question – central in recent European case law – of whether a politician has a special responsibility to prevent his expression from inciting to religious intolerance and religious hatred and discrimination. This raises surprise, because disregarding the European case law deviates from the general friendly attitude of Dutch law to the ECHR and the judicial interpretation of the speech offences in the light of Article 10 ECHR in specific.

Moreover, the interpretation of the case law of the ECtHR on so-called ‘hate speech’ and its application to the Wilders case formed a central controversy in the case. In its advice to the public prosecution, Lawson concluded from international law and the case law of ECtHR that Wilders had to be prosecuted. According to cases such as Souls, Féret and Le Pen, a politician would have a special responsibility that obliges him to exercise more restraint in public debate. The Amsterdam Court of Appeal had explicitly considered that Wilders’ appeal to freedom of expression constituted an abuse of right in the light of the case law of the ECtHR. Contrarily, the prosecution and the District Court found the case law of the ECtHR of mere secondary importance and emphasized the special freedom of a politician, but did not specify whether this concerned the political debate in general or the position of the politician within this debate. The District Court did not refer to the concept of abuse of right, although the proportionality test that expression must not be ‘exceeding’ might be interpretable as such.

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2131 Amsterdam Court of Appeal, 21 January 2009, L/N BH0496, para. 12.2.2.
2133 Janssen & Nieuwenhuis 2012, p. 202. Generally, in applying 137d the Dutch judge does not establish whether expression constitutes an abuse of right, which is understandable since the Dutch Constitution lacks this concept (para. 1.2.2 supra).
The strict interpretation of 137d Sr by the District Court in the Wilders case thus resulted in a limited scope. Not all expression that the ECtHR describes as hate speech against which limitations are justified fall under this scope. Other than the District Court, in the previously mentioned cases the ECtHR did not require the existence of a strong link between discriminatory opinions and subsequent discriminatory actions in order to justify limitations on freedom of expression. In the application of 137d Sr, the case law of the ECtHR unmistakably influences the ‘context of the public debate’. However, even the previously mentioned European case law on hate speech does not determine which limitations are prescribed but only whether limitations are in conformity with Article 10 ECHR or not. In this respect, it is a pity that the ECtHR found the complaint by the As-Soennah mosque in Rotterdam of a violation of Article 9 with regard to Wilders’ acquittal inadmissible.\footnote{The complaint was denied by letter of 11 October 2012 sent to the applicant (unpublished). The applicant, the As-Soennah mosque in Rotterdam, however argued that Wilders’ offensive statements about Islam and the Koran affected the ‘peaceful enjoyment’ by its members of their freedom of religion. The mosque might have had more success, if it had argued that Wilders’ political proposals were discriminatory towards Muslims and formed an actual threat to the equal exercise of their religion or that Wilders’ attribution of an inherent criminal nature to Muslims on account of their religion and culture formed ‘a negative stereotyping of the group, capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group, thus affecting the private life of members of the group’ (cf. the Aksu-case).} The case could have further clarified the positive obligations to prevent hate speech on the basis of religion on the ground of Articles 8 and or 9 ECHR (Chapter 3, para. 1.6, ftnt. 513).

Furthermore, a group of Dutch-Moroccan Muslims have filed a complaint of violation of Article 20 (2) ICCPR with regard to Wilders’ acquittal before the HRC.\footnote{Communication of 15 November 2011, available at: \url{http://www.prak kendoliveira.nl/user/file/complaint-ep-geanominiserde-s60bw-11111712190.pdf}.} Firstly, it is not certain that the HRC will decide that individuals may invoke Article 20 under the Optional Protocol, but if so, it might for the first time directly deal with a case on the merits on the ground of Article 20 (2). Even if the HRC decides that this is the case, on the basis of the strict requirements recently developed for ‘incitement’ under Article 20 (2) ICCPR, it is not certain that the HRC will decide that the acquittal in the Wilders case amounts to a violation of that article. This does not signify that, if Wilders would have been convicted and had filed a complaint of a violation of freedom of expression, his conviction could not be considered permissible under Article 19 (3) ICCPR (Chapter 3, para. 5.3, ftnt. 633).

One could question whether the success rate of a complaint about Wilders’ acquittal might be higher before CERD, even though ICERD is strictly speaking limited to racial discrimination and hate speech. After all, CERD considers itself as competent to deal with cases in which an ‘intersectionality between race and religion’ exists, i.e. when an utterance treats the religious...
beliefs of members of a group as the hallmark of their racial and ethnic identity. Wilders’ statements that the violent nature of non-western immigrants and Morroccans is a result of their religion and culture may precisely form a pre-eminent case of such an ‘intersectionality between race and religion’; inherent negative qualities are attributed to a designated group of a particular national and ethnic background and associated with their religion and culture. This question was underexposed in the Wilders case, because the public prosecution and the District Court strictly separated Wilders’ prosecution for hate speech on the basis of race and hate speech on the basis of religion and simply found that Wilders’ criticism on Moroccans and non-western immigrants did not concern their race.\footnote{2136}

Moreover, ICERD is the only treaty among the three that actually obliges its member states to criminalize incitement to hatred and discrimination and to effectively enforce such an offence. In fact, the national offences, on the basis of which Wilders was prosecuted, were introduced in order to implement ICERD into Dutch law. Finally, under ICERD the required degree of probability that the speech would succeed in inciting actual action against the target group is in principle less strict than under 20 ICCPR and CERD has recommended the criminalization of several categories of expression when it amounts to ‘incitement’. Therefore, the threshold for criminal liability for hate speech under ICERD may be reached earlier (Chapter 3, para. 6.4, ftn. 676).

A decision of an international institution about the compatibility of Wilders’ acquittal with international law seems important. Although the Wilders case did not reach the Dutch Supreme Court, as a notorious public and principled trial, it can have a special signification or even be regarded as preluding a shift in the limits to freedom of expression in the Netherlands. After Wilders’ acquittal, in 2011 the Hague Court acquitted a suspect on the ground of 137c-e Sr with regard to several expressions and emails, in which he called Muslims liars and a danger to our Western freedoms. The court obliquely remarked that the expressions did not have a more insulting or hateful character than those of Wilders uttered in the same period.\footnote{2137} In 2012, Wilders’ Freedom Party initiated a bill proposing the entire abrogation of 137c-d Sr, except for incitement to violence (para. 7.3 infra).

6.8 Conclusion

In order for expression to constitute the offence of incitement to hatred, discrimination or violence in 137d Sr, it does not have to constitute an explicit call to commit a precise determined fact that is punishable under Dutch law. As a result of the case law of the Supreme Court, more implicit incitements to

\footnote{2136} Amsterdam District Court, 23 June 2011, L/N BQ9001, para. 4.4.  
\footnote{2137} The Hague District Court, 11 November 2011, L/N BU3944.
discrimination, hatred or violence can equally constitute the offence of 137d Sr. The expression must be likely or sensible to incite others to discrimination, hatred or violence. Hence, ‘associations’ with a racist ideology and political pamphlets that do not with so many words incite third parties to discriminate themselves, but rather aim to obtain political power in order to install discriminatory laws can be punishable.

With regard to 137d Sr, the Supreme Court uses the same broad interpretation of the discriminatory ground of race and the same criteria for the identification of a racial group as with 137c Sr. In a ‘racist context’ expression about immigrants or a group of a non-Dutch nationality can be punishable. Similar to 137c Sr, 137d Sr comprises expression about part of a racial group, but does not protect individual persons as such. Other than for 137c Sr, with regard to 137d Sr the Supreme Court has not strictly distinguished criticism of a religion from criticism of its adherents and has not established that expression must unmistakably concern a group on the ground of its religion. Neither has the Supreme Court developed a method of contextual review comparable to 137c Sr, in which the context of a public debate can remove liability under 137d Sr.

In several respects the Wilders case does not fit into this established case law of the Supreme Court. The court applied the distinction between expression about a religion and expression about its adherents to 137d Sr so restrictively that most criticism of islamization and Muslim-immigration formed lawful criticism of Islam. The court required that expression more or less literally, direct and in strong terms incites to hatred or concrete described acts of discrimination against a religious group. Subsequently, the court applied the contextual review of 137c Sr to 137d Sr by analogy. As a result, Wilders’ political proposals on measures against Muslims uttered in the context of the public debate on Muslim-immigration and the multicultural society were not per definition ‘exceeding’ even though they might constitute a prohibited form of discrimination.

7. Modifications of 137c-d Sr

After their introduction into Dutch law in 1971, the hate speech bans have successfully been extended to the discriminatory grounds of sex, sexual preference and handicap (7.1). Given the increasing importance attached to the free public debate, the question arises whether is would be desirable to insert a free-speech clause into the hate speech offences (7.2). Several draft proposals to limits the scope of the offences have, however, remained without effect (7.3). The analysis results in a general conclusion about the evolution of the criminalization of hate speech in Dutch law (7.4).
7.1 Extension of the scope of 137c-e Sr to the discriminatory grounds of sex, sexual preference and handicap

In 1991, the scope of Articles 137c-e Sr was extended to the discriminatory grounds of sex and hetero- or homosexual orientation.\textsuperscript{2138} In 2005 the scope of Articles 137c-e Sr was extended to the discriminatory ground of handicap.\textsuperscript{2139} The extension of 1991 formed part of the larger development of the anti-discrimination policy: both insulting expression and expression inciting to hatred and discrimination could lead to negative imaging of a particular group which could lead to their discrimination and subordination.\textsuperscript{2140} However the government subsequently did distinguish between the offences of 137c and d Sr.

Unlike in France, the government thought that the insertion of the discriminatory ground of sex into the offence of group insult was unnecessary, because discrimination against women would not originate in insults against women, but in existing opinions about the ‘natural’ role of women in society. As the criminalization of anti-women insults would not contribute to a better position of women in society, in this field freedom of expression therefore prevailed.\textsuperscript{2141} This non-falsified hypothesis is disputable and the question arises as to why this argument would not also apply to racial or religious insults.\textsuperscript{2142} An amendment to insert the discriminatory ground of sex into the offence of group insult in order to counter forms of pornography was rejected.\textsuperscript{2143} Contrarily, Article 137d Sr was broadened to incitement to hatred, discrimination or violence against people on the ground of hetero- or homosexual orientation \textit{and} sex. The government thought that here the insertion of the discriminatory ground of sex was desirable to prevent actual discrimination and aggression against women.\textsuperscript{2144} The insertion of the discriminatory ground of hetero- or homosexual orientation in both 137c and d Sr was desirable, because discrimination of homosexuals, other than of women, was often the result of repeated public insults and Articles 137c-d Sr would both prevent aggression against homosexuals.\textsuperscript{2145} Several Christian political parties that rejected the homosexual practice for constituting a sin feared that the insertion of the discriminatory ground of hetero- or homosexual orientation would render the expression of traditional Christian convictions about the homosexual practice punishable. Therefore, they desired to limit the discriminatory ground of sexuality in 137c-d

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{2138} Act of 14 November 1991, Stb. 623.
\item \textsuperscript{2139} Act of 10 March 2005, Stb. 111.
\item \textsuperscript{2140} Kamerstukken II, 20239, 1988-1989, nr. 3, p. 4, nr. 8, p. 1.
\item \textsuperscript{2141} Kamerstukken II, 20239, 1988-1989, nr. 3, p. 4.
\item \textsuperscript{2142} For a criticism see: Rosier 1997, p. 91 et seq.
\item \textsuperscript{2143} Kamerstukken II, 20239, 1988-1989, nr. 3, p. 4, nr. 5, p. 5-6.
\item \textsuperscript{2144} Kamerstukken II, 20239, 1988-1989, nr. 3, p. 2.
\item \textsuperscript{2145} Kamerstukken II, 20239, 1988-1989, nr. 3, p. 4-5.
\end{enumerate}
\end{footnotesize}
Sx to sexual inclination. During the parliamentary debates this was rejected: sexual orientation comprised both sexual preference and its manifestation (thus sexual practice), because such conduct of adults among themselves cannot form a ground to hinder people in their social functioning.\textsuperscript{2146} Sexual preference comprises hetero-, homo- and bisexuality, but not transsexuality.\textsuperscript{2147} In my opinion, paedophilia should also be omitted because people should only be protected in their lawful conduct.

Unlike in France, the Dutch legislator attempted to meet the objections raised against the ground of hetero- or homosexual orientation, not by limiting the scope of 137d Sx to incitement to certain forms of discrimination criminalized in the Dutch Criminal Code, but by introducing a justifying ground. In the original draft a new Article 137f Sx was inserted, which exempted from liability under Articles 137 c-e Sx expression that has the purport to give an opinion on the protection of public interests that is not gratuitously offensive. It was feared that the extension of the scope of Articles 137c-e Sx to the discriminatory grounds of sex, and hetero- or homosexual preference would seriously interfere with freedom of expression. Expression of an innocent character, such as honest commentary on matters of public concern, should not be punishable. However, it was thought that once an expression would fall under 137d Sx, it could not nevertheless constitute honest commentary on matters of public concern that were not gratuitously offensive. The proposed Article 137f Sx would therefore notably be applicable to insulting expression for the purposes of 137c Sx and would scarcely be applied to insults about groups on the basis of their race or religion. Finally the insertion of this due regard-clause was however rejected, because it was feared that the proposed Article 137f Sx would violate ICERD. Besides, the Christian Parties had argued that the clause was too selective in its justifying ground; Articles 137c-e Sx not only threatened the free expression of political opinions but also the free proclamation of religious convictions, thus freedom of religion.\textsuperscript{2148}

ICERD, however, also required that the principles of the Universal Declaration of Human Rights were taken into account and with regard to Article 4 ICERD freedom of expression in particular. But the ICERD-Committee that was established by the Convention opined that the convention already struck the right balance with freedom of expression. The Committee therefore rejected the insertion by the Member States of extra elements to the offences, such as the requirement of the disturbance of the public order or the risk of violence.\textsuperscript{2149} Likewise, the Dutch legislator of the 1970s seemed to opine that his formulation of Articles 137c-e Sx equally precisely struck the right balance, because he did not insert a free speech clause in 137c-d Sx. He thereby deviated from the system

\textsuperscript{2146} Kamerstukken II, 20239, 1988-1989, nr. 5, p. 19.
\textsuperscript{2147} Leeuwarden Court of Appeal, 13 January 1995, NJ 1995, 243.
\textsuperscript{2149} Mahalic & Mahalic 1987, p. 98.
of Articles 266 and 261 and seemed to afford a certain priority to the protection of racial groups against discrimination over the interest of freedom of expression.

In the 1990s, with the insertion of the new discriminatory grounds the question as to how to balance the criminalizations in Articles 137c-e Sr with freedom of expression became weightier. However, it was nevertheless feared that proposed Article 137f Sr would undermine the functioning of Articles 137c-e Sr. Finally, it was thought that when applying Articles 137c-e Sr judges would attach importance to freedom of expression even without the existence of proposed Article 137f Sr. According to the Minister for Justice, the rejection of proposed Article 137f Sr did not mean that an appeal to freedom of expression could no longer be made, but that there was no reason to give a detailed description of the situations, in which an appeal to freedom of expression could be made.\textsuperscript{2150}

7.2 Desirability of a free speech clause

Indeed, even without the existence of proposed Article 137f Sr, since the 1990s the judge has increasingly attached importance to freedom of expression through the method of contextual review. It is not surprising that the method of contextual review was first developed with regard to expression concerning homosexuals, such as rejection of the homosexual practice or same sex marriage, thus with regard to the discriminatory ground of sexual orientation, before it was subsequently also applied to expression concerning Jews or Muslims, such as denial of the holocaust or criticism of Muslim-immigration, thus with regard the discriminatory ground of race and religion. Although the free public debate on matters of public concern has generally gained importance over time, the specific weight of freedom of expression in one case however remains dependent on the issue concerned and the specific discriminatory ground. This is understandable, because proposals that oppose same sex marriage are not punishable to the same extent as proposals that oppose interracial marriage and pleas for an immigration policy based on race are not punishable to the same extent as pleas to abolish Dutch ‘institutionalized multiculturalism’.\textsuperscript{2151}

The criteria that the Supreme Court and lower courts have developed for the application of 137c and d Sr raised many questions\textsuperscript{2152} and might give

\textsuperscript{2150} Kamerstukken I, 1990-1991, 20239, nr. 76a, p. 5.

\textsuperscript{2151} Nieuwenhuis & Janssen 2011, p. 100.

\textsuperscript{2152} The questions that raised from cases such as Herbig, Jammaat, Cancer called Islam, Combat 18, Hofstadgroepe and Wilders were: must the criterion that expression unmistakably concerns a group apply to all discriminatory grounds? Must it apply both with regard to 137c and d? Must the contextual review apply to both 137c and d? Which associations can partly determine the signification of expression? How to distinguish between legitimate and illegitimate criticism on behavior of a religious group?
reason for the current legislator to give a more detailed description of the situations in which an appeal to freedom of expression could be made after all. In my opinion, there are notably three ways in which the legislator could incorporate the interest of freedom of expression into Articles 137c-d Sr. Firstly, he could insert extra elements to the offence that limit the scope of the offences and elevate the threshold for punishability, such as defining what constitutes insult or incites or by specifying that expression must constitute a ‘direct insult’ or ‘direct incitement’. Such specifications would, however, not fit in with the Dutch system of open statutory norms that accommodate judicial interpretation and balancing in concrete cases. The same holds true for the creation of more specific offences next to 137c and d Sr, such as a separate offence of holocaust denial. This would open up a Pandora’s box in relation to the creation of more and more specific speech offences depending on the development of ideas on punishability of expression.

Finally, the legislator could insert a free speech clause that exempts from liability expression uttered in public debate on a matter of public concern that is not gratuitously offensive or excessive after all. As such a clause would merely consolidate an existing judicial practice, the question arises as to what would be its exact added value? In my opinion, it would oblige the judge in each case to explicitly take into account freedom of expression and force him to use in his motivation a specific method or order that could safeguard that the different stages of the balancing-test are not merged into one single test. Furthermore, the clause could sharply distinguish between the discriminatory grounds of race and religion in order to allow relative far-reaching limitations to expression concerning race but to allow free severe criticism on religious convictions and practices that can reasonably be connected with a religion. Finally, the clause could sharply distinguish between 137c and 137d Sr and determine that the context of a public debate can only remove the punishable character of group insults in the sense of 137c Sr, provided that the expression is not gratuitously offensive.

It is difficult to imagine that once expression has been found to incite to hatred, discrimination or violence, the context of a public debate can nevertheless justify such a threat. However, further clarification is needed in relation to the limitations to expression that incites to discrimination pursuant to Article 137d Sr. In my opinion, 137d Sr criminalizes incitement of third parties to make unjustified distinctions based on race or religion etc., thus prohibited

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2153 Nieuwenhuis proposes the limitation of group insult to slander/libel and terms of abuse or the entire abrogation of 137c Sr and the abrogation of the vague ‘incitement to hatred’ in 137d Sr. See: Nieuwenhuis, A.J., Na de zaak Wilders. Is de wetgever nu aan zet?, Ars Aequi, December 2011, p. 869.

2154 For example connecting freedom of expression with the insulting or inciting character of expression rather than a suspects’ intent or requiring that the gratuitously offensive or excessive character of expression remains a final proportionality test.
forms of discrimination. This signifies that the judge must give an appreciation of the (un)lawfulness of the discriminatory content of the expression and cannot shift the threshold for punishability to expression that contains the risk of a disturbance of the public order or of violent conflicts. Being a normative term, ‘unjustified distinction’ already entails a balance by the judge. Strictly speaking, the insertion of a free speech clause is therefore unnecessary. However, in order to give sufficient room to political proposals that do not directly incite third parties to discriminate, but – merely – aim to reform the law, the legislator could insert a free speech clause determining that the context of a political or public debate can remove the punishable character of incitement to discrimination in the sense of 137d Sr, provided that the expression does not violate people’s human dignity by aiming at the destruction of their fundamental rights. Another possibility would be to adopt the proposal of the State Commission to insert a general provision into the Dutch Constitution declaring that the Netherlands is a constitutional state that respects and guarantees human dignity. Such a provision can partly function as a guideline for the interpretation of Articles 137c-e Sr (para. 1.2.3 supra). Thus the principle of human dignity becomes a final constitutional barrier against ‘hate speech’.2155

7.3 Draft proposals to modify 137c-e Sr in the light of freedom of expression

While in France several draft proposals have been made that proposed to broaden the scope of the French hate speech bans in order to more effectively fight the diffusion of racist propaganda and xenophobe ideas, in the Netherlands several draft proposals have been made that proposed to limit the scope of the Dutch hate speech bans in the light of freedom of expression. In May 2009, the Liberal Party launched a plan to modify the offences that to a certain extent corresponds with American free speech doctrine.2156 The plan suggested two methods to broaden the scope of freedom of expression in the Netherlands. The first method was to maintain the offence of incitement to violence, but to abrogate the offences of blasphemy, group insult and incitement to hatred, to abrogate incitement to discrimination or limit it to direct incitement to discrimination and to define discrimination restrictively. The second method was to introduce a clause that exempts a person that participates in public debate from liability under group insult, incitement to hatred and if desired incitement to discrimination.

Peters has welcomed the plan, because it affords a preferred position to expression that contributes to the public debate and therefore fits in with his plea to follow the American free speech doctrine on this point (para. 5.11

2155 If the prohibition of constitutional review of Article 120 of the Constitution would be abrogated.
The plan, however, faded under severe criticism on the statement of the leader of the Liberal Party Rutte that holocaust denial should be allowed, which is a pity due to the fact that the plan could have induced a profound debate on the necessity of further specification of the hate speech bans.

After Wilders’ acquittal, in September 2012 Driessen, representative of Wilders’ Freedom Party, initiated a bill that revived the issue. The bill is more far-reaching than the plan of Rutte, because it proposes the entire abrogation of 137c-d Sr, except for incitement to violence. According to the explanatory memorandum to the bill, the bill primarily aims to restore the ‘lex certa principle’. In the eyes of the initiator, Articles 137c-d Sr are too vague and for this reason must be abrogated. However, from this perspective it is surprising that the initiator subsequently argues that the bill does not prevent any civil action based on Article 6:162 BW, one of the most open statutory norms in Dutch law.

Furthermore, the initiator argues that the interests and values protected in 137c-d Sr are already sufficiently protected by the offences of defamation and insult of an individual, incitement to violence, incitement to criminal offences, threatening and factual discrimination. This argument disregards the fact that 137c-d Sr form independent offences that protect groups and do not formulate racist motives as an aggravating circumstance to generic offences that protect individuals as ‘hate crimes’ do and thus are not leges specialis to 261, 266, 131, 285 or 90 quater and 429quater Sr as leges generales. Hence, if 137c-d Sr would be abrogated, these generic offences cannot simply take over their function; there will be a – either desired or not – gap in the protection of non-further specified racial or religious groups against insults or incitement to hatred or discrimination that do not refer to any person in particular. Subsequently, the initiator argues that the generic offences would already comply with the obligations of international treaties, such as ICERD, the Additional Protocol to the Convention on Cybercrime and the EU Framework Decision for combating Racism and Xenophobia. One could object that the rationale of these treaties is precisely to oblige the state to explicitly criminalize certain expression with a racist purport. Moreover, the fact that the offences of defamation and insult of an individual can only be prosecuted on complaint of the victim does not fit in with the general rationale of these treaties that the state has the positive obligation to actively fight racism and discrimination.

Finally, the initiator argues that the obligations of the international treaties would conflict with the ‘consensus in the case law of the ECtHR on the preferred position of political opinions regardless of their content.’ The bill aims

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2158 Kamerstukken II, 33369, nr. 1-2.
2159 Kamerstukken II, 33369, nr. 3, p. 3-4.
2160 Kamerstukken II, 33369, nr. 3, p. 8.
2161 Kamerstukken II, 33369, nr. 3, p. 4; 7.
to contribute to this consensus by abrogating 137c-d Sr. However, as previously mentioned, the European case law on hate speech does not determine which limitations are prescribed but only whether limitations are in conformity with 10 ECHR or not.

The difference between the French and Dutch proposals for law reform clearly shows the different underlying characteristics of French and Dutch law. In French legal doctrine, the preservation of specific hate speech bans is justified, because specific legislation ensures legal certainty and effectiveness in the protection of both the value of (individual) human dignity and the public order. The decriminalization of defamation and insult of an individual person is on the other hand justified, because these offences protect mere personal interests.

Contrarily, in Dutch legal doctrine, the abrogation of the hate speech bans is justified with the preservation of the generic offences of defamation, insult and incitement to criminal offences. Such open norms enable further judicial interpretation and balancing in concrete cases. However, in my opinion such open norms can neither effectively ensure freedom of expression nor non-discrimination, if there is no legal certainty about which discriminatory expression they cover. I doubt whether these generic offences could function as a sufficient criminal safety net, an ultimum remedium, for discriminatory expression that targets not one particular identifiable individual person but larger groupings.

7.4 Conclusion

In 1991 and 2005, the scope of Articles 137c-e Sr was extended to the discriminatory grounds of sex and hetero- or homosexual orientation, respectively handicap. The Dutch legislator of 1991 attempted to meet the objections raised against the ground of hetero- or homosexual orientation, not by limiting the scope of 137d Sr to incitement to certain forms of discrimination criminalized in the Dutch Criminal Code, but by introducing a free speech clause in new Article 137f Sr. Article 137f Sr was finally rejected, because it was feared that it would undermine the functioning of Articles 137c-e Sr. Nevertheless, the judge has increasingly attached importance to freedom of expression through the method of contextual review, starting with regard to expression concerning homosexuals and subsequently with regard to criticism of immigration policies or the multi-cultural or multi-religious society.

The fact that the criteria that the Supreme Court and lower courts have developed for the application of 137c and d Sr raise many questions might be a reason for the legislator to give a more detailed description of the situations in which an appeal to freedom of expression could be made after all. There have been several plans to modify Articles 137c-e Sr in the light of a more robust freedom of expression that sought to entirely abrogate the offences, limit the

2162 Kamerstukken II, 33369, nr. 3, p. 4-8.
scope of the offences by specifying the existing elements of the offences or adding new elements to the offences, or insert a free speech clause, which might fit best in the Dutch system of open norms that accommodates judicial interpretation and balancing.
III THE GOVERNMENT AS THE SOLE GUARDIAN OF THE PUBLIC ORDER

8. The engagement of prosecutions

In the Netherlands, the public prosecution has the exclusive right to engage in the public prosecution on the ground of the hate speech bans (8.1). However, civil parties can appeal the decision of the public prosecution not to prosecute a particular fact on the ground of the hate speech bans before the Court of Appeal. Only complaints by ‘interested parties’ are admissible. If the Court of Appeal orders the public prosecution to prosecute, they have no special position in the criminal case on the merits as joint civil parties, which can be well illustrated by the Wilders case (8.2). The analysis results in a general conclusion about the enforcement of the hate speech bans in the Netherlands (8.3).

8.1 The engagement of prosecutions by the public prosecutor

In the Netherlands, the public prosecution is charged with the prosecution of criminal offences pursuant to Article 124 of the Judicial System Act (Wet RO). Pursuant to the principle of opportunity in Article 167 j 242 of the Dutch Code of Criminal Procedure (Sv) the public prosecution has a discretionary power in relation to whether to prosecute or not. Under the principle of opportunity the decision to prosecute depends not only on the feasibility of the prosecution but also on the public interest in the prosecution.2163

The exclusive right of the Dutch public prosecution to engage public prosecutions of criminal offences prevents criminal prosecutions from being dependant on the personal views of the injured parties.2164 Unlike in France, a person who has personally suffered damages directly caused by a violation of a felony or misdemeanor cannot therefore set in motion a public prosecution in order to obtain reparation of damages as a joint party. This has not always been the case. When the Kingdom of the Netherlands was annexed by Napoleon’s France in 1811, the French Code d’Instruction Criminelle entered into force that provided in this ‘action civile’. The civil action was abrogated by the Code of Criminal Procedure in 1838 and this decision was maintained in the current code that dates back to 1926.2165 Criminal justice was (and is) considered to be a public interest and could not be governed by personal feelings of revenge.

2163 Article 167 Sv. reads: ‘1) Indien naar aanleiding van het ingestelde opsporingsonderzoek het openbaar ministerie van oordeel is dat vervolging moet plaats hebben, door het uitvaardigen van een strafbeschikking of anderszins, gaat het daartoe zoo spoedig mogelijk over; 2) Van vervolging kan worden afgezien op gronden aan het algemeen belang onthoedend. Het openbaar ministerie kan, onder het stellen van bepaalde voorwaarden, de beslissing of vervolging plaats moet hebben voor een daarbij te bepalen termijn uitstellen.’
2164 Tekst & Commentaar, Wetboek van Strafvoering, Artikel 167, Valkenburg, para. 1a.
Affording a right of prosecution to affected parties was undesirable, because it would cause an increase in minor cases.\footnote{2166}

This does not signify that criminal law does not take into account the interests of victims in a prosecution. The prosecution of the offences of defamation or insult of an individual person of Articles 261 and 266 Sr depends on a prior complaint filed by an injured party.\footnote{2167} Contrary to France, this equally applies to defamation or insult of an individual person on the ground of his race or religion etc., because such expression falls under these generic offences (para. 5.2 supra). The prosecution of the hate speech bans of Articles 137c-e Sr on the other hand does not depend on a prior complaint filed by an injured party. The decision to prosecute discriminatory expression under Articles 137c-e Sr is regulated by the principle of opportunity of the public prosecution.

The principle of opportunity is, however, curtailed by the Discrimination Directive of the College of the Attorneys General that determines the prosecution policy with regard to discrimination.\footnote{2168} The first Discrimination Directive was drafted in 1999 in order to more effectively and coherently enforce the anti-racism and discrimination laws.\footnote{2169} The directive was renewed in 2003 and 2007 and still remains in force.\footnote{2170} It more specifically concerns the prosecution of Articles 137c-g and Article 429quater Sr and generic offences ‘with a discriminatory aspect’, including defamation or insult of an individual person if motivated by discrimination or hatred.\footnote{2171} It establishes, as a general rule, that if the violation of these offences can be proven and the suspect is liable to punishment, in principle the suspect must be prosecuted, given the negative effect of insufficient enforcement and the preventive effect of prosecution. Hence, in cases concerning discrimination, opportunity is assumed in advance. The decision to dismiss a case for policy reasons must be taken with restraint; opportunity considerations can only lead to a dismissal in exceptional cases. Under no circumstances, the potential martyrdom of a suspect or the potential exploitation by the suspect of the forum that a public prosecution would afford him to expound his ideas can form a ground to dismiss a case.\footnote{2172}

\footnotesize{2166} Bijlagen II, 1913-14, nr. 3, p. 55.
\footnotesize{2167} Tekst & Commentaar, Wetboek van Strafrecht, Inleidende opmerkingen bij Titel XVI, Van Maurik/Janssens, aant. 10.
\footnotesize{2169} Discrimination Directive, 1999A008.
\footnotesize{2171} Other than France, Dutch law does not have so called ‘hate crimes’, being criminal offences that stipulate a suspect’s racist motive as an aggravating circumstance and element of the offence. However, the Discrimination Instruction requires a 50-100 percentage increase in the penalty for generic offences that are motivated by discrimination or hatred. The directive also requires that the discriminatory background of the offence be announced in the prosecutor’s closing statement.

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In the past, this latter argument often formed a ground for the public prosecution not to prosecute discriminatory expression uttered by extreme right-winged politicians. For example, in the 1980s the public prosecution prosecuted a suspect for having distributed discriminatory pamphlets during a manifestation of the extreme right winged political party Centrumpartij, but refrained from prosecuting politician Janmaat, the leader of the party, even though he was primarily responsible for the content of the pamphlets, had confessed his guilt and had asked for the acquittal of the other distributors. The public prosecution did not contradict the thesis that it had aimed to prevent Janmaat from becoming a martyr and having potential electoral advantage from a trial. According to the Court of Appeal, the prosecution thereby aimed to influence the results of the elections, which did not form a public interest that prevailed over the interest in prosecution.\textsuperscript{2173} In his annotation, ‘t Hart criticizes the Court of Appeal for twisting things around; the prosecution aimed to prevent a politician from abusing the administration of criminal justice as an instrument for his own electoral advantage. The prevention of such manipulation did form a public interest.\textsuperscript{2174, 2175}

Pursuant to the Discrimination Directive, the prosecution can only dismiss a case for reasons of feasibility, thus on technical grounds – except for exceptional cases. In my opinion, determining liability under 137c-d Sr does not, however, entail an ordinary appreciation of the proof of the facts like in any other case. The question of whether a suspect has committed the charged facts requires an interpretation and the attribution of a certain meaning to expression and a balancing test with the interest of a suspect’s freedom of expression that is incorporated into the statutory elements of the offence (para. 5.8.6.4 \textit{supra}). These factors make it difficult to anticipate the decision by the judge.

Moreover, technical and policy arguments seem to easily merge into one another.\textsuperscript{2176} In 2008, the prosecution dismissed the complaints in the \textit{Wilders

\textsuperscript{2173} Dutch Supreme Court, crim. Ch., 21 June 1988, \textit{NJ} 1988, 1021, annotation ‘t Hart.

\textsuperscript{2174} Annotation ‘t Hart para. 6 at: Dutch Supreme Court, crim. Ch., 21 June 1988, \textit{NJ} 1988, 1021. While the District Court had convicted the suspect, the Court of Appeal found the decision to prosecute the suspect but not Janmaat arbitrary and declared the prosecution inadmissible. The Supreme Court finally annulled the decision of the Court of Appeal for being insufficiently motivated, because it was limited to the decision not to prosecute Janmaat and did not take into account the decision to prosecute the suspect.

\textsuperscript{2175} Courts generally reject a suspects’ defence that his expression is prosecuted for a political purpose. The prosecution of political opinions uttered in public debate does not necessarily constitute a political trial. See: Dutch Supreme Court, Crim. Ch., 18 May 1999, \textit{NJ} 1999, 634, annotation ‘t Hart; Dutch Supreme Court, Crim. Ch., 16 April 1996, \textit{NJ} 1996, 527; ‘s-Hertogenbosch Court of Appeal, Crim. Ch., 10 November 2006, \textit{LJN} BH3383.

\textsuperscript{2176} An undisputable technical dismissal formed the decision in 2010 not to prosecute Prime Minister Rutte with regard to his statements on dual citizenship during a parliamentary debate, because nationality does not form a protected ground and the Prime Minister enjoyed parliamentary immunity on the ground of Article 71 Dutch Constitution. More questionable formed the dismissal
case, because it considered Wilders’ criticism of Islam, islamization and Muslims not to be punishable.2177 Dommering criticizes the prosecution for having resorted to technical grounds, while in fact the dismissal constituted a policy decision.2178 Indeed, the idea that a criminal prosecution of Wilders would inevitably result in his acquittal seems untenable, considering the different appreciations of the case by legal scholars, the legal advisors of the prosecution and the court order of the Amsterdam Court of Appeal (para. 6.7 supra). This raises the question about the tenability of the directive itself.

In the last decade the prosecution has dismissed more complaints against severe criticism of Islam and Muslims.2179 In 2003, the prosecution dismissed the complaints against politician Hirsi Ali for calling Islam ‘backward’ and prophet Mohammed a ‘pedophile’ in a national newspaper. In 2009, the prosecution found the distribution of the Danish cartoons by Wilders on his website and by a national television program not punishable under 137c and d Sr, because they did not concern Muslims as a group, but Islam as a religion. In 2010, the prosecution finally dropped charges against Dutch cartoonist Gregorius Nekschot with regard to several cartoons critical of Islam and Muslims. Although it found the cartoons punishable under 137c and d Sr, Nekschot had been arrested and put in pretrial detention in 2008, which caused much public and political debate.2180 Since then, the cartoons were no longer online, a considerable period of time had passed and no new complaints were filed.

The prosecution has been criticized by Dommering for applying double standards with regard to Articles 137c-e Sr that it applied to sensitive issues in the secular western society such as the Holocaust and not to sensitive issues for Muslims such as the Mohammed-cartoons.2181 In 2009, although the prosecution found the Auschwitz cartoon punishable under 137c Sr, it dismissed the case under the condition that the cartoon would be removed. Initially, the AEL met

in 2010 with regard to the statement ‘Intifada, intifada, free Palestine’ uttered by a socialist politician during a demonstration against the invasion by the Israeli army of the Gaza Strip, while other participants exclaimed ‘Hamas, hamas, Jews to the gas’. According to the prosecution, the politician was not responsible for expressions of others and his statement constituted mere criticism of the State of Israel that incited to non-violent resistance. The press releases by the public prosecution with regard to the dismissals are accessible at: www.om.nl.


2179 The press releases by the public prosecution with regard to the dismissals are accessible at: www.om.nl.


this condition, but the dismissal in the Danish cartoon-case brought the AEL to replace its cartoon on its website. The prosecution thus nevertheless pressed charges and finally the Supreme Court confirmed that the cartoon constituted an insult to Jews, because it insinuated that Jews deliberately invented the Holocaust.

In the AEL case, the status of the Discrimination Directive was explicitly under discussion. Although the directive does not constitute a general mandatory regulation, pursuant to principles of due process the instruction binds the public prosecution and suspects can therefore directly appeal to it in court and argue that the prosecution has acted contrary to it.\textsuperscript{2182} The Court of Appeal, however, rejected the suspect’s defence that the directive requires expression to be ‘unmistakably punishable’, which could not be said of the cartoon in question; it would be undesirable, if the prosecution could not bring a doubtful case to court in order to get a decision by the judge.\textsuperscript{2183} In my opinion, the latter can equally form a valid argument to prosecute certain forms of harsh criticism of Islam and Muslims; the somewhat structural dismissals in this field have cost legal uncertainty by a lack of case law and social unrest by a lack of a judicial decision in concrete cases.

This social unrest might be partly explained by the little involvement in the Dutch prosecution policy of victims or civil society in general. Certainly, the aim of the Discrimination Directive is to provide an effective response to racism and discrimination through a close cooperation between specialized referent magistrates of the public prosecution charged with the enforcement of anti-racism and discrimination laws, local authorities, the police and regional anti-discrimination services.\textsuperscript{2184} But other than in France, the Dutch policy does however not establish dense relations between these officials and civil society for collaboration in a joint fight against racism and discrimination by means of so-called framework conventions with anti-racism associations or monthly consultations with such associations organized by the Parisian offices of the prosecution in order to discuss the engagement of prosecutions.

Moreover, pursuant to Article 167 sub 3 Sv, 51a Sv and the Discrimination Directive, the prosecution must give a written motivated notification of its final decision to prosecute, dismiss or settle a case to the complainants about a violation of an offence, but the law does not prescribe that the prosecution hears complainants in the decision-process. In principle, victims

\textsuperscript{2182} It nevertheless constitutes written law subject to interpretation by the Supreme Court in the sense of Article 79 of the Judicial System Act. The Supreme Court established this general rule applicable to all instructions by the College of Attorneys General in: Dutch Supreme Court, Crim. Ch., 19 June 1990, NJ 1991, 119. See: Tekst & Commentaar, Wetboek van Strafvordering, Artikel 167, Valkenburg, para. 5b.

\textsuperscript{2183} Arnhem Court of Appeal, Crim. Ch., 19 August 2010, LJN BN4204, NJFS 2010, 294, para. 3.1.1.3.

and other affected parties thus have no part in the decision making process of the public prosecution. It is therefore good that affected parties can appeal a dismissal in court.

8.2 Appealing the dismissal of the prosecution

8.2.1 Complaint procedure of Article 12 Sv

The monopoly and opportunity of the public prosecution, said to be quite unique from a comparative perspective, affords the government much power that calls for control. In order to prevent possible arbitrariness of the public prosecution, the Dutch legislator of 1926 created Article 12 Sv, according to which an interested party can appeal the decision of the prosecution (not to prosecute, not to further prosecute or to settle a case) before the Court of Appeal. The court can review whether prosecution must take place and order the prosecution to nevertheless prosecute with regard to specific criminal facts (offences) or refuse to do so in the public interest. Against the decision of the court no appeal in cassation is possible. Although in the field of discrimination appeals against dismissals have often been rejected, certain appeals that

2187 Article 12 sub 1 reads: ‘Wordt een strafbaar feit niet vervolgd, de vervolging niet voortgezet, of vindt de vervolging plaats door het uitvaardigen van een strafbeschikking, dan kan de rechtstreeks belanghebbende daarover schriftelijk beklag doen bij het gerechtshof, binnen het rechtsgebied waarvan de beslissing tot niet vervolging of niet verdere vervolging is genomen, dan wel de strafbeschikking is uitgevaardigd. Indien de beslissing is genomen door een officier van justitie bij het landelijk parket of bij het functioneel parket, is het gerechtshof te ‘s-Gravenhage bevoegd.’
2188 Article 12i reads: ‘1) Indien het beklag tot de kennisneming van het gerechtshof behoort, de klager ontvankelijk is en het gerechtshof van oordeel is dat vervolging of verdere vervolging had moeten plaats hebben, beveelt het gerechtshof dat de vervolging zal worden ingesteld of voortgezet ter zake van het feit waarop het beklag betrekking heeft. Tenzij het gerechtshof anders bepaalt, kan de vervolging niet worden ingesteld of voortgezet door het uitvaardigen van een strafbeschikking; 2. Het gerechtshof kan het geven van zodanig bevel ook weigeren op gronden aan het algemeen belang ontleend.’ See further: Tekst & Commentaar Wetboek van Strafverordening, Artikel 12i, Valkenburg, para. 5.
2190 In 2000, the Court of Appeal rejected a complaint against the dismissal with regard to the remark ‘bomb that country’ made by columnist Blokker in a national newspaper in reaction to a demonstration of Iraqi in The Hague; the expression did not concern the race, religion or belief of the Iraqi nor incited to discrimination. See: Amsterdam Court of Appeal, Crim. Ch., 20 February 2000, R 99/158. In 2001, the Court of Appeal rejected a complaint against the dismissal with regard to an article by cineaste Van Gogh critical of Islam comprising phrases such as ‘that goat fucker from Mekka’ and ‘potential murderers’; although the expression was gross, in the light of the discussion in the article, did not overstep the limits of journalistic freedom. See: Amsterdam Court of Appeal, Crim. Ch., 9 April 2001, Art.I nr. 2039; Amsterdam Court of Appeal, Crim. Ch., 29 March 2003, R 97/083, Art. 1 nr. 1976. Available at: www.art1.nl.
were allowed finally resulted in landmark decisions by the Supreme Court or a lower court, such as the cases against the religiously motivated anti-gay expression of Mr and Mrs Goeree\textsuperscript{2191} and Reverend Van Dijke\textsuperscript{2192}, or the anti-Islam expression of Wilders.

The court reviews both the feasibility and opportunity of the prosecution and does not have to take the Discrimination Directive into account.\textsuperscript{2193} The courts’ review is not limited to a marginal test, but can consist of an integral review. Hence, the court can step into the shoes of the public prosecution.\textsuperscript{2194} The review could be regarded as a ‘shift in the separation of powers’ that would not fit into the French legal system. Indeed, it implies that the court can interfere with the prosecution policy that falls under the political responsibility of the Ministry for Justice. Several scholars argue that the review in fact violates the principle of the separation of powers and must therefore be limited to a marginal review.\textsuperscript{2195} Moreover, the decision of the prosecution to prosecute is also marginally reviewed in the case on the merits. De Lange objects that the complaints procedure should not be limited to a marginal review, because this would benefit the suspect and affect the equal position that the suspect and the victim have in the complaints procedure – other than in a case on the merits.\textsuperscript{2196} In any event, the court must proceed with caution: although it must decide on the punishability of a suspect’s expression (feasibility), it cannot step into the shoes of the judge on the merits and decide on the liability of the suspect.\textsuperscript{2197}

Kaptein strictly holds on to the principle according to which the public prosecution of criminal offences serves the public interest and the interests of victims in prosecutions are marginal side issues. In the Article 12 procedure, the judge should therefore only take into account the interest in the prosecution and not also the interests violated by criminal offences. These are only indirectly relevant for the possibility of obtaining damages in criminal proceedings.\textsuperscript{2198} Several legal scholars, however, opine that the legislator let the power of the prosecution as the ‘sole guardian of the public order’ go too far and therefore

\textsuperscript{2191} Arnheim Court of Appeal, Crim. Ch., 21 January 1991, Art.1 nr. 0725.
\textsuperscript{2192} Annotation de Hullu, para.3 at: Dutch Supreme Court, Crim. Ch., 9 January 2001, NJ 2001, 203; 204.
\textsuperscript{2193} Tekst & Commentaar, Wetboek van Strafvordering, Artikel 12i, Valkenburg, para. 2.
\textsuperscript{2195} Van der Leij, J.B.J., Het slachtoffer in de beklagprocedure van artikel 12 Sv, Strafblad 2009, p. 467.
\textsuperscript{2196} De Lange 2009, p. 490-491.
\textsuperscript{2197} Corstens 2008, p. 551; Melai, Wetboek van Strafvordering, Artikel 12i, para. 5.
\textsuperscript{2198} Kaptein, H., Slachtoffers van Wilders’ vervolging op klacht, in: Ellan, Molier & Zwart 2011, p. 150.
suggest a reorientation of the Article 12 procedure in order to reinforce the position of the victim.\textsuperscript{2199}

De Lange argues that while the opportunity of the prosecution is tested against the criterion of the ‘public interest’, this vague criterion does not actually exist, but forms an abstraction of a balanced plurality of special interests. This focus on the public interest has caused a loss of sight of the concrete values and interests that criminal offences aim to protect. Criminal offences consist of different layers and protect next to the legal and the public order, specific underlying values. With regard to 137c-d Sr, these would be the honour of a group or the non-existence of hatred, discrimination and violence against a group. These underlying values form the core of criminal offences and should partly determine the opportunity of the prosecution. In other words, ‘criminal politics should get content’.\textsuperscript{2200} To achieve this, the prosecution would benefit from a more active participation of affected parties. After all, the individual person who is entitled to, for example, the respect to his honour has most knowledge about the gravity of the criminal act and an opinion about its morality. This information is valuable for the decision to prosecute and the opinion of the victim matters, because his interest is violated. This equally applies to representatives of collective interests, such as anti-racism associations, precisely because it is difficult to indicate the individual rights holders of impartible values or interests.\textsuperscript{2201}

However, even when adapted, the Dutch system of the complaints procedure does not afford an interested party a relatively strong position as a joint civil party in the case on the merits comparable to the French civil action. Firstly, although the interested party can obtain a court order that commands the prosecution to prosecute with regard to specific criminal facts, the interested party does not produce the initial act of the prosecution. He cannot exactly qualify the criminal act and thus choose and indicate which exact passages

\textsuperscript{2199} Groenhuijsen and Kwakman argue that a more active involvement of victims in prosecution decisions would prevent unnecessary annulments of dismissals in appeal and propose – amongst others- that a victim before lodging an appeal is required to turn to the prosecution that must review its decision in the light of the interests of the victim. The Minister of Justice however opposed the introduction of a requirement that a victim must be heard by the public prosecution before taking the decision to dismiss a case (Kamerstukken II, 26436, nr. 12). This is understandable considering the work load that would burden the prosecution. Van der Leij therefore advocates a less obligatory criterion and proposes that the prosecution must, after having reached its decision, invite victims to hear both sides of the argument and give further explanation, which would equally reduce appeals. Groenhuijsen, M.S. & Kwakman, N.J.M., Het slachtoffer in het vooronderzoek, in: Groenhuijsen & Kwakman (eds.), Duwngmiddelen en rechtsmiddelen, Derde interimrapport onderzoeksproject Strafverordening 2001, Deventer: Kluwer 2002, p. 933-935; Van der Leij 2009, p. 466-467. See generally: Thema Artikel 12 Sv, Strafblad 2009, 29 October 2009, jrg. 7, nr. 5.

\textsuperscript{2200} De Lange 2009, p. 479.

\textsuperscript{2201} Hence, De Lange proposes that in the complaint-procedure victims should always be heard and even be allowed to put forward supporting evidence, because the victim must demonstrate that the dismissal was incorrect. De Lange 2009, p. 482-488.
within a publication are prosecuted and the exact speech offence as the legal basis. This signifies that as a joint civil party he may not give any appreciation as to the constitution of the speech offence and the punishability of the expression. Indeed, strictly speaking a joint civil party is only allowed to demonstrate damages and subsequently prove the causal link with the violation of the speech offence.

However, although the prosecution is bound by and must execute the court’s order to prosecute, the prosecution can freely determine its own sentence. Thus, despite the court’s order to prosecute, the prosecution can persist in its vision that a suspect’s expression is not punishable under 137c-e Sr, motivate this vision in its closing speech and request an acquittal of the suspect with regard to the entire charge. If the prosecution decides to do so, the case on the merits runs the risk of lacking the character of an adversarial prosecution. After all, the suspect will not contradict the requested acquittal and the joint civil parties are prohibited from contradicting the prosecution and expressing the reasons why, in their vision, the suspect’s expression is punishable.

In my opinion, in the specific event that the prosecution persists in its vision and requests an acquittal, the joint civil parties should be allowed to express their vision on what the concrete values and interests protected by the speech offences are and why a suspect’s expression violates these values and interests and is punishable on this account. The participation of the joint civil parties preserves the character of an adversarial prosecution that assures that all pros and cons and evidence are brought before the judge, who must decide on the basis of the case files. This is particularly true with regard to the speech offences, because punishability of expression notably depends on interpretation and the attribution of a certain meaning. In France, the civil actions of the anti-racism association contributed to the development of the case law concerning the notion of a group, more specifically to the development of the line in case law that demarcates free criticism of a religion that might hurt religious feelings from the disqualification in harsh terms of a determined religious group.

Secondly, another difference with the French system is that the joint civil party cannot appeal the decision of the court to reject the requested damages up until the Dutch Supreme Court. A joint civil party can, on the other hand, subsequently initiate a separate civil case based on Article 6:162 BW. Unlike in France, when expression is not punishable on the ground of the speech offences, it can nevertheless be unlawful on the ground of the due-diligence-norm of Article 6:162 BW. It is, however, doubtful whether such a civil case will succeed, given that the criminal and civil restrictions to freedom of expression appear to differ little and due-diligence considerations may already be included in the contextual review of 137c-d Sr (para. 5.9 supra). Nevertheless, unlike in France, the initiation of such a civil case seems indispensable in order to be able to finally file a complaint with the ECtHR for violating a possible positive obligation to protect citizens against ‘hate speech’, because in order to be admissible before the ECtHR all national remedies must be exhausted.
The position of the affected parties in the prosecution of the speech offences is well illustrated in the Wilders case.

8.2.2 The position of the affected parties in the Wilders case

In the Wilders case, before the Amsterdam District Court amongst others the foundations Nederland Bekent Kleur (The Netherlands’ True Colors – NBK), Landelijk Beraad Marokkanen (National Counsel of Moroccans – LBM), Movimentu Antiano i Arubano por Promové Participashon (MAAPP), the association Arbeiders uit Turkije in Nederland (Workers from Turkey in the Netherlands – HTIB) and two Islamic Dutchmen of Moroccan origin joined as civil parties. The case first and foremost highlighted the disagreement between the prosecution and the affected parties about which underlying values Articles 137c-d Sr aim to protect. The interpretation of the offences by the prosecution was notably colored by their categorization as ‘public order-offences’ (para. 4.3.2 supra). Before the District Court, the joint civil parties argued that Article 137d Sr had to be colored by the norms arising from international law that are grounded on the value of human dignity. Therefore, 137d Sr was not merely an offence against the public order that prohibits the threat of the violation of an interest; it protects the intrinsic worth of the right to live in a society that is free from intolerant, hateful and discriminatory expression. He, who utters offensive expression, does not merely pass a message or express an opinion: he commits a harmful act.2202

According to the civil parties, the combination in Fitna of images of 9/11 with ordinary Muslims in the street and flats with satellite dishes was so suggestive that all Muslims were depicted as terrorists and a threat to society. Wilders was guilty of ‘framing’ a technique, in which a speaker uses specific words to bend the debate to his will: the term ‘islamization’ evoked the association with ‘criminalization’, thus with people; what was presented as criticism of Islam, actually concerned Muslims.2203 Wilders’ suggestive use of language that connects islamization and Muslim-immigration with increased crime rates was punishable, because the existence of such expression can form a breeding ground for discrimination.

Like the Amsterdam Court of Appeal, the civil parties thus saw a certain overlap between actions and opinions. The constructive force of language turns the simple expression of an opinion into a ‘speech-act’ that qualitate qua constitutes an actual disturbance of the public order. Moreover, Wilders’ framing and associations already violated the human dignity and position of Muslims in society. In its court order, the Amsterdam Court of Appeal had thus largely taken the victims’ interests into account. Its comprehensive motivation to

2202 Motivation of the claims by the civil parties 27 May 2011, p. 15; 21-22.
2203 Motivation of the claims by the civil parties 18 October 2010, p. 7; Motivation of the claims by the civil parties 27 May 2011, p. 9.

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order the prosecution of Wilders was criticized precisely for leaving the judge little room to independently decide on the merits (para. 6.7 supra). In my opinion, the court rightly integrally reviewed the decision by the prosecution. For the determination of the public interest in the prosecution, the Court explicitly included the interest of a judicial decision on the merits of the case, in the light of legal certainty and the direction of future public debate.

Before the District Court, the closing speech and request for Wilders’ acquittal of the prosecution was naturally not contradicted by Wilders, but even won the prosecution the highest praise of the defence. Both the prosecution and the defence objected to the plea of the civil parties as to why Wilders’ expression was punishable under 137d Sr, whereupon the court prohibited them from continuing to do so. The civil parties, however, persisted stating that as the unlawfulness of Wilders’ expression under 6:162 BW resulted from the liability pursuant to 137d Sr, they had to be able to discuss which underlying values Article 137d Sr aimed to protect. This question was not only relevant for the interpretation of the scope of the article, but also to contradict the vision of the prosecution that the civil parties did not suffer direct damages. After all, direct damages emerge if a person is harmed in an interest protected by the violated criminal offence. The civil parties claimed to suffer from the poisoned atmosphere created in the Netherlands by Wilders’ expression.

The District Court seemed to have disregarded the reasoning of the civil parties and to have followed the analysis of the prosecution for the most part of its decision (para. 6.7 supra). Neither the prosecution nor the defence appealed the decision of the District Court and the Prosecutor General at the Supreme Court has refrained from filing an appeal in cassation in the interest of the law. On behalf of one of the civil parties, a complaint has been brought before the ECHR for violation of Article 9 ECHR that could have contributed to the development of the European case law concerning ‘hate speech’ (para. 6.7 supra). However, on 11 October 2012 the ECtHR declared the complaint to be

2204 Amsterdam Court of Appeal, Crim. Ch., 21 January 2009, L/N BH0496.
2206 Amsterdam Court of Appeal, Crim. Ch., 21 January 2009, L/N BH0496, para. 13.2.
2207 Wilders did argue that the prosecution was inadmissible on account of the alleged condemnatory nature of the court order of the Amsterdam Court of Appeal, but the District Court rejected this preliminary defence. See: Amsterdam District Court, 23 May 2011, L/N BQ5561.
2208 Motivation of the claims by the civil parties 27 May 2011, p. 4; 23.
2209 In my opinion, admissibility on the ground of 8 or 9 j 14 ECHR was not entirely unimaginable, since Wilders’ expression comprises very negative qualifications of Muslims. In the same sense: Rosier, Th., ‘Kunnen de klagers in de Wilders-zaak een beroep doen op artikel 8 EVRM?’, NTM/NJCM-bull. 2011, p. 725-737.
inadmissible without motivation.\textsuperscript{2210} On behalf of the other civil parties a complaint has been brought before the HRC for violation of Article 20 sub 2 ICCPR, which explicitly provides that states should protect citizens against hate speech.\textsuperscript{2211}

The Wilders case furthermore showed the disagreement between the prosecution and the affected parties about the concrete execution of the court order of the Court of Appeal by the prosecution. The Court of Appeal had partly rejected the complaints of the affected parties and ordered the prosecution of Wilders with regard to specific criminal facts, i.e. incitement to hatred and discrimination and – with regard to Wilders’ comparisons of Islam with Nazism – group insult, and not with regard to specific expressions.\textsuperscript{2212} The prosecution subsequently converted the order into a concrete charge that filled in the specific criminal facts with concrete expressions of Wilders.

The civil parties, unsatisfied with the charge of the prosecution, requested in summary proceedings the replacement of the attending public prosecutors, the supplementation of the summons with more expressions of Wilders\textsuperscript{2213} and a different substantial preparation by the prosecution. All requests of the civil parties were denied.\textsuperscript{2214} This is not surprising, because any uncertainties about the court order to prosecute Wilders must be clarified by the Court of Appeal itself. Moreover, the prosecution’s request for Wilders’ acquittal did not bind the judge.\textsuperscript{2215}

However, in my opinion, as the prosecution persisted in its vision and requested Wilders’ acquittal, the District Court should have taken into account the reasoning of the joint civil parties in relation to what the concrete values and interests protected by 137d Sr are and why Wilders’ expression violated these concrete values and interests and was punishable on this basis. This could have preserved the character of the Wilders case as an adversarial prosecution and could have prevented the after taste of it constituting a one-sided judgment strongly relying on the analysis of the prosecution (para. 6.7 supra).

In his annotation, Mevis concludes that the Wilders case can be considered as the ‘fitra’ of the Dutch system of criminal justice. Despite Wilders’ acquittal, the discussion the case raised about the scope of the hate speech bans seems sufficiently important to continue to bring similar cases before the judge.

\textsuperscript{2210} Decision unpublished (by letter sent to the complaining party).

\textsuperscript{2211} The complaint is accessible at: http://www.prakendoliveira.nl/user/file/complaint-ep-geanonimiseerde-s60bw-111111712190.pdf

\textsuperscript{2212} Amsterdam Court of Appeal, Crim. Ch., 21 January 2009, L/N BH0496, para. 14.

\textsuperscript{2213} It concerned several expressions uttered by Wilders since 2004 about for example expelling dozens of Muslims, a ban on wearing the headscarf and the introduction of a ‘tax on Head Rags’.

\textsuperscript{2214} The Hague District Court, summary proceedings, 26 November 2010, L/N BOS107.

\textsuperscript{2215} Annotation Mevis, para. 4-6 at: Amsterdam District Court, 23 June 2011, N/ 2012, 370.
in the future. If the prosecution fails to prosecute, then interested parties can persist in appealing to Article 12 Sv.\textsuperscript{2216}

8.2.3 Interested parties

In order to be admissible in his complaint against a dismissal by the prosecution, a complainant must have a direct interest in the prosecution in order to prevent any third party from having the power to confront the person of whose prosecution he desires with the threat of prosecution.\textsuperscript{2217} According to the drafting history of Article 12 Sv, an interested party must have a ‘reasonable interest’ in the prosecution. This stands midway between the too narrow ‘aggrieved party’ and the too broad ‘interested party’ or ‘any person’.\textsuperscript{2218} Although the right of complaint does not merely serve the interest of the complainant but also the public interest, the term interested party should not be interpreted broadly; the argument that any person has an interest in a fair criminal justice would lead to the ‘actio popularis’.\textsuperscript{2219}

Hence, in 1973, the Dutch Supreme Court further specified the term interested party as ‘a person who is affected by the dismissal in an interest of his particular concern.’ The Supreme Court rejected the vision of the Court of Appeal that had considered a complainant admissible on account of his status as ‘a Dutchman, father and concerned intellectual’ with regard to the decision not to prosecute the performance of the alleged obscene musical ‘Oh Calcutta’. According to the Court of Appeal, the term interested party had to be broadly interpreted in relation to ‘criminal offences that affect the legal order to such an extent that possibly any person can be considered as an interested party.’\textsuperscript{2220} Furthermore, as a result of the case law, a complainant must have a personal interest that can be objectively determined.\textsuperscript{2221} An interested party must be personally affected by the criminal offence, either materially or immaterially, and must be aggrieved by the dismissal.\textsuperscript{2222}

Pursuant to Article 12 sub 2 Sv, legal persons, such as foundations and associations that according to their statutes and factual activities protect an idealistic interest or collective interests, can equally form a direct interested party.\textsuperscript{2223} The Article aimed to afford a right of complaint to associations because

\textsuperscript{2216} Ibid., para. 25.
\textsuperscript{2217} Corstens 2008, p. 547-548.
\textsuperscript{2218} Kamerstukken II 1917/18, 77, nr. 1, p. 23; 45.
\textsuperscript{2219} Melai, Wetboek van Strafvordering, Artikel 12, aant. 10.
\textsuperscript{2220} Dutch Supreme Court, crim. ch., 7 March 1972, NJ 1973, 35; Arnhem Court of Appeal, 10 January 1963, NJ 1963, 404.
\textsuperscript{2221} Melai, Wetboek van Strafvordering, Artikel 12, aant. 11.
\textsuperscript{2222} Tekst & Commentaar, Wetboek van Strafvordering, Artikel 12, Valkenburg, para. 6; Corstens 2008, p. 547-548.
\textsuperscript{2223} Article 12 Sv sub 2 reads: ‘Onder rechtstreeks belanghebbende wordt mede verstaan een rechtspersoon die krachtens zijn doelstelling en blijkens zijn feitelijke
it was considered a loss that interests that concern every person could not be represented and defended by any one.\textsuperscript{2224} The article applies only with regard to the situation in which an association defends an idealistic or collective interest, not to the situation in which an association acts in another capacity; then Article 12 sub 1 Sv can apply.\textsuperscript{2225} According to the drafting history, the article does not afford a right of complaint to groups lacking any legal personality or ‘ad hoc groups’. The interests that an association aims to represent must be sufficiently described in its statutes. The requirement of factual activities assures that associations actually exist and are not only on paper and prevents ‘ad hoc advocating’.\textsuperscript{2226} The admissibility furthermore depends on the protected interest of the criminal offence concerned: the interests that an association according to its statutes protects must correspond to the interests protected by the criminal offence. However, the statutes of an association do not have to specify that the association aims to realize its objectives by means of criminal proceedings.\textsuperscript{2227}

An interesting case is the appeal against the decision not to prosecute Fortuy\’n’s political opponents on the ground of 137d Sr with regard to their expressions against Fortuy\’n’s controversial political ideas. The complaint was filed by the representatives of the deceased Fortuy\’n, his surviving relatives and his political party, List Pim Fortuy\’n. In their view, the ‘hate speech’ of Fortuy\’n’s opponents had led to his assassination. In 2003, the Hague Court of Appeal declared all complainants inadmissible. The late Fortuy\’n had lost his personal interest in a prosecution by dying. His surviving relatives were only indirectly affected by the violation of the name and memory of Fortuy\’n. His political party did not, according to its statutes, specifically aim to protect the interests protected by 137d Sr. Moreover, in principle political parties could not be considered to represent special, partial interests. Perhaps unnecessarily, the Court recalled that in any event Article 137d Sr would not be applicable to the case, because it does not protect persons against incitement to hatred on the basis of their political ideas that must be distinguished from a religion or belief.\textsuperscript{2228}

According to the Minister for Justice, associations such as the Anne Frank Foundation and the Dutch Centre for Foreigners would in principle be

\textsuperscript{2224} Melai, Wetboek van Strafvoordering, Artikel 12, aant. 19.
\textsuperscript{2225} The right of collective action origins and is guaranteed in Article 3:305 sub a and b BW. Associations and foundations with legal personality can exercise this right and protect similar interests of other persons. The legislator has determined that in collective action individual files cannot be used without prior permission of the parties involved. Furthermore, associations must first try to reach an agreement before taking legal action. Moreover, a legal demand cannot be aimed at obtaining damages.
\textsuperscript{2226} Melai, Wetboek van Strafvoordering, Artikel 12, aant. 18.
\textsuperscript{2227} Amsterdam Court of Appeal, 9 April 2008, NJ 2005, 599, annotation Legemaate.
\textsuperscript{2228} The Hague Court of Appeal, Crim. Ch., 19 May 2003, L/JN AF8921, NJ 2003, 382.
admissible in their complaints with regard to concrete cases of discrimination. 2229 Indeed, anti-racism and discrimination associations, such as the Anne Frank Foundation, CIDI (Centre Information and Documentation Israel) and regional ADV’s (Anti-Discrimination Services) are generally admissible in their complaints against dismissals with regard to racist and other discriminatory expression and acts of discrimination. 2230

In the Wilders case, the Court of Appeal seemed to use a very different criterion to determine the admissibility of the nine complainants against the dismissal with regard to Wilders’ expression about Islam and Muslims. The complainants consisted of a motley crew of individuals, associations and legal professionals, comprising of a concerned Dutch student, the board of the As Soennah Mosque in The Hague, Dutch politician and attorney Lucas in private capacity, Dutch pastor Ipenburg in private capacity and on behalf of several Dutch University professors, the chairmen of the Elfath Mosque in Maastricht, the Islamic Student Association in Maastricht, Mad-Der, an Association of Alevites in Maastricht and the Islamic Council of Limburg.

According to the Court, on the one hand the requirement to belong or have a certain connection to the Muslim community was difficult to use because it was impossible to verify. On the other hand, the criterion of the abstract desire of the enforcement of the law was too broad. The right criterion consisted of the fear of social unrest that can arise from an actual disturbance of the functioning of the democratic order caused by disorder. Individual citizens had a concrete interest in the aversion of a dangerous disturbance of social life and public debate. The Court declared all complainants admissible, because their complaints specifically concerned the offences of group insult and incitement to hatred, thus offences against public order; and every person had a verifiable and personal interest in the preservation of the public order. 2231

In my opinion, the Court of Appeal wrongly based the admissibility on the preservation of the public order. Although this does form a legitimate ground to partly motivate the order of Wilders’ prosecution, it does not constitute an interest of the particular concern of the complainants. 2232 As every person has an interest in the preservation of the public order, the Court thus left the door slightly open to the ‘actio popularis’ in the field of the hate speech bans. This is a pity, because the collective action should not be confused with the ‘actio popularis’ and criticized on this basis. In the context of the Article 12 Sv procedure, the actions of anti-racism associations could precisely complement the ‘sole guardian of the public order’ in the protection of the underlying values or interests of 137c-d Sr.

2229 Handelingen II 1983/84, p. 4342.
2230 Decisions by Courts of Appeal in complaint procedures ex. Article 12 Sv are accessible at: www.Art.1.nl.
2231 Amsterdam Court of Appeal, Crim. Ch., 21 January 2009, L/JN BH0496, para. 7.4.
2232 In the same sense: Kaptein 2011, p. 154.
In the broader context of criminal, civil and administrative law and the CGB, Van Stokkum and Rodrigues observe that in the Netherlands, collective action is underexposed as a means of fighting discrimination. However, an individual can refrain from action out of fear of reprisals, i.e. ‘victimization’. It can be easier to take action as an organization. Furthermore, the collective action compensates the existing inequalities between the parties to the case and decreases the thresholds (time, money, effort, knowledge) to a lawsuit. Finally, an economic argument for the right to collective action is to avoid separate individual cases. It thus signifies an efficient, effective and economic use of the law.

Hence, in the fight against discrimination, the right of collective action can form an important instrument. This notably applies to forms of structural discrimination, such as continuous hate speech on the Internet that has an international dimension. For example, in the 1990s, the Dutch National Anti-racism Service (LBR), CIDI and the Anne Frank Foundation successfully undertook collective action against the distribution of Holocaust denial by a Belgian association and Verbeke (para. 5.5.3 supra). The Dutch judge imposed an injunction prohibiting the further distribution of the material in the Netherlands. When Verbeke continued to distribute his material, it took two and a half years of lobbying to convince the prosecution to start criminal proceedings that resulted in a fine of 6000 florins. Interestingly, De Boer argues that the standards for civil actions should approximate criminal standards and the same importance must be attached to freedom of expression as in the event that the government would have initiated action. If a criminal action has failed, it would be strange if a legal person or individual would succeed in getting a publication removed on the basis of 6:162 BW.

In 2005, in the context of the discussion about the preservation of ‘fundamental rights in a pluralistic society’ and countering ‘radicalization and radicalism’, in Parliament the idea was even launched to create a commission comparable to the CGB for an adequate and easily accessible approach to counter hate speech that, on the request of complainants, can judge in concrete

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2235 The case can be compared to the famous French Yahoo-case started by French antiracism associations against Yahoo for facilitating the auctioning of Nazi-collector items on the Internet.
2236 De Boer, J., De collectieve actie in verband met discriminatie van een collectiviteit, NJB 27 June 1987, nr. 26, p. 818.
cases. The Minister, however, did not support the idea of creating such an alternative form of dispute settlement.\textsuperscript{2237}

8.3 Conclusion

The Dutch public prosecution has the exclusive right to engage public prosecutions with regard to discriminatory expression on the ground of Articles 137c-e Sr. The prosecution of discriminatory expression against one person in particular on the ground of 261 or 266 Sr depends on a prior complaint by the victim. The opportunity of the public prosecution is curtailed by the Discrimination Directive, which concerns the enforcement of – amongst others – Articles 137c-e Sr. The Directive establishes, as a general rule, that a suspect must be prosecuted if the violation of the offence can be proven and he is liable for punishment. Given the difficulties in determining liability under 137c-d Sr, the tenability of the directive is questionable with regard to these offences. Several legal scholars opine that the legislator let the power of the prosecution go too far. In the last decade the prosecution dismissed several complaints against severe criticism of Islam and Muslims. Affected parties can appeal such dismissals in the so-called Article 12-procedure before the Court of Appeal that can order the prosecution of a suspect with regard to specific criminal facts. Compared with the French civil action, this procedure, however, provides an interested party with a less strong position as a joint civil party in the case on the merits.

This can be illustrated by the \textit{Wilders} case that did not constitute an adversarial prosecution, because the acquittal requested by the prosecution was not contradicted by Wilders while the joint civil parties were not allowed to give their opinion in relation to which concrete values and interests Article 137d Sr protects. However, the participation of victims and other affected parties such as anti-racism associations could complement the ‘sole guardian of the public order’ in the protection of the underlying values or interests of 137c-d Sr. However, in the \textit{Wilders} case, the Court of Appeal wrongly based the admissibility of complainants against the dismissal by the prosecution on the preservation of the public order and threatening character of Wilders’ expression, because this does not constitute an interest of their particular concern; it thereby opened the door to the ‘actio popularis’. The right of collective action can, however, form an important instrument to counter structural forms of hate speech and discrimination.

\textsuperscript{2237} \textit{Handelingen II}, 22 February 2005, 503259; 24 February 2005, 523370.