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 6 – ANALYSIS AND CONCLUSION
Introduction

Against the background of the problem defined in chapter 1 and the analytical framework established in chapter 2, chapter 3 described the international and European obligations with regard to restrictions to hate speech. From this chapter it can be seen that a substantial balancing act must be made between the right to freedom of expression and the interests served with the restriction of hate speech on the basis of religion. Subsequently, chapters 4 and 5 described what the restrictions to hate speech – on the basis of religion – are in France and the Netherlands respectively. The analysis shows that the restrictions to hate speech and the way in which they are drawn differ between the different legal systems. The aim of the present and final chapter is to combine the findings and further analyze them in order to provide a synthesis on France, the Netherlands and the European Convention on Human Rights (ECHR) (para. 1) and to discuss some concluding observations (para. 2).

To that end, paragraph 1 of this chapter further analyzes how the four factors2238 elaborated in chapter 2 influence the determination of restrictions to hate speech in the examined legal systems. Paragraph 1 will then conclude to which extent the restrictions in the systems are drawn in a consistent manner. Subsequently, paragraph 2 advances, on the basis of the entire research, a number of considerations that could form an inspiration for the making of certain fundamental choices in the determination of restrictions to hate speech. It is not intended to create one particular, conclusive model to develop a universal, uniform approach to hate speech. Its modest intention is rather to provide certain tools for enhancing consistency within existing approaches to hate speech, thus answering the central research question of this study.

1. Synthesis France, the Netherlands and the ECHR

This paragraph starts by sketching a number of differences and similarities in the French and Dutch approaches to freedom of expression and the regulation of hate speech against the background of the characteristics of the constitutional state and the national legal culture in general (1.1). Attention is paid to the interrelationship between different actors. There then follows a comparison with the approach under the ECHR (1.2). Thereafter follows a more elaborated comparison of the restrictions to hate speech in the three legal systems as far as the four factors are concerned (1.3-1.7).

2238 Being: actions versus opinions; public debate versus other types of expression; facts versus value judgments; and race versus religion.
1.1 France versus the Netherlands

Both France and the Netherlands have prohibited certain forms of hate speech. A striking difference between France and the Netherlands is the number of hate speech bans. France has four different hate speech bans; the offences of ‘racial defamation’, ‘racial insult’ and ‘racial provocation’, as well as the offence of ‘Holocaust denial’. The Netherlands has only two different hate speech bans; the offences of ‘group insult’ and ‘incitement to hatred, discrimination or violence’. The offence of blasphemy has existed for a long time in the Netherlands and has only recently been abolished in 2013. The distinction in the number of hate speech bans can be explained by the fact that French law is very legalistic – the French legislator must create precisely circumscribed norms that the French judge must strictly apply –, while Dutch law is characterized by more open norms that can be further ‘coloured’ by the Dutch judge in concrete cases. Hence, in the Netherlands defamatory statements about a group fall under the prohibition of group insult and Holocaust denial can, under certain circumstances, amount to a prohibited form of group insult or incitement to hatred. The number of hate speech bans thus gives an indication but does not in itself determine the exact restrictions on hate speech. One must also look at their application by the judge (infra).

Unlike the Dutch hate speech bans, the French hate speech bans are imbedded into the – values of the – French Constitution. In both France and the Netherlands, freedom of expression is protected in the Constitution. A striking similarity is that the limitation clause of both the French and Dutch provisions indicate that the formal legislator is competent to determine the substantive restrictions to freedom of expression, but does not indicate the interests these restrictions must protect. More than the Dutch Constitution, the French ‘Constitutional bloc’ can form guidance for the determination of the restrictions to freedom of expression by the legislator and the judge.

In fact, the constitutionality of restrictions can be reviewed by the French Constitutional Council either in the context of the legislative process or an individual case at the request of the French Supreme Court (Question Prioritaire de Constitutionnalité/ QPC). The French hate speech bans have, however, not been subjected to such a constitutional review. The offences of racial defamation, racial insult and racial provocation were adopted unanimously in 1972. Contrarily, the adoption of the offence of Holocaust denial in 1990 was controversial and it is argued that a review of its constitutionality was bypassed for political reasons.

The French Supreme Court, for its part, has up to this date refused to transmit a QPC about the offences of racial provocation and Holocaust denial that it considers to be sufficiently formulated and in conformity with the right to freedom of expression in the Constitution and Article 10 (2) ECHR. A tension thus appears to be possible between the fields of competence of the Supreme
Court and the Constitutional Council. The Constitutional Council has, however, decided in general that restrictions to freedom of expression must protect either the rights of others or human dignity or the public order. Furthermore, freedom of expression and the restriction thereof is bound by the harm-principle in the French Declaration (individual freedom finds its limits in the harm to others and the enjoyment of their rights and the law can only prohibit harmful actions).

The Netherlands does not have a Constitutional Council. The Dutch Constitution even prohibits the constitutional review of statutory laws. The legislator must himself preserve the constitutionality of his laws. However, the Dutch Constitution does not contain a reference to values such as human dignity or an abuse of rights clause that can form a guideline in the determination of restrictions. The Dutch Supreme Court has established that the Dutch hate speech bans are in conformity with Article 10 (2) ECHR.

The French hate speech bans are incorporated into the French Press Act of 1881 that originally has a criminal law nature and forms a ‘closed legal world’; it not only cites the specific press offences, but also creates, in the context of a suspect’s defence, specific justifications in relation to each press offence – such as the excuse of provocation for the offence of insult and the exception of truth for the offence of defamation –, and very strict procedural rules for the prosecution of the press offences. The French legalism and fear of free judicial interpretation explains why the 1881 Press Act has developed into a hybrid act that also applies in civil cases. How paradoxical it may seem, precisely criminal law is regarded as the appropriate means to assure freedom of expression by precisely determining its limitations. The press offences therefore form the legal basis in both criminal and civil cases; when an utterance cannot be qualified under a specific hate speech ban, it cannot nevertheless constitute a wrongful act under Article 1382 of the French Civil Code (CC). In principle the criminal and civil restrictions to hate speech are thus the same. The French Press Act appears to provide precise and clear norms concerning the prosecution of hate speech, which at first sight can be assumed to benefit the consistency of the restrictions to hate speech.

The question does arise as to whether the 1881 Press Act with its specific press offences and procedural law meets its objective to strike a fine balance between freedom of the press and the rights of victims of defamations, insults and provocations. More generally put, whether the very legalistic French legal system meets its objective to assure legal certainty in order to protect and guarantee the effective enjoyment of – fundamental – rights of citizens. From the perspective of the defence, the 1881 Press Act poses problems by establishing a regime of criminal responsibility disconnected from an author’s intention (through the presumption of bad faith) and the existence of actual prejudice. From the perspective of the prosecuting party, the very strict procedural rules of the 1881 Press Act form actual obstacles in the prosecution. The protection of freedom of expression by means of higher procedural thresholds can jeopardize
effective access to the judge. The formalism of the ‘closed legal world’ of the 1881 Press Act cannot be intended to complicate access to justice.

The Dutch hate speech bans are incorporated into the Dutch Criminal Code and their prosecution is subjected to the general rules of criminal procedure. Unlike in France, prosecutions on the ground of double – either cumulative or alternative – qualifications and requalification by the judge are generally permitted. The Dutch Criminal Code does not determine specific justifications for a suspect’s defence in relation to the hate speech bans. The Dutch system appears to provide more open norms concerning the prosecution of hate speech, which at first sight can be assumed to complicate the consistency of the restrictions to hate speech. The hate speech bans do form a primary guideline for the determination of unlawfulness of expression under Article 6:162 of the Dutch Civil Code (DCC – wrongful act). When an utterance cannot be qualified under a specific hate speech ban, it can nevertheless constitute a wrongful act on the basis of due diligence norms.

In principle, the Dutch criminal and civil restrictions to hate speech can thus differ. From the (French) perspective of legal certainty, one could argue that an utterance may only be unlawful when it is punishable under a specific hate speech ban and that the French ‘hybrid’ approach could therefore form an inspiration for the Dutch judge. In practice, the Dutch criminal and civil restrictions do not, however, necessarily have to differ much; both the criminal and civil judge, when applying the statutory norm, make a further balancing act with the right to freedom of expression. Possible distinctions between criminal restrictions (‘intent’) and civil restrictions (‘due diligence’) are to some extent already discounted in this balancing act or ‘contextual review’. The French uniform approach appears to be notably more efficient; hate speech cases are often joint criminal and civil cases brought before and decided by the same judge, while in the Netherlands after such a joint case civil parties can still initiate a separate civil case.

Given the fact that French law does not recognize the existence of minorities (infra), it appears quite paradoxical that in France the public prosecutor and anti-racism associations representing minority interests have a shared role in the enforcement of hate speech bans. In fact, anti-racism associations have the right to set in motion public prosecutions on the ground of the hate speech bans and constitute as a civil party. The activism of the anti-racism associations has led to an extensive case law concerning hate speech. On the one hand, one could argue that this right of legal action for associations has led to a far-reaching juridification of public debate, which may have a chilling effect on freedom of expression. The legal actions can indeed be criticized for sometimes being aimed at protecting religious or moral interests rather than the fight against racism in the general interest and for being aimed at obtaining criminal condemnations rather than the reparation of damages. Furthermore, there is a risk of over – and under – representation of certain groups (Some groups, such as the Roma’s, may
not be so well organized as others). Moreover, as the anti-racism associations have had a role in the drafting of the hate speech bans and their right to legal action, the question is whether they are not too influential in the restriction of hate speech; who in the French system will speak for freedom of expression?

On the other hand, the right to legal action does afford associations the possibility to bring politically delicate subjects, such as harsh criticism on Islam and immigration, in which the public prosecutor remains inactive, before the judge and assure effective access to justice. Generally, however, a dense cooperation and consultation between the public prosecution and anti-racism associations exists. The anti-racism associations can form the checks and balances within the strict separation of powers by continuously renewing the discussion with the legislature, the executive (i.e. the public prosecutor) and the judiciary on the creation, application and interpretation of the hate speech bans. They can falsify the premises that shape the relationship between freedom of expression and discrimination in new cases, new circumstances. Their direct invocation of the hate speech bans before the judge submits the norms to a constant adaptation to the needs and state of society. Such activism seems to fit perfectly into the goal of the French social contract: the indefinite promotion of individual rights.

In the Netherlands, the fact that the law precisely assumes the existence of minorities and generally accommodates groups in the enjoyment of their cultural and ethnic identities, does not also lead to a dense cooperation between the public prosecutor and minority associations in the enforcement of hate speech bans. The public prosecutor has the exclusive right to engage public prosecutions on the basis of the hate speech bans. Affected parties can obtain a court order demanding the prosecution that initially dismissed a case to prosecute a particular publication on the basis of the hate speech bans after all. However, the Wilders case showed that joint civil parties do not then have a strong position in the case on the merits, which is notably objectionable when the prosecution requests an acquittal. A better cooperation and consultation between the public prosecution and anti-racism associations with regard to the prosecution of hate speech could prevent such non-adversarial prosecutions.

1.2 The approach under the ECHR

The European Court of Human Rights (ECtHR) uses a broad and autonomous notion of hate speech that includes ‘all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)’. According to the ECtHR, the prohibition on hate speech thus described under the ECHR is primarily informed by its underlying values of equal human dignity and non-discrimination. It results from the ECtHR’s case law that the existence of national prohibitions of incitement to hatred, discrimination or violence, Holocaust denial, group defamation and even of blasphemy are not per definition incompatible with the Convention. The ECtHR has on several
occasions reviewed the compatibility of national convictions for hate speech on the basis of such provisions with the right to freedom of expression.

If the statements did not fall into the category of abuse of rights for the purposes of Article 17 ECHR, the ECtHR examined the restriction in question in the light of Article 10 (2) ECHR. The ECtHR then balances the interest of a particular restriction with the interest of freedom of expression in the specific context of the case, thereby affording the state a certain margin to determine the restrictions to hate speech. With regard to hate speech, this margin is often quite broad. Subsequently, the ECtHR has generally found restrictions to hate speech to have the legitimate aim of protecting the rights of others and/or the public order and has found them to be necessary in a democratic society. The ECtHR does not principally favor the use of civil law to counter hate speech. Based on the ECtHR’s case law concerning hate speech one could argue that national convictions for utterances that amount to hate speech will normally not constitute a violation of Article 10 ECHR as long as criminal sanctions remain proportionate and for example do not consist of long prison sentences.

This does not signify that the refusal to prosecute or acquittals in comparable hate speech cases necessarily amount to a violation of the Convention. This can be illustrated by a comparison between the two admissibility decisions in the cases Le Pen and Wilders. It is stipulated that the ECtHR does not oblige states to prohibit and prosecute particular forms of hate speech, but merely leaves this possibility open for states. After all, the ECtHR does not determine which restrictions are prescribed, but only which restrictions are in violation of the right of freedom of expression as protected in Article 10 ECHR and which are not. The ECHR also does not include a general right to have criminal proceedings instituted against a third person on the basis of existing national offences. Furthermore, the ECtHR appears to be quite reluctant to derive any positive obligations from the right to privacy (reputation) or freedom of religion in Article 8 and 9 ECHR respectively, for states to prosecute and convict utterances that amount to hate speech on account of race, ethnicity or religion, thus to restrict and sanction such use of freedom of expression. The broad margin afforded by the ECtHR with regard to the setting of restrictions to hate speech thus limits the impact of the ECtHR’s case law concerning hate speech on national law (infra).

1.3 Actions versus Opinions

French free speech doctrine makes a fundamental distinction between the performance of physical actions and the expression of opinions. According to the traditional French concept of the ‘délit d’opinion’, as articulated by Constant, French law cannot criminalize – the expression of – a mere opinion, but only of an opinion that supports a criminal act. This concept presupposes that for the criminality of an opinion there is a requirement of a close link with a following action. The ‘délit d’opinion’ can furthermore be defined as an offence that 1)
does not form the object of a precise qualification by the legislator, 2) does not determine the specific rights and interests with which it interferes and 3) its arbitrary prosecution and sanction constitutes a danger to freedom of expression. Strictly speaking, the French hate speech bans display some of these features and are therefore inconsistent with the traditional French free speech doctrine.

In fact, the French law on hate speech starts precisely from the premise as articulated by Sartre, ‘racism is not an opinion, but a criminal offence’. Racist discourse violates the core values of the French Republic, because it denies the equal human dignity of French citizens and forms an aggression against both the members of the target group and the indivisible French Republic as a whole. Racist expression therefore lacks the protection of freedom of expression. At stake is not so much the preservation of the French public order through the prevention of subsequent actions causing disorder and violence, but rather the preservation of the French social order created by ‘le pacte républicain’ through the prevention of the existence of intolerant, inhuman racist opinions. The value of human dignity is at the basis of the change in thought about the criminality of opinions; from opinions that prepare reprehensible actions to opinions that form reprehensible actions. The French vision of what constitutes a ‘délit d’opinion’ has thus changed. Therefore, the particular liberal aims of the 1881 Press Act have also been adjusted.

As the hate speech bans were created precisely to intervene in racist discourse in an earlier stage, they require a relatively weak link between the expression of an opinion and a subsequent criminal act. The Decree law Marchandieu of 1939 still prohibited defamation and insult of a group with the aim to incite hatred between citizens and thus was primarily aimed at preventing disharmony between groups that violated the public order, even though the prohibitions were categorized as ‘misdemeanors against persons’. In 1972, the prohibitions were adapted to protect the members of a group and the requirement of the aim to incite hatred was abrogated. Since then, the prohibitions thus primarily protect individual persons belonging to a group against violations of their reputation, thus their estimation in the eyes of others, or dignity rather than to prevent the effects defamations and insults may have on the actions of third parties and public order.

The French offence of provocation to discrimination, hatred or violence specifically protects members of the target group against possible effects of expression on third parties who may, as a result of an utterance, proceed to discriminatory or violent actions against their person. Its scope is not limited to expression that directly, literally and with so many words provokes third parties to commit precisely defined punishable acts, but encompasses more disguised forms of racial provocation that can form a breeding ground for such acts and is likely to lead to future discrimination and violence. This comprises a large variety of utterances that according to its purport could set groups against each other. Although the French legislator has thus not precisely qualified the offence
of racial provocation, it is not seriously contested because it clearly determines
the interests it aims to protect; the right of others not to be discriminated or
exposed to hatred or violence.

To the contrary, the offence of Holocaust denial cannot be criticized for
lacking a precise qualification by the legislator. A legitimate and common
objection is, however, that the offence does not clearly determine the right or
interest it protects and with which it interferes. Its actual rationale is to protect
the Jewish community and other victims of the war crimes committed during
the Second World War against defamatory and provocative statements of a
clearly profound racist and anti-Semitic nature and to prevent the rehabilitation
of national socialism, thus equally to protect the dignity and rights of others and
the French political order. However, the offence forms a ‘délit d’opinion’ by
appearances, because – contrary to the other hate speech bans – according to its
statutory elements it seemingly prohibits mere opinions on the history of the
Holocaust regardless of whether they are harmful to persons. To the extent that
the offence protects the ‘human dignity’, the latter notion then rather functions
as a public moral.

Dutch free speech doctrine has less fundamental principles about the distinction
between actions and opinions and lacks a concept comparable to the ‘délit
d’opinion’. The Dutch hate speech bans can therefore not be said to be
inconsistent with any traditional Dutch free speech doctrine. To a certain extent
they share some characteristics with their French equivalents; the offence of
group insult does not require that an utterance has the aim of inciting hatred
and the offence of incitement to hatred, discrimination or violence has a similar
wording as the French provision. In 1971, these hate speech bans replaced the
offences of group insult of 1934 that – just as in France – were still primarily
aimed to prevent disturbances of the public peace as a result of public insults of
sectors of the population. Although the rationale of the new hate speech bans
was to prevent discrimination of groups in society, the offences were
categorized as ‘offences against the public order’. The significance of ‘public
order’ thus became more substantive and shifted from disturbances of the peace
to a society free from discrimination.

The subsumption of the norm of equality and non-discrimination under
the term of public order, however, makes the hate speech bans susceptible to an
inconsistent application and interpretation. With the creation of the hate speech
bans, the legislator precisely aimed to prohibit utterances that according to their
content violated the independent value of the equal human dignity of citizens,
even though it laid less emphasis thereon. The fact that such utterances may
affect the public order rather formed a reason for their criminalization than an
extra requirement for the criminality of expression. Hence, negative utterances
about immigration, the multicultural society and foreigners used to easily
amount to prohibited forms of group insult or incitement to hatred or
discrimination, because such expression violates the dignity of minorities by
targeting their position in society and can form a breeding ground for and is likely to lead to future discrimination and violence.

Conceptions about the criminality of utterances and the importance of freedom of expression have however changed; nowadays, one is less willing to prohibit expression on the basis of its content. Therefore, in case law and scholarship the scope of the offence of incitement is sometimes limited to expression that directly, literally and with so many words incites third parties to commit precisely defined acts of discrimination and violence and its application is sometimes limited to those situations where there is a direct threat to public order or actual risk of violent conflicts. The question is whether the Dutch legislator must more specifically determine the scope and rationale of the Dutch hate speech bans, precisely because a broader constitutional framework that compels or constrains to an unambiguous interpretation by the judge is absent.

Although it results from the case law of the ECtHR that expression that amounts to ‘hate speech’ may be prohibited, the term is not evidently clear and does not in itself form a solution to the disagreement within the Court about its exact criteria, which notably came to the fore in the Féret case (Chapter 3, para. 1.3). According to a majority, expression may be prohibited as hate speech for the reason that it is insulting, ridiculing or defamatory of a group and violates their dignity and security and because it can lead to intolerance and feelings of distrust, rejection or hatred towards foreigners or other groups. The negative influence of hatred based on prejudices on the political stability and serene social climate is sufficient in order to justify a restriction.

For the ECtHR, reasons for the suppression of hate speech thus form both the harm it causes to the members of the target group and its possible harmful – long-term – effects on society at large. This latter criterion has been compared with the American ‘bad tendency test’ and criticized on this account: the nature of the act – incitement – and the intention of the author are deduced from the ‘tendency’ of the words to persuade others to adopt hateful or discriminatory attitudes. The minority within the ECtHR requires a stricter connection between the content of expression (actual incitement) and subsequent concrete forms of discrimination and violence by others in order to justify a restriction and incidentally refers to the American ‘clear- and-present-danger-test’. The different approaches can, to a certain extent, also be found in the opinions of the majority and minority in other cases, such as in the Gündüz case (Chapter 3, para. 1.1).

An important factor is whether the ECtHR considers expression that seems primarily directed against the – form of or the policy of the – government to at the same time constitute an unacceptable attack on groups in society. Possible inconsistencies in the ECtHR’s case law might notably flow from its interpretation of expression. The distinction is important, because the ECtHR’s approach to hate speech deviates from its approach to the incitement to violence against the authorities (Chapter 3, para. 1.2). With regard to the latter, the Court
sets relatively clear and strict criteria for ‘incitement’, the intention of the author to stigmatize the other side to the conflict, and the likelihood of its impact and affords the state a large margin only for the assessment of the national security situation. Contrarily, with regard to hate speech, the Court leaves states a large margin not only to assess the possible impact of expression and the sensitivity of the situation given the specific national context, but also to bring a large variety of expressions, on the basis of its content, under this broad notion.

This does not signify that the ECtHR’s approach to hate speech is in itself inconsistent. For hate speech, the ECtHR has simply not developed clear standards and precise criteria of review comparable with incitement to violence, such as the expression of actual ‘incitement’, the intention of the speaker to stigmatize others and the likelihood of subsequent violent action as a probable effect of the expression. Nor does the ECtHR principally distinguish between group defamation and incitement to hatred, discrimination or violence and between the harm of hate speech to its target group and its harm to society at large, although it does mention both. Nor does the ECtHR require any demonstration of how hate speech consisting of group defamation affects the dignity or security of the target group, for example by reference to its psychological effects.

This does signify that the ECtHR leaves national authorities a certain margin to interpret and apply its national provisions prohibiting specific forms of hate speech. These need not necessarily cover all expressions that the ECtHR describes as hate speech and for which the ECtHR considers measures justified. In general, national courts need to ensure that hate speech bans are not applied in contravention of Article 10 ECHR. On the other hand, they are at liberty to place a narrow interpretation on those provisions (‘imminence’), even if a broader interpretation (‘likelihood’) would not be inconsistent with the ECtHR’s case law. This would only be different, if clearly defined obligations to make the act in question a criminal offence followed from this case law, and at the moment this is not the case, even in relation to the abuse of rights (Chapter 3, para. 1.6).

1.4 Public Debate versus Other Types of Expression

France has the particular concept of the state as a distributor of rights, which results in a somewhat paternalistic conception of freedom of expression; freedom of expression therefore notably exists within the contours of the state. This also applies to the free public and political debate. Furthermore, pursuant to the French strict separation of powers, the legislator primarily determines the public interest by voting on precisely circumscribed laws and the judge may not reconsider the balance struck a priori by the legislator. Therefore, when an utterance constitutes a prohibited form of hate speech, the French judge cannot further balance the interest in upholding the norm with the interest of a free public debate. In other words, freedom of expression cannot form a general
justification for expression that is punishable on the ground of the hate speech bans (Chapter 4, para. 6.4). The French legislator and judge thus work in unison.

On the one hand, the legalistic French legal system provides for a ‘lock’ on acquired rights, in the Constitution and in relation to the principles of the French Republic. The courts cannot nullify, expand or create laws. Under no circumstances is it permitted to incite to hatred, discrimination or violence, defame or insult racial or religious groups: un point c’est tout. In principle, the context of a public or political debate about immigration or integration cannot remove the criminality of expression that depicts a particular minority group as criminal and thus dangerous exclusively on the basis of its race or religion or of political proposals that violate a binding prohibition of discrimination, such as the proposal to deport foreign nationals from the country (Chapter 4, para. 6.2). Furthermore, it results from the French notion of equality that all citizens participating in public debate have equal freedom of expression; this also applies to politicians, including elected representatives (Chapter 4, para. 6.5.2).

On the other hand, this leads to a very rigid and abstract application of the hate speech bans, in which there is little room for attaching importance to the general interest of free public debate in the light of the concrete circumstances of the case. The French judge, however, sometimes gives weight to the interest of freedom of expression in the question whether an utterance meets all the statutory elements of the offence. This implies that the judge does a bit more than strictly applying the hate speech bans and in fact implicitly attaches importance to freedom of expression. This results in certain inconsistencies in French case law in relation to the distinction between the imputation of specific facts and free value judgments (Chapter 4, para. 4.5) and the requirement that an utterance must designate a particular group (Chapter 5, para. 5.2), depending on whether the judge desires the preservation of a free debate on a specific topic (infra).

If the French judge could and would more explicitly and structurally attach importance to freedom of expression as a justifying ground, he could make his motivation more transparent and consistent. Although the case law increasingly refers to and takes into account the interest of a free public debate, neither the French Supreme Court nor the lower courts have developed a specific ‘balancing-test’ as a standard for judicial review in all hate speech cases. This again leads to certain inconsistencies in case law. It is in itself incomprehensible why the French judge finds the qualification of Roma’s as particularly criminal and thus dangerous permissible because the expression is uttered in the context of a public debate about their integration, but in the case of North Africans finds the same qualification a punishable form of hate speech even though it is uttered in a similar context (Chapter 4, para. 6.2). The French courts originally introduced the reference to the general interest of a public debate in defamation cases, because the traditional notion of the good faith developed in French case law as a suspect’s means of defence proved not to meet the standards of the Article 10 case law of the ECHR (Chapter 4, para.
4.4.3). This has created confusion as to the interrelationship between the two notions and questions about the subjectivity of the judge.

Strictly speaking, it is not clear why the French judge could not develop further standards about the interest of public debate, if he can develop standards about a suspect’s good faith as a justifying ground (Chapter 4, para. 4.4.2). Yet French legalism appears to oppose not only to the judicial balancing involved therein but also the accommodation or ‘importation’ of European free speech standards. As far as the latter is concerned, the ECtHR, however, has always decided that the French convictions for hate speech fall within the margin it uses to review restrictions to hate speech (Chapter 3, para. 1.3). With regard to the former, a judicial balancing act does not necessarily amount to a reconsideration of the balance struck by the legislator, but can also form a method to determine why, in the particular circumstances of the case, negative remarks about a particular group, although uttered in public debate, nevertheless violate the values or rights protected by the hate speech bans.

In the Netherlands, free public and political debate is not only allowed by the authority of the Dutch State but is also legitimizing it. Although this perspective leads in itself to wider boundaries in public debate, it does not prevent the existence of certain paternalistic prohibitions protecting authorities, morals and religion, such as the offence of lese majesty and the former offence of blasphemy, as the outcome of the political process. Dutch law is, however, less legalistic than French law and is characterized by more open norms that can be further ‘colored’ by the Dutch judge in concrete cases. In general, these may not be interpreted extensively, given the principle of legality. The Dutch Supreme Court has developed a ‘three-step-test’ as a standard for judicial review of the criminality of utterances under the offence of group insult and in the Wilders case the District court applied a similar test with regard to the offence of incitement to discrimination that, however, has not been endorsed by the Supreme Court – yet.

Pursuant to this test, when an utterance according to its purport and direct textual context constitutes a punishable insult, the fact that it is uttered in the context of a public or political debate on a matter of public interest can nevertheless remove its punishable character, provided that it is not gratuitously offensive. Likewise, the context of a public or political debate on a matter of public interest can remove the punishable character of an utterance that according to its purport and direct textual context constitutes a punishable incitement to discrimination, provided that it is not exceeding. Hence, when an utterance constitutes a prohibited form of hate speech, the Dutch judge can further balance the interest in upholding the norm with the interest of a free public debate. In other words, freedom of expression can form a general justification for expression that is punishable on the ground of the hate speech bans. The Dutch Constitution protects freedom of religion and freedom of expression in separate provisions. It is unclear from the case law of the Dutch
Supreme Court whether in the Netherlands – unlike in France – a concurrence of these rights can result in a higher protection of religiously motivated opinions uttered in public debate than non-religiously motivated opinions per se. In certain decisions lower courts tend to equate the regime of religious and political convictions.

On the one hand, a further balancing act in the light of the concrete circumstances of the case appears desirable, because the hate speech bans restrict utterances on the basis of their content and therefore interfere with the core of the right to freedom of expression. This method of judicial review, then, results in a more proportional application of the hate speech bans and leaves room to discuss certain taboos in public debate; negative utterances about immigrants and foreigners in the context of a debate on the problems related to their integration and the multicultural society do not always amount to a prohibited form of hate speech but can be justified to expose social problems. Furthermore, it results from the Wilders-case that other than the direct incitement of third parties to proceed to particular acts of discrimination or violence against a particular group, political proposals to take concrete measures against a particular group, such as the proposal to refuse Muslims access to the country, that – if implemented – could violate a binding prohibition of discrimination are not by definition punishable. It remains undecided as to whether within these broad contours of public debate all citizens have equal freedom of expression or whether politicians are afforded an even larger freedom. In any event, in the Netherlands there can be a wide scope to plead for discriminatory legislation as a political solution to immigration problems and criticism of the government’s immigration policy.

On the other hand, this method of judicial review can interfere with the aim of the legislator in relation to the introduction of the hate speech bans and can entirely deprive the hate speech bans of the protection they aim to assure as grounded in international law. One could even wonder whether the judge, instead of making a substantial balancing act, does not afford the right to freedom of expression such weight that competing rights or interests necessarily pale into insignificance. In fact, in certain cases the judge does not apply this test consistently and in a reasoned fashion; he seems to be inclined to simply cancel out the insulting or discrimination-inciting nature of statements with reference to the interests of freedom of expression, omitting to review whether the statements were ‘gratuitously offensive’ or ‘exceeding’. At first sight it might appear inconsistent, when the legislator has decided to only criminalize insults and incitements that violate the reputation or dignity of the target groups and threaten their right to non-discrimination, but the judge subsequently determines the criminality of utterances on the ground of whether they are ‘gratuitously offensive’ or ‘exceeding’. These criteria must therefore only be applied as a final proportionality-test, otherwise the judge would alter the rationale and scope of the hate speech bans as intended by the legislator. The exact significance of the criterion that discriminatory political proposals may not
be ‘exceeding’, however, remains unclear. The latter term is open to different interpretations and is thus sensitive to an inconsistent application; it could refer both to the risk of a breach of public order in the form of violent conflict and to the aim of the destruction of the fundamental rights of others. Therefore the term must be further clarified.

The legislative history points to the latter interpretation. The Constitutional legislator of 1983 found it unnecessary to insert an abuse of rights clause into the Dutch Constitution; the hate speech bans would suffice for the protection of democracy. The function of the hate speech bans is thus not only to guarantee the fundamental rights as they exist in society without distinction on account of race and so on. The same follows from the background of the hate speech bans; the aim of the ICERD is to eliminate all forms of racial discrimination that impairs the equal enjoyment of fundamental rights. Its drafting history precisely opposes the requirement of a breach of public order or a risk of violence for the criminality of hate speech. Such a requirement resembles the ‘imminent lawless action test’, of which the underlying premise is, however, that the state must be entirely neutral with regard to the – discriminatory – content of expression. The hate speech bans, on the other hand, prohibit expression precisely on the basis of its discriminatory content and the effect it may have on fundamental rights. Hence, even if discriminatory political proposals are only considered punishable when they are ‘exceeding’, then it must still be determined whether, according to their purport and aim, they overstep the outer limits of the constitutional state, i.e. the rule of law.

If the Dutch legislator does not more specifically determine the scope and rationale of the Dutch hate speech bans, it is incumbent on the judge to crystallize further standards. The current standards in case law are, however, unclear and inconsistent. Contrary to the Wilders decision, the results of earlier case law of the Dutch Supreme Court is that the fact that a discriminatory statement forms an unspecified political proposal that the speaker hopes to put into practice once he has come to power democratically does not divest it of its criminality. Furthermore, the case law is also not clear in relation to which extent the interest in a free public debate can remove the punishable character of utterances that incite to hatred or violence. This appears less likely the case than with racist insults. Given the ambiguity in case law, a more ideological Constitution could nevertheless form a useful guideline for the application and interpretation of the hate speech bans. Alternatively, the judge, for the determination of the outer boundaries of public debate, could refer to Article 17 ECHR, which prohibits the abuse of rights.

The ECHR has found complaints about a violation of the right to freedom of expression inadmissible by reference to Article 17 ECHR, which prohibits the abuse of rights. The ECHR has applied Article 17 ECHR in this direct manner with regard to Nazi- and other racist propaganda, Holocaust denial, anti-Semitic and Islamophobic expression and has excluded these categories of expression from the protection of Article 10 (1) ECHR on account of
their content without reviewing the restriction under Article 10 (2) ECHR. The ECHR however increasingly applies Article 17 ECHR in an indirect manner, as an interpretative tool, when it examines the necessity of a restriction on expression in a democratic society under Article 10 (2) ECHR in the case on the merits (Chapter 3, para. 1.1).

The ECHR generally affords a high level of protection to contributions to public and political debate compared to other types of expression (Chapter 3, para. 1.1). It results from the case law that hate speech can concern, or can in itself be, a topic of general interest. Furthermore, in principle hate speech can also be aimed at contributing to a public debate. However, the Court often leaves states a large margin of appreciation to determine the necessity of restrictions to hate speech, most notably for the reason that the expression addressed problems related to the immigration and integration of foreigners or other groups. According to the Court, states are entitled to set the boundaries to the public and political debate concerning immigration and integration differently, because the extent of these problems and the measures to solve them may differ from country to country (Chapter 3, para. 1.3). This approach appears to be inconsistent with the Court’s general approach towards political expression.

Firstly, immigration and integration are highly political, European issues and the ECHR generally exercises a stringent review of restrictions on political speech, regardless of its specific topic. The fact that member states may adopt different solutions to counter political problems does not generally alter this. Secondly, the exercise of a stringent review of restrictions on political speech need not necessarily result in the conclusion that Article 10 ECHR has been violated. The two should not be equated. The ECHR could also arrive at the conclusion that a measure is justified because a particular form of hate speech is not acceptable in political debate. The ECHR however essentially seems reluctant to set criteria for hate speech in the politically sensitive context of immigration and integration.

Furthermore, it results from the case law that politicians in particular and more specifically parliamentarians – of the opposition – must have a large freedom to contribute to public debate and to criticize the government (Chapter 3, para. 1.1). At the same time, a majority within the ECHR stresses the special responsibility of politicians thereby not to incite hatred and intolerance against a part of the population. The public must be protected against such irrational ‘dangerous discourse’. Politicians must be aware of the effects of their words, precisely because they aim for political support, and must respect the principles of democracy, precisely because they strive to obtain political power (Chapter 3, para. 1.3). The relationship between the special freedom and the special responsibilities of politicians is thus diffuse.

The ECHR seems to ascribe an exemplary role to politicians, whose words inevitably have a larger impact on society. To a certain extent, the duties and responsibilities of politicians can therefore be compared with those of
teachers, who, according to the ECHR, form a symbol of authority for their students and therefore must act with reserve and tolerance, even in their activities outside the school. In both cases, awareness of their special position seems to partly color the authors’ intent. Moreover, one is inclined to conclude that expression of politicians may qualify as an abuse of rights sooner than expression of any other citizen. On the other hand, although the ECHR has gradually extended the scope of Article 17 ECHR to many forms of speech deemed contrary to the ‘spirit of the Convention’, the ECHR nowadays appears to exercise restraint in recurring to Article 17 ECHR – except for Holocaust denial and revisionist theories –, also with regard to speech by politicians.

The manner in which Article 17 ECHR is applied by the ECHR appears to be inconsistent and is considered as undesirable by some because all limitations to freedom of expression should be reviewed under Article 10 (2) ECHR that would be sufficient to achieve the goal of Article 17 ECHR to protect the democratic system and human rights. Furthermore, the ECHR has been criticized for affording political parties a larger freedom to contribute to public and political debate than individual politicians have, while anti-democratic ideas expounded by political parties form a greater threat to democracy the more they reach the centre of power. In fact, the ECHR found the dissolution of the Turkish Welfare Party justified, because its long-term political policy to set up a regime based on the Sharia was contrary to the concept of a democratic society and its leaders did not exclude the recourse to violence to force the implementation of this policy; ‘the risk to democracy’ was proven to be ‘sufficiently imminent’ (Chapter 3, para. 1.1). Indeed, this test forms a higher threshold than the standards used in hate speech cases, but actually it is tailored to the far-reaching measure of the prohibition and dissolution of a political party.

The added value of Article 17 ECHR appears to be that it can form a helpful tool for the ECHR in determining the outer boundaries of free public and political debate. First, Article 17 ECHR can justify such far-reaching measures that otherwise might not easily pass the test of Article 10 (2) / 11 (2) ECHR. Secondly, the prohibition on the abuse of rights can play a role in the development of positive obligations; it seems reasonable that expression that can be qualified as an abuse of rights must at least be prohibited by law or even criminalized and prosecuted by the state. This in principle does not just apply to political parties, but also to individual politicians or citizens.

1.5 Allegation of Facts versus Value judgments

French law distinguishes between the imputation of facts and the expression of value judgments in a number of ways. The concept of the ‘délit d’opinion’ assumes that the expression of an opinion is only punishable, if it supports a criminal act. This principle thus does not apply to the expression of a – false – factual statement. The French legislator has, however, criminalized both defamation and insult of an individual person as an offence; he thus has found it
necessary to protect persons not only against the harm ‘imputations of a specific fact’ inflict on their reputation, but also against the harm insults consisting of ‘outrageous expression, terms of contempt or invectives’ cause to their dignity. The distinction between the two offences is notably relevant, because the law sanctions defamation more severely than insult and affords a suspect the possibility to prove the truth of his defamatory statements, but not of his insulting opinions; the latter are not susceptible of proof.

French law also criminalizes defamation and insult of a person or group on the basis of his/their race, religion and so on as two separate offences and sanctions the former more severely than the latter. The distinction between racial defamation and racial insult appears, however, somewhat artificial. With regard to racial defamation, the possibility for a suspect to prove the truth of his imputations is excluded just as with regard to racial insult (Chapter 4, para. 4.4.1). The premise thus is that factual accusations against persons on the basis of their race or religion are also not susceptible of truth. Furthermore, in cases of racial defamation and racial insult, a suspect’s bad faith is always presumed and his appeal on his good faith as a justifying ground is generally rejected, respectively not permitted (Chapter 4, para. 4.4.2).

On the one hand, in this practice utterances appear likely to be interpreted to the disadvantage of the suspect, as having a racist or discriminatory purport, and the burden of proof is shifted towards the suspect, who in practice has few means of defence at his disposal. Criticism of relatively high crime rates among a particular group of the population is generally interpreted as an allegation that criminality is inherent in and an immutable characteristic of that group and is thus considered punishable (Chapter 4, para. 4.3.1). However, if such criticism does not explicitly draw this conclusion, it does not necessarily have a racist or discriminatory purport, but can also have the aim of discussing problems existing within a particular group in society that might just as well be caused by socio-economic circumstances. Although to require or allow the demonstration of the factual proof that a particular group possesses certain inherent discrediting characteristics would run counter to the essence of anti-discrimination laws, the question is whether the French judge should more explicitly take into account whether or not such criticism contains any truth or a sufficient factual basis in the context of a suspect’s appeal to his good faith or a free public debate on a matter of public interest. In France, such assertions are, however, in any event difficult to sustain, given the prohibition of collecting data on the behaviour of groups categorized on the basis of their race, ethnicity or religion (Chapter 4, para. 2.2). Although this prohibition has the laudable aim to prevent statistics from being misused, which may lead to racism and discrimination, it appears to complicate an informed and open public debate on and valuation of social problems.

On the other hand, the French judge discounts the interest of freedom of expression in relation to the question of whether an utterance constitutes an imputation of a specific fact or a value judgment. As a result of the case law,
there is a high threshold in relation to the imputation of ‘a specific fact’ as the
offence of racial defamation is not easily met, because hate speech often consists
of generalizations about a group. This results, however, in certain
inconsistencies in French case law about this distinction, depending on whether
the judge desires to preserve a free debate on a specific topic. Although the
imputation of the Jews to humiliate, despise and persecute the Palestinians
appears just as precise as the imputation of North Africans to live off social
security benefits, the judge only considered the former sufficiently precise to
constitute punishable defamation (Chapter 4, para. 4.3.1; 4.5.1). Without further
motivation, these different outcomes are incomprehensible and inconsistent.
Such inconsistency is notably objectionable, because prosecutions on the ground
of double – either cumulative or alternative – qualifications (defamation/insult)
and requalification by the judge is not permitted.

Dutch law less explicitly discerns imputations of a specific fact from the
expression of value judgments. While the law criminalizes defamation and
insult of an individual person separately, the offence of group insult comprises
both defamatory and insulting statements about a group on the basis of its race,
religion and so on and in principle does not sanction them differently.
Furthermore, with regard to the offence of group insult, neither the legislator
nor the judge has crystallized a suspect’s means of defence. The same applies to
the offence of incitement to hatred, discrimination or violence. Therefore, it is
unclear to which extent it is relevant that an utterance constitutes the imputation
of a specific fact or a negative value judgment about a particular group and to
which extent a suspect is allowed to demonstrate that his assertions contain any
truth or have a sufficient factual basis.

The latter criteria do appear to be implicitly relevant for the question of
whether the context of a public debate on a matter of public interest can divest
an utterance from its criminality under the hate speech bans. Where the French
judge thus discounts the interest of freedom of expression in relation to the
question of whether all elements of the offence are met (a false fact or an
insulting opinion), the Dutch judge appears to discount the distinction between
facts or value judgments in the question whether the statement in question
forms part of public debate. However, as the judge omits to give a more explicit
motivation as to whether assertions contain any truth or have a sufficient factual
basis, the case law appears to be inconsistent. In certain cases, the judge
considered the depiction of Moroccans and Muslims as inherently criminal in
the context of a public debate on their immigration and integration punishable.
Contrarily, in the Wilders case, the judge found the conclusion from the
relatively high crime rates among Moroccans and Muslims that criminality is
inherent in their religion and culture permissible in the context of a public
debate on problems related to immigration and integration. The judge thus
sometimes appears to accept statistical correlations as a sufficient basis for the
making of causal connections. However, such a negative conclusion about the
inherent nature of all members of a group on the basis of its religion or ethnic background has more of a racist purport than the aim to discuss social problems and thus runs counter to the essence of the hate speech bans.

For the determination of the criminality of utterances about the Holocaust under the offence of group insult, the judge does not explicitly distinguish between facts and value judgments. The flat denial of the fact that the Holocaust has taken place, the imputation of the fact that Jews have invented the Holocaust, the minimization of the Holocaust or the making of gross jokes can all, under certain circumstances, constitute an insult that is ‘gratuitously offensive’ and thus punishable. The first two assertions can, however, be qualified as pertinent untrue factual statements, the aim and value of which appears likely to be more questionable than that of the latter two provocative opinions that – contrary to untrue facts – form a matter of degree; the term ‘gratuitously offensive’ therefore also appears to be more applicable to negative value judgments than to untrue factual statements.

The ECtHR generally strictly distinguishes between facts and value judgments in its case law concerning defamation of individual persons (Chapter 3, para. 1.1). As a result of the case law, other than for untrue factual statements, the state may not require any proof of truth with regard to negative value judgments, which in principle one is free to express, although strong negative opinions may require a sufficient factual basis and may not be ‘gratuitously offensive’. These principles have notably had a strong impact on the national law in the Netherlands and also, albeit to a lesser extent, in France. It is striking that, in cases concerning hate speech, the ECtHR refers little or not at all to this distinction, while the utterances in question mainly consisted of imputations, allegations and negative opinions about a particular group. Nevertheless, the distinction appears to be implicitly relevant in the considerations of the Court. For example, the ECtHR found the restrictions to the accusation against Jews of plotting against Russia and the linking of the entire group of Muslims with the terrorist attacks of 9/11 acceptable, because these statements constituted a prohibited ‘general and vehement attack on a group’ (Chapter 3, para. 1.3); the underlying premise appears to be that these utterances constitute ‘false factual allegations or strong negative value judgments that lacked a sufficient factual basis’.

If the ECtHR would more explicitly refer to these principles, it would make its reasoning more transparent. In its hate speech case law, however, the distinction often seems to fade, because of the broad notion of hate speech used by the ECtHR and the large margin afforded to states in determining the restrictions to the immigration and the integration debate. An exception to this is the Le Pen case, in which the ECtHR explicitly rejected the news facts to which Le Pen referred in his defence as a ‘sufficient factual basis’ for his negative value judgments about Muslims (Chapter 3, para. 1.3). However, the ECtHR neither discussed the content of these news facts nor did it give further reasoning for its
decision on this point. Therefore, the decision does not shed much light on the requirement of a ‘sufficient factual basis’ for allegations in hate speech cases. The distinction between facts and value judgments is more structurally apparent in the ECtHR’s case law concerning religious group defamation and Holocaust denial. Here it functions as a helpful tool in order to discern strong but free critical opinions about religious dogmas, institutions or officials that might hurt religious feelings but are not ‘gratuitously offensive’ from the prohibited actual defamation of religious groups (Chapter 3, para. 1.4) and the prohibited negation of ‘the category of clearly established historical facts’ which amount to the racial defamation of Jews, Nazi-propaganda and glorification from the free research, interpretation and debate on historical events (Chapter 3, para. 1.5).

By referring to the distinction between facts and value judgments in a more structural manner, the ECtHR could develop further standards to consistently distinguish between free critical remarks and hate speech. For example, the accusation that Jews are responsible for 80 percent of all murders in the Netherlands is evidently untrue and the depiction of Muslims as animals constitutes a strong value judgment that lacks any factual basis and can in any event be considered to be ‘gratuitously offensive’. Such statements therefore appear unjustifiable in any public debate. More difficulties arise with the category of expression that lies in between such pertinent untrue statements and terms of abuse and merely intolerant and offensive remarks. Criticism of relatively high crime rates among a particular group of the population must be allowed. The fact that such high crime rates exist among a particular group can, however, not justify the negative conclusion that the criminality is caused by their belonging to a particular race or religion and therefore forms an inherent characteristic of that group. The proposal is thus not to introduce the proof of truth or a sufficient factual basis as a means of defence that justifies such racist conclusions; the distinction is precisely aimed at discerning such racist expression that actually affects the dignity of members of the target group from critical contributions to subjects of public debate.

The distinction between facts and value judgments does not apply to the direct and literal incitement of others to hatred, discrimination or violence against a particular group. After all, such utterances may be grounded in factual claims and opinions about a group. They do not express them but instead primarily urge others to discriminatory or violent action. Contrarily, it can be of relevance for the valuation of more indirect and disguised forms of spreading hatred and creating a breeding ground for discrimination or violence. Such expression also falls under the ECtHR’s broad notion of hate speech and can consist of pertinent falsehoods, value judgments that affect people’s basic dignity or mere intolerance. Generally put, the ECtHR could differentiate more between different utterances in order to better evaluate their purport in the specific context of the case. This could contribute to the development of clear and consistent standards for restrictions to hate speech. The ECtHR can only differentiate between (different levels of protection for) different forms of hate
speech, if it starts using a stricter review in hate speech cases as well as in highly sensitive political discussion.

1.6 Race versus Religion

A particularity of the French law is that it does not recognize the existence of national minorities, defined by a common race, ethnic origin or religion. The French Republic only recognizes individual and equal citizens that have the right of indifference to their specific characteristics (strict equality). Against this background, the hate speech bans can be understood as a means of social integration; French citizens are not to be addressed on the basis of their specific characteristics. On the one hand, this notion of strict equality results in a more limited protection under the hate speech bans. Certain national minorities, such as the Corsicans, are not considered to constitute a group protected by the hate speech bans, even though they do form the target of defamatory and insulting remarks (Chapter 4, para. 4.3.1).

On the other hand, for those minority groups that are protected by the hate speech bans, the French strict equality results in a more robust protection of their individual members against hate speech, because the offences of racial insult, defamation and provocation explicitly protect both individuals and groups. The offences of racial defamation and insult thus protect the individual members belonging to the group on the basis of their basic, civic reputation or dignity and not a group qua group on the basis of a common group reputation or dignity. They protect individuals when defamatory or insulting statements are associated with shared characteristics such as race or religion. Hence, in order for an utterance to fall under the hate speech bans it does not have to target a particular group in its entirety (quantitative criterion), but a member or certain members of the group limited to a geographical area as a sum of individuals each entitled to protection (qualitative criterion) (Chapter 4, para. 4.3.1).

The hate speech bans do require that an utterance targets persons and, as hate speech often consists of statements about groups, the case law requires that in order for an utterance to be punishable under the hate speech bans, the group must be ‘precisely designated’. The French judge does not, however, apply the latter criterion in a consistent manner. In some cases this criterion seems to signify that an utterance must explicitly name a particular target group; the judge found the enunciation of ‘the inequality of races’ or the denunciation of ‘the mixing of races’ permissible, precisely because these remarks did not refer to a particular group. Contrarily, the judge has found associations with the Nazi-ideology that did not in so many words refer to the Jewish community punishable because such expression has an inherent racist and anti-Semitic purport (Chapter 4, para. 5.2.1). Nevertheless, draft proposals to criminalize racist propaganda or the diffusion of racist and xenophobic ideas have all failed,
precisely because they no longer required that the expression must directly address a person or group.

In other cases, the criterion that a group must be precisely designated seems to be more substantive and signify that, in order to qualify for protection under the hate speech bans, a group must, on the basis of its common characteristic, be sufficiently demarcated. Foreigners, immigrants and ‘Harkis’, i.e. North Africans who served in the French army during the Algerian wars and their descendants, do not form sufficiently designated groups to qualify for protection under the offences of racial defamation and insult (Chapter 4, para. 4.3.1; 5.2.1). On the one hand, the judge thus does require a sufficient commonality of a group in order for defamatory and insulting remarks to affect the individual reputation or dignity of its members. On the other hand, the exclusion of these groups from protection seems to be inspired by the desire to preserve a free public debate on certain topics. The degree of strictness of the ‘designation’criterion, then, conceals a judicial balancing act between different interests that not necessarily always turns in favour of freedom of expression, but can differ per hate speech ban. Given the different protected interests by the different hate speech bans, then, this is not inconsistent per se. In fact, foreigners, immigrants and ‘Harkis’ are protected against incitement to hatred, discrimination or violence (Chapter 4, para. 6.3). It is likely that this also applies to Corsicans. The incitement of others to commit harmful acts against persons on whatever ground is simply not permitted in public debate.

In France, utterances concerning race and utterances concerning religion are valued differently. Unlike with race, it is not only permitted to express negative value judgments about religion in general, but also about one religion in particular, its religious figures, tenets, dogmas, institutions and practices. In fact, in 1881 the French legislator abolished the offence of blasphemy and other prohibitions of religious offence, because in his vision such offences protect religious feelings based on personal religious convictions, which requires the recognition of a religion by the State. This is contrary to the laïc principle of the French Republic, which has been elaborated since 1905 and affirmed in the French Constitution since 1946. This is also contrary to the French principle of equality, according to which the State respects all beliefs equally. Since 1789, Articles 10 and 11 DDHC indeed explicitly protect the expression of religiously and non-religiously motivated opinions on equal footing.

Since the 1930s, the French hate speech bans, however, do criminalize forms of hate speech both on the basis of race and religion. Not only racial groups, but also religious groups are thus protected against hate speech. Religious and conservative associations often take legal action against vehement criticism on their religion. For the determination of the criminality of utterances about people’s religion under the hate speech bans the French judge uses a number of distinct methods. First of all, the judge points to the laïc character of the French State and the absence in French law of the offence of blasphemy as a reference point for the fact that opinions about the tenets, dogmas and practices
of a particular religion do not fall under the scope of the hate speech bans (Chapter 4, para. 5.4; 6.5.2). Hence the ridiculing of the Catholic faith or the denouncement of the ‘islamization’ of French society and of the accommodation by the French State of Islamic practices, such as the wearing of the garb or the burqa, ritual slaughtering, the financing of mosques, how offensive it may be to personal religious convictions, are permitted.

Furthermore, the judge rejects any civil responsibility on the ground of Article 1382 CC that prohibits the wrongful act for utterances that merely offend religious feelings by referring to the application of the hate speech bans in civil cases and their primacy over the latter article (Chapter 4, para. 5.4.2). Subsequently, the judge interprets the hate speech bans strictly and requires utterances concerning people’s religion to constitute an imputation or a ‘personal and direct attack’ against a ‘designated’ group. On the one hand, the criterion of the ‘designation’ of a group has proved a helpful tool for the judge to demarcate free criticism of religion from punishable hate speech against people on account of their religion. The explicit depiction of Muslims as harmful, criminal or dangerous exclusively on the ground of their religion is punishable, also in the context of a debate on immigration, integration, the ‘islamization’ of society and religion-state relationships (Chapter 4, para. 6.5.2; 6.5.3).

On the other hand, the application of the designation-criterion appears to be particularly delicate with regard to religious groups. For example, in the Mohammed cartoons case, the judge found the cartoons permissible, because they did not target ‘the entire group of Muslims as a whole’, but formed part of the public debate about the criminal acts committed by fundamentalists in the name of Islam (Chapter 4, para. 5.4.4). The judge thus returned to the ‘old’ quantitative criterion that in order to be prohibited an expression must designate the entire group. However, the criticism was eventually considered to be permissible, not because of the ‘demarcation’ of the group as such, but because the criticism was founded on a sufficient factual basis. Without a further elaboration on this point, however, the case law is inconsistent. The judge thus must further clarify whether the criterion that a group must be perfectly designated signifies that an utterance explicitly names a particular group, a group meets a certain degree of homogeneity or that a discrediting characteristic or behaviour is considered inherent to all members of the group. For the determination of whether an utterance about such a designated group has either a racist purport or enters into a public debate, it is inevitable that the judge will consider whether it contains any truth or has a sufficient factual basis.

In the Netherlands, the law precisely recognizes the existence of minorities and accommodates the enjoyment of people’s ethnic identities and their cultural rights (institutionalized multiculturalism). Unlike in France, this minority approach does not raise any problems in relation to the protection of different minority groups under the hate speech bans. Strictly speaking, this focus on groups does, however, result in less strong protection of individuals belonging to a minority
group under the hate speech bans. In fact, the offence of group insult explicitly only protects groups and not individual persons against insults on the basis of their race, religion and so on. Insults about an individual person on the basis of his race, religion and so on can only amount to group insult, when according to its purport it concerns the entire group. In practice, references to a person’s race or religion are, however, likely to be interpreted as such. Otherwise, such expression can be punishable under the offences of defamation or insult of an individual person, but then the judge is not obliged to weigh the racist purport of an utterance when imposing a penalty. This technical and theoretical distinction might notably become important, if the offence of group insult would be abrogated on the ground that such expression should only be prohibited by civil law. Strictly speaking, the offences of defamation or insult of an individual cannot form a guideline for its unlawfulness under Article 6:162 DCC, because defamatory and insulting remarks about larger groupings do not identify particular persons.

Just as in France, the Dutch hate speech bans criminalize since the 1930s forms of hate speech both on the basis of race and religion. It results from the drafting history and the case law that ‘criticism of religious convictions and practices’ must be free and that offended religious feelings is not a criterion for criminality under the hate speech bans. The mere fact that offensive statements about a religion also offend the adherents of that religion is not sufficient for those statements to be equated with statements about those adherents. The Dutch Supreme Court has therefore ruled that in order to constitute a punishable group insult a statement must unmistakably refer to a particular group of people characterized by their religion. The Court has thereby demarcated the offence of group insult from the at the time ‘dormant’ offence of blasphemy that precisely criminalizes statements that denigrate the concept of God by ‘scornful’ blasphemy, i.e. in a manner that is offensive to religious feelings. This unmistakably criterion, then, forms the Dutch equivalent of the French requirement that a group must be ‘precisely designated’. In Dutch case law, it seems to notably signify that an utterance must explicitly name the target group (‘Muslims’). On the one hand, a strict application of this criterion appears to be a helpful tool for the determination of the criminality of utterances about people’s religion under the hate speech bans; it has the advantage of simplicity and thus serves legal certainty. On the other hand, a strict application of this criterion appears inconsistent with the drafting history, according to which in ‘hybrid’ cases the criminality of an utterance about a particular religion/its adherents depends on whether the speaker intended to pass judgment on the adherents or the beliefs. Eventually the judge must determine whether such a judgment constitutes a punishable form of insult.

Another question is whether certain statements about a religion can be so vicious and aggressive that they should be regarded as a punishable form of inciting hatred or discrimination against believers. In the Wilders case, the court considered that a statement must also unmistakably refer to a particular religious
group in order to constitute a punishable incitement to hatred and discrimination. On the one hand, it logically follows that making associations and links between the ‘Islamization’ of immigration to the Netherlands and higher crime rates in the Netherlands in the abstract without naming a particular group is not punishable. On the other hand, it appears to be inconsistent that in that case the offence did not even cover the attribution of the fact that one in five Moroccans are registered with the police as suspects to their religion and culture, because Islam is a violent religion and the problems therefore lie in the community itself. After all, the statement, by the way it is worded, clearly refers to the group of Moroccans in connection with their religion. Furthermore, it also appears inconsistent that in that same case statements that explicitly name Muslims are initially regarded as incitements to discrimination against them on the basis of their religion, but are later divested of their criminality by the argument of the need for free public debate on Islam without any further motivation (supra).

This illustrates that the fact that an utterance explicitly names a religious group does not in itself say anything about whether it has a punishable purport and that the view of the legislators and the Supreme Court that criticism of ‘religious practices’ is not a criminal offence is in need of clarification. Does this effectively refer to facts of common knowledge? Does it refer to establishing a – potential – connection between religion and antisocial behaviour? Must all the members of the group display particular behaviour, or is it sufficient for there to be a statistical relationship? Is it merely about gauging particular risks? Hence, just as in France, the Dutch judge must thus further clarify the criterion that an utterance must ‘unmistakably’ refer to a particular group of people characterized by their religion and, for the determination of whether an utterance has either a racist purport or enters into a public debate, must consider whether it contains any truth or has a sufficient factual basis.

Also in the Netherlands utterances concerning race and utterances concerning religion are valued differently. The criterion that an utterance must ‘unmistakably’ refer to a particular group does not apply to hate speech on the basis of race. The Supreme Court accepts the propagation of racist ideologies through the dissemination of Nazi symbols as a punishable form of incitement to hatred and discrimination against the Jewish population. Such statements do not explicitly name the Jewish population, but do spread hatred against that group because of the associations they awaken with Nazism, the Second World War and the Holocaust. The Court also accepts the ridiculing, denial or trivialization of the Second World War and the Holocaust as a punishable form of group insult to the Jewish population. Such insulting statements are also not worded so as to refer directly to the Jewish population, but because of the sensitivity of the subject with which the group identifies these statements ‘offend the feelings of the group’.

On the one hand, the rejection of the associative power of utterances about Islam and islamization but the acceptance of such power of racist
ideologies and symbols is not in itself inconsistent, because the association is of a
different nature. The association with Nazism can be regarded as a substantial
threat to the Jewish population, as it involves behaving towards them from a
Nazi point of view. Contrarily, the association by Wilders between Islam and
Nazism through a comparison between the Koran and Mein Kampf suggests a
similarity between Muslims and the Nazis, but this does not imply a Nazi-type
threat. However, it does appear that the question of whether, in the context of a
public debate on the immigration and integration of foreigners, Islam as a
religion is not treated as the hallmark of people’s racial and ethnic identity is
somewhat overlooked in the case law. When an attack on Islam may, on the
basis of its context, actually be considered to be an attack on immigrants or
Arabs, at least the judge should explain why it is not regarded and treated as
such.

On the other hand, the case law does appear to be inconsistent in that
Holocaust denial can constitute a punishable form of group insult on the ground
that such expression deeply offends the sensitivities and feelings of the victims
of the Holocaust or their relatives. This creates a special protection for a specific
group; why would the law not also protect the feelings of other groups of the
population against offence through statements about other atrocities? Moreover,
why then would the law not also protect the feelings of Muslims or other
religious adherents against offence through statements about Islam or another
religion? Hence, it must be clearly explained why an utterance about the
Holocaust or Islam constitutes a defamatory or insulting statement about Jews,
respectively Muslims that violate their dignity or constitutes an incitement
against them.

It follows from the ECtHR’s broad notion of hate speech that the Court does not
principally distinguish between hate speech on the basis of religion and hate
speech on the basis of race. The case law does suggest that racist expression that
refers to the superiority or inferiority of a race, the attribution of inherited
biological characteristics to a racial group and Anti-Semitism qualifies sooner as
an abuse of rights. A majority within the ECtHR however also considers
restrictions to discourses that incite to hatred founded religious, ethnic or
cultural prejudices acceptable under Article 10 (2). This equally applies to hate
speech on the basis of sexual orientation. The ECtHR implies that such religious
prejudice and hatred based on sexual orientation is just as serious as racist hate
speech (Chapter 3, para. 1.3).

A minority within the ECtHR makes a stricter distinction between
‘classic racist hate speech’ and other forms of intolerant speech that, in the vision
of the minority, do not have a racist purport. The strict distinction between hate
speech on the basis of race and hate speech on the basis of religion seems
untenable. Most cases concerning hate speech on the basis of religion before the
ECtHR concerned the attribution of negative qualities or behavior to
immigrants, foreigners, or a particular ethnic group on the basis of their religion,
as it were their inherited biological characteristics. If the ECHR found the
restrictions to religious prejudice in these cases acceptable, because a religion
was in fact treated as the hallmark of people’s racial and ethnic identity, it had
better explicitly explain this.

The ECHR has, however, also accepted restrictions to hate speech
against a group purely on the basis of its religion. The ECHR increasingly
distinguishes between unprotected gratuitously offensive attacks on persons on
the basis of their religion from protected criticism on a religion, its religious
dogmas, institutions or officials (Chapter 3, para. 1.4). However, unlike in the
Dutch and French courts, the ECHR does not require that an utterance must
‘unmistakably’ concern a particular group or that a group must be precisely
designated. The Court leaves open the possibility that criticism on religious
dogmas and institutions expressed in a provocative manner and insulting tone
can constitute an improper attack on a religion and thereby be indirectly
gratuitously offensive or defamatory to its adherents. Moreover, the ECHR
does not principally reject the criminalization of blasphemy as such. Finally, the
ECHR has also not explicitly abandoned its conception of the issue of
blasphemy and religious offence as a direct conflict between freedom of
expression and freedom of religion that – in the vision of the Court – includes
the right of respect of religious feelings of others.

The reference by the ECHR to Article 9 appears to be quite inconsistent.
In fact, other than in cases concerning blasphemy, in cases of hate speech on the
basis of religion such reference was absent, while religious rights appear notably
at stake in cases of actual incitement to hatred against a particular religious
group. However, when the ECHR accepts restrictions to religiously offensive
expression for constituting a violation of Article 9, the Court should explain in
which manner such speech actually affected or threatened to affect the free
exercise of the religion by its adherents, the onus of which is on the state. The
ECHR has, however, rejected any positive duty for the state to prosecute
expression that amounts to blasphemy and religious offence under Article 9
(Chapter 3, para. 1.6). This is not in itself inconsistent, because affording states
the possibility to criminalize such speech under the ECHR does not necessarily
entail the obligation to prosecute it. To date, under the ECHR, this also applies to
hate speech against people on the basis of their religion.

1.7 In sum

It results from the above synthesis that the approaches to hate speech in the
examined legal systems each have their own (dis)advantages and score
differently with regard to the four factors. As far as the ECHR is concerned, it is
briefly stipulated that the development of clearer standards for the restriction of
hate speech on the grounds of religion and religiously offensive speech, is
principally blocked by the ECHR’s broad margin of appreciation. The ECHR
could notably make a clearer distinction between utterances about people’s race
and utterances about people’s religion and better explain when and why restrictions to the latter are permissible.

As for France, on the whole, one could say that the French legalism cannot prevent the appearance of inconsistencies in the case law on hate speech. To the contrary, the strict and abstract application of the French hate speech bans by the judge dissimulates the importance that is sometimes implicitly attached to freedom of expression. In France, the interest of a free public debate could be taken into account in a more explicit and structural manner. The Dutch approach, then, could form an inspiration for France in that the Dutch judge more explicitly balances the less crystallized hate speech bans with the right to freedom of expression. This generally leads to a more transparent judicial reasoning.

However, the Dutch case law must also provide clear standards that are structurally applied. It appears that the Dutch approach is also not without inconsistencies. Dutch law precisely scores low on the distinction between actions and opinions. The Dutch norms could better clarify the exact values and interests they aim to protect and the required connection between an utterance and subsequent acts of discrimination and violence by third parties against members of the target group. The French approach, then, could form an inspiration for the Netherlands in that the principles and values of the French Constitution function more as a compass for the application of the hate speech bans and the determination of the outer limits to public and political debate.

Finally, it appears that all examined legal systems could more accurately differentiate between different types of hate speech. One can distinguish, on the one hand, between pertinent untrue factual claims, strong value judgment that lack any factual basis and are ‘gratuitously offensive’; and direct and literal incitements for which the proof of truth or a sufficient factual basis can be no means of defence and, on the other hand, value judgments that have a sufficient factual basis or are not gratuitously offensive and mere intolerant and offensive remarks. The former qualify sooner for restriction than the latter. By referring to the distinction between facts and value judgments in a more structural manner, further standards could be developed to consistently distinguish between free critical remarks and hate speech.

2. Towards greater consistency

The previous paragraph analysed the law of the examined legal systems. Each system scored differently as far as the four factors of the analytic framework are concerned. This paragraph advances, on the basis of the entire research, a number of considerations that could contribute to the determination of restrictions to hate speech – on account of religion – in a consistent manner. Ten bullet points are formulated and further elaborated in smaller font. Here the four factors selected for the analysis (being actions versus opinions; public debate versus other types of expression; facts versus value judgments; and race
versus religion) and the actors in the determination of restrictions to hate speech (being the legislator, the judge, the public prosecution and victims, and antiracism and minority associations) are being interlinked. No further detailed reference to the law of the examined systems is made; these have precisely been excluded in order to make recommendations of a more general application.

- The French concept of the ‘délit d’opinion’ can form an inspiration for the thought that a consistent norm directed against a particular form of hate speech must as precisely as possible determine which types of utterances it prohibits and reflect which rights and interests it wants to protect. More generally, given the principle of legality, restrictions to hate speech must be strictly construed and not be ‘overbroad’.

It is, in principle, the legislator who a priori and in abstracto determines the restrictions to hate speech by creating specific hate speech offences. Hate speech bans, by their very nature, prohibit utterances that target persons or groups defined by a common characteristic. It is desirable that this is unambiguously reflected in the statutory wording of the offences. Offences criminalizing defamation or insult of groups or incitement to hatred, discrimination or violence against persons comply with this criterion. Contrarily, blasphemy and Holocaust denial laws may not be regarded as proper hate speech bans, because, according to their statutory wording, they prohibit utterances that target religious figures or a historical truth. This does not signify that utterances about a particular religion or the Holocaust under certain circumstances, thus in concreto, cannot amount to hate speech against a particular group and constitute a prohibited form of group defamation or ‘incitement’. The judge then must clearly explain why this is the case. Furthermore, the legislator must, one way or another, clarify what interests the hate speech bans protect. It is preferable that these can unmistakably be derived from the hate speech bans themselves. In any event, the categorization of the hate speech bans in the law must, as much as possible, fit in with the protected interests. As hate speech bans, by their very nature, can be assumed to primarily protect persons, they in principle belong to the category of offences against persons. This applies in any event to group defamations and insults. To the extent that the legislator with the creation of the offence of incitement – as well as group defamation and insult – has aimed to protect the public order, he must at least clarify what the notion of public order in this particular context signifies. In fact, the judge must, in the application of the hate speech bans, take the aims of the legislator into account.

- Hate speech bans can prohibit expression on the basis of a certain degree of probability that the expression will succeed in inciting to discrimination and violence by others against the target group. Such causation can be more or less direct, varying from likelihood to capability to imminence. A consistent norm must mark a spot somewhere on this gradual scale.
The offence of incitement to hatred, discrimination or violence requires the ‘activation of a triangular relationship between the object and subject of the speech as well as the audience’, i.e. a speaker can induce third parties to act in a certain manner towards the target group of the speech. It is precisely this triangular relationship that may, next to harming persons, also affect public order. This does not signify that any proven effect on the public order necessarily forms a requirement of criminality on the basis of ‘incitement’. Nor does the incitement have to be followed by effect; it is by definition an ‘inchoate crime’. The triangular relationship does signify that criminal law can be regarded as the proper means to counter incitements to hatred, discrimination or violence. ‘Hatred’ is, however, a vague term that refers to an emotion or an attitude towards others and not to particular actions against them. However, the importance of the prevention of discrimination and violence may precisely justify the countering of racist discourse at an early stage. In principle, the offence, according to its statutory wording, can include both utterances that have an imminent connection with subsequent actions of discrimination or violence and whose harmful effect are rather direct and utterances that do not have such an imminent connection with subsequent actions, but still are likely to contribute to future discrimination and violence and can be harmful in the mid- and long term. The legislator must therefore clearly choose the required degree of probability that expression will succeed in inciting to discrimination and violence in order for it to be punishable. In the application of the offence in concrete cases, the judge then must clearly determine whether or not an utterance complies with this required degree of probability. One could question whether it is desirable for the legislator to prohibit a priori and in abstracto a category of expression, such as the ‘dissemination of ideas based on racial hatred’ or ‘racist propaganda’, without explaining that such expression is harmful because it can lead to discrimination or violence or is per definition harmful to human dignity. After all, such an offence would, according to its statutory wording, just as with Holocaust denial and blasphemy, prohibit ‘opinions’ without indicating the interests (object) it aims to protect. It might then be considered preferable if the judge would only under certain circumstances, given the contextual factors, thus in concreto, qualify such racist opinions as a prohibited form of ‘incitement’.

- Hate speech bans can also prohibit expression, because it violates human dignity. Then, a consistent norm must clearly indicate when expression actually affects the equal basic dignity of members of the target group.

The prohibition of group defamation or insult by the legislator without the requirement that such expression is uttered with the aim to incite hatred or that it in fact constitutes an incitement is controversial; it directly protects members of the target group against a violation of their reputation or dignity not against subsequent actions by third parties. The prohibition of group defamation and insult without the requirement that expression is aimed at ‘inciting’ hatred is therefore not required by international law, let alone its criminalization. However, with Waldron and French Republicanism, it can be presumed that
every citizen has the right to respect for his equal basic dignity and that the reciprocal respect between citizens thereof forms a public good. In the context of hate speech this signifies that group vilifications and insults that violate people’s equal basic dignity can be prohibited as a form of aggression in and of itself. A consistent norm must then clarify that such expression is prohibited not because it violates human dignity as a public moral, but because it actually affects the equal basic dignity of its victims because of the consecutive effects it has on them (psychic harm) or the public at large (discriminatory views or practices). Then human dignity takes on a different meaning and assault on human dignity becomes a concrete problem for victims of hate speech. The legislator can clarify this by explicitly referring to the impairment of the equal basic dignity of the target group as an element of the offence. This does not only afford legal certainty, it also demarcates the scope of the offence; offensive and intolerant opinions will not meet this threshold. The public interest to counter expression that affects people’s equal basic dignity separate from any aim or likelihood that such expression leads to acts of discrimination or violence, its effect on the public order and the harm to the target group caused by such expression may, however, be considered too little to justify its criminal repression. Then, group defamation and insult that actually violate people’s equal basic dignity can at least be considered unlawful. Such expression may not identify one particular person and harm its personal reputation, it is directed against a large number of people, thought of as a group, and can harm the equal basic dignity of all persons of that kind.

- For a consistent demarcation of – prohibited forms of hate speech against – persons adhering to a particular religion from – permissible criticism of – the convictions and practices of religion as such, a first starting point can be to consider whether expression clearly designates a particular religious group.

In principle, one can distinguish criticism of a particular religion from utterances about its religious adherents. After all, religion generally consists of a coherent set of convictions and prescriptions. Those convictions and prescriptions can also form the basis for opinions on social and political issues and for behaviour and practices of religious adherents. Criticism thereof can be aimed at a religion as well as its followers as a group. In order to consistently demarcate permissible criticism of religious convictions and practices from prohibited hate speech against persons on the basis of religion, the criterion that an utterance must ‘unmistakably’ concern a group on the basis of its religion or that a group must be ‘perfectly designated’ in principle forms a helpful and simple tool. A consistent norm, then, must clarify whether this signifies that utterances, in order to constitute hate speech, must always explicitly name a group, whether a group must have a certain degree of homogeneity or whether a negative quality or characteristic is in fact attributed to all members of the group. The criterion that, in order to be punishable, an utterance must clearly designate a religious group is most applicable to the offences of defamation and insult that according to their nature prohibit utterances about a group. With regard to the offence of incitement to hatred, discrimination or violence, in principle a distinction can
also be made between statements that present certain religious convictions and practices as totally reprehensible and hateful on the one hand and statements about persons on the other. On the other hand, situations are conceivable where statements about a religion are so vicious that they can be punishable as incitements to hatred. The judge then must clearly explain why this is the case. In fact, statements on the ‘Islamization’ of society that do not explicitly refer to Muslims as a group can also be interpreted as criticism on existing state – religious relationships and the place of religion in the public domain. In the end, the criminality of an utterance does not, however, merely depend on whether it clearly designates a particular group; the judge must clearly explain where the defamatory, insulting or threatening character of expression resides.

- Another criterion for demarcating speech about religious adherents from speech about a religion as such can be whether an ‘intersectionality between race and religion’ exists, i.e. whether an utterance treats the religious beliefs of members of a group as the hallmark of their racial and ethnic identity.

Another criterion for demarcating speech about religious adherents from speech about a religion as such can be whether an ‘intersectionality between race and religion’ exists. In principle, a distinction can be made between utterances about a particular religion and utterances about a particular race. Unlike religion, race is supposed to be an immutable characteristic that people cannot change. The rejection of a particular race implies that the people belonging to that race must also be rejected. This is different to religion. It is likely that utterances about a particular race will sooner exceed the limits of the law than utterances about a particular religion. However, cases can arise where hate speech discourse is careful to avoid direct racial or ethnic insults or incitements and may have ‘switched’ its language from the racial/ethnic to the religious in relation to the same targeted community. For example, an attack on Islam may, on the basis of its context, actually be an attack on immigrants or Arabs. When the public prosecution demonstrates that such an ‘intersectionality between race and religion’ exists, then the judge should at least motivate why he does not regard and treat an utterance as such. Given the problematic character of the discriminatory ground of religion, some argue in favour of confining the hate speech bans to the discriminatory ground of race. Even then, hate speech bans must at least include cases where an ‘intersectionality between race and religion’ exists. Such a broad interpretation of the discriminatory ground of race by the judge appears, however, not to be beneficial to the clarity of the prohibitions. Another solution can be that the legislator gives a better description of the scope of the discriminatory ground of religion, for example by inserting a clause that exempts criticism of religious convictions and practices. In principle such criticism must be allowed, even when it can have all kinds of associations and connotations. This is different with utterances that contain ‘associations’ with certain racist ideologies such as Nazism that is per definition harmful to human dignity. In the end, the criminality of an utterance does not merely depend on whether, according to the context, an ‘intersectionality between race and
religion’ exists; the judge must always clearly explain where the defamatory, insulting or threatening character of expression resides.

- In order to consistently distinguish between free critical remarks and prohibited hate speech on the basis of religion, a norm must accurately differentiate between factual statements and value judgments. Pertinent untrue factual statements about a particular group and strong value judgments that lack a sufficient factual basis or are ‘gratuitously offensive’ are in principle unjustifiable; this is also the case when uttered in the context of a public debate.

A consistent norm must clearly distinguish between different types of hate speech. Restrictions to pertinent untrue factual statements and strong value judgments about a particular group that lack a sufficient factual basis or are ‘gratuitously offensive’, such as strong racist epithets, invectives and terms of abuse, are in principle justifiable, precisely because such statements violate people’s equal basic dignity. This also applies when such expression is uttered in the context of a public debate. It is difficult to sustain that such statements enter into a public debate on a matter of public concern. More difficulties arise with the category of expression that lies in between such pertinent untrue statements and negative value judgments that are gratuitously offensive and merely intolerant and offensive remarks, such as vague allegations and generalizations. It is beyond discussion that serious scientific research into the role of people’s religion in certain tendencies and conduct must be permitted. Furthermore, criticism of relatively high crime rates among a particular group of the population uttered in the context of a public debate on the issue of immigration and integration must also be allowed. Such criticism can, however, amount to prohibited hate speech when it refers to high crime rates among a particular group as being per definition caused by their belonging to a particular race or religion, especially if it is presented as a ground to discriminate the members of the group and deny them an equal enjoyment of fundamental rights. Then the statement violates the equal basic dignity of members of the target group. In order to consistently distinguish between free critical remarks and prohibited hate speech, a consistent norm must clarify to which extent an utterance that makes a connection between certain actual or supposed behaviour or practices and people’s race or religion can/must be substantiated by a factual basis. This primarily is a task for the judge when applying offences of group defamation/insult in concreto. From the perspective of both freedom of expression and legal certainty, the legislator could, however, also more clearly demarcate the scope of the offence of group defamation/insult, by limiting its statutory wording to pertinent untrue factual accusations and strong epithets, invectives and terms of abuse. Another possibility that would afford the judge more leeway is if the legislator introduces a clause exempting contributions to public debate provided that they are not ‘gratuitously offensive’. The latter term is, however, more applicable to negative value judgments than to untrue facts; other than facts, value judgments can be viewed as a matter of degree. The distinction between facts and value judgments does not apply to the direct and literal incitement of others to hatred, discrimination or violence against a
particular group. After all, such utterances may be grounded on factual claims and opinions about a group, they do not express them but primarily urge others to discriminatory or violent action. Contrarily, the distinction can be of relevance for the valuation of more indirect and disguised forms of spreading hatred and creating a breeding ground for discrimination or violence through vague allegations. Therefore, in such cases the judge can also take into account the distinction between facts and value judgments for the application of the offence of incitement to hatred, discrimination or violence.

- In order to consistently distinguish between harsh criticism of the government and hate speech against particular minorities, a norm must clarify when contributions to public debate overstep the outer limits of the democratic constitutional state. This is in any event the case when speech aims at the destruction of the fundamental rights of others. It can be argued that at least a positive obligation for the state exists to criminalize and prosecute against such forms of hate speech.

A consistent norm directed at expression uttered in public debate must clearly distinguish harsh criticism of government authorities, officials and policies from hate speech against particular minorities. It is not obvious that the context of a public debate can remove the punishable character of an utterance that incites to hatred, hostility or violence against sectors of the population. With regard to ‘incitement’ to ‘discrimination’, a consistent norm must more specifically distinguish between the persuasion of others to adopt discriminatory thoughts or visions; the calling into question of constitutional principles of human dignity, equality and non-discrimination in the abstract; the urging of fellow citizens to proceed to specific acts of discrimination; and concrete legislative proposals that discriminate on account of race or religion. Only the latter two may be characterized as hate speech, because they target the position of particular groups within the state in such a manner that it can affect their fundamental rights. Incitement to ‘discrimination’ precisely refers to such prohibited and unjustified forms of unequal treatment. The law then must clarify whether both types of utterances are punishable. It can be argued that the judge, for the determination of the criminality of an utterance, must always explicitly take into account the importance of a public debate; this can structure a robust motivation on the proportional application of the offence given the specific circumstances of the case. For those legal systems where the judge is only permitted to strictly apply statutory law as created by the legislator, the question arises whether the latter had better facilitate such robust motivation by introducing a clause exempting contributions to public debate provided that they do not exceed the outer limits of the democratic state. For those legal systems where the judge is permitted to interpret statutory law and balance the upholding of a norm with the right to freedom of expression, the introduction of such a clause can also be useful, especially when a broader constitutional framework that compels or constrains an unambiguous interpretation of the offence by the judge is absent. A more fundamental approach would be, if the Constitution would define the characteristics of the democratic state or refer to the inviolability of the human dignity, which can function as a compass for a
consistent determination of restrictions to hate speech by both the legislator and the judge.

- A consistent norm must also clarify whether citizens, who participate in public and political debate, all have the same degree of freedom of expression or whether certain functions or positions bring either special freedoms or special responsibilities. The position or function of a politician can in any event form a contextual factor that influences the valuation of his intent or the qualification of his expression as an abuse of rights.

It is in principle logical that in a democracy, citizens must have an equal degree of freedom to express their opinions in public and political debate. It can be argued that the principle of equality is opposed to affording certain citizens per definition special freedoms or special responsibilities on the basis of their particular functions or positions. However, this does not signify that a speaker’s position or function cannot form a contextual factor that influences the valuation of his intent or the qualification of his expression as a prohibited form of hate speech. For example, politicians and notably members of the opposition in Parliament must have ample room to criticize the government, for example with regard to its immigration policy. Harsh criticism of the government’s immigration policy often goes along with harsh criticism of a particular minority group and political proposals for improvement, which include measures that can affect the fundamental rights of the group concerned. Then an inherent tension exists between the freedom and responsibilities of a politician. In fact, politicians strive to obtain the support of citizens for their ideas and their words inevitably have a larger impact on society. This is precisely why politicians may be aware of the effect of their speech. This awareness can partly color their intent. Furthermore, politicians may be considered to take into account the principles of a democracy, precisely because they strive to obtain political power. It can be contended that expression of politicians may qualify as an abuse of rights sooner than expression of any other citizen.

- While the legislator must set restrictions to hate speech a priori and in abstracto, the judge must apply the hate speech bans created by the legislator in concreto thereby explicitly taking into account certain contextual factors and the right to freedom of expression. The legislator must define the speech offences in such a way that facilitates consistent judicial adjudication and compels the judge to give a structural robust motivation of his decisions.

Restrictions to hate speech are determined by the interplay of different actors. It is primarily the legislator who has the task of determining the substantive restrictions to freedom of expression by setting them out in statutory laws. The legislator must interpret the extent of freedom of expression in the light of the broader constitutional framework that may to a stronger or lesser extent have an ideological nature. When constitutional principles are absent, the legislator has
to rely on his own considerations; this does not make it impossible for the legislator to create consistent legislation, but a changing policy increases the chance of inconsistency. It can be reasoned that the less clear the broader constitutional framework compels an unambiguous application of a hate speech ban by the judge, the more precise the norm must arise from the offence itself. The judge, in the application of the norm as defined, is confronted with a series of complicated questions related to the four previously discussed factors, being actions/opinions; public debate/other expression; facts/value judgments; race/religion. The legislator must provide a legislative framework that not only facilitates consistent judicial adjudication but also compels the judge to give a structural robust motivation of his decisions. This applies both to those legal systems where the judge is only permitted to strictly apply statutory law as created by the legislator and to those legal systems where the judge is permitted to interpret statutory law and balance the upholding of a norm with the right to freedom of expression. This research has brought to the fore a number of suggestions for law reform that can form the basis for further discussion. The legislator is, amongst others, faced with the choice of the creation of specific criminal speech offences and/or restrictions in civil law. A rationale behind the criminalization of hate speech can be – next to the public interest in countering such speech – that in a constitutional state based on the separation of powers, a primary task of the legislator is to assure legal certainty for its citizens by creating clearly defined, demarcated norms. Creating specific criminal offences is a means of clearly demarcating such substantive restrictions and thereby, paradoxically, guaranteeing freedom of expression. Criminal speech offences may function as a guideline or even a basis for determining civil liability for hate speech. As a result, the criminal and civil restrictions to freedom of expression do not necessarily defer much or can even coincide. In fact, from the perspective of legal certainty, it can be argued that hate speech may only be considered unlawful when it violates a particular hate speech ban.

- Existing hate speech bans must be effectively enforced. The public prosecution must carry out a clear prosecution policy, the consistency of which he must be able to explain to civil society. As regards the explanation of this policy to the victims of hate speech, anti-racism associations and other interest groups could play a role. One could even go further and afford the latter a role in the decision to prosecute in cases of hate speech.

Existing hate speech bans must be effectively enforced. A clear legislative framework facilitates a clear prosecution policy of the public prosecution. The appreciation of the criminality of utterances is, however, not an evaluation of the evidence like any other; it requires an interpretation of an utterance within its context and a balancing act with freedom of expression. The line between opportunity, evaluation of the evidence and sitting on the seat of the judge seems particularly vague. Furthermore, in politically sensitive cases, the public prosecution may refrain from prosecuting out of fear of creating ‘free speech martyrs’. The public prosecution must, however, be able to explain the consistency of its prosecution policy to civil society. One can go even further and
afford anti-racism associations and other interest groups a role in the decision to prosecute. One option is to establish a structural cooperation and consultation between the prosecution and anti-racism associations and other interest groups in the process of deciding on the prosecution of cases of hate speech. A more far reaching option is that the law affords anti-racism associations and other interest groups the possibility to set in motion criminal prosecutions on the ground of the hate speech bans. The participation of civil society in the enforcement of the hate speech bans can contribute to their effective enforcement, – clarifying – developments in case law and can afford victims of hate speech, who nowadays also notably include Muslims as a religious group, effective access to justice. It must be ensured, however, that such participation does not have a chilling effect on freedom of expression and does not amount to an unduly juridification of public debate.

These findings hopefully answer the central research question of this study, being to which extent restrictions to hate speech on the basis of religion can be determined in a consistent manner. The modest intention of this study has been to draw lessons from a comparative analysis of the consistency of restrictions to hate speech in French, Dutch and – selected instruments of – international and European law on the basis of a limited number of factors. The study identified those areas where the determination of restrictions to hate speech on the basis of religion may be improved. The intention has not been to offer single ready-made solutions. The findings of this study can, however, form a starting point for further research, for example, about the role of anti-racism, minority and other civil society associations in the effective countering of hate speech and providing victims of hate speech with effective access to justice. Hopefully, this study can give an impetus to scientific, political and public discussion about the regulation of hate speech.