An Undefinable Hatred. Some Comparative Law Remarks about the Dutch Criminal Offence of Incitement to Hatred

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3 AN INDEFINABLE HATRED

Some Comparative Law Remarks about the Dutch Criminal Offence of Incitement to Hatred

Aernout Nieuwenhuis

INTRODUCTION

According to Section 137d of the Dutch Criminal Code, public incitement to hatred, discrimination or violence against people because of their race, religion or philosophy of life; gender, hetero- or homosexual orientation; or physical, psychological, or mental disability is a criminal offence.

Background

This section, popularly known as the ban on inciting hatred, was introduced in 1971, together with the ban on group defamation, as laid down in section 137c Criminal Code. By introducing these offences, the Kingdom of the Netherlands fulfilled its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Religion and philosophy of life were included, just as race, on the assumption – which turned out to be false – that there would come into being a similar Convention regarding discrimination on account of religion and philosophy of life. Moreover, discrimination on account of race and religion might be interrelated. In 1991, gender and heterosexual or homosexual orientation were included as an element of the policy against discrimination on account of these characteristics. The same holds true for the inclusion of disability in 2006.

Looking back even further, one may point to the ban on group defamation introduced in 1934 in Section 137a (old) of the Criminal Code. In this offence, no special groups or

This contribution is an English adaptation of my article Een onbestemde haat. Enkele rechtsvergelijkingen over artikel 137d 3r geniet in het licht van de vrijheid van meningsuiting, in: A. Ellian and others (Eds.), Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting. The Hague 2011, p. 263-286.

grounds of discrimination were indicated. The legislator’s explicit aim was to curb the overheated political discussion. At the same time the legislator introduced a ban on defaming public authorities. According to the legislator, therefore, the political climate was not only threatened by ill-will between sections of the population, but also by ill-will between the government and sections of the population. One may emphasize the latter aspect by pointing to the hate speech offenses in the former Criminal Code for the Dutch East Indies. These were also meant to prevent ill will between sections of the population, but were applied, among others, to critics of the colonial rule.

Application

Section 137c Criminal Code has been successfully applied to, inter alia, offensive references to the Holocaust and the calling of members of an ethnic group criminals and rapists. As far as Section 137d Criminal Code is concerned, one may point, among others, to the conviction of the anti-immigration politician Janmaat. In the 1990s, the court considered his utterance ‘we will, if we have the power and the opportunity is there, abolish the multicultural society’ together with banners which were present at the same time reading ‘our own people first.’ In light of his party’s ideas, this utterance was seen as a call for the deportation of people on account of their ethnic origin. Fifteen years later, Geert Wilders has been acquitted for sweeping utterances mainly focussing on the religion of sections of the population (see later paragraphs).

The application of section 137c and d Criminal Code has always triggered discussion. After the turn of the century, criticism has been growing, however. This criticism may be distinguished in four somewhat interrelated parts. First, it has been argued that incitement should only be punishable by law if there is a clear link between an utterance and violent or criminal acts. Second, it has been argued that political speech should have a special position that leaves little room for interference. Third, it has been argued that the fact that controversial opinions cause outrage is not an adequate reason for banning them as hate speech. Fourth, it has been argued that utterances regarding (adherents of) a religion should not be aligned with utterances regarding race.

The other way around, one might say that there is a certain agreement concerning the ban on incitement to violence and on advocacy of an explicitly racist policy. Disagreement starts, however, while answering the question of whether section 137c and d Criminal Code should also be applied to vehement and offensive criticism on the immigration and presence of certain groups, or on, time and again, the desecration of Islam, for example by a comparison with Nazism.

Research question and comparative law perspective

Disagreement not only exists because the criminal Code provisions themselves are not crystal clear, but also because the importance of freedom of speech is valued differently. Therefore, this contribution will try to answer the following question: How should banning incitement to hatred be understood from a freedom of speech perspective? To shed light on this matter and to bring into the open different points of view, a comparative law approach is chosen. The American First Amendment doctrine, inspiring supporters of an almost limitless freedom of speech, would pull to pieces the Dutch bans on group defamation and incitement to hatred and discrimination. On the other hand, the Criminal Code provisions are more congruent with German law and freedom of speech’s meaning within the German fundamental rights concept.

The relevant case law of the European Court of Human Rights will be discussed as well. The Court’s judgements, showing what sort of utterances may be banned by the contracting states, also encounter the problem of how the interest of freedom of speech should be balanced with the interest of combating discrimination. In this respect, the difference between the Court’s considerations and the dissenting opinion in the Féret case is exemplary. Féret, a member of parliament for the Belgian right-wing party the Front National, had protested in several pamphlets, among other things, the immigration of profiters, the islamification of Belgium, the troublemaking and violence of refugees, and the ostensibly terrorist ‘couscous-clan,’ as well as advocating precedence for Belgians. In Belgium, Féret had been convicted on account of incitement to hatred and discrimination and the ECHR did not find a violation of the right to freedom of speech as laid down in article 10 ECHR.

Structure

The research question will be answered by a separate treatment of the four forms of criticism mentioned above: No clear link between utterance and harmful effect, underestimation of the political debate’s position, confusing hatred with outrage, and not distinguishing between race and religion well enough. In all of these sections, some relevant characteristics of American and German law will be sketched; the ECHR’s case law will be discussed as well. This detour will bring us back to the Dutch Criminal Code section and the discussions

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3 Supreme Court 18 May 1998, NJ 1999, 634.
4 For example, Strafblad 2007, p. 363-409.
on the application thereof. The contribution's subtitle makes clear that this design does not result in a well-rounded argument about the nature and application of section 137d Criminal Code. The contribution's aim, rather, is to gain some insight into a set of problems with which the legislator and the judge are faced.

**Speech and harmful effect**

Section 137d of the Criminal Code penalizes *incitement* to discrimination, hatred and violence. This makes it likely that the aim of the penalization is the prevention of possible harmful effects of the speech in question. Discrimination and violent acts are themselves prohibited, after all. As far as hatred includes the inclination toward discrimination or the use of violence, there is also a link between speech and undesirable acts.

The question arises: What connection between utterance and action is required before an interference of freedom of speech is justified. To answer this question, of course, requires an estimation of the risks and dangers, which may play an important part. Hobbes’ main oeuvre, for example, presents the idea that conflicting opinions may sow the seeds for armed conflict and civil war. Limitations on public speech are therefore permitted rather soon. On the other side of the spectrum is the premise that there should be room for all opinions, advocacy and incitement included, because opinions are not acts. If people are influenced by the utterances concerned, and that influence results in certain actions, they are themselves responsible for their deeds; the speaker cannot be held responsible.

That premise has been baptized the Millian principle. The reference to Mill is not incoherable, since Mill draws a line where utterances are likely to instigate harmful acts and there is no room for further discussion: ‘(...) Even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.' An example given by Mill is inciting an already excited mob to set fire to a house in front of them. For the rest, conflicting opinions and controversial ideas contribute to the sharpening of one’s intelligence and to the progress of knowledge.

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**Clear and Present Danger**

In the last century, the USA Supreme Court has elaborated the question, in what cases the government is allowed to ban utterances because of their possible undesirable effects. At the beginning of the century, the Court accepted an interference when the speech in question had a 'bad tendency.' The current doctrine, however, is much stricter in this respect. The government may only interfere in the process of opinion forming in a case of 'incitement to imminent lawless action,' for example, in circumstances wherein violent acts actually threaten to happen and the utterance incites violence. Taking action against a publication merely because of its violent aim or tenor, or because of the glorification of the violence it includes, is not allowed. This strong protection of freedom of speech is not only based in a certain trust in social debate’s purifying effect, but is nourished by a distrust of the government as well.

The First Amendment’s protection, however, is weaker if a threat is addressed to one or more specific persons on the spot. In those circumstances, speech may be banned in order to prevent the ‘disruption that the fear engenders.’ On the other hand, prevention of ill-will between sections of the population, even where racial hatred is concerned, is not sufficient ground for banning speech. In other words, in this respect, extremist political speech, racist or not, is completely protected by freedom of speech.

**Public order, in a broad sense**

In many other countries, like Germany, the approach differs. It’s not necessary that an utterance incites imminent lawless action before an interference is justifiable. Moreover, the very concept of what qualifies as a breach of the peace is different, as the interpretation of the German Criminal Code provision banning stirring up hatred against sections of the population shows. Formally, this ban protects the public order. An utterance may be punishable, however, even if it is not very plausible that it will result in action breaching the peace. Increasing ill-will between sections of the population may be sufficient for an interference of the right to freedom of expression. In accordance therewith, the utterance in question does not have to show what specific breach of the peace is at issue.

A far as the Jewish minority is concerned, the Criminal Code provision has been interpreted to protect their confidence in the rule of law as well. That confidence may be
at issue even in case of an 'entfernter Gefähr' (distant danger) or in case of an adverse effect on 'das Friedensgefühl' (the confidence that one may live in peace). The very fact that hateful utterances are made could be seen as a sufficient cause to that effect.  

Social Climate

The European Court of Human Rights also does not require a 'clear and present danger' for an interference in the right to freedom of speech.  

Government action is also justified when speech endorses or glorifies the use of violence according to the Court. Moreover, interferences are not only allowed in case of advocacy of violence, but in case of stirring up hatred as well. Still, in these seditious speech cases, concerning utterances attacking the government, the hatred required may be seen as an overture to violence.

In the case of utterances attacking minority groups, the rules seem to be different. In Féret c. Belgique, the Court explicitly rejects the requirement that speech should at least advocate a definite lawless or violent act before an interference is justified. If sections of the population are abused and scoffed at, the authorities may give precedence to protecting human dignity and combating discrimination over freedom of speech. Moreover, social peace and tolerance may be protected in the interest of political stability. Although politicians may recommend painful solutions for problems related to immigration and integration, that does not mean they are free to resort to plainly degrading proposals. Otherwise the public at large, and particularly the less informed sections thereof, may be influenced in a way that is incompatible with 'un climat social serein' (a peaceful social climate).

The dissenting opinion in the Féret case argues that the reasons put forward by the court to justify the interference with freedom of speech are too vague. The dissenters indicate that all effects of the utterances mentioned by the court are, at the most, possible effects. The authorities should have made them at least more plausible. The dissenters themselves propose a ban only permitted if stirring up hatred tends toward incitement to violence or at least calls for definite acts. Intolerance as such, according to them, is 'un sentiment sans action ou du moins sans tendance manifeste à l'action' (a feeling and no

15 For example, O.L.G. Hamburg 18 February 1975, NJW 1975, p. 1088.
16 The extensive interpretation of 'violation of public order' has been criticized, e.g., R. Poscher, Neue Rechtsgrundlagen gegen rechtsextremistische Versammlungen, NJW 2005, S. 1316-1319.
18 E.g., ECtHR 8 July 1999, nr. 2316/94, Karatas v. Turkey.
19 E.g., ECtHR (GC) 8 July 1999, nr. 24735/94, Sûreç v. Turkey (No. 3).
20 Inter alia ECtHR (GC) 8 July 1999, nr. 26682/95, Sûreç no. 1 v. Turkey.

Sedition and hate speech

The Dutch Criminal Code penalizes seditious speech (Section 131), to be defined, among other things, as incitement to lawless action. There is no requirement that the utterance actually has been followed by punishable acts or that there was at least a substantial risk. On the other hand, the utterance must make concrete the punishable acts it incites to. Incitement to violence against groups (Section 137d) has a clear affinity with seditious speech, and a substantial risk of real violence is not required.

In the original decision of the Public Prosecutor not to prosecute Geert Wilders, the affinity was extended to the whole of Section 137 of the Criminal Code, which penalizes not only incitement to violence against groups, but incitement to discrimination and incitement to hatred as well. On the other hand, the Amsterdam Court of Justice ordering the Public Prosecutor to prosecute Wilders disagreed. According to this Court, incitement to hatred has a broader meaning than inciting to lawless action: creating ill-will between sections of the population may also be qualified as incitement to hatred. In another case, the same Court had used the term 'intrinsically discordant'. The former case law using the term ill will between sections of the population, however, does not solve the problem put forward. The question remains: What is meant by ill will? It may cover displeasure, an intolerant attitude, or the overture to a blazing row.

The District Court of Amsterdam, in its judgment acquitting Wilders, does not use the term 'ill-will between sections of the population'. The District Court's approach is that hatred is a rather strong term. Therefore, just creating negative feelings falls short of being punishable. Incitement to hatred requires a 'krachtversterkend' (reinforcing) element. The Court does not elaborate on this term, but one may suppose that the District Court considers hatred almost as a transitional stage between attitude and action. Because no appeals were made in the Wilders case, opinions of an appellate Court or of the High Court about the requirement of a 'reinforcing element' are still lacking.

24 The judge, however, may assess whether violent effects were possible; Utrecht District Court, 26 April 2010, Lijn 8138.
25 Court of Appeal Amsterdam 11 October 2010, Lijn 8001.
26 Cf Supreme Court 2 April 2002, NJ 2002, 421, m.nt Meevis; see as well Den Haag District Court 12 May 2005, Lijn 8301.
27 District Court Amsterdam 23 June 2011, Lijn 89001.
Résumé

There is a certain consensus that in case of utterances resulting in punishable acts, interferences may be justified. However, the First Amendment doctrine requires an almost immediate connection between utterance and act. A less strict requirement, for example to be found in the interpretation of the Dutch seditious speech provision, is that an utterance at least shows what punishable acts are deemed desirable by the speaker or writer.

By making the incitement to hatred a punishable offence, the connection between speech and action is found to become more diffuse. It concerns a call for a certain state of mind or emotion that may or may not, for its part, result in certain punishable acts. If the legislator bans incitement to hatred the question therefore remains what link between utterance and act is required. If the Criminal Code provisions are meant to protect the social climate or to prevent longer term effects on social harmony, the interpretation will differ from an interpretation based on prevention of actual breaches of the peace. The District Court's requirement of a 'reinforcing element' in the Wilders' case may be seen as an example of the second interpretation.

Democracy and incitement to discrimination

Freedom of speech and democracy are more often than not considered as two sides of the same coin. Under the First Amendment, there is pre-eminently room for a robust public debate.28 There is a certain presumption that a free discussion will lead to the best results29 or, at least, that government interference has a detrimental effect. In the German Constitutional Court's case law one may find the same considerations, to a certain extent. Permanent discussion and criticism is seen as the best way to control the government and its policy.30 Therefore, utterances which are seen as part of public debate will be especially protected.31

The starting point of the European Court of Human Rights is not altogether different: 'According to the Strasbourg Court's case law there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest.'32 One-sidedness and some exaggeration should be permitted as well. The Dutch Courts have adopted this approach. Therefore, under Dutch law, in some cases, the answer to the question if an utterance is to be seen as a contribution to the public debate will often be decisive as well.33 Regarding Section 137c Criminal Code (group libel), the context of the public debate may take away an utterance's offensive character, as far as the utterance is not gratuitously offensive.34 In this respect, one may point to the Amsterdam District Court's judgement in a civil law case against Wilders. The Court did not find Wilders' utterances against Islam, Mohammed and the Koran unlawful, because they were directly connected with Wilders' political opinions, and the utterances as such played a part in the public debate.35

The question may arise what the implications of the relationship between democracy and freedom of speech are in respect to Section 137d of the Criminal Code. This paragraph will focus on the ban on incitement to discrimination and explain that the connection between freedom of speech and democracy has to be elaborated to clarify the actual implications.

Freedom of Speech and Democracy in the United States

The concept of democracy in the United States implies that all citizens should be free to express their (political) opinions, whether they are of a conservative, liberal, racist or egalitarian nature. The indivisibility of the First Amendment is seen as a guarantee for minorities and individuals with strongly dissenting opinions, especially for opponents of the government.

This idea of democracy is grounded in two interrelated notions. First, not the government but every single citizen should be the judge of political opinions: 'At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rests upon this ideal.'36 Second, in a democracy everything is a possible subject of political debate, including the core values of democracy itself. Constitutional principles or values therefore cannot draw a line as far as freedom of speech in public debate is concerned.

Of course, there is a clear link with the starting point that only incitement to imminent lawless action is punishable. As long as there are no clear and present dangers of violence or other lawless action, the political discussion should go on. Therefore, political opinions of a racist character, as well as advocacy of rebellion,37 may be disseminated freely. If one

30 Federal Constitutional Court 17 August 1956, E 5, 85.
31 Inter alia Federal Constitutional Court 26 June 1990, E 82, 272; Federal Constitutional Court 13 May 1980, E 58, 125.
allows the government more room to interfere in the public discussion, it will always try
to silence persons with strongly dissenting opinions or opponents of the government.

Freedom of Speech and Democracy in Germany

The connection between freedom of speech and democracy in Germany has other impli-
cations. Not every political opinion gets equal protection. Section 18 of the Basic Law
(abuse of right) shows that persons who use their freedom of speech to undermine the
‘freiheitlich demokratische Grundordnung’ (free democratic basic structure), may not
appear to the right of freedom of speech. One might say that the right to freedom of speech
is situated within the basic law’s structure. From the outset, therefore, some political
opinions like racism and Nazism have a different position, even though the abuse of
rights provision actually will only be applied when these opinions are expressed in a militant
and aggressive way.

The fact that some sections of the Constitution are unalterable clearly shows the invio-
lability of certain constitutional principles. One may point first of all to the inviolability
of human dignity, laid down in section 1 of the Basic law, which may be relevant, among
other things, in case of racist speech. Other utterances aimed at an essential alteration of
the democratic structure may as well have a similar position, though a ban should
counter an actual risk that someone’s rights are injured. As has been argued in the last
section, however, causing fear may be seen as an actual detrimental effect.

Freedom of speech and democracy under the ECHR

One may think that these are all German particularities. However, under international
law, especially the International Convention regarding the Elimination of all Forms of
racial Discrimination, racist speech is given a special position as well. One may also point
to the ECHR (section 17) and the Fundamental Rights Charter of the EU (section 54) both
including an abuse of right provision.

Section 17 of the ECHR states that the Convention shall not be interpreted as giving
a person a right to engage in any activity aimed at the destruction of any of the Convention
rights or freedoms. That does not mean that one may not strive after an alteration of
the form of government, for example: ‘It is the essence of a democracy to allow diverse political
programs to be proposed and debated, even those that call into question the way the State
is currently organised, provided that they do not harm democracy itself.’

Section 17 ECHR has been applied to fascist, communist and racist political opinions. In a
broader sense, political utterances may be covered by the abuse of right provision
when they ‘run counter to the spirit of the Convention.’ The Court, that may hold true for Islamophobic utterances as well. The Court considered the pinning
up, shortly after 9/11, of a poster with a picture of the Twin Towers in flames and the text:
‘Islam out of Britain – Protect the British People’ as an abuse of right. The Court, like
the national courts, interpreted the poster as a ‘public expression of attack on all Muslims in
the United Kingdom.’ Such a general and vehement attack on a religious group is
‘incompatible with the values proclaimed and guaranteed by the Convention, notably
tolerance, social peace and non-discrimination.’

Hate speech is covered by Section 17 of the ECHR, as far as it is part of an effort ‘that runs
counter to the Convention.’ The vehemence of the words used may play a part as well. In
Féret, the Court rejected the application of Section 17 of the ECHR, but subsequently
stated that ‘tolerance and respect for equal dignity of all human beings constitute the
foundation of democratic, pluralistic society; Therefore, generally speaking, in democratic
societies it may be seen as necessary to punish or prevent all forms of speech that spread,
prove, incite or justify hatred based on intolerance (including religious intolerance).’

According to the Court, the utterances at stake represent the community of Muslim
immigrants as ridiculous profiteers with a tendency toward crime. Such speech will rouse
feelings of contempt, or even hatred against foreigners, especially as far as the less informed
part of the public is concerned.

The dissenting opinion did not consider Féret’s utterances to be punishable hate speech.
Speech should only be qualified as such if it is aimed at the destruction of rights and freedoms
protected by the Convention. A possible, longer term connection between endorsing
prejudices and punishable acts is not a sufficient reason for a restriction of the political
debate. According to them, in a democracy, only the unhindered exchange of ideas may
lead to the truth, or will at least allow us to make our own political decisions taking into
account the arguments of all other participants.

41 ECHR 25 May 1998, nr. 21237/93, SP of Turkey v. Turkey.
42 The court has also qualified the denial of the holocaust as abuse of right, because it uses to be linked to an
anti-Semitic striving, ECHR 24 June 2003, no. 65831/01, Garaudy c. France.
43 ECHR 13 December 2005, no. 7485/02, Wiltsch v. Germany (dec.).
44 ECHR 2 October 2008, no. 36109/03, Leroy c. France.
45 ECHR 19 November 2004, no. 23131/02, Norwood v. U.K. (dec.).
46 ECHR juli 2008, no. 15948/03, Soulas e.a. c. France.
After all, the starting point in a democratic society is that all persons are capable of making well informed choices. According to the dissenting opinion, the Court alludes to a social class of nitwits not being able to distinguish between the arguments put forward in the public debate by reason of their irrational feelings. According to the dissenting opinion, this is not in agreement with the starting points of democracy.

Freedom of Speech and Democracy in the Netherlands

Striving toward political aims is not unlawful in the Netherlands. The Dutch Constitution lacks an abuse of rights provision. The government deemed the introduction thereof superfluous, because the Criminal Code, in particular Section 137c and d, would be sufficient as a basis to take action against, for example, a racist political grouping. One may point here to the Court's consideration, in a case concerning the ban of a racist political party, that a racist political striving conflicts with the 'generally accepted foundations of our constitution'.

Therefore, Section 137d of the Criminal Code apparently draws a line between the one hand, lawful political speech aimed at an alteration of the law or the Constitution and, on the other hand, political speech striving for aims contrary to certain constitutional foundations. The conviction of the politician Jammast in the nineties of the last century matches this starting point. His aim was the abolition of multicultural society, interpreted by the court to include the expulsion of certain ethnic minorities. The fact that the abolition would only have taken place after he would have come into power was no impediment for a conviction.

In contrast, the public prosecutor who initially deciding not to prosecute Wilders stressed the fact that Wilders was almost always asking for government measures rather than just pitting people against each other. Therefore, in his opinion, Section 137d of the Criminal Code, in particular the ban on incitement to discrimination, did not apply. Seen in the light of the ICERD, that pre-eminently points to racist political strivings and, seen in the light of the case law, that is a rather restrictive interpretation of the provision at issue. The Amsterdam Court of Appeal, ordering the prosecution of Wilders, argued an opposing approach. Some of Wilders' utterances should be considered abuse of law under the ECHR, whilst others would at least incite to discriminatory government measures and therefore to discrimination.

48 E.g., Handelingen II, 24 February 2005, 52-3361.
49 District Court Amsterdam 18 November 1998, NJ 1999, 377, banning the political party CIU86; that party was convicted several times under Section 137c and d Criminal Code.

The District Court acquitting Wilders, for its part, argued that political speech may only be qualified as incitement to discrimination if it exceeds a certain limit. This requirement is not elaborated by the court. One may speculate, however, that advocating a proposal to stop financing Muslim primary schools, or a proposal to stop further immigration of Muslims does not exceed this limit, but the advocacy of a proposal to expel all Muslims might qualify as punishable incitement to discrimination.

Résumé

In the United States, all political views are strongly protected. Equality means that every citizen's political opinion is equally defended. In Europe, generally speaking, there exists a different approach. Political speech denying equal dignity or rights to others may be treated differently. The best example is the idea of an abuse of rights, for example in Germany, which draws a line between debate of a democratic nature and advocacy of proposals that are contrary to the democratic starting points.

Introducing the term 'hatred' makes the situation more complicated. The ECtHR has not only qualified political speech explicitly aimed at the destruction of rights as an abuse of rights, but seems, under certain circumstances, to also include incitement to intolerance. Moreover, not all forms of punishable hate speech qualify as an abuse of right, according to the Court.

The existence of a rather clear line between debate of a democratic nature and other political speech, in my opinion, is a necessary condition for convicting politicians, trying to win supporters, on account of the substance of their proposals. In the Netherlands, that line is not demonstrated clearly in the Constitution. Therefore, the courts have to draw that line in applying Section 137d of the Criminal Code to utterances that may be qualified as incitement to discrimination. The Wilders' court required utterances to 'exceed a certain limit.' That requirement may be considered to be fulfilled if the substance of political proposals is evidently contrary to the principles of the constitution. To call it a clear line, however, would be a step too far.

Hatred and Outrage

In 2003, immediately after the murder of the Dutch filmmaker and columnist Theo van Gogh by a Muslim-fundamentalist, the Dutch Attorney General suggested that the blas-
Phrased in the Criminal Code should be revived. Presumably his line of reasoning was that blasphemous speech may provoke violent reactions or may at least contribute to a social climate that forms a breeding ground for violent acts. His suggestion, however, was not well received, and by now the parliament has approved a Bill lifting the ban on blasphemy. The Bill’s explanatory memorandum, though, considers that Section 1374 of the Criminal Code may be applied to blasphemous utterances if they contribute to the sowing of hatred.52

Hereunder, the relationship between freedom of speech and provoking outrage will be sketched; one of the questions to be answered is whether such provocative utterances may be seen as the sowing of hatred.

Freedom of Speech and Outrage in the United States

In the United States, banning speech merely because of its outrageous nature does not fit within the First Amendment doctrine. The rather recent Snyder v. Phelps case is an excellent example.53 Members of a sectarian Christian group had the right to, even in the neighbourhood of fallen soldier’s burial, freely express their opinion that ‘God hates fags’ and that American soldiers are deservedly killed in action.

One of the most famous cases, in this respect, is Cantwell v. Connecticut.54 A Jehovah’s witness asked the passers-by on the public road if he might play them a record on his portable gramophone. When they assented to the proposal, they heard an offensive harangue against Catholicism and the Pope. Some passers-by were outraged, to say the least, and Cantwell was eventually convicted for a breach of the peace. The Supreme Court, however, judged the tirade to be protected by the First Amendment. The fact that people present were seriously offended was not a sufficient reason for an interference in the right to freedom of speech. That also holds true in case of a fascist and anti-Semitic speech for a larger public, according to the Supreme Court in Terminello v. New York.55

Public inconvenience, annoyance and unrest all definitely fall short of being a good reason for an interference.56 Otherwise, the hostile audience present or even the public at large would determine the scope of freedom of speech. Individuals with dissenting or controversial opinions would be the first victims. Therefore, only the outrage caused by the rather small category of fighting words, face to face, directed toward a specific person, may be ground for an interference. The same holds true if intimidating utterances are directed toward a specific person.57 Of old, those categories of speech are, in principle, outside the reach of the First Amendment.

The conclusion is that public racist speech may not be banned because of its offensive or outrageous character, apart from racist speech in special settings, for example on the shop-floor or as a form of intimidation directed against a specific person.

Freedom of Speech and Outrage in Germany

In many European Countries, there is more room for a ban on offensive or outrageous speech. In Germany, in 1969, the ban on blasphemy may have been abolished, but the Criminal Code nowadays includes a provision banning the abuse of religions and philosophies of life as well as the rites and organization of religious or philosophy of life associations (§ 166). The provision does not want to prevent offended feelings in general. Sate as such is allowed, but grossly insulting images may be prohibited.

The ban may only be applied if the public order is violated. The legislator wants to protect the social peace, between sections of the population, with a different conviction. The interest protected, therefore, is comparable to the interest protected by the German hate speech ban. Moreover, in the past, the courts have considered that a violation of the public order may also occur when believers’ confidence in their religion being treated respectfully is betrayed.58 This interpretation agrees with the idea that Section 166 of the German Criminal Code not only protects the public order but the right to freedom of religion as well.59

Freedom of Speech and Outrage under the ECHR

The ECHR’s approach is comparable. The Court’s case law50 shows that vehement attacks on what believers deem to be holy may be prohibited, if the attacks are considered gratuitously offensive and therefore not a contribution to the public debate. Sometimes, the reference to public order in a broader sense is encountered as well.51 In some of these blasphemy cases, the dissenting opinion rejects the protection of believers’ feelings as sufficient reason for an interference.52

56 ECHR 20 September 1994, nr. 13478/87, Otto Preminger Institut v. Austria.
Both outrage and hatred regard, first of all, feelings. Therefore, the question may arise of whether hurting feelings or evoking outrage may be qualified as forms of hate speech. The rather broad definition the Court uses - all forms of expression which spread, incite, promote or justify hatred based on intolerance (religious intolerance included)⁶³ - does not answer the question whether the intolerance provoked may show itself by the outrage provoked.

The 'social harmony,' mentioned in the Féret case, may not only be disrupted by the vehement feelings of the speaker's or publicist’s supporters, but also by the outrage directed against the speaker or publicist. This lack of clarity disappears, to a certain extent, in the dissenters’ approach, which requires a more obvious link between the utterance and a harmful act.

**Freedom of Speech and Outrage in the Netherlands**

The introduction of the ban on blasphemy in the thirties of the last century should be understood in light of the turbulent political situation. Notably, communists and anarchists did attack church and religion as cornerstones of bourgeois society. These often facetious utterances evoked vehement reactions from believers, even threatening to teach the blasphemers a lesson. In the criminal offence’s phrase, the public order interest was lacking. Offending religious feelings by abusing God in a vehement manner could be banned.

Recently, however, the blasphemy ban has been abolished. More generally, the interest of freedom of speech implies that public debate should not easily be restricted, even when people take offence. Therefore, the Rotterdam District Court did not consider the following utterance unlawful: 'In the thirties, when the national-socialists were coming up, the establishment looked away; nowadays the same is happening regarding islamisation'.⁶⁴

A more specific question is the meaning of outrage as far as Section 137c and d of the Criminal Code are concerned. The Supreme Court has judged that criticism of a religion, religious law and religious figures, in whatever way expressed, does not qualify as defamation of a religious group under Section 137c. Only utterances which evidently regard the group itself may be prohibited under this Section.

One may ask if outrage plays a part regarding Section 137d of the Criminal Code. As far as the ban on incitement to hatred is meant to prevent an 'intrinsically discordant situation',⁶⁵ evoking outrage might be included as well. If hatred, however, is seen as an overture to discrimination or violence by the speaker's supporters, evoking outrage will be out of the Section’s reach. An additional argument may be that minorities may deserve protection from hatred against them, but the same minorities are responsible for their own outrage.⁶⁶

In the Wilders case, the Amsterdam District Court has chosen the second approach. Utterances that attack a religion, religious practices or holy books do not qualify as incitement to hatred. To qualify as incitement to hatred, the utterance - and the hatred - should evidently regard the religious group.

**Résumé**

A ban on incitement to discrimination or violence will not easily cover utterances which have as their main effects hostile reactions or outrage directed against the speaker or publicist. That is less clear in case of a ban on incitement to hatred, especially if the interest protected is a peaceful social climate. This lack of clarity may be retrieved in the term 'hate speech.' Some definitions may seem to include utterances on account of their outrageousness as well: 'Hate speech is expression that aims to cause extreme offence and to vilify its target audience.'⁶⁷ The offensive nature of the speech involved may at least become an indication for the qualification 'incitement to hatred'.

The term 'hate speech' in the ECHR's case law has a certain equivocality. On the one hand, in sediment cases, hate speech is close to incitement to violence and the glorification of violence. On the other hand, in cases of speech directed against minorities like the Féret case, speech may as well be considered hate speech on account of its effects on the social climate. That does not mean, however, that incitement to hatred in Section 137d of the Dutch Criminal Code should be interpreted as broadly as that.

**Religion and Philosophy of Life versus Race**

Until now, utterances regarding race and utterances regarding religion have been treated more or less alike. Nevertheless, they cannot be placed entirely on the same footing. First, the Convention regarding the Elimination of all Forms of Racial Discrimination includes an obligation to make incitement to racial hatred and propagation of racial discrimination a criminal offense. There are no conventions with a similar obligation as far as religion is concerned.

Section 20 of the ICCPR may prohibit advocacy of hatred regarding both race and religion, but the obligation is not as far reaching as the CERD obligation. Section 20 of the

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⁶³ ECHR 6 July 2006, nr. 59405/00, Erbakan c. Turquie. This description is based on the definition given by the Committee of Ministers of the Council of Europe in 1997, RE(97)20.

⁶⁴ District Court Rotterdam 21 November 2006, Lijn AZ3031.


⁶⁶ See for example, J. Searle, Making the Social World, Oxford University Press 2010, p. 190-191;

ICCPR seems to require a stricter link between the utterance and its possible effects, because the advocacy of hatred should at the same time constitute incitement to discrimination, hostility or violence. Moreover, Section 20 of the ICCPR does not include an explicit obligation to penalize those utterances. At least, Section 20 of the ICCPR is not aimed at preventing the expression of the opinion that a certain religion is by far superior and all other religions are serious fallacies. Section 4 of the ICERD is definitely aimed at preventing the expression of the opinion that a certain race is by far superior.

Second, this difference between race and religion is not incomprehensible. Skin colour, for example, can be considered an unchangeable quality. To change one’s beliefs is not impossible altogether, even if religion might be seen as a part of one’s identity. Therefore, an effort may be made to convert people in the interest of salvation. The same holds true for an effort to convince people that all religions result in misery, so the best thing to do is becoming an agnostic. Such efforts are not conceivable as far as race is concerned.

Third, and maybe even more important, is that many religious convictions include, apart from an unprovable core, certain doctrines and moral rules. These ideas are often disseminated and have possible implications for the law on public morality and family law. They may also regard the ratio and the meaning of public authority. Such ideas play their part in public debates. The same holds true for criticism on these opinions. More generally, cultures may be criticized as well. For utterances regarding race interpreted as an unalterable quality there is no similar argument possible.

Race Religion Distinction Irrelevant

Under the First Amendment doctrine, the distinction between speech regarding race and speech regarding religion is not really relevant, because freedom of speech is paramount in both cases. If racist hate speech normally may not be restricted, hate speech on account of religion will be just as free.

The distinction may also be irrelevant if the protection of the social climate is paramount. Utterances regarding religion may result in as much ill will between sections of the population as utterances regarding race. The European Commission against Racism and Intolerance goes one step further. It considers expressing contempt for a religious group or expressing superiority on account of religion quickly to become a form of racism. Therefore, publicly libelling a group of believers should be penalized. Such an argument almost discards the difference between race and religion.

71 For example, the depiction of a religion as a fabrication meant to keep the people ignorant may be a contribution to the public debate, ECtHR 2 May 2006, nr. 50602/09, Taliav v. Turkey.
72 Supreme Court 10 March 2009, LNJ BI9655.
73 For example, it is not obvious to make a difference between the utterance ‘Roman-Catholicism is a backward conviction’ and the utterance ‘Roman Catholics are adherents of a backward religion.’ In both cases, in my opinion, the utterance concerns the religion.
74 District Court Utrecht 25 April 2010, LNJ BM8138.
The more interesting question is, to what extent does the distinction made between speech against convictions and speech against persons play a part as far as incitement to hatred is concerned. It would be strange, for example, if the legislator, having desired to give room to all kinds of comments on ideas and morals regarding Section 137c of the Criminal Code, would have meant Section 137d of the Criminal Code to be applicable to the same utterances. Moreover, the aversion against certain religious convictions, based on personal experiences or on the opinion about a religion’s influence in society, may play an important role in the public debate. The prevention of hatred directed against persons, by contrast, is nearer to the prevention of violence and discrimination against persons.

An incidental argument may be that utterances describing a religion as hateful often rest on a certain explanation thereof. However, a Criminal Court is not an appropriate body, if any body can be, to determine what the right interpretation of a religion is. From this argument, it follows naturally that it would be remarkable if the Criminal Code would cover harsh criticism of religions or philosophies of life as, for example, the Scientology Church.75

The distinction between race and religion may also be relevant regarding political proposals of a discriminatory nature. First, international law makes a ban on racist political speech obligatory,76 even when it cannot be seen as incitement to harmful acts. Second, the borderline in a democratic society between robust political debate, and utterances that exceed a certain limit, may possibly be drawn more clearly regarding race than regarding religion. Although striving for the destruction of the rights of people adhering to a certain religion may be a clear case,77 what remains unclear is which measures may or may not be propagated in order to take care of the problems in a multicultural society.78

Résumé

Concerning incitement to violence, the distinction between race and religion is not that important. However, if utterances are aimed at certain convictions, freedom of speech will carry a relatively great weight. In this light, it is quite conceivable that in applying Section 137d of the Criminal Code the Courts will make a certain distinction between on the one hand, speech about convictions and customs and on the other hand, speech about a group of persons.

If the prevention of outrage and the protection of the social climate are paramount, however, the distinction between race and religion has less importance. Offensive utterances regarding a Supreme Being, a Prophet or a Holy Book sometimes evoke even more outrage than speech attacking the very members of a religious group.

Conclusion

Speech may incite punishable acts. Therefore, a ban on certain forms of hate speech will often focus on the speech’s tenor and the possible effects. In this respect, there is a big difference between the utterance ‘the multicultural society should be abolished’ and stirring up an excited mob threatening to lynch someone. The same holds true for on the one hand, an utterance characterizing a holy book as the product of an aggressive and megalomaniac imagination, and on the other hand, an utterance advocating the expulsion of all persons of an ethnic group.

The answer to the question ‘which of the aforementioned utterances should be penalized,’ cannot be answered without bearing in mind the meaning and weight of freedom of speech. If an unhampered public discussion is so important that only a clear and present danger will justify a restriction, only the second utterance (the excited mob) is punishable, at the most. The implication of this ‘First Amendment approach’ will be that not only vehement criticism on religious ideas and customs, but explicit racist speech, will be free. Only racist speech, directed at a specific individual and to be considered a fighting word or having an intimidating character may be banned. On the other hand, if a restriction may be justified by the prevention of possible ill-will and outrage, all four of the utterances mentioned above may be banned.

Section 137d of the Dutch Criminal Code does not agree with the First Amendment doctrine that much is obvious. First, although incitement is banned, no incitement to imminent lawless action is required. If there is only a small chance that an utterance will result in action, the provision may be applied as well. The penalization of incitement to hatred, apart from incitement to discrimination and violence, stresses even more the weakness of the link required between utterance and action. After all, to hate is not a punishable act, but, at most, a disposition to act. The German and Strasbourg case laws show that restrictions protecting the social climate also drop a clear connection between an utterance and an act as a requirement.

Second, the First Amendment offers the same protection to every single political opinion. In Germany, and under the ECHR, it’s different. Section 16 of the German Basic

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75 E.g., G. Komrij, De stankbel aan de Nieuwezijds, Amsterdam 1979.
76 Article 4 ICJRD.
77 The argument that the discriminatory measures propagated will only be introduced after the political party involved will have come to power, is not really relevant under this approach, Supreme Court 14 March 1978, NJ 1978, 664.
78 In the Janmaat case, Supreme Court 18 mei 1999, NJ 634, the Court of Appeal deduced from the context that Janmaat was not advocating the introduction of a ‘Latikultus’ but was aiming at the expulsion of people on account of their ethnic descent.
Law as well as section 17 of the ECHR cover, for example, explicit racist strivings. The ECHR, in certain cases, has also qualified the less well defined incitement to religious intolerance and hatred an abuse of right. The Dutch Basic Law does not include an abuse of rights provision. Nevertheless, Section 137d of the Criminal Code not only penalizes incitement to discriminatory acts, prohibited by current law, but also covers the propagation of a discriminatory policy, at least if a certain limit is exceeded, as the Wilders Court considered.

Third, The First Amendment doctrine almost completely rejects outrage as a reason for a restriction of freedom of speech. The approach in Germany and under the ECHR differs, especially when a restriction's aim is the protection of the social climate. To what extent evoking outrage may be qualified as incitement to hatred under Section 137d of the Dutch Criminal Code is not quite clear.

In almost all of the cases mentioned above, the distinction between race and religion may play a certain part. Negative utterances about religious doctrine and religious custom may have another quality than negative speech about people. Hatred against religious tenets and morals may be distinguished from hatred against people. As far as race is concerned, those distinctions are not easily conceivable. Making a distinction on account of race will also be more easily qualified as a form of punishable discrimination than on account of religion or culture.

This article shows that the ECHR does allow a whole range of restrictions on freedom of speech. Put otherwise: Article 10 of the ECHR does not prevent an extensive interpretation of Section 137d of the Dutch Criminal Code. That does not imply that the Strasbourg case law makes such an interpretation obligatory. In this respect, one may point to the national authorities' margin of appreciation in assessing the necessity of an interference in the debate about immigration and integration. According to the Strasbourg Court, the national authorities have a more profound understanding of the reality in their country, and therefore are in a better position to judge what the appropriate measures are to tackle the problems involved.79

Therefore, the interpretation of Section 137d of the Dutch Criminal Code, in particular the interpretation of incitement to hatred, is first of all a Dutch national law issue. While interpreting this provision, the courts come up against a range of problems, which have been addressed in this article. Moreover, the Courts not only have to determine the provision's meaning, but the explanation of the utterance itself. Is an utterance's purpose, for example, the expulsion of all Muslims living in the Netherlands, or is the utterance's purpose a reduction of the amount of radical Muslims who are not agreeing with democracy under the rule of law.

One last remark: Hatred may be undefinable, but criminal provisions are horses of a different color. A citizen expressing his opinion must have some idea about the risks involved in vehement criticism and other forms of extreme speech. The courts must also be on solid ground when applying the hate speech provisions. The foregoing may be an extra argument for a rather restrictive interpretation. Otherwise, incitement to hatred will become a really indefinable offence. In that case, somebody who is inspired by a holy book and admonishes homosexuals may be considered to be in breach of the law; somebody, in his turn, abusing that holy book may run certain risks, and so on. However, hate speech bans should, in my opinion, not interfere with such a public debate.

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