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Political Rhetoric, Freedom of Expression and Hate Speech against Religious Believers

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Abstract:

Many politicians across Europe – for example, Marine Le Pen in France, Geert Wilders in the Netherlands and the AfD party in Germany - have made derogatory remarks about Islam and its incompatibility with and threat to modern Western values. When these politicians are challenged, they often invoke their right to freedom of speech; they state that they are only saying what a lot of people are thinking and are worried about and thus that they are contributing to the political and public debate. They also sometimes point out that their criticism is aimed at Islam, not at Muslim believers. This chapter will examine whether, under the European Convention of Human Rights, the right to freedom of expression of a politician or of any other person contributing to the public debate can be curtailed to spare religious believers' feelings, to protect religious people from offensive attacks on their beliefs or from expressions that stir up hatred or violence against them.

Introduction

Many politicians across Europe – for example, Marine Le Pen in France, Geert Wilders in the Netherlands and the AfD party in Germany - have made derogatory remarks about Islam and its incompatibility with and threat to modern Western values. When these politicians are challenged, they often invoke their right to freedom of speech; and, they state that they are only saying what a lot of people are thinking and are worried about and thus that they are

contributing to the political and public debate. They also sometimes point out that their criticism is aimed at Islam, not at Muslim believers.

This raises a number of questions. The right to freedom of expression¹ includes expressions that criticise religions, but what are the limits (if any) on speech that is seriously offensive to religious believers, that seeks to stir up hatred against them or that insults religious believers? Is there a difference between criticising religions and insulting believers? These are the questions examined in this chapter.

The pertinence of these questions is clearly illustrated by the two prosecutions of Dutch far right politician Geert Wilders, the leader of the Party for Freedom. He was first prosecuted for a number of remarks made during interviews. He called Islam the sick ideology of Allah and Mohammed, a violent, fascist religion which aims to eliminate non-Muslims and likened the Quran to Hitler's 'Mein Kampf'.² He also expressed negative views of Islam in a film called 'Fitna'.

Initially, the Dutch Public Prosecutor decided not to prosecute Wilders for incitement to hatred and discrimination and for intentional group defamation based on their racial or ethnic origins or religion, because they did not think that this would lead to a conviction. One of the considerations was that the expressions were directed against Islam, not against Muslims. The Amsterdam Court of Appeal then ordered the Public Prosecutor to prosecute Wilders for these offences (as is possible under Dutch law). Among the reasons for doing so

¹ The terms 'freedom of expression' and 'freedom of speech' will be used as meaning the same and thus as interchangeable throughout this chapter.

² See: Amsterdam District Court (Rechtbank Amsterdam) 23 June 2011 ECLI:NL:RBAMS:2011:BQ9001 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2011:BQ9001>> accessed 17 August 2018. In the following, all references to Dutch cases have been translated from Dutch by the author.

were that the expressions were insulting because they harmed the religious dignity of Muslims; and, because Wilders had also insulted Muslim believers by insulting the symbols of the Muslim religion.³

In the subsequent prosecution, the District Court of Amsterdam acquitted Wilders on all counts.⁴ The Court referred to case law of the Dutch Supreme Court that hurtful expressions about a religion might insult or offend the believers in that religion, but that this was not enough to consider the expressions to be insulting of the religious group.⁵ It held that Wilders' expressions did not constitute group defamation because criticism, even strong criticism, of a group's opinions or behaviour fell outside the ambit of the criminal law provision.⁶ The Court also referred to the fact that the legislator had specifically intended to make incitement to hatred or discrimination a criminal offence, but that it had wanted to keep expressions about religion outside the scope of this offence.⁷ In relation to the film 'Fitna', the Amsterdam District Court found that the main message was, as Wilders had stressed, to point out the dangers of Islam. The Court placed this in context: the film was made at a time

³ Amsterdam Court of Appeal (Gerechthof Amsterdam) 21 January 2009 ECLI:NL:GHAMS:2009:BH0496 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2009:BH0496>> accessed 17 August 2018.

⁴ Amsterdam District Court (n 2).

⁵ Supreme Court (Hoge Raad) 10 March 2009 ECLI:NL:PHR:BF0655 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2009:BF0655>> accessed 17 August 2018..

This concerned a poster with the text: *Stop het Gezwel that Islam Heet* (Stop the Tumour that is Islam).

⁶ Amsterdam District Court (n 2) para. 4.2.

⁷ Ibid. para 4.3.1.

when multicultural society and immigration played a big role in public debate and, as a politician, Wilders contributed to this debate.⁸ Wilders was thus acquitted on all counts.

In December 2016, Wilders was convicted for incitement to discrimination and group defamation for remarks made during a post-vote meeting with supporters in The Hague at the time of the local elections in March 2014. At the meeting, Wilders asked the crowd ‘and do you want more or fewer Moroccans in your city and in the Netherlands?’ To which the crowd chanted: ‘fewer, fewer, fewer’. ‘We’ll arrange that,’ Wilders said, smiling, when the chanting died down.⁹ These remarks led to Wilders being prosecuted again and, on 9 December 2016, the District Court of The Hague convicted Wilders of group defamation and incitement to discrimination, both based on race.¹⁰ The expressions at stake in this case were different from those subject to the first prosecution. The first prosecution concerned expressions mainly against Islam, while the ‘fewer Moroccans’ remarks were aimed at a group of people because of their national or ethnic origin and thus because of race. However, it must be noted that Wilders generally links Moroccans with Islam and considers that the criminality of

⁸ Ibid. para 4.3.2.

⁹ *PVV Leader Geert Wilders will be Prosecuted for Inciting Hatred* (Update) (2014) <www.dutchnews.nl/news/archives/2014/12/pvv-leader-geert-wilders-will-be-prosecuted-for-inciting-hatred-and-discrimination/> accessed 17 August 2018.

¹⁰ The Hague District Court (Rechtbank Den Haag) 9 December 2016 ECLI:NL:RBDHA:2016:15014 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014>> accessed 17 August 2018. Both Wilders and the Public Prosecutor have appealed the decision of the District Court of The Hague and the appeal is due to be heard later in 2018.

Moroccans is based on the Quran.¹¹ Moreover, the sections of the Dutch Criminal Code under which Wilders was prosecuted¹² do not distinguish between race or religion as such.

In both cases in the Dutch national courts, Wilders invoked his right to freedom of expression as guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention). The considerations of the different courts involved in these prosecutions clearly illustrate the questions which this chapter is addressing: the issues which would arise with these kind of political expressions under the ECHR and the case law of the European Court of Human Rights (ECtHR), the Court tasked with overseeing the Convention.

Other politicians have invoked their right to freedom of expression in a similar way when challenged for their anti-Islam and anti-immigration remarks. Another argument often used by these politicians is that they criticise Islam as a religion and that they do not target Muslim believers. This leads to the question whether expressions criticising religions or offending religious believers are protected by the right to freedom of expression. According to the ECtHR, Article 10 ECHR applies not only to expressions that are favourably received but also to those that offend, shock or disturb.¹³ The right to freedom of expression thus appears to include expressions criticising and denouncing religions and beliefs. Although this might be seen by those who practice the religion or belief as offensive, does it mean that the freedom of expression must be restricted to protect religious people from offensive attacks on

¹¹ Ian Traynor, 'I don't Hate Muslims. I Hate Islam,' says Holland's Rising Political Star' *The Guardian* 17 February 2008 < <https://www.theguardian.com/world/2008/feb/17/netherlands.islam> > accessed 17 August 2018.

¹² Article 137c (group defamation) and Article 137d (incitement to hatred and discrimination) Dutch Criminal Code.

¹³ *Handyside v the United Kingdom* A 24 [1979-80] 1 EHRR 737, para 49.

their religion or belief? Can religious believers expect to be exempt from all criticism? And if they are, what does this mean for the right to freedom of speech of the person (or the politician) who wants to discuss and criticise that religion or belief? These are the questions addressed in the following.

The right to freedom of expression is not the only fundamental human right which could be involved. Article 9 ECHR guarantees freedom of religion. But is this right violated in cases where someone offends or criticises a religion or belief? Does Article 9 ECHR include a right not to be offended in one's religious feelings? This will also form part of the analysis.¹⁴

This chapter starts with a discussion of the rights to freedom of expression and freedom of religion and the circumstances under which these rights can be restricted. This is followed by an analysis of the questions whether expressions criticising religions or beliefs attract the protection of Article 10 ECHR and whether religious believers are protected against expressions which insult or offend their religious feelings by Article 9 ECHR. This analysis leads to an assessment of where the line should be drawn between protecting freedom of expression and protecting religious believers' feelings.

It must be noted that the term 'political speech' is used in a broad interpretation which is not limited to expressions by politicians but 'encompasses any genuine contribution to the public debate about some issue of social or political importance'.¹⁵

¹⁴ For a more extensive discussion of these issues see Erica Howard, *Freedom of Expression and Religious Hate Speech in Europe* (Routledge, 2017).

¹⁵ Stefan Sottiaux and Stefan Rummens, 'Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' Case Law on Freedom of Expression and Freedom of Association' (2012) 10(1) *International Journal of Constitutional Law* 106, 119.

Freedom of Expression and Freedom of Religion

The ECHR guarantees both freedom of religion and freedom of expression. Article 9(1) ECHR determines that everyone has the right to freedom of thought, conscience and religion and that this right includes the freedom to change one's religion or belief and the right to manifest one's religion or belief. Article 10(1) ECHR guarantees the right to freedom of expression and this includes the freedom to hold opinions and to receive and impart information and ideas. The ECtHR has repeatedly stressed the importance of both these rights for a democratic society.¹⁶

However, the right to freedom of expression and the right to freely manifest one's religion are not absolute. Article 10(2) ECHR allows for restrictions on the right to freedom of expression as long as these are: prescribed by law; necessary in a democratic society to fulfil a pressing social need; and, have a legitimate aim (these legitimate aims are summed up in Article 10(2)). The ECtHR has interpreted this as including that the means used to achieve the legitimate aim must be proportionate and necessary.¹⁷ This test can be described as a three part test of legality, necessity and proportionality. The right to freedom of thought, conscience and religion as guaranteed in Article 9(1) ECHR is an absolute right and, thus, cannot be restricted by the state, but the right to freely manifest one's religion can be restricted, as is clear from Article 9(2). The latter determines that such restrictions must fulfil the same conditions as required for Article 10(2), although there are less legitimate aims

¹⁶ For Article 9: *Kokkinakis v Greece* (1994) 17 EHRR 397, para 31; for Article 10: *Handyside v the United Kingdom* (n 13) para 49.

¹⁷ *Handyside v the United Kingdom* (n 13) para 49.

mentioned. Therefore, the same three part test applies here as well. Both articles mention the protection of the rights of others as a legitimate aim.

Therefore, both the freedom to manifest one's religion and the freedom of expression can be restricted. The ECtHR has explained that the States Parties are better placed to assess what is necessary in a democratic society and thus that they have a certain margin of appreciation to make the initial assessment of the reality of the pressing social need implied by the notion of necessity. However, this margin is not unlimited and the ECtHR is empowered to give the final ruling.¹⁸ The margin of appreciation is important because, if the ECtHR affords states a wider margin of appreciation, it will scrutinise a restriction less closely. The ECtHR has consistently held that exceptions to the right to freedom of expression in Article 10 ECHR 'must be narrowly interpreted and the necessity for any restrictions must be convincingly established'.¹⁹ The ECtHR has also repeatedly stressed the importance of freedom of speech for the public and political debate. For example, in *Lingens v Austria*, the ECtHR pointed out that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'.²⁰ In a number of cases, the ECtHR has also held that 'there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest'.²¹

¹⁸ Ibid. paras 48-49.

¹⁹ *Observer and Guardian v the United Kingdom*, A 216 (1992) 14 EHRR 153, para 59. See also: *Oberschlick v Austria* (1998) 25 EHRR 357, para 29; *Ceylan v Turkey* (2000) 30 EHRR 73, para 32; *Balsyte-Lideikiene v Lithuania* (2008) ECHR 1195, para 75.

²⁰ *Lingens v Austria* (1986) 8 EHRR 103, para 42.

²¹ See, for example: *Ceylan v Turkey* (n 19) para 34; *Balsytė-Lideikienė v Lithuania* (n 19) para 81; *Perinçek v Switzerland* (2016) 63 EHRR 6, para 197.

However, in *Wingrove v the United Kingdom*, the ECtHR held that a wider margin of appreciation is generally available for expressions on religious matters, because there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions. ‘What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations’.²² The width of the margin of appreciation given to states under Article 9(2) ECHR is also generally wide, because ‘it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... even within a single country such conceptions may vary’.²³ On the one hand, it can be said that politicians who use anti-Islam rhetoric address an issue which many people in Europe worry about and, thus, that they contribute to the public debate, which means that they have a very strong right to freedom of expression and that restrictions should be scrutinised closely. On the other hand, can it be said that their expressions are on religious matters and thus that there is less scrutiny because states are given a wider margin of appreciation? Even the freedom of political expression is not unlimited and can be restricted under the three part justification test of Article 10(2) ECHR and, as mentioned, one of the legitimate aims mentioned in this article is the protection of the rights of others. Could the right to freedom of religion of religious believers be infringed by criticism of their religion or belief, or by insults to their religion and its symbols? As the Amsterdam Court of Appeal held, Wilders’ expressions were insulting because they harmed the religious dignity of Muslims and because Wilders has also insulted

²² *Wingrove v the United Kingdom* (1997) 24 EHRR 1, paras 58. See also: *Murphy v Ireland* (2004) 38 EHRR 13 para 67.

²³ *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34, para 50.

Muslim believers by insulting the symbols of the Muslim religion.²⁴ This suggests that criticising a religion offends the religious believers and that this is enough to accept that this constitutes defamation of the group of believers. However, the findings of the Amsterdam District Court²⁵ in the first prosecution against Wilders and the case law of the Dutch Supreme Court²⁶ suggest otherwise. The following analyses how the ECtHR would deal with this.

Criticising Beliefs

As already mentioned, the fact that an expression offends, shocks or disturbs does not negate the right to freedom of expression of the speaker or author. As Barendt writes, ‘the proscription of any type of speech on the ground of its offensiveness is, of course, very hard to reconcile with freedom of expression, for a right to express and receive only inoffensive opinions would hardly be worth having’.²⁷ The ECtHR has also expressed that

those who choose to exercise the freedom to manifest their religion ... cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.²⁸

²⁴ Amsterdam Court of Appeal (n 3).

²⁵ Amsterdam District Court (n 2).para 4.2.

²⁶ Dutch Supreme Court (n 5).

²⁷ Eric Barendt, ‘Religious Hatred Laws: Protecting Groups or Belief? (2011) 17(1) *Res Publica* 41, 44.

²⁸ *Otto-Preminger-Institut v Austria* (n 23) para 47.

Therefore, religious believers must accept that their beliefs will be criticised and challenged. Article 9 ECHR mentions four forms of manifestations: worship, teaching, practice and observance. According to Knights, this ‘protects rituals, rites, acts of worship, and attempting to convert others’.²⁹ Teaching and attempting to convert others is thus part of the right to freely manifest one’s religion or belief. In *Kokkinakis v Greece*, the ECtHR stated that without the right to try to convince one’s neighbour, for example through teaching, the freedom to change one’s religion or belief ‘would be likely to remain a dead letter’.³⁰ This right would also remain a dead letter if one could not receive or impart ideas that criticise or deny the tenets of one’s religion or belief or support those of another than one’s own. Moreover, the right to receive and impart ideas is also part of the freedom of expression in Article 10 ECHR. Nathwani points out that ‘little else seems to further human affairs more than a critical stance to religious beliefs and a deeper understanding of the limitations of religious beliefs and the mechanisms of their production’.³¹ And, as Temperman expresses, the right to freedom of religion ‘includes the right to manifest beliefs that may be heretical, defamatory or blasphemous to another person’.³² Therefore, a democratic society requires that religions and beliefs can be openly discussed, professed, advocated, criticised and

²⁹ Samantha Knights, *Freedom of Religion, Minorities and the Law* (Oxford University Press, 2009) 44.

³⁰ *Kokkinakis v Greece* (n 16) para 31.

³¹ Niraj Nathwani ‘Religious Cartoons and Human Rights – A Critical Legal Analysis of the Case Law of the European Court of Human Rights on the Protection of Religious Feelings and its Implications in the Danish Affair Concerning Cartoons of the Prophet Muhammad’ (2008) 4 *European Human Rights Law Review* 488, 499.

³² Jeroen Temperman ‘Blasphemy versus Incitement: An International Law Perspective’ in Christopher Grenda, Chris Beneke and David Nash (eds.) *Profane: Sacrilegious Expression in a Multicultural Age* (University of California Press, 2014) 404.

denied. Vrieling sums this up well where he writes that ‘allowing hostile criticism, ridicule and even “desecration” of religious tenets and beliefs is a necessary price of living in a free society’.³³

This suggests that religions or beliefs as such are not protected by the right to freedom of religion. Bielefeldt, Ghanea and Wiener confirm this where they write that freedom of religion protects human beings, not religions.³⁴ And, Leigh explains that ‘religions do not have rights because ideas do not have rights. Groups of religious believers on the other hand do have rights’.³⁵ Therefore, expressions which criticise religions and beliefs do not interfere with the right to freedom of religion of the religious believer. This means that such expressions cannot be restricted by the state for the protection of the rights of others under Article 10(2) ECHR and if they are restricted, this should be considered as a violation of the right to freedom of expression.

A good illustration of where this has been applied is the following. Wilders party showed, during a political broadcast before the Dutch local elections in March 2018, a film with ‘Islam is’ in red letters followed by words like discrimination, violence, terror, hatred against women, homosexual people and Jews, and deadly. Blood dripped from the letters.

³³ Jogchum Vrieling ‘Islamophobia and the Law: Belgian Hate Speech Legislation and the Wilful Destruction of the Koran’ (2014) 14(1) *International Journal of Discrimination and the Law* 54, 57.

³⁴ Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief An International Law Commentary* (Oxford University Press, 2016) 492-493.

³⁵ Ian Leigh ‘Damned if They Do, Damned if They Don’t: the European Court of Human Rights and the Protection of Religion from Attack’ (2011) 17(1) *Res Publica* 55, 68.

The film led to 17 complaints but the Dutch Public Prosecutor has decided not to prosecute because the expressions are about Islam and not about Muslim believers.³⁶

Expressions criticising religions or belief are thus protected by the right to freedom of expression, but does the same apply to expressions which criticise religious believers? This is discussed next.

Criticising Believers: a Right not to be Offended?

The question in this part is whether expressions criticising or offending religious believers are protected by Article 10 ECHR or whether they can be considered a violation of the Article 9 right of the religious believers targeted. If the latter is the case, the expressions might be restricted under Article 10(2) for the protection of the rights of others. This question can be formulated in another way: does Article 9 include a right not to be offended in one's religious feelings? The Research Division of the European Court of Human Rights states that the right to protection of religious feelings appears to be protected by Article 9.³⁷ In *Otto-Preminger-Institut v Austria*, which concerned the seizure and ban on a film depicting the figures of Christ, God and Mary in a disparaging way, the ECtHR stated that

the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its

³⁶ Openbaar Ministerie *Aangiften Tegen PVV Campagnefilmje Geseponneerd* (Public Prosecutors Office, the Netherlands, Complaints against PVV Campaign Film Dismissed) 1 May 2018 <www.om.nl/actueel/nieuwsberichten/@102954/aangiften-pvv/> accessed 17 August 2018.

³⁷ European Court of Human Rights Research Division, *Overview of the Court's Case-law on Freedom of Religion* (Strasbourg, Council of Europe, 2013) para 40, <http://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf> accessed August 2018.

responsibility *to ensure the peaceful enjoyment* of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.³⁸

The ECtHR also mentioned that ‘the *respect for the religious feelings* of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration’.³⁹ And, the ECtHR accepted that the purpose of the measures taken by Austria in this case (seizing and banning the film in question), which was ‘to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons’, served the legitimate aim of the protection of the rights of others.

In *I.A. v Turkey*,⁴⁰ the applicant had published a fictional novel containing disparaging remarks about Islam and the Prophet Muhammad. The ECtHR did not find his conviction to be a violation of the author’s freedom of expression, because the publication concerned ‘an abusive attack on the Prophet of Islam’ and ‘believers may legitimately feel themselves to be the object of unwarranted and offensive attacks’. The ECtHR concluded that ‘the measure taken in respect of the statements in issue was intended to provide protection against

³⁸ *Otto-Preminger-Institut v Austria* (n 23) para 47 [emphasis added].

³⁹ *Ibid.* [emphasis added].

⁴⁰ *I.A. v Turkey* (2007) 45 EHRR 30, para 29.

offensive attacks on matters regarded as sacred by Muslims’ and thus that it met a pressing social need.⁴¹

All this suggests that the right not to be insulted in one’s religious feelings is part of the protection provided in Article 9 ECHR and that causing offence to religious believers through criticising their beliefs is enough to restrict a person’s freedom of expression. However, in contrast, it was already mentioned that the fact that an expression offends, shocks or disturbs does not negate the right to freedom of expression of the speaker or author;⁴² and, that religious believers must accept that their beliefs will be challenged and denied.⁴³ As Kapai and Cheung write, the decision in *Otto-Preminger-Institut v Austria* that believers feelings are protected from offence and insult ‘is contradictory to the landmark ruling in *Handyside v the United Kingdom*’.⁴⁴ All this would suggest that a right not to be offended in one’s religious feelings does not exist under Article 9. It is submitted that there is no right not to be offended in one’s religious feelings despite what the ECtHR held in *Otto-Preminger-Institut v Austria* and *I.A. v Turkey*.⁴⁵ As Leigh writes, the ECtHR has sometimes

⁴¹ Ibid. para 30.

⁴² *Handyside v the United Kingdom* (n 13) para 49.

⁴³ *Otto-Preminger-Institut v Austria* (n 23) para 50.

⁴⁴ Puja Kapai and Anne SY Cheung ‘Hanging in the Balance: Freedom of Expression and Religion’ (2009) 15 *Buffalo Human Rights Law Review* 70.

⁴⁵ See for a discussion of this point: Nathwani (n 31); Puja Kapai and Anne SY Cheung (n 44); Jeroen Temperman ‘Protection Against Religious Hatred under the United Nations ICCPR and the European Convention System’ in Silvio Ferrari and Rinaldo Cristofori (eds) *Law and Religion in the 21st Century* (Ashgate Publishing, 2010); Leigh (n 35); George Letsas ‘Is There a Right not to be Offended in One’s Religious Beliefs?’ in Lorenzo Zucca and Camil Ungureanu (eds) *Law, State and Religion in the New Europe* (Cambridge University Press, 2012); Howard (n 14) 23-28.

read into Article 9 ECHR ‘a right not to be offended where none is present in the text’.⁴⁶ Nathwani also points out that ‘the wording of Art. 9 does not give anybody the right to be protected in their religious feelings’.⁴⁷

More support for the argument that there is no right not to be offended in one’s religious feelings present in Article 9, can be found in the fact that, in both cases, the judges of the ECtHR were divided and strong dissenting opinions support this argument. In *Otto-Preminger-Institut v Austria*, six judges found that Article 10 ECHR had not been violated, but the three dissenting judges held that there was a violation and stated expressly that ‘the Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others’.⁴⁸ And, in *I.A. v Turkey*, three of the seven judges dissented and suggested, with a reference to the case of *Otto-Preminger-Institut v Austria*, that the time had come to revisit the case law.⁴⁹

Not only was there dissent in the two cases themselves, later case law from the ECtHR also supports the view that there is no right not to be offended in one’s religious feelings present in Article 9 ECHR. For example, in *Giniewski v France*, a conviction for publicly defaming a religious group was challenged. The ECtHR held that the article in question contributed to a matter of public interest and, although the article contained conclusions and phrases which might offend, shock or disturb some people, this did not

⁴⁶ Leigh (n 35) 72.

⁴⁷ Nathwani (n 31) 503-504.

⁴⁸ *Otto-Preminger-Institut v Austria* (n 23) dissenting opinion, para 6.

⁴⁹ *I.A. v Turkey* (n 40) dissenting opinion, paras 7 and 8.

preclude the enjoyment of freedom of expression.⁵⁰ *Klein v Slovakia* concerned an article by a journalist who attacked an archbishop for suggesting that a film should be banned. The ECtHR unanimously held that the conviction violated Article 10 ECHR. It ‘was not persuaded that the applicant had discredited and disparaged a sector of the population on account of their Catholic faith’ and it accepted that ‘the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith’.⁵¹ According to Temperman, ‘this seems to be the right decision as it is indeed unlikely that this publication was ever going to undermine anyone’s right to freedom of religion or belief’.⁵²

In *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v Turkey*, a temporary broadcasting ban had been imposed after a broadcasting company had broadcast certain comments that an earthquake in Turkey in which thousands of people had died was a warning from Allah to his enemies. The ECtHR found a violation of Article 10 ECHR. It noted that the remarks were of a proselytising nature in that they accorded religious significance to the earthquake. But, although the remarks might have been shocking and offensive and might have led to superstition and intolerance, they did not in any way incite to violence and were not liable to stir up hatred against people.⁵³ In *Öllinger v Austria*, the ECtHR repeated what it had said in *Otto-Preminger-Institut v Austria*, that ‘those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism’ and then appeared to limit the duty of the state to ensure the peaceful enjoyment of the right guaranteed in Article

⁵⁰ *Giniewski v France* (2007) 45 EHRR 23, para 52.

⁵¹ *Klein v Slovakia* (2007) 50 EHRR 15, paras 51 and 52.

⁵² Temperman (n 45), 220.

⁵³ *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v Turkey* App No 6587/03 (ECtHR, 27 November 2007) para 30.

9 ECHR to instances ‘where religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them’.⁵⁴

In *Vajnai v Hungary*, the ECtHR considered that restrictions on human rights, applied to satisfy the dictates of public feeling, did not meet a pressing social need, since a democratic society must remain reasonable in its judgement. As the Court stated, ‘To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto’.⁵⁵ And, very recently, in *Bayev and Others v Russia*, the ECtHR reaffirmed again, in relation to the expression of religious and philosophical views, that ‘the Convention does not guarantee the right not to be confronted with opinions that are opposed to one’s own convictions’.⁵⁶

All these later cases indicate that there is no right not to be offended in one’s religious feelings present in Article 9 ECHR and this is supported in the literature.⁵⁷ Edge, for example, suggests ‘that *Otto-Preminger-Institut* should be treated with caution as an authority on the extent of Article 9 protection’.⁵⁸ This is clearly linked to the importance of both the right to freedom of religion and the right to freedom of expression for a democratic society. As Grimm writes, ‘a general prohibition against hurting religious feelings would put the public discourse at the mercy of the sensitivity of religious groups, and particularly the most

⁵⁴ *Öllinger v Austria* (2008) 46 EHRR 38, para 39.

⁵⁵ *Vajnai v Hungary* (2010) 50 EHRR 44, para 57.

⁵⁶ *Bayev and Others v Russia* (2018) 66 EHRR 10, para 81.

⁵⁷ See, for example: Peter Edge ‘The European Court of Human Rights and Religious Rights’ (1998) 47(3) *International and Comparative Law Quarterly* 680, 683; Temperman (n 45) 217-220; Bielefeldt, Ghana and Wiener (n 34) 493; and the other authors in (n 45).

⁵⁸ Edge (n 57) 683.

militant amongst them'.⁵⁹ The fact that expressions about religion are insulting to the believers in that religion is thus, in itself, not enough to restrict the freedom of expression of the speaker or author. Therefore, restrictions on the right to freedom of expression of politicians or other contributing to the public debate are, following the case law of the ECtHR, not justified merely because the expressions are insulting a religion or its believers. However, this does not mean that such expressions can never be restricted because they can still be limited if this is justified under the three part test in Article 10(2) ECHR. The question is then when this would be justified to protect believers' feelings. This is discussed in the next part.

Protecting Believers' Feelings: Where to Draw the Line?

Expressions which stop believers from manifesting their belief

It can be deduced from the case law of the ECtHR analysed that expressions offending or insulting believers can be restricted in two specific circumstances: where these expressions interfere with the right of believers to express and manifest their religion;⁶⁰ or, where they incite to violence and are likely to stir up hatred against people.⁶¹ Do the anti-Islam and anti-Muslim expressions of many politicians in Europe stop Muslims from exercising their right to express or manifest their religion? It is submitted that this is not the case. In *Otto-Preminger-Institut v Austria*, the ECtHR considered that 'in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those

⁵⁹ Dieter Grimm 'Freedom of Speech in a Globalized World' in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, 2009) 19.

⁶⁰ *Klein v Slovakia* (n 51) para 52; *Öllinger v Austria* (n 54) para 39.

⁶¹ *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v Turkey* (n 53) para 30.

who hold such beliefs from exercising their freedom to hold and express them'.⁶² In *Klein v Slovakia*, the ECtHR accepted that 'the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith'.⁶³ Therefore, it appears to be only in extreme cases that expressions inhibit believers from exercising or manifesting their belief.

But when are believers actually stopped from expressing or manifesting their religion by the expressions of others? Fenwick and Phillipson give as example a situation where a person bursts into a religious service and disrupts it by heckling and obscenities.⁶⁴ Benesch writes that 'if a non-believer flagrantly violates a basic tenet of a religion inside one of its houses of worship that could indeed interfere with freedom to worship'.⁶⁵ She gives two examples: the slaughtering of a pig in a synagogue or mosque or relieving oneself on a holy book.⁶⁶ Benesch continues 'when the violation or mocking takes place, instead, in the public sphere, or in the pages of a magazine which the devout need not read, it is much less clear that their freedom of religion is compromised, and not their *legally unprotected feelings* or sense of dignity'.⁶⁷ So, Benesch also expresses the opinion that religious feelings are

⁶² *Otto-Preminger-Institut v Austria* (n 23) para 47.

⁶³ *Klein v Slovakia* (n 51) paras 51 and 52.

⁶⁴ Helen Fenwick and Gavin Phillipson *Media Freedom under the Human Rights Act* (Oxford University Press, 2006) 501.

⁶⁵ Susan Benesch 'Charlie the Freethinker: Religion, Blasphemy and Decent Controversy' (2015) 15 *Religion and Human Rights* 244, 251.

⁶⁶ *Ibid.* The examples are from Christopher Hitchens 'Cartoon Debate the Case for Mocking Religion' *Slate* 4 February 2006 <www.slate.com/articles/news_and_politics/fighting_words/2006/02/cartoon_debate.html> accessed 17 August 2018.

⁶⁷ Benesch (n 65) 251 [emphasis added].

unprotected and suggests that the freedom to manifest one's religion is not violated by mocking or offending a religion or its believers.

In contrast to the examples given here, the political expressions discussed in this chapter are made in the public sphere and contribute to the public debate by raising issues which many people across Europe are worried about. But does this type of anti-Islam political rhetoric stop Muslims from practising and manifesting their religion or belief? It can be said that the rhetoric about Islam and Muslims used all over Europe by far right politicians – and, increasingly by many mainstream politicians as well - can, especially because it is often repeated, foster intolerance and create a climate that becomes hostile to the groups targeted. In *Erbakan v Turkey*, one dissenting judge pointed out that the impact of Erbakan's words about distinctions between religions, races and regions, could only be measured over time but that his speech was, in her view, a harmful contribution to a climate of intolerance nourishing primitive prejudice and cleavages in society.⁶⁸ However, this effect, as the dissenting judge states, does happen over time and not immediately. It is questionable whether such expressions actually stop people from practising or manifesting their beliefs. Moreover, would contributing to the growth of intolerance over time be enough to prohibit certain expressions? If this was the case, it would mean that someone could be prosecuted and punished because their expressions could or might have some harmful effect in the future. As Heinze writes, people are not usually punished 'for things that *could within some imaginable scenario* result from their actions', and it is precisely to avoid this happening that

⁶⁸ *Erbakan v Turkey* App No 59405/00 (ECtHR, 6 July 2006) dissenting Opinion Judge Steiner, para 2.

the rule of law was created.⁶⁹ Therefore, punishing expressions for the effect they might have in the future presents huge problems from a legal point of view.

It is submitted that the anti-Islam political rhetoric discussed in this chapter, although it might lead to a less tolerant attitude of some people towards Muslims, does not stop Muslims from manifesting their religion. This would, of course, be different if the politicians actually started banning mosques, Muslim schools and the wearing of Muslim clothing or symbols. But these expressions, made within the political debate, do not stop Muslims from practising their religion and thus should not be restricted and punished merely because they might contribute to a climate of intolerance. The fundamental right to freedom of expression, a right that plays such an important role in a democratic society, should not be restricted for this reason. Expressions that foster and contribute to intolerance against certain groups are further examined in the next part.

Expressions which incite to hatred or violence

Do these kind of expressions incite to violence and/or are they likely to stir up hatred against Muslims and, therefore, can they be restricted? First of all, the ECtHR has held that criminal laws against speech which incite to hatred or violence can be compatible with Article 10 ECHR, but only if they fulfil the three part justification test of Article 10(2).⁷⁰ In *Hocaogullari v Turkey*,⁷¹ the ECtHR upheld a conviction of the owner and publisher of a monthly publication for disseminating separatist propaganda. The ECtHR considered that:

⁶⁹ Eric Heinze *Hate Speech and Democratic Citizenship* (Oxford University Press, 2006) 170 [emphasis in original].

⁷⁰ See, for example: *Gündüz v Turkey* (2005) 41 EHRR 5, paras 40-41; *Erbakan v Turkey* (n 68) para 56.

⁷¹ *Hocaogullari v Turkey* (2006) ECHR 201, paras 39 and 40.

the language of the author, who was targeting young people and explaining to them that no revolution was possible without loss of life, could not be regarded as calling for peace or the peaceful settlement of political problems. On the whole, the tenor of the article could be construed as incitement to violence, armed resistance or an uprising.

This suggests that, in the ECtHR's view, if the expression incites to violence or hatred, it can be restricted under Article 10(2) ECHR for the protection of the rights of others.

The content of the expression, the words used, plays a role in the ECtHR's decisions. In *Balsyte-Lideikiene v Lithuania*, the ECtHR considered that the words used expressed aggressive nationalism and ethnocentrism and that this incited to hatred against Poles and Jews.⁷² On the other hand, in a number of cases, the ECtHR has held that the words used, although they had a hostile tone, did not encourage or incite violence.⁷³ In *Arslan v Turkey*, for example, the ECtHR held that the book in question painted an extremely negative picture of the population of Turkish origin and had a hostile narrative, but that it did not constitute an incitement to violence, armed resistance or an uprising.⁷⁴ As Cannie and Voorhoof⁷⁵ write, in many cases against Turkey (including *Arslan v Turkey*), the ECtHR found national convictions or sanctions for separatist propaganda or incitement to hatred or hostility to be a

⁷² *Balsyte-Lideikiene v Lithuania* (n 19) para 79.

⁷³ *Arslan v Turkey* (2001) 31 EHRR 9, para 48; *Polat v Turkey* (1999) ECHR 49, para 52; *Duzgoren v Turkey* (2006) ECHR 966, para 31; *Gül and Others v Turkey* (2010) ECHR 847, para 42.

⁷⁴ *Arslan v Turkey* (n 73) para 48.

⁷⁵ Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: an Added Value for Democracy and Human Rights Protection?' (2011), 29(1) *Netherlands Quarterly of Human Rights*, 54, 74.

violation of Article 10, because the impugned expressions did not act to incite violence or terrorism. All this suggests that the ECtHR has set a high threshold for justifications of restrictions on expressions which incite violence.

However, if we return to the second Wilders prosecution given as an example earlier on in this chapter, Wilders was convicted of incitement to discrimination, but the District Court of The Hague did not find him guilty of incitement to hatred.⁷⁶ The District Court considered that for incitement to hatred it was necessary to establish an aggravating element that rouses others to take (illegal) action, but that it was not necessary to prove that the action had indeed been taken.⁷⁷ It held that there was no evidence of any aggravating element and, thus, that there was no incitement to hatred. However, it did find that the ‘fewer Moroccans’ remarks constituted incitement to discrimination as this did not require an aggravating element, nor did it require that discrimination had actually followed.⁷⁸ However, the case law of the ECtHR discussed in the previous paragraphs suggest that incitement to discrimination would not be enough to justify restricting a politician’s expressions under Article 10(2) ECHR.

On the other hand, in *Féret v Belgium*,⁷⁹ Féret, a politician of the right wing Front National party, had edited leaflets, distributed by his party, which represented non-European migrant communities in Belgium, including Moroccans and Muslims, as criminally-minded and inferior to Belgian and European people. He was convicted under Belgian law for public incitement to racism, hatred and discrimination and he challenged this conviction in the

⁷⁶ The Hague District Court (n 10).

⁷⁷ Ibid. para 5.4.3.2.

⁷⁸ Ibid.

⁷⁹ *Féret v Belgium* App No 15615/07 (ECtHR 16 July 2009).

ECtHR as a violation of his freedom of expression. The judges of the ECtHR in this case were strongly divided with three out of seven judges dissenting. The four majority judges held that political speech that stirred up hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic states.⁸⁰ They considered that incitement to hatred did not necessarily call for an act of violence or other criminal act. Assault on persons by insulting, ridiculing or defaming certain groups of the population or *incitement to discrimination* was sufficient.⁸¹ Contrary to what was stated earlier, this suggests that incitement to discrimination is enough to justify restricting freedom of expression.

In *Féret v Belgium*, the ECtHR also mentioned that the promotion of the exclusion of foreigners constituted a fundamental attack on the rights of individuals and should justify special precautions of all, including politicians.⁸² Therefore, politicians, when expressing themselves in public, had to avoid fostering intolerance.⁸³ The ECtHR then found that the restriction was necessary in a democratic society for the protection of public order (here because the expressions were a threat to social peace and political stability)⁸⁴ and for the protection of the rights of others (here the rights of the immigrant community to safety and

⁸⁰ Ibid. para 73.

⁸¹ Ibid. [emphasis added].

⁸² Ibid. para 75.

⁸³ Ibid. See also: *Erbakan v Turkey* (n 68) para 64.

⁸⁴ The protection of public safety and the prevention of disorder are also mentioned as legitimate aims in Article 10(2) ECHR.

dignity).⁸⁵ It concluded that Féret's conviction did not violate his freedom of expression under Article 10 ECHR.⁸⁶

This raises the question whether it is sufficient justification for restrictions if expressions by politicians merely foster intolerance. Although the ECtHR held that politicians must avoid fostering intolerance, it is submitted that it did not decide that mere fostering intolerance in itself is enough to restrict a politician's freedom of expression. The ECtHR also mentioned a 'threat to social peace and political stability', which clearly suggests that more than mere fostering intolerance is required. It is submitted that this is the right interpretation and that expressions by politicians and others who contribute to the public debate should not be restricted merely because they foster intolerance. The dissenting opinion of the three minority judges in *Féret v Belgium* clearly supports this interpretation. They stated that there had been an interference with Féret's right to freedom of expression and that combating mere intolerance was not sufficient to justify infringing freedom of expression. *Real – and not potential - impact* on the rights of other needed to be demonstrated.⁸⁷ It is advanced that, because of the importance, for a democratic society, of the freedom of speech of politicians and others who contribute to the public debate, the opinion of the dissenters should be followed and laws against incitement to hatred or violence should only be held to be compatible with the ECHR if there is real impact, if there is a real likelihood that violence will follow. Buyse sums this up well where he writes that the dissenters in *Féret v Belgium*:

⁸⁵ *Féret v Belgium* (n 79) para 78.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* dissenting opinion [emphasis added].

pointed out the difference between incitement - with direct effect - and the long-term consolidation of prejudice and intolerance. Such potential future dangers should not be presented as an apocalyptic scenario which warrants limits on freedom of expression in the present. To do so would limit free political debate and deny the power of counter-arguments and the independent formation of opinions.⁸⁸

Voorhoof also criticises the European Court of Human Rights in *Féret v Belgium* for not clearly differentiating between the different political pamphlets at issue in that case. By doing so, the ECtHR could have avoided holding that punishment of political criticism is protected by the right to freedom of expression in Article 10 ECHR. The pamphlets which criticised a minister, a political party, the money-wasting government and their integration policies should have attracted the extensive protection given to political speech, while other pamphlets, which incited to hatred of foreigners, should not have done so, according to Voorhoof.⁸⁹ He also writes that the Court's argument to legitimise the criminal conviction of a politician with extreme views, that political speech that stirred up hatred was a threat to social peace and political stability in democratic states, is far-fetched and difficult to reconcile with the wide freedom of speech given to expressions contributing to the political debates especially during elections.⁹⁰ Therefore, both authors criticise the majority judgment

⁸⁸ Antoine Buyse 'Dangerous Expressions: the ECHR, Violence and Free Speech' (2014) 63(2) *International and Comparative Law Quarterly* 491, 494.

⁸⁹ Dirk Voorhoof 'Politicus die Haat Zaait is Strafbbaar', Noot onder *Féret/Belgie*, EHRM 16 juli 2009, (Politician who sows Hatred can be Punished, Case Comment *Féret/Belgium*, ECtHR 16 July 2009) *Media Forum* 2009/10 373, 377 (in Dutch, translation by author).

⁹⁰ *Ibid.*

of the ECtHR for not giving enough weight to the protection of expressions which contribute to the political and public debate.

Another argument for following the opinion of the dissenters in *Féret v Belgium* is that the term ‘fostering intolerance’ is particularly vague and open to a very broad interpretation and, thus, that it might be used by states to suppress speech by (opposition) politicians or anyone else who opposes or criticises their policies. Based on the above, mere ‘fostering intolerance’ is, therefore, not enough to restrict the speaker or author’s freedom of expression in these cases. As Kapai and Cheung write, incitement to hatred and violence should only be accepted if ‘it is likely that violence will indeed occur’.⁹¹ Cannie and Voorhoof criticise the ECtHR in *Le Pen v France* for not examining whether there was actual violence as a consequence of the speech by Jean Marie Le Pen in question.⁹² And, Bonello, a former judge of the ECtHR, criticises the Court’s decision in *Zana v Turkey* because there is ‘not a trace of a “clear and present” danger’ analysis’,⁹³ and opines that ‘the suppression of freedom of expression is justifiable in a democratic society only when the words reproved would beget immediate lawless action’.⁹⁴ Therefore, expressions which merely foster intolerance without any real danger that violence is likely to follow should not be restricted and if they are, this should be held to violate Article 10 ECHR. However, as the discussion of

⁹¹ Kapai and Cheung (n 45) 77.

⁹² Cannie and Voorhoof (n 75) 76, footnote 87. *Le Pen v France* App No 18788/09 (ECtHR 20 April 2010).

⁹³ Giovanni Bonello, ‘Freedom of Expression and Incitement to Violence’, in Josep Casadevall, Egbert Myjer, Michael O’Boyle and Anna Austin (Eds) *Freedom of Expression, Essays in Honour of Nicolas Bratza* (Oisterwijk, the Netherlands, Wolf Legal Publishers, 2012) 349, 350. *Zana v Turkey*, App No. 18954/91, 25 November 1997.

⁹⁴ Bonello (n 93) 359.

the case law has shown, the ECtHR is not always consistent in this and, in many cases regarding freedom of expression, its judges do not agree with each other and this results in many dissenting opinions.

There is support in the ECtHR case law for the argument made here that, under Article 10(2) ECHR, only expressions inciting to hatred or violence which have real impact and which are likely to lead to violence, can be restricted. First, the Court's reference, in *Hocaogullari v Turkey*, to 'incitement to violence, armed resistance or an uprising'⁹⁵ supports this argument. Then, in *Gündüz v Turkey*, the ECtHR considered that 'the mere fact of defending sharia, without calling for violence to establish it cannot be regarded as "hate speech"' and that the conviction of the applicant for hate speech or incitement to hatred thus violated his right to freedom of expression under Article 10 ECHR.⁹⁶ And, in contrast, in *Soulas v France*, the ECtHR mentioned that: the style of the book in question was polemic; it used military language; it presented the effects of immigration as close to catastrophic; and, it led the readers to share the solution recommended by the author, namely a war of ethnic reconquest.⁹⁷ Because of this, the conviction of the authors was not considered to have violated their right to freedom of expression.⁹⁸

But, perhaps the strongest support for the argument made here can be found in the following two cases. First, in *Erbakan v Turkey*, the ECtHR considered that it may, in principle, be considered necessary in democratic societies to sanction or prevent all forms of expressions which spread, incite, promote or justify hatred or intolerance, subject to the

⁹⁵ *Hocaogullari v Turkey* (n 71) paras. 39-40.

⁹⁶ *Gündüz v Turkey* (n 70) para 51.

⁹⁷ *Soulas v France* App No 15948/03 (ECtHR 10 July 2008) paras 41 and 43.

⁹⁸ *Ibid.* para 44.

justification test of Article 10(2) ECHR.⁹⁹ The ECtHR then held that ‘it had not been established that at the time of his prosecution the speech in question had given rise to a “present risk” and an “imminent danger” to society’¹⁰⁰ and thus a violation of Erbakan’s freedom of expression was found. Second, in *Vajnai v Hungary*, a politician who was Vice-President of the Workers Party was convicted of wearing a totalitarian symbol in public, after he had worn a red star as symbol of the international workers movement at a legal demonstration. The ECtHR considered that there was no evidence that there was a ‘real and present danger’ and that the government, prior to enacting the ban in question, had not shown the existence of such a threat.¹⁰¹ The ECtHR also expressed the view that ‘the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a “pressing social need”’.¹⁰² This supports what was argued above, that a mere speculative danger, like contributing to the fostering of intolerance, is not enough to justify restrictions on the freedom of expression of politicians and others contributing to the public debate.

Therefore, freedom of expression of politicians and others contributing to the public debate should not be restricted to protect the right of others unless real impact, a present risk or imminent danger can be demonstrated. This real impact can be because the expression constitutes hate speech with a real likelihood that violence will follow or because it can be shown that the expression factually stops people from manifesting or practising their religion. However, even then, the three part justification test of Article 10(2) ECHR should be used by

⁹⁹ *Erbakan v Turkey* (n 68) para 56.

¹⁰⁰ *Ibid.* para 68.

¹⁰¹ *Vajnai v Hungary* (n 55) para 49.

¹⁰² *Ibid.* para 55.

the ECtHR and it should scrutinise carefully whether the means used to restrict the right to freedom of expression are proportionate to the aim of protecting the rights of others. And, mere ‘fostering intolerance’ or ‘offending religious feelings’ should never be enough to justify restrictions on freedom of expression of politicians or others contributing to the public debate.

Conclusion

The focus of this chapter has been on the limits on speech by politicians and those who contribute to the public debate, which is offensive to religious believers or which seeks to stir up discrimination, hatred or violence against them. The analysis included the question whether freedom of expression, as guaranteed by Article 10 ECHR, must be curtailed to protect religious believers from offence or insult and whether a right not to be offended in one’s religious feelings is present in the guarantee of freedom of religion in Article 9 ECHR. The relevant case law of the ECtHR was examined and the importance of the right to freedom of expression in a democratic society was emphasised as was the requirement in such a society that religions and beliefs can be openly discussed, professed, advocated, criticised and denied. This is essential not only for the freedom of expression but also for the freedom of religion as guaranteed in Article 9 ECHR, which include the freedom to change one’s religion.

It was established that the ECtHR leaves states a certain margin of appreciation in deciding the question whether an interference with Articles 9 or 10 ECHR is necessary in a democratic society and thus whether a restriction on the rights in these articles is justified. However, the width of the margin of appreciation left to the states is not always the same. Under Article 10, it is wider for expressions on moral or religious matters than for expressions that contribute to the political debate. It is also wider under Article 9.

It was argued that religious believers are not exempt from criticism and that they must accept that their beliefs will be criticised, challenged and even denied; and, that there is no right not to be offended in one's religious feelings present in Article 9 ECHR. As Barendt writes, 'limits on freedom of expression should not be upheld to prevent offence to religious groups, for this is often a thin disguise for the imposition of restrictions on open discussion on religious truths and beliefs'.¹⁰³

Where, then, must the line be drawn between freedom of expression and protecting religious believers against speech that is offensive or that seeks to stir up hatred or violence against them? It was argued that freedom of expression should not be restricted to protect the right of others unless real impact can be demonstrated. This real impact can exist because the expression constitutes hate speech with a real likelihood that violence will occur or because it can be shown that the expression factually stops people from holding, practising or manifesting their religion. However, even then the justification test of Article 10(2) ECHR should be used by the ECtHR and it should examine carefully whether the means used to restrict the right to freedom of expression are prescribed by law and proportionate to the aim of protecting the rights of others or to any of the other legitimate aims laid down in Article 10(2). Restrictions on expressions that merely foster intolerance or offend religious feelings but that do not incite to hatred and violence or impede a person's right to hold or manifest their religion or belief should be held to violate the right to freedom of expression of the speaker or author. Because of the crucial importance of an open public and political debate for a democratic society, this is where the line should be drawn and 'freedom of expression as

¹⁰³ Barendt (n 27) 53.

protected under Article 10 of the ECtHR should not be further restricted to meet increasing sensitivities of certain religious groups'.¹⁰⁴

¹⁰⁴ Parliamentary Assembly Council of Europe Resolution 1510 (2006) Freedom of Expression and Respect for Religious Beliefs para 12 < <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17457&lang=en> > accessed 7 May 2018.