[NL] Amsterdam Court of Appeal Orders Criminal Prosecution of Dutch MP Geert Wilders

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On 21 January 2009, the Amsterdam Court of Appeal ordered the criminal prosecution of Dutch MP Geert Wilders of the *Partij voor de Vrijheid* (the Party of Liberty - PVV) for the incitement to hatred and discrimination against, as well as the insult of a group of people on the ground of their religion, penalized in Articles 137d and 137c respectively of the Dutch penal code. The basis for the prosecution were Wilders' statements about Islam and Muslims in his film Fitna, which was distributed over the Internet, and in several interviews and columns published in national newspapers and online.

The complaints procedure was begun by eight organizations and individuals who did not agree with the decision issued on 30 June 2008 by the Public Prosecution Service not to give effect to their reports against Wilders. In sum, the Public Prosecution Service considered most statements made by Wilders to be acceptable critique on Islamic belief that did not concern the Muslim community. Although some statements could be considered as insulting to Muslims, they were made by a politician outside the parliament as a contribution to public debate, thereby cancelling any unlawfulness. On 17 November 2008, the Chief Advocate-General of the Amsterdam Court of Appeal advised the Advocate-General not to prosecute. On 27 November 2008, the Advocate-General decided that the Chief Advocate-General could reasonably have reached this conclusion: prosecution would necessarily result in an acquittal. While the clarification of the standing legal framework could be a reason for prosecution, a public acquittal could not.

The Court declared all eight complaints admissible. The plaintiffs had a direct and personal interest in the prosecution of Wilders, because their complaints concerned offences against public order. In addition, according to the Court, all individual citizens, irrespective of whether or not they belong to the Muslim community - a criterion that could not be verified - have a concrete and verifiable interest in the averment of a dangerous breach of social life and public debate.

The Court regarded the assessment of the statements by Wilders as a classical problem of a conflict between fundamental rights, i.e. on one hand, the right of freedom of expression, as laid down in Articles 7 Dutch Constitution, 10 ECHR and 26 ICCPR and, on the other hand, the right not to be offended in one's religious feelings which, although contested by many, according to the Court, arises from

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freedom of religion, as laid down in Articles 6 Dutch Constitution, 9 ECHR and 18 ICCPR.

Although the complaints concerned the perpetration of more public speech offences, the court confined itself to answering the question of whether or not Wilders should be prosecuted for incitement to hatred and/or insult of a group of people. According to the Court, prosecutions in the recent past on the basis of the offence of blasphemy had rarely resulted in a conviction and the current political discussion tends to the abolishment of the offence.

First, the Court considered that the statements by Wilders, taken together, constitute a criminal offence according to Dutch law, because of their content and the method of presentation. This method of presentation was characterized by biased, strongly generalizing phrasings with a radical meaning, ongoing reiteration and an increasing intensity, which essentially affected the dignity of Muslims. The mode of presentation indicates that the statements were manifestly geared towards causing a conflicting discord in society with regard to Muslims. The Court cited several statements by Wilders, amongst which the following: “I’ve had enough of Islam in the Netherlands; no more Muslim immigrants. I’ve had enough of the worship of Allah and Mohammed in the Netherlands; no more mosques. I’ve had enough of the Koran in the Netherlands; prohibit that fascist book.’” With his statements, Wilders depicted Muslims and Islam as a danger to Dutch society, aimed at the recruitment of others for the realization of his wishes, suggested that fundamentalism is inherent in the Muslim faith and that there is a connection between the increase of Muslims and the increase of extremist violence or crimes in the Netherlands and systematically concluded that Dutch borders should be closed to Muslim immigrants. As such, Wilders had incited to hatred.

The Court considered most individual statements to be insulting to Muslims as well, especially those in which Islam is referred to as ‘fascist Islam’ and the Koran as ‘the Islamic Mein Kampf’. Considered in toto, the statements by Wilders clearly concern not only the Islamic faith, but also Muslims. Although Wilders does not emphasize the connection, the insult of a group of people can be deduced from the disdain shown towards certain of their features, traditions or symbols (Allah, Mohammed and the Koran). According to the Court, this “indirect insult” is accepted both in the case law of the Dutch Supreme Court and the ECtHR.

Secondly, the Court considered that a possible criminal prosecution or conviction of Wilders is admissible under the ECHR and the case law of the ECtHR. Speech should be able to “shock, offend and disturb”, but the exercise of the freedom of expression comes with “duties and responsibilities”. Politicians do not have an absolute freedom, because they participate in public debate. When a politician expresses himself in a well-thought publication he has a special responsibility:

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moderation and restraint are required. When a politician incites to hatred and discrimination, he misuses free speech and, on the basis of Article 17 ECHR, cannot appeal to Article 10 ECHR. The comparison of Islam with Nazism did not substantially contribute to public debate and therefore was not permitted either. According to the Court, in this case a pressing social need existed for the criminal prosecution or conviction of Wilders and the restriction of his freedom of speech was necessary in a democratic society.

Finally, the Court held that the criminal prosecution of Wilders is opportune, because the incitement to hatred and discrimination of any group in society, as a result of which one group is opposed to another group, is unlawful; public interest justifies the criminal prosecution of Wilders for incitement to hatred. As regards the insult of a group of people on the ground of their religion, the Court considered that criminal prosecution is not opportune and prefers the political, public and other legal counter forces, as these would result in a promotion of public debate, including the active participation of Muslims.

However, the Court made an exception for insults that connect Islam or the Koran with Nazism. These statements are insulting to Muslims to such a degree that the prosecution of Wilders for them is opportune. The government is committed to taking a clear position as regards incitement to hatred and discrimination. According to the Court, the statements of Wilders block the public debate to such an extent that Muslims are excluded from participation in the debate on the grounds of their religion. This exclusion from the debate is an exclusion from the democratic legal order. The way in which public debate about controversial issues is held does not fall within the ambit of the law in principle, but the situation changes when fundamental boundaries are exceeded. Then, the criminal judge can indicate the outer normative borders.

In contrast with the Public Prosecution Service, the Court did not conclude that prosecution would necessarily result in an acquittal, but concluded that law enforcement and legal certainty called for the criminal prosecution of Wilders. The Court emphasized that it rendered a provisional judgment, meaning that it had not convicted Wilders, but had only judged whether there were sufficient indications - at the level of a reasonable suspicion - to start a criminal prosecution against Wilders and that it is the penal judge who will ultimately render judgment in a public criminal trial and will answer the question of whether there is ground for conviction, and if so, to what extent.

However, the decision by the Court has received strong criticism from scholars, opinion makers and politicians. Generally, the detailed reasoning by the Court is interpreted as a full judicial review or a de facto conviction, that would be contrary to the *trias politica* and which would leave no room for an independent judgment by the penal judge. Although the judgment of the Court is final, Wilders has announced a request to the Procurer-General of the Supreme Court to lodge

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an appeal in cassation in the interest of the law.

Decision of the Public Prosecution Service, 30 June 2008

http://www.om.nl/actueel/archief_strafzaken/@148332/wilders_not/

LJN: BH0496, 21/01/2009

http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH0496

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