[NL] Supreme Court upholds politician's insult conviction over televised speech and interview

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On 6 July 2021, the Supreme Court of the Netherlands (*Hoge Raad*) delivered its closely-watched judgment concerning the conviction of Dutch politician Geert Wilders for group insult over comments made during a televised speech and media interview (see IRIS 2017-2/25 and IRIS 2020-9/13). Importantly, the Supreme Court held that Wilders' conviction for group insult should be upheld, and did not violate the right to freedom of expression. Notably, no sentence had been imposed on Wilders by the lower courts, which the Supreme Court also upheld.

The case arose in 2014 in the run-up to the Dutch municipal elections. On 19 March 2014, during a public meeting, Wilders asked an audience whether they wanted more or fewer Moroccans. In response, the audience cheered "Fewer! Fewer! Fewer!" numerous times. Wilders then said, "Well, then we are going to take care of that." Both Wilders' statements and the cheering of the audience were broadcast by the Dutch public broadcaster NOS. Earlier, on 12 March 2014, Wilders had given an interview to a reporter, while out in a market, where he stated that certain voters were voting for "a city with fewer problems and, if possible, fewer Moroccans." The Dutch Public Prosecution Service charged Wilders with incitement to hatred, incitement to discrimination, and group insult.

In December 2016, The Hague District Court convicted Wilders of group insult and incitement to discrimination, but found him not guilty of incitement to hatred. Wilders appealed the convictions, and on 4 September 2020, The Hague Court of Appeal upheld the conviction for group insult. The court held that Wilders had aimed to discredit all those with a Moroccan background on the sole ground that they belonged to this population group, and that his statements, even if made in the context of a political debate, were "unnecessarily offensive". However, in relation to incitement to hatred, the court of appeal acquitted Wilders. Essentially, the court found that there was insufficient proof that Wilders had intended to incite hatred or discrimination, but was rather "seeking political gain" with his statements. Notably, the court of appeal decided not to impose a sanction on Wilders. The court held that it had to take account of the special circumstances of the politician, noting that he was a democratically elected representative, and that he had made the statement in that capacity.

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In its judgment of 6 July 2021, the Supreme Court upheld the court of appeal's ruling. First, the Supreme Court noted that group insult is criminalised under Article 137c of the Criminal Code, and in determining whether a group has been insulted, the Supreme Court held "it is not just about the words that have been used, but also about the context in which such a statement was made". The Court emphasised that the context consisted of the fact that, after Wilders' earlier statement about fewer Moroccans in the media interview on 12 March 2014 had caused such controversy, the speech Wilders was to give at the public meeting of 19 March 2014 had been "pre-discussed" by Wilders. The question was raised whether only "Moroccans" or "criminal Moroccans" should be mentioned, and Wilders had approved the proposal to only speak of "Moroccans in general". The Supreme Court ruled that in the speech, Wilders had "deliberately spoken about this group as a whole" and had been "unnecessarily offensive". As such, the Supreme Court held Wilders had "insulted" this group, which is prohibited under Article 137c of the Criminal Code. Crucially, the Supreme Court held that the fact that Wilders "spoke as a politician does not change this". The Court accepted that "it is true that a politician should be able to raise matters of general interest, even if he thereby offends or disturbs others"; however, that "does not alter the fact" that a politician "bears the responsibility in the public debate" to prevent the spreading of statements that are "contrary to the law, and to the fundamental principles of the democratic constitutional state, including statements that directly or indirectly incite intolerance". Finally, the Supreme Court found that the non-imposition of a sanction had been "sufficiently reasoned" by the court of appeal.

Hoge Raad der Nederlanden, ECLI:NL:HR:2021:1036, 6 juli 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:1036

Supreme Court of the Netherlands, ECLI:NL:HR:2021:1036, 6 July 2021

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