

**Public prosecutor's demand re G. Wilders (Part 2) – summary**  
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**13/425046-09**

This is a summary of the second part of the public prosecutor's demand, delivered on 15 October 2010, in the criminal proceedings against G. Wilders. This summary is not a procedural document but is intended solely as an accessible summary for the press and other interested parties. If any discrepancy exists or appears to exist between this text and the public prosecutor's demand delivered, then the text delivered during the public prosecutor's demand shall prevail. No rights may be invoked based on this text of the summary.

**Introduction**

On 12 October 2010 the Public Prosecution Service (OM) discussed the assessment criteria for Section 137c, Penal Code (Sr) and assessed the statements charged under Offence 1 according to them. The OM has requested acquittal for Offence 1.

The public prosecutor's demand continued on 15 October 2010 with a description of the assessment criteria for Section 137d Sr and the assessment of offences 2, 3, 4 and 5.

[The following] has therefore been addressed today:

- theoretical part of Section 137d Sr (instigating hatred and instigating discrimination)
- assessment according to criminal law of Offence 2 (instigating hatred because of religion)
- assessment according to criminal law of Offence 3 (instigating discrimination because of religion)
- assessment according to criminal law of Offence 4 (instigating hatred because of race)
- assessment according to criminal law of Offence 5 (instigating discrimination because of race)

**Section 137d Sr, instigating hatred and instigating discrimination**

In offences 2 and 4 of the indictment the charge is instigating hatred, in offences 3 and 5 [the charge is] instigating discrimination. The assessment criteria under criminal law for these two types of 'instigation' differ.

*Legislative history*

Section 137c and Section 137d Sr were both introduced in the Penal code in the 1970s following the International Convention on the Elimination of All Forms of Racial Discrimination. Religion was not a subject of this convention, but the legislator decided to include religion as a ground for discrimination. Sections 137c and 137d Sr thus have the same legislative history: the deliberations by the government and the Senate and the House of Representatives when introducing sections 137c and 137d Sr. This legislative history provides important information for assessment according to these sections.

*Negative perceptions*

The legislative history stipulates that the purpose of introducing sections 137c and 137d Sr was to counteract negative perceptions of certain groups. Negative perceptions about a certain group may lead to discrimination and subordination. The primary issue is therefore not hurt feelings among the group concerned. What matters is the danger that negative perceptions may lead others to discriminate against these groups in society. The sections were not introduced to protect the feelings of individuals.

*Freedom of expression*

When the sections were introduced, avoiding unnecessary restrictions on freedom of expression was considered to be very important. Accordingly, no obstacles under criminal law were imposed on criticizing views, even if such criticism were offensive. Criticism of the deepest convictions among religious people and of religion itself and the institutes and organisations based on religion is permitted, and the same holds true for Section 137d Sr. Criticism is punishable, however, if it unmistakably targets the actual people, and not merely their views, convictions and conduct.

**Instigation toward**

Instigating means the same as inciting, and that means provoking, stirring up, egging on. The OM distinguishes two types of instigation:

- direct instigation ('*Throw those rocks through that window!*')
- indirect instigation ('*It's all right to smashing those windows there*')

Especially the indirect form of instigation makes instigation a relatively broad concept.

#### *Context*

In reviewing whether a statement is punishable under criminal law, the first step is to assess whether a statement is worded to instigate hatred or discrimination. Conceivably, the basic wording may lend itself to various interpretations, and the connection with the rest of the text may make clear the meaning of the wording or the meaning of the words toward a specific group. The context may be decisive in determining which meaning should be attributed to certain words, and the context may bring together the components of instigating hatred or discrimination, so as to constitute instigation of hatred or discrimination.

The meaning of a statement is nearly always discernible from the actual expression. With each statement, the connection with criminal law is basically limited to one section, one book, one interview, one meeting.

In the assessment according to criminal law, statements from Writing A from 2008 and Writing B from 2009 may not be combined, if the suspect has not personally placed them together. Doing so would remove a certain statement from its direct context and connection to the rest of the writing. Moreover, if statements from Writing A from 2008 and Writing B from 2009 are combined, and a specific message is inferred from this, then it cannot be proven that the suspect was aware of the message that the statements convey in combination with one another. In legal terms, the *intent* of the suspect can no longer be proven.

#### **Instigating hatred**

Hatred is an attitude of sweeping hostility, an extreme form of hostility, a sense of deep repulsion. Instigating hatred against people entails instigating an extreme emotion. The issue is people's right to exist. Instigating hatred is instigating a certain state of mind.

'Instigation' may be direct or indirect, as has been discussed. Instigating hatred, however, is possible only indirectly. After all, saying 'go hate Group X!' would be ineffective. Instigating hatred therefore necessarily entails conveying an image sufficiently powerful to arouse hatred, an extreme emotion.

#### *Intrinsic discordant dichotomy*

Few cases in Dutch case law are about instigating hatred. The only specific criterion provided in case law to determine whether hatred is being instigated is the intrinsic discordant dichotomy.

The OM believes an intrinsic discordant dichotomy is when:

1. Two groups are pitted against each other, where
2. It is conveyed from a unilateral perspective that
3. Society or one group is seriously victimised by one or more characteristics of the other group, and
4. The gap (in interests) between the two groups arising from this dichotomy may well lead to serious and often violent conflicts.

Only if these elements are present, is an image conveyed that is potentially strong enough to generate hatred, constituting instigation of hatred.

#### *Reinforcing element*

Case law supports the assertion that in addition to the purely substantive incitement, there needs to be an element of provocation, or a reinforcing element, to constitute instigation. Within Dutch society, to convey the powerful image necessary to 'instigate hatred,' reinforcing elements will often be present within the intrinsic discordant dichotomy for the image conveyed to be sufficiently powerful to potentially arouse such hatred.

### **Instigating discrimination**

'Instigating discrimination' entails instigating conduct in the sense of discriminatory or unequal treatment of people. It does not mean instigating discriminatory thoughts or a discriminating vision. Instigating discrimination involves making a statement intended to arouse (or reinforce) the idea among others of engaging in discriminatory treatment of a certain group in the sense of Section 90quater Sr.

#### *Direct and indirect*

Discrimination may be instigated directly. The idea for the discriminating treatment targeted by the words is then literally spelled out.

Indirect instigation of discrimination is a more concealed form of instigation. The discriminating treatment being instigated is not literally stated, but the wordings are nonetheless selected with the intent to arouse the idea for discriminating treatment. Indirect instigation of discrimination requires two elements: arguments for discriminating against people and wordings intended to arouse the idea of actually engaging in discriminating treatment.

#### *Reinforcing element*

The OM believes that direct instigation of discrimination does not require a reinforcing element. Nor are inciting elements necessary for indirect instigation of discrimination, but the presence of reinforcing elements does indicate instigation toward discrimination.

#### *Context*

Some discriminating measures may be ethically proper or socially desirable. One example is removing children from the care of parents who are severely mentally handicapped. Opinions may vary as to whether such a measure is desirable, but such a measure requires serious discussion, and it must therefore be possible to propose the measure as well. Considered independently, this may constitute 'instigating discrimination'.

As with Section 137c Sr, 'instigation to discriminate' requires assessing the context. If a statement that considered on its own would instigate discrimination is made to contribute to a social debate, this may eliminate the punishable nature of instigating discrimination.

As with Section 137c Sr, the context assessment requires a corrective step. The final step in the review framework entails assessing whether the measure proposed in the statement, considered in terms of wording and content alike, is disproportionate to the underlying social problem that is the cause for instigating that the measure be taken. If such an imbalance exists, the OM calls that *unnecessary excess*. Such a case constitutes punishable instigation toward discrimination.

### **Intent**

The word 'intent' does not appear in the description of the offence in Section 137d Sr. Still, 'instigating hatred or discrimination' is regarded as an intentional offence. The intent requirement is contained in the word 'instigate'.

Section 137d Sr is a formal offence. This means that the possible consequence that may or may not ensue from the offence, or the likelihood of that consequence, does not determine whether the description of the offence has been fulfilled. The intent of the suspect need not concern a specific consequence or a specific likelihood of that consequence. The intent is present, if the suspect must necessarily have been aware of the hate-instigating nature of the expressions used.

### **Assessing statements as charged (offences 2, 3, 4 and 5)**

In Offence 2 (instigating hatred because of religion), the charge is based on 28 statements from different source documents. In Offence 3 (instigating discrimination because of religion), the charge is based on the same 28 statements.

In Offence 4 (instigating hatred because of race), the charge is based on 4 statements, and same statements are the basis for charge in Offence 5 (instigating discrimination because of race).

### **Offence 2**

#### *Source documents*

The first eight statements are from the interview entitled 'De Paus heeft volkomen gelijk' [The Pope is entirely right], published in *de Volkskrant* of 7 October 2006. Here, Wilders was portrayed as heading the list of candidates of a political party. In the interview, Wilders indicated what he viewed as the consequences of Islamization in the Netherlands, highlighting the relationship presumed by Wilders between Islam and criminals and conduct that causes a nuisance. The vision elaborated in the interview is that Islamization of our society needs to be stopped.

The next two statements are from an internet column of 6 February 2007 on the website [www.geenstijl.nl](http://www.geenstijl.nl) and the website [www.pvv.nl](http://www.pvv.nl), entitled 'Mohammed (deel II): de islamitische invasie' [Mohammed (Part II): the Islamic invasion]. In the column Wilders mentions the rise of Islam in the Netherlands and Europe.

Four statements are from an interview published in *Dagblad de Pers* of 13 February 2007 entitled: 'Ik heb goede bedoelingen' [I have good intentions]. Various subjects are covered in the interview. The political position of Wilders, his personal and political past and Islam are addressed.

The next two statements appeared in an article in *de Volkskrant* of 8 August 2007, entitled 'Wilders: verbied de Koran, ook in moskee' [Wilders: prohibit the Koran, also in mosques]. This article announces the letter submitted by Wilders about prohibiting the *Koran*. Wilders's statements in the letter submitted are described: Wilders compares the *Koran* to *Mein Kampf* in the letter submitted.

Seven statements are from the letter submitted by Wilders to *de Volkskrant* of 8 August 2007, entitled 'Genoeg is genoeg: verbied de Koran' [Enough is enough: prohibit the Koran]. Wilders compares the *Koran* to *Mein Kampf* in the letter submitted and describes why he believes the *Koran* should be prohibited.

The next statement is from the website of Radio Nederland Wereldomroep. The title of the article is: 'Wilders wil vernieuwde mini-koran' [Wilders wants a renovated mini Koran]. This is a report of a conversation with Wilders about his proposal to prohibit the *Koran*.

The next two statements appeared in the *Limburgs Dagblad* of 9 February 2008 and were part of an article featuring the headline 'Islam is mijn Fitna' [Islam is my Fitna]. This is an interview with Wilders about making the movie *Fitna*. Wilders discusses the content of the movie and the way the movie came about.

The last written statement in the charge is from an article in *de Volkskrant* of 11 February 2008 featuring the headline: 'Het hoeft niet meer, maar De Film komt er' [No longer necessary, but The Movie is coming].

Finally, the entire movie *Fitna* by Wilders is included in the charge.

#### *Assessment of 'instigating hatred against people because of their religion'*

An intrinsic discordant dichotomy is when two groups are pitted against one another through a dichotomy, while a unilateral perspective conveys that either society or one group is seriously victimised by one or more harmful characteristics of the other group, and the gap (in interests) arising from the dichotomy between the two groups may well lead to serious and often violent conflicts.

Considering the wording and connection with the rest of the text, several statements do not relate to Muslims but to the Islamic religion or the *Koran*. To be punishable, instigating hatred needs to target people. Legally, there needs to be a distinction between the religion and the people. Statements about Islam and the *Koran* are not instigations of hatred against people.

Several statements distinguish between Muslims and others, for example Dutch people. This division does not constitute an intrinsic discordant dichotomy. Sometimes a single element of the intrinsic discordant dichotomy is present, but the other elements have not been fulfilled. In that case hatred has not been instigated in the sense of Section 137d Sr. Considered in conjunction with the rest of the

statement, Wilders targets only Islam and the *Koran* and the problems arising from them in his view. The wording and context of the statements thus do not instigate hatred of people because of their religion.

If a statement based solely on its wording *does* convey an intrinsic discordant dichotomy between Muslims and others, the connection with the rest of the expression reveals that Wilders does this in his effort to curb the influence of the *Koran* and Islam. Considering the wording of the statement and its connection with the rest of the expression, no intrinsic discordant dichotomy between Muslims and others is conveyed. Considered in connection with the rest of the expression, the statement does not instigate hatred against people because of their religion.

Considered based on their wording and in connection with the rest of the expression, none of the statements in Offence 2 conveys an intrinsic discordant dichotomy in the sense of Section 137d Sr. The statements do not instigate hatred against people because of their religion. Acquittal is requested for Offence 2.

### **Offence 3**

In Offence 3 the charge is that several statements by Wilders instigate discrimination against a group of people because of their religion.

In assessing the statements the first step is to assess whether the statement, based on its wording, directly or indirectly instigates discrimination against people. The next step is to assess whether the statement in conjunction with the entire expression or the article in which it appears instigates discrimination directly or indirectly. If it is established that in light of this first step discrimination is basically being instigated, the next step is to examine whether any context is provided that might strip the statement of its discriminating nature. If this is the case, the third and final step in the review framework is to examine whether the form and content of the statement reflect unnecessary excess, so that it would nonetheless entail punishable instigation of discrimination against people.

In assessing the framework of Offence 3, we have found with respect to several statements that they basically instigate discrimination against people. This would be instigation through advocating potentially discriminatory government measures against Muslims. Advocating these measures consistently figured in the context of a political debate that basically stripped the statement of its discriminating nature. The measures proposed in the statements were, considered objectively based both on their content and their wording, functional with respect to the social problem raised. The nature of the statements that instigated discrimination was therefore not punishable. In the view of the OM, this contribution to the political debate that is significant for the suspect makes the essential difference in the assessment according to criminal law. In the context of debate, a politician needs the latitude to make proposals. These may also include proposals that, if implemented in practice, boil down to discriminating against certain groups. Provided that the form and content of these proposals do not entail unnecessary excesses with respect to the social issues raised in the debate. In some statements both the content and the wording are somewhat crude, but, in light of the issues raised, this does not make for unnecessary excesses in the statement.

### **Offence 4 and Offence 5**

The four statements on which the charges are based in offences 4 and 5 appear to concern non-Western residents of foreign extraction or Moroccans because of their race. Considered in the context, this is not the case, and the statements concern religion. The component 'because of their race' has not been fulfilled. Acquittal is requested for offences 4 and 5.

### *Conclusion regarding the assessment of offences 2, 3, 4 and 5*

The statements on which the charges are based have been reviewed according to the assessment criteria for 'instigating hatred' and 'instigating discrimination'. None of the statements met the assessment criteria. None of the statements therefore constitutes 'instigating hatred' or 'instigating discrimination' in the sense of Section 137d Sr.

**The OM requests acquittal for all statements in offences 2, 3, 4 and 5.**