

# The space for strategic manoeuvring in adjudicating a freedom of speech case in the Netherlands

## The first trial of Geert Wilders

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In this article it is shown that the institutional preconditions of the activity type adjudicating a freedom of speech case leave much room for strategic manoeuvring with topical selection. To this end, an analysis is presented of the argumentation of the District Court in a case against the Dutch anti-immigration politician Geert Wilders. In order to show the space for manoeuvring, this argumentation, resulting in acquittal, is compared with the argumentation put forward by the Court of Appeal, which had ordered, after the Public Prosecution Service's refusal to do so, that Wilders be prosecuted. The analysis shows that the District Court made ample use of the space for manoeuvring provided at the normative level concerning the interpretation of legal rules and case law, and the space provided at the factual level of classifying the contested facts in light of the previously identified meaning of a rule.

**Keywords:** activity type, classifying facts, freedom of speech, institutional preconditions, insult, inciting hatred, inciting discrimination, legal argumentation, legal interpretation, strategic manoeuvring, topical selection

### 1. Introduction

In contrast to the United States of America, where only statements that incite immediate violence are sanctioned, criminal law in the Netherlands and other European countries contains several articles limiting freedom of speech. It is for violating these rules that the Dutch far-right politician Geert Wilders, the national leader of the Freedom Party who strongly opposes immigration and Islam, has been brought to court twice. In December 2016, Wilders was convicted by the

District Court of The Hague of insulting a group of people and inciting discrimination in a case that was occasioned by statements expressing the wish to have fewer Moroccans in the Netherlands.<sup>1</sup> The other case against Wilders was prompted by statements making a comparison between Islam and Fascism, between the Qur'an and *Mein Kampf*, sketching a future of violence and war as a result of Islamic immigration and proposing measures to stop this Islamic immigration. In this case Wilders was eventually acquitted from the charges in 2011.

The first case against Wilders stands out for the contradictory opinions held by several participants with legal authority. At the end of 2008 the Public Prosecution Service had decided that Wilders could not be successfully prosecuted, but on 21 January 2009 the Amsterdam Court of Appeal ruled that a prosecution should go ahead. This verdict was the result of specific legal proceedings brought by private individuals who had appealed against the Public Prosecution Service's initial decision. After the Court of Appeal's verdict, the case was redirected to the Amsterdam District Court. The Public Prosecutor examined the case again and pleaded for acquittal – not this institution's usual plea. But there were more unusual elements in these proceedings. The appointed judges had been challenged twice by the defence and were replaced by other judges after the second challenge. Finally, in June 2011 the newly appointed judges ruled that Wilders should be acquitted.

In this article I will study the argumentation put forward in the first case against Wilders as an example of strategic manoeuvring within the boundaries of an argumentative activity type (van Eemeren, 2010, Chapter 5). In doing so, I will make use of the extended pragma-dialectical theory of argumentation as developed by van Eemeren and Houtlosser (a.o. 2002). I will show that the institutional preconditions of a criminal trial concerning the doctrine of freedom of speech leave much room for strategic manoeuvring and therefore for seeking a legally justified decision that could also satisfy other, e.g. political, aims. To this end, I will present an analysis of the argumentation of the District Court to which the first case was redirected after the Court of Appeal's verdict ordering Wilders' prosecution. In order to show the space for manoeuvring, I will also address the Court of Appeal's argumentation on the same issues, and the legal literature commenting on both verdicts. Firstly, I will deal with the argumentation concerning the charge of insult, the criminality of which is defined in Art. 137c of the Dutch Criminal Code. Secondly, I will discuss the argumentation concerning the charge of inciting hatred and/or discrimination, the criminality of which is defined in

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1. Wilders expressed this wish for the first time in response to a journalist's question when visiting a market in The Hague. A week later, on the night of the municipal council elections in March 2014, a roomful of Freedom Party members had been instructed to chant 'fewer, fewer' etc. when Wilders asked if they would like more or fewer Moroccans in the Netherlands.

Art. 137d. Before presenting my analysis of the argumentation, I will begin with an explanation, in the next section, of the theoretical concepts that are relevant with regard to my goal.

My analysis suggests that the District Court made ample use of the space for manoeuvring while aiming for an outcome of acquittal. In this respect, it may be interesting to note that during the period when Wilders' case was being heard by the District Court, Wilders and his party occupied 30 (out of 150) seats in Parliament and were 'tolerators' of a minority government.<sup>2</sup> This was an exceptional political construction, allowing Geert Wilders to influence governmental policy without being responsible for it. In return the government was secured of this party's confirmatory votes when bills were debated.

## 2. Adjudication in a criminal trial

According to the extended pragma-dialectical theory of argumentation discussants are supposed to manoeuvre strategically between the dialectical aim of resolving a difference of opinion in a reasonable way and the rhetorical aim to resolve it in a way that is most advantageous for them (van Eemeren, 2010, p. 39ff.). In their endeavours to manoeuvre strategically the discussants are bound to the rules and conventions that shape the argumentative practice concerned. These rules and conventions can be more or less formal, depending on the question whether or not they have been laid down explicitly (van Eemeren et al., 2014, p. 557). In theoretical terms, an argumentative practice is called an 'argumentative activity type', which argumentative characteristics are the result of the specific institutional requirements contributing to the realization of its goal.

Almost any aspect of a criminal trial is governed by explicit constitutive and regulative rules and the activity type is therefore strongly formally conventionalized (van Eemeren et al., 2014, p. 557; van Eemeren, 2010, p. 147). This conventionalization puts constraints on the argumentation that can be put forward. In the first place, the argumentation should meet the criteria laid down in the Criminal Procedure Code. This Code does not only prescribe how a criminal trial should proceed, but also, for instance, what kind of proof is admissible, and which questions should be addressed before a defendant can be convicted. In the second place, the argumentation should ultimately be based on common starting points drawn from the relevant, codified law, i.e.: (1) the Criminal Code, defining criminal acts and their sanctions, and (2) case law, in which generally formulated rules

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2. This was Prime Minister Rutte's first government, in power from 14 October 2010 to 23 April 2012.

get an (authoritative) interpretation. In the third place, with regard to unclear legal rules that need interpretation, participants in a legal trial can take recourse to legal theory, where the methods for interpretation (functioning as arguments for defending a certain interpretation) are described and evaluated. Considering these constraints, which function as the institutional preconditions for strategic manoeuvring in the relevant activity type, the manoeuvring of a judge defending a legal decision can be regarded as keeping a balance between pursuing the dialectical aim of abiding by the relevant legal norms and the conventional methods concerning their interpretation, and the rhetorical goal of choosing from this normative legal framework those elements that suit one's standpoint best.

There is, however, still another requirement regarding the argumentation in a criminal case that could also give occasion for strategic manoeuvring. This requirement can be drawn from Art. 350 of the Criminal Procedure Code. According to this article's second criterion for conviction, the actual facts a defendant has been charged with should comply with the legal description of a criminal act. This means that in a legal ruling reference should not only be made to a legal norm, but it should also be made clear that this norm does in fact cover the actual facts for which the defendant has been brought to court. In other words, the argumentation for a legal decision about criminality should contain a *normative* element involving a(n) (interpretation of the) relevant legal rule, and a *factual* element concerning a classification of the actual facts in terms of the criminal act defined in the legal rule. In my view, both elements can be considered as levels in the argumentation leaving room for manoeuvring. As will be shown in the following sections, the manoeuvring in the Wilders case does indeed affect the normative level of how to interpret the meaning and scope of a relevant legal rule; and also the factual level of classifying the facts, i.e. the level at which the contested facts are examined in light of the previously identified meaning of a legal rule.

Analyzing the argumentation in the Wilders case from the viewpoint of the choices that were made regarding the kinds of argumentative moves (i.e. appeals to a legal rule, to case law, to a certain method of interpretation and to a particular qualification of the facts), the aspect of strategic manoeuvring that is discussed in this paper predominantly involves the 'topical potential' (van Eemeren, 2010, Chapter 4). It should be noted though that this aspect, concerning the selection a discussant makes from a range of potential discussion moves, is strongly interrelated with the two other aspects of strategic manoeuvring. These are 'audience demand' – according to which an arguer's choices relate to the preferences and values of the audience – and 'presentational devices' – according to which the discussion move concerned is formulated in the most effective way. Although the strategic manoeuvres described in my analysis of the Wilders case could certainly be viewed from all three perspectives and although it would be interesting to do

so, it is due to the limits of this article that I will only present an analysis of the manoeuvres in terms of topical selection.

### 3. The charge of insult

#### 3.1 Legal arguments with regard to the application of Art. 137c

Art. 137c point 1 reads:

Any person who in public, either verbally or in writing or through images, intentionally makes an insulting statement about a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to (...).<sup>3</sup>

In the case against Wilders, the following statements were at issue with regard to this article:

- (1) Moderate Islam does not exist. And it does not exist because there is not such a thing as Good and Bad Islam. There is Islam and that's all. And Islam is the Qur'an. Nothing but the Qur'an. And the Qur'an is the Mein Kampf of a religion which has always aimed to eliminate the others, which calls non-Muslims infidel-dogs, meaning inferior beings. Read it over, that Mein Kampf. Whatever the version, you find out that all the evil which the sons of Allah commit against us and against themselves comes from that book. (Quotations from Oriana Fallaci's work)
- (2) The root of the problem is fascist Islam, the sick ideology of Allah and Mohammed as laid down in the Islamic Mein Kampf: the Qur'an. In this regard, the texts from the Qur'an speak for themselves.
- (3) Why don't we ban that miserable book? After all, we also decided to ban Mein Kampf.
- (4) Islam wants to rule, submit, and seeks to destroy our western civilisation. In 1945 Nazism was defeated in Europe. In 1989 communism was defeated in Europe. Now the Islamic ideology has to be defeated. Stop Islamisation. Defend our freedom.

Except for the last, which came from Wilders' film *Fitna* (released in March 2008), these statements were expressed in an op-ed called 'Enough is enough: ban the Qur'an' written by Wilders and published in a national newspaper (*the Volkskrant*,

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3. Translations of Dutch texts have been found on the web or are mine.

8 August 2008). The original charge against Wilders, based on the complaints filed by private individuals, had contained many more disputed statements, but the Court of Appeal that ordered Wilders' prosecution decided that only comparisons with Nazism could be brought to trial. Although this Court regarded most of Wilders' other statements as indeed legally punishable (although without specifying exactly which ones) because of their disparaging and derogatory tone, it did not consider prosecution of all of these statements 'opportune', i.e. it argued that there is no public interest that would justify legal prosecution of this matter. In this regard, the Court considered that the Dutch culture of debate requires a high degree of tolerance on both sides, and that Muslims should understand the sentiments against their religion, especially since some parts of it, like the Sharia, are irreconcilable with the values of the European Convention on Human Rights. For these reasons, the Court says, Muslims should tolerate criticisms of their faith. But there is one exception: statements in which Islam or the Qur'an is compared to Nazism, especially when such statements are in the clothing of one-liners and when they lack support, are so insulting that prosecution is found to be opportune.

The District Court, which had to assess the actual criminality of the statements at issue, acquitted Wilders of the charge of insult. It based its verdict on new case law on the relevant article of the Dutch Criminal Code (137c) that had been developed after the Court of Appeal's verdict. This new case law concerned a decision of the Supreme Court (of cassation) in the so-called 'Cancer case' (10 March 2009). This case was occasioned by a poster in a window saying:

Stop the Cancer that is called Islam, Theo died for us, who will be next? Resist NOW. National Alliance, we do not submit to Allah. Become a member! N.A., P.O. Box [...], [postal code], [city], <http://www.nationalealliantie.com>.<sup>4</sup>

In the Cancer case, the person who had displayed the poster had been found guilty by both a District Court and a Court of Appeal, but these verdicts were overruled by the Supreme Court. According to the Supreme Court, statements about a religion and not about the people adhering to that religion do not fall under the scope of Art. 137c:

Art. 137c Sr. penalizes insulting expressions 'about a group of people because of their religion', but not insulting expressions about a religion, even if this happens in such a way that the adherents of that religion have their religious feelings hurt.

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4. 'Theo' refers to Theo van Gogh, director (of *Fitna*), actor, scriptwriter, columnist, TV program developer and presenter, who was murdered on 2 November 2004 by a Muslim extremist. 'National Alliance' is an extremist right-wing organisation.

Following this interpretation of Art. 137c, the District Court classed the statements with which Wilders was charged as only addressing the religion, and therefore judged that he is not guilty.<sup>5</sup> As for statement (1), which did indeed mention persons ('the sons of Allah'), the Court decided that the criticism is directed at someone's *behaviour*. According to the Court, the history of the development of Art. 137c shows that this type of criticism is allowed.

The Cancer verdict explains why two arguments that were put forward by the Court of Appeal were not addressed by the District Court. Firstly, the Court of Appeal had argued (in 12.1.3) that both the Dutch Supreme Court and the European Court have ruled against insult through disparagement of certain characteristics, traditions or symbols (Allah, Mohammed, the Qur'an) – a form of insult that is called 'indirect insult'. As a result of the Cancer verdict, however, indirect insult of religious people by insulting their symbols became allowed (Noorloos, 2011, p. 281; Nieuwenhuis, 2009, p. 131), even though some politicians interpreted the verdict as still viewing such statements as illegal (Vermeulen, 2011, p. 659).<sup>6</sup> Secondly, the Court of Appeal cited (in 12.2.2) European case law showing that the European Court does not accept the difference between Muslim people and the Islamic religion. But as the Cancer verdict sets a national criterion endorsing freedom of expression, this freedom cannot be limited by European case law.<sup>7</sup>

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5. The distinction between a religion and its followers had also been invoked by Wilders himself when addressing the Court of Appeal that had to decide about whether or not to prosecute: 'I don't object to groups of people and I don't object to Muslims. In the past I have visited all Islamic and Arabic countries, where I have met wonderful and friendly people. (...) As I said, I don't object to Muslims, but I do object to the Islamic ideology. I see that as a great danger. Turning that into a problem is not a juridical sophistry aimed at avoiding a conviction, but it is something that I really believe.'

6. Due to the Cancer verdict, Minister Donner abandoned his plan to clarify the scope of Art. 137c by adding the phrase 'direct or indirect' (Janssen & Nieuwenhuis, 2012, p. 185). This plan would have meant extending the scope of this article (i.e. compared with the new interpretation of Art. 137c in the Cancer verdict), also in light of the plan to simultaneously abolish Art. 147 on blasphemy (Nieuwenhuis, 2009, p. 132). Article 147 relates to slander of God (blasphemy) and not to slander of other important religious figures or symbols, whereas the phrase 'direct or indirect' could have included the latter in the scope of Art. 137c. Art. 147 has been a dormant article since the famous trial against novelist Gerard Reve (HR 2 April 1968, NJ 1968, 373). Reve was acquitted of blasphemy for picturing a love scene with God embodied by a donkey, because the Supreme Court judged that the Article's condition of an intention to scorn had not been fulfilled. (See also Vermeulen, 2011, pp. 656–660.)

7. A European limitation would only be justified if Art. 9 of the ECHR (protecting freedom of religion) entailed an obligation to prosecute if this right were endangered (Nieuwenhuis, 2009, p. 133; Nieuwenhuis & Janssen, 2011, p. 102).

### 3.2 Strategic manoeuvring with regard to Art. 137c

With regard to legal argumentation, the space for manoeuvring concerns (1) the legal validity of the interpretation of the legal framework (normative level) and (2) the actual determination of whether the legal framework is applicable to the facts at hand, i.e. whether these facts fall under the scope of the relevant legal framework (factual level). In the case at issue, the normative level involves the legal validity of the distinction between insulting a religion and insulting a group of religious people. The factual level involves the question of whether Wilders' statements relate to the group of Muslim people or only relate to the Islamic religion. I begin below with a discussion of the normative level, and follow this with a discussion of the manoeuvring at the factual level.

#### 3.2.1 *Manoeuvring at the normative level*

With regard to the distinction between insulting a religion and insulting a group of religious people, the District Court's line of reasoning seems to be that the Cancer case sets a clear and undisputable criterion that should be applied in the case against Wilders. In the Cancer case, the Supreme Court decided that statements fulfilling the conditions of Art. 137c should 'unmistakably' relate to the group of people that are characterised by their faith. As the poster that had occasioned this case ('Stop the Cancer that is called Islam') only mentioned the religion and did not mention or portray Muslims in any way, the Supreme Court did not find it insulting of them. The press release that accompanied the verdict made explicit reference to the relevance of this judgement for the Wilders case.

In the legal literature, however, doubts have been expressed about the Cancer interpretation of Art. 137c. In the first place, it is the first time in its history that Art. 137c has been given this interpretation; the distinction between the religion and its adherents had never been applied in case law before (van Noorloos, 2011, p. 281).<sup>8</sup> For this reason, annotator Mevis (2010, p. 198) classifies the Supreme Court's judgement as 'unexpected'. Although the Supreme Court's interpretation of Art. 137c does indeed seem to be supported by the text of the proceedings of the

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8. The distinction between a religion and its adherents had been introduced by the Public Prosecutor when pleading for Wilders' acquittal before the Court of Appeal deciding on Wilders' prosecution, and was referred to by the Solicitor General in the Cancer case. However, neither the Public Prosecutor nor the Solicitor General used the distinction as a first step in assessing the statements' alleged illegal character. Both followed the usual approach, consisting of an assessment of the statement itself, the statement in its context and the degree of unnecessary hurtfulness. After dealing with the context in detail, and concluding that the context could excuse the Cancer poster, the Solicitor General said as an aside that Wilders' statements were probably more hurtful for Muslims than the content of the poster.



development of this law, Mevis (*ibidem*, p. 201) speaks of a ‘rediscovery’ of this historical argument. The usual procedure (until the Cancer verdict) of a judge faced with similar cases had always been to decide firstly whether the contested statement ‘is unnecessarily hurtful’ and not whether it relates to a group of people or to the religion that this group belongs to. According to Mevis, the interpretative approach that had been used until then finds equal grounds in the history of Art. 137c. He therefore claims that the appeal to the history of the law put forward by the Supreme Court is less obvious than suggested.<sup>9</sup>

Secondly, the distinction has been criticised for its arbitrariness. People who make insulting statements about a religion can surely have the intention to simultaneously insult the followers of that religion. The accused in the Cancer case had even explicitly stated in court that the poster had been intended to address people (Veraart, 2010, p. 725), namely ‘those who do things like murdering him [Theo van Gogh]’ and ‘those who think they can commit offenses to life on grounds of their radical religious beliefs.’ A result of the Cancer verdict is that insults can be legally expressed by simply choosing your words carefully. That is, one and the same abusive message can be formulated in both a variant that would not be classed as a criminal act and a variant that would: ‘A smart guy can avoid criminality by using a formulation in which the statement does not refer to “a group of persons because of their religion”’ (Mevis, 2010, p. 202).<sup>10</sup> According to Nieuwenhuis & Janssen (2011, 98), this is a strange outcome, because insulting a religion can be just as provocative as insulting a group of people defined by their religion. Ideally it would depend on the context whether a statement is insulting or not, but this aspect, which used to be important with regard to the question of whether Art. 137c is applicable, lost its function when the distinction between a religion and its followers was introduced.<sup>11</sup>

Be these criticisms as they may, it seems to be a widely held view in the legal literature that the Cancer case provides case law that could not be ignored in the Wilders case: the District Court had to deal with the Cancer criterion in some way

9. See also Sackers (2009, pp. 222–225), who sketches the specifics of this history and the problems for its interpretation.

10. Although the Supreme Court’s interpretation was favoured in two dissertations published in the 1990s (Rosier, 1996; Janssen, 1998), Mevis (2010, p. 201) notes that in one of them (Rosier) the criterion was called ‘extremely hard to apply’.

11. According to Veraart (2010), the accused in the Cancer case seems to have been acquitted by accident, because the context was ignored. The social and political situation in which the Cancer poster had been displayed, i.e. after the murder of Van Gogh, was very turbulent, leading to violence against mosques and Islamic primary schools, whereas the National Alliance did not distance itself (enough) from this violence.

or another. One might perhaps argue that the Court could have pointed out differences between the Cancer poster and Wilders' statements, e.g. by looking at the context, but on the other hand it is not logical for a lower court to deviate from a clear criterion set by the Supreme Court. It seems that the new direction taken by the Supreme Court with regard to Art. 137c's interpretation can only be altered by the Supreme Court itself, by European rulings (if a case like this were brought to the European Court of Human Rights) or by the legislator. All in all, the conclusion of the above review of the legal literature must therefore be that the Cancer verdict greatly restricted the scope for the District Court to choose a different interpretation of Art. 137c in the case of Geert Wilders (had it wanted to do that).

### 3.2.2 *Manoeuvring at the factual level*

Once a judge has determined the normative framework as one of the pillars for a decision, i.e. when the interpretation of the relevant legal rule has been set, the next step is to address the factual issue of the application of the legal rule. In answering the factual question of whether Wilders' statements address the religion or its adherents, both the Court of Appeal ordering Wilders' prosecution and the District Court deciding on whether Wilders' statements are illegal or not, referred to the *context* in which these statements were made. The Court of Appeal argued that Wilders' statements should be interpreted from the viewpoint of their connection to one another, which was this Court's understanding of context. It then concluded that Wilders' statements concern not only the religion, but also the people:

From the interconnection between Wilders' statements it is obvious that he [Wilders] (...) addresses the group of Muslim believers (and not only Islam as a religion) (...). (...) that he constantly links Islam and adherents of the faith of Islam (e.g. 'I'm fed up with Islam in the Netherlands: let's put a stop to the influx of Muslim immigrants,' and: 'If Muslims want to stay here, they will have to tear out half of the Qur'an and throw it away'). (12.1.3)

The District Court used a different concept of 'context', i.e. the text of which a contested statement was a part. This resulted in the conclusion that Wilders' statements concern the religion and that they 'do not acquire a different meaning if you look at them in connection with the whole article' (4.2). In the legal literature, this judgement raised questions. Janssen & Nieuwenhuis (2012, p. 186) point out that the Fitna film, which forms the context from which the fourth statement was taken, does indeed depict Muslim people, as these people do actually appear in the film (and in this regard the Wilders case differs from the Cancer case). But the Court assessed this fourth statement as follows:

The words of this statement unmistakably concern Islam. Muslims are not mentioned. Also in connection with the rest of the film, the accused does not appear to draw negative conclusions about Muslims as such with this statement. (4.2)

This judgement could reveal that the Court did not take the context into account after all. This seems to be the opinion of Janssen & Nieuwenhuis (2012, p. 186) when they say that this judgement shows that the Cancer criterion can entail ‘a very abstract assessment on the basis of the literal text, without viewing that text within its specific textual and social context’. In my view, this is a strange interpretation of the Court’s judgement, because the Court explicitly says that it is using the context. It seems to me that this Court has its own idiosyncratic interpretation of what it finds in this context. Be that as it may, in both interpretations the District Court’s assessment of Wilders’ fourth statement can be classed as strategic manoeuvring at the factual level of applying a legal rule: either because it does not consider the context although it says that it does, or because it does, but then wrongly does not discern a reference to people.

A final note about the factual level concerns an interesting observation made by Janssen & Nieuwenhuis (*ibidem*). These legal theorists conclude that the Wilders case shows that the outcome of an insult case greatly depends on the particular charges selected by the Public Prosecutor, in this case on the selection of Wilders’ statements that were included in the charges. The injured parties had asked for the charges to be changed because they did not agree with the Prosecutor’s selection out of Wilders’ statements (*ibidem*, p. 187). One may wonder why the Public Prosecutor Service stuck to its own selection, especially since it argued for acquittal.

## 4. The charge of inciting hatred or discrimination

### 4.1 Legal arguments with regard to the application of Art. 137d

Art. 137d, concerning inciting hatred and discrimination, reads:

Any person who publicly, either verbally or in writing or through images, incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to (...).

Twenty-eight of Wilders' statements were alleged to incite hatred or discrimination (the 28th statement being the entire film *Fitna*).<sup>12</sup> As to these statements' contested criminality, the District Court's standpoints and argumentation and those of the Court of Appeal were totally opposite. The Court of Appeal stated (in 12.1.2) that in their interconnection Wilders' statements are designed to incite hatred and discrimination, not only because of their content but also because of the way they have been formulated, i.e. with bias and strong generalisations containing a radical meaning, ongoing repetition and increasing vehemence. According to this Court, the way these statements are formulated is provocative, due to their commanding and truculent tone and because, in terms of their outward appearance, they aim at division, discrimination, intolerance, contempt, hostility and at creating fear. It says that statements like 'Close the borders, no more Muslims coming into the Netherlands, many Muslims out of the Netherlands' can hardly be understood in any other way than aiming to achieve these propagated actions. And finally, hatred is incited by statements representing Muslims as a danger to our society and as a cause of increasing criminality, which is also the moral of the *Fitna* film, where the Islamic faith and Islamic extremism are portrayed as the same thing.

In contrast, the District Court also acquitted Wilders of this charge. Before reaching this decision, it started by defining three criteria that it would use in relation to the application of Art. 137d (4.3). Its first criterion is that for the application of this legal rule it will follow the same distinction between a religion and the adherents of that religion that it had already made regarding the application of Art. 137c. According to the Court, it had been the legislator's express intention to penalise incitement of hatred of and discrimination against *persons* and to exclude

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12. The sources of these statements are: an op-ed 'De Paus heeft volkomen gelijk' [The Pope is completely right] in *de Volkskrant*, 7 October 2006 (1–8); 'Stop de tsunami' [Stop the tsunami] at [www.geertwilders.nl](http://www.geertwilders.nl) 6 October 2006; 'Mohammed deel II: de islamitische invasie' [Muhammed part II: the Islamic invasion] at [geenstijl.nl](http://geenstijl.nl) 6 February 2007 (<https://www.pvv.nl/index.php/in-de-media/opinie/352-mohammed-deel-ii-column-geenstijl.nl.html>); an interview with Wilders in *De Pers*, 13 February 2007, titled 'Ik heb goede bedoelingen'/'Wat drijft Geert Wilders' [My intentions are good/What motivates Geert Wilders]; a newspaper's announcement of an op-ed written by Wilders 'Wilders: verbied de Koran, ook in moskee; Dit boek zet aan tot haat en moord' [Wilders: ban the Qur'an, also in mosques; this book incites hatred and murder] in *de Volkskrant*, 8 August 2007; the op-ed itself: 'Genoeg is genoeg: verbied de Koran' [Enough is enough: ban the Qur'an]; 'Wilders wil vernieuwde mini-Koran' [Wilders wants revised mini-Qur'an] at the website of the Dutch world broadcasting services, 7 September 2007 (<http://web.archive.org/web/20100130202824/http://static.rnw.nl/migratie/www.wereldomroep.nl/actua/nl/nederlandsepolitiek/070907wildersintvw-redirected>); an interview with Wilders titled 'Islam is mijn Fitna' [Islam is my Fitna] in *De Limburger-Limburgs Dagblad*, 9 February 2008; 'Het hoeft niet meer, maar De Film komt er' [It's not necessary any more, but the film will be released] in *de Volkskrant*, 11 February 2008; the film *Fitna* ([www.liveleak.com](http://www.liveleak.com)).

from this law expressions about the religion itself. It drew this intention from the legislator's remarks in Parliament during the debate on the introduction of points (c) and (d) of Art. 137.

The second criterion defined by the District Court is that in order to incite hatred the statement should contain an 'amplifying' element. The Court's argumentation for this criterion is that in order to explain the meaning of the element 'inciting', the legislator has sought a connection with the criminal offence called 'instigation'. This offence is explained as: 'encouragement to commit an unlawful act'. The Court deduced the criterion of an amplifying element from the equal status of the criminal acts of incitement and instigation, and from considering that hatred is an extreme emotion, concerning deep aversion and hostility. The Court also decided that the criterion of an amplifying element is not necessary with regard to the charge of discrimination, because discrimination is an act that has been clearly defined (in Art. 90quater):

(...) any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the field of politics or economics, in social or cultural matters or any other area of social life. (4.3)

The Court's third criterion for assessing hatred or discrimination is that account should be taken of the circumstances in which the statements were made. This criterion has three angles. Firstly, the Court mentions two Supreme Court verdicts in Dutch case law, ruling that 'the nature and interconnection of the statements and the context in which they have been made should be examined' (HR 16 April 1996; the *Janmaat* verdict) and that this examination should take place 'in view of the associations' the statements evoke (HR 23 November 2010; the *Combat 18* verdict). Secondly, the Court analogously applies Dutch case law on Art. 137c concerning insult and the ruling that the context of public debate can be an excuse for insulting statements (i.e. HR 9 January 2001, *NJ* 2001, 204). According to the Court, the nature and wording of Art. 137c (on insult) and 137d (on inciting hatred and discrimination) allow for this analogical application, although such a context could excuse inciting discrimination more easily than inciting hatred. Thirdly, the Court addresses European case law and concludes from this that European law leaves very little room for restricting freedom of speech, in particular for a politician representing part of the electorate (ECHR 16 July 2009, *Féret – Belgium*). There is even a European Court judgement allowing politicians to use statements that offend, shock or disturb (ECHR 12 December 1976, *Handyside – United Kingdom*), and stating that any imposed restriction should be based on a 'pressing social need' and should be proportionate. At the same time, however, the District Court recognizes restrictions to the special position of politicians in public debate. It mentions

a European Court decision making clear that politicians should refrain from using words that could foster intolerance (ECHR 6 July 2006, *Erbakan – Turkey*) and a decision ruling that encouraging exclusion of foreigners is an encroachment of fundamental rights (ECHR 16 July 2009, *Féret – Belgium*).

When the three criteria were applied to Wilders' statements, many of them were found to be acceptable on the grounds of the first criterion alone. The Court judged that these statements do not fall within the scope of Art. 137d because they concern the religion rather than the people who adhere to that religion (4.3.2). Other statements do, however, relate to people; for example, statements like

- (5) [When we are in power] [t]he very same day the borders will close for all non-western foreigners.<sup>13</sup>
- (6) Everyone will adapt to our dominant culture. Those who don't, will no longer be here in twenty years; they will be expelled from the country.
- (7) We have a gigantic problem with Muslims, it's escalating out of control, and we've been offered solutions that won't even get a mouse into a cage.
- (8) We want enough [in terms of policy proposals]. Close the borders, no more Muslims coming into the Netherlands, many Muslims out of the Netherlands, denaturalisation of Islamic criminals.

Many other statements predicting a dangerous, large-scale future presence of Muslims in the Netherlands also mention Muslims explicitly:

- (9) The demographic composition of the population is the biggest problem of the Netherlands. I'm talking about what is coming to the Netherlands and what is reproducing itself. (...) We have to stop the tsunami of Islamisation.
- (10) My intentions are good. We're allowing something to happen that is making this a totally different society. I know that in a few decades there won't yet be an Islamic majority. But it's growing. Containing aggressive elements, imperialism. Walk through the streets and see where it's going. You feel that you don't live in your own country any more. There's a fight going on and we have to defend ourselves. Soon there may be more mosques than churches.

As to those statements, the Court takes the standpoint that they too do not incite hatred of Muslims, and neither do they incite discrimination. The argumentation for the standpoint that they do not incite *hatred* is either that they do not fulfil the second criterion of an amplifying element, or that they are not instigating. Or, if

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13. According to the District Court, the context of the newspaper article immediately makes clear that 'non-western foreigners' refers to Muslims. The same was said about 'those who' in the next statement.

they are instigating, as the second part of the Fitna film is considered to be, they are still not illegal because of the third criterion – the context. The second part of Fitna was judged to be instigating because of the oversimplified scenes, the accompaniment of music suggesting a threatening situation and the suggestion that violence and criminality will increase as a result of Muslims already living in the Netherlands. Nevertheless, the Court decided that the film as a whole should be regarded as conveying a message, i.e. the bad influence of Islam, in the context of public debate. In this respect it also considered that Wilders has said on many occasions that he does not object to Muslims but to Islam.

As for the standpoint that these statements do not incite discrimination, one line of argumentation is that they ‘neither directly nor indirectly’ incite discrimination (as is said about statements (9) and (10)). Another line is that if these statements should indeed be regarded as discriminatory (as is said about statements (5), (6), (7) and (8)), they can be excused on grounds of the context. One aspect of this context is that the statements must be regarded as policy proposals contributing to the public debate. For statement (8), taken from an interview in *De Pers* (13 October 2007), the reference to the context of public debate is the only contextual argument considered. Another aspect of the context is, as the Court itself indicated, the textual context. In this respect, the Court’s view on statements (5), (6) and (7), which were taken from an interview in *de Volkskrant* (7 October 2006), is that Wilders said in the same interview that his measures do not concern every Muslim.

## 4.2 Strategic manoeuvring with regard to Art. 137d

Also with regard to the application of Art. 137d, the space for strategic manoeuvring will be considered for both the normative and the factual level. The normative level is addressed in the Court’s development of the three criteria relating to the applicability of Art. 137d. The factual level is addressed in the application of these criteria to the concrete facts, i.e. to the 28 statements that are the subject of the charges. Below I will discuss each criterion in terms of its normative and factual aspects.

### 4.2.1 *The distinction between a religion and its adherents*

#### *Manoeuvring at the normative level.*

The District Court’s first criterion for deciding whether the conditions of Art. 137d have been met concerns the distinction between a religion and the adherents of that religion. Just as this criterion was new with regard to Art. 137c, it had also never been used before with regard to Art. 137d (van Noorloos, 2011, p. 281). As



regards Art. 137d, the Court drew the distinction from the legislator's remarks accompanying the development of points (c) and (d) of Art. 137. In these remarks the legislator explains that points (c) and (d) do not limit criticisms concerning the wordings or actions of institutions or organisations that have been founded on a religious basis or on other beliefs:

Criticisms of actions should be allowed as much space as possible. The proposed rules of criminal law do not change that, even when those criticisms concern the deepest beliefs on which these institutions or organisations have been founded. Criminality arises when criticisms derail into the attack on the status, credit and honour of those groups or into inciting hatred towards or discrimination against the group on the grounds of the sole fact that its members adhere to the religion or belief to which the criticisms have been addressed.

(Kamerstukken II 1969–1970, 9724, Memorie van Antwoord, no. 22a, pp. 3–4)

Unlike the Court, I do not see that a very clear distinction between a religion and its adherents is made in this quotation. In my view, this quotation particularly focuses on the difference between statements criticising actions and utterances of religious institutions (allowed) and statements criticising people just because of their religion (not allowed). The obscurity of the quotation may be the reason that Janssen & Nieuwenhuis (2012, p. 188) say that the Court's first criterion is the result of an analogical application of the criteria of the Cancer verdict of 2009 (concerning Art. 137c) to Art. 137d. As was discussed in Section 3.1, the Cancer verdict had been published after the Amsterdam Court of Appeal's decision that Wilders should be prosecuted. In this verdict, the Supreme Court came up with a new interpretation of Art. 137c, introducing the distinction between insulting a religion and insulting a group of people defined by a religious belief.

On the occasion of the Cancer verdict, legal theorists had reflected on whether this distinction would only hold for Art. 137c or also for points (d) and (e) of Art. 137. (Point (e) penalizes the divulgence (distribution) of statements that are insulting or that incite hatred or discrimination.) Annotator Mevis (2010, p. 198) argued that point (d) is very different from point (c), and this is also how he interprets the Cancer verdict, i.e. that this verdict is applicable only to point (c). Vermeulen (2011, pp. 363ff.) shares this interpretation and provides further reasons for this standpoint. Whereas point (c) speaks of insulting statements *about* a group of people, point (d) speaks of inciting hatred *of* or discrimination *against* people. According to Vermeulen, this means that a distinction between the religion and the group of people that adhere to it is not relevant in relation to point (d). This is also obvious from the nature of the matter: inciting hatred or discrimination logically concerns people, even if they have not been mentioned explicitly (*ibidem*, p. 664). Finally, Vermeulen refers to the Combat 18 verdict (HR 23



November 2010, ECLI:NL:HR:2010:BM9132), where the Supreme Court judged with respect to Art. 137e that the meaning of the contested statements not only depends on the wordings that have been used, but should be determined in the circumstances of the case and in the light of the associations they evoke.<sup>14</sup> This verdict would imply that the people addressed do not have to be mentioned explicitly as a group.

The conclusion should be that the Court made ample use of the space for strategic manoeuvring. This space is provided by the general formulation of Art. 137d ('against persons *because of* their religion') and the freedom judges have in applying their own choice of interpretation methods. By making use of this space, the District Court took a new direction with regard to the interpretation of Art. 137d that had not been used until then. It did so by either taking recourse in a peculiar interpretation of a quotation from the historical proceedings of Art. 137d (my interpretation), or by an analogical application of the Cancer criteria concerning insult (Janssen & Nieuwenhuis' interpretation). In respect of the latter interpretation, it should be noted that the possibility of an analogical application of the Cancer criteria had already been criticized in the legal literature before the Court had to deal with the Wilders case. Nevertheless, Janssen & Nieuwenhuis endorse the Court's understanding of Art. 137d, because they find it strange if criticisms of a religion were allowed on grounds of point (c) and not on grounds of point (d). In my view this is not so strange if one considers the comments made in the legal literature. Moreover, Jansen & Nieuwenhuis themselves claim that a strict application of the distinction between a religion and its followers could lead to an undesirable outcome. According to these authors, criticisms directed at the religion should indeed be regarded as illegal if, for instance, posters saying 'Islam bugger off' or 'Death to Islam' are displayed in a neighbourhood where a Muslim family has just come to live.

#### *Manoeuvring at the factual level.*

Apart from the manoeuvring at the normative level, in the form of introducing the new criterion, the Court also made use of the space for manoeuvring with regard to this criterion's factual application. In my view, it could be argued that application of the criterion making a distinction between a religion and its followers can be regarded as manoeuvring that has been derailed. First of all, Janssen & Nieuwenhuis (2012, pp. 188–189) mention an example of Wilders' contested statements in which a group of people (rather than their faith) have actually been

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14. This case law is also mentioned by the District Court in justifying its third criterion regarding the application of Art. 137d – the criterion concerning the context (see Section 4.1 of this article).

addressed, albeit in a different way than in statements (5), (6), (7) and (8), because it does not mention Muslims but Moroccan youngsters:

- (11) One in five Moroccan youngsters is registered as a suspect by the police. Their behaviour stems from their religion and culture. You can't separate those things. The Pope was completely right the other day: Islam is a violent religion.<sup>15</sup>

This statement mentions a group of people (Moroccan youngsters) who are, in the context of these three sentences, clearly defined on grounds of their religion. Nevertheless, the District Court mentioned this statement as included in a list of statements about which it judged:

If the contested statements are examined individually, both in the light of their own wording and in interconnection with all the other statements, it should be concluded that the majority of these statements concern Islam and the Qur'an. (4.3.2)

Actually, there were other contested statements that did indeed mention the group of people, for example:

- (12) The Muslim population is doubling each generation – 25 years – and the presence of Islamic people in every European country is reaching a more than alarming scale.
- (13) If Muslims want to participate, they must distance themselves from the Qur'an.

The above statements show that the Court did not always apply its own criterion – the distinction between followers and their religion – in a comprehensible way.<sup>16</sup> In fact, the Court's way of assessing Wilders' statements gives the impression that it was aiming at an outcome in which most of the contested statements could be set aside. On the one hand, the distinction was rigidly applied when a contextual interpretation of the relevant statement would favour the opposite conclusion, i.e.

15. Statement (12) claims a causal relationship between being a follower of Islam and being a criminal. Janssen & Nieuwenhuis (2012, p. 189) raise questions about the fact that the Court did not require proof to sustain this relationship. According to them, statements equating Moroccans, Antilleans or Muslims with criminals have been judged unacceptable in the past because of their incitement of hatred or discrimination on grounds of race and/or religion.

16. Maybe the Cancer criterion is not so clear after all. Vermeulen (2011, p. 659) wonders whether the condition that a statement should 'unmistakably concern' a group of people characterised by their faith implies that the statement explicitly mentions the group of people.

that the people are indeed at issue and not the religion. On the other hand, the distinction was loosely applied when the exact wording referred to people.

#### 4.2.2 *The amplifying element*

*Manoeuvring at the normative level.*

Like the other aspects of the normative framework discussed so far, the Court's second criterion – the requirement of an amplifying element – necessary for determining incitement of hatred, was also new (Janssen & Nieuwenhuis, 2012, p. 189; van Noorloos, 2011, p. 281).<sup>17</sup> It had been introduced in the Solicitor General's advice to the Amsterdam Court of Appeal, which had to decide about Wilders' prosecution, although the Solicitor General acknowledged that Dutch law might not be aware of this rule because the law is not clear-cut on this matter. Subsequently, the Public Prosecutor adopted the criterion when requesting Wilders' acquittal.

Strategic manoeuvring is – again – possible because of the vague formulation of the relevant legal rule. After all, it is not clear in itself how the term 'inciting' should be demarcated. In the case against Wilders several interpretations of this term emerge. When the Court of Appeal had to deal with the issue of Wilders' prosecution, the Solicitor General, advising Wilders' acquittal, proposed an interpretation according to which the contested statements should sketch an adversarial division between different groups in the country (in 6.2 in the Court of Appeal's verdict) and it should contain an instigatory element. The Court of Appeal followed this interpretation but then drew the conclusion, opposite to the Solicitor General's conclusion, that Wilders' statements do in fact contain the instigatory elements and that the way they have been expressed is apparently aimed at creating an adversarial division. Next, the District Court omitted the criterion of the adversarial division, adopted the criterion of instigatory element and invented the new criterion of the amplifying element. According to Janssen & Nieuwenhuis (*ibidem*), however, 'inciting' could equally be interpreted as 'propagating', which would not require the amplifying element.

Another and more important problem is that the District Court does not explain what it means by an amplifying element and how such an element could be identified. The Court thus provides itself with even more space for manoeuvring, namely with regard to the factual issue of classifying the facts (i.e. with regard to whether Wilders' statements do indeed contain such an element).

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17. It was discussed in Section 4.1 that the criterion of an amplifying element applies to inciting hatred and not to inciting discrimination.

*Manoeuvring at the factual level.*

Because the Court did not explain how ‘amplifying element’ should be understood, it could simply state without giving reasons whether it found that a statement incited hatred or not. And so it did. As described before, the Fitna film was regarded as crossing or almost crossing the line, but no other statement was judged to be problematic. In the literature this judgement did not raise much doubt, except for a comment put forward by van Noorloos (2011, p. 281). She says that it would be reasonable to understand statement (9), repeated below, as instigatory, because of its lack of nuances and suggestive effect:

- (9) The demographic composition of the population is the biggest problem of the Netherlands. I’m talking about what is coming to the Netherlands and what is reproducing itself. (...)

Leaving out nuances and using a suggestive tone had been mentioned by the Public Prosecutor as conditions for identifying incitement of hatred (*ibidem*), but apparently the Court did not find these sufficient to class them as amplifying elements. In my view, apart from the doubts one could have about statement (9), one may also wonder why the following statements do not contain an amplifying element:

- (14) The tsunami of a culture that is alien to us, which has become increasingly dominant here. That must be stopped.
- (15) (...) is quoting Professor Raphael Israeli predicting a ‘Third Islamic invasion of Europe’ by means of penetration, propaganda, conversion and demographic changes. In his view Europeans are even committing ‘demographic suicide’ due to an advancing Islam. The first Islamic invasion was stopped in 732 at Poitiers after the conquest of Spain, Portugal and the south of France; the second attempt to invade by Ottoman Turks was stopped when they were slaughtered at the gates of Vienna in 1683. According to Prof. Israeli the third attempt to invade, which is going on now in Europe, has much more chance of success. This man is totally right. (...)
- (16) (...) says that the Third World War had begun. I’m not the one who says this, but it’s true.

As these statements contain intensifiers and hyperboles, use war metaphors or even explicitly talk about a war that is going on between people adhering to Western values and the Islamic culture, it is not immediately obvious that these statements do not contain the required amplifying element.

### 4.2.3 *The context*

The third criterion involves all aspects of the context in which Wilders' statements were made. The following elements can be distinguished from the way the District Court has described this criterion:

- a. The textual context occasioning the interpretation of the contested statements
  1. according to their phrasing,
  2. in relation to the rest of the article or interview in which they appeared,
  3. in relation to other statements by the accused that are part of the file.
- b. The practical context in which the statements were made, such as the context of public debate or an artistic context.<sup>18</sup>

As can be concluded from (a) and (b), the context as presented here is a varied concept, on the one hand consisting of a method of interpreting an utterance (sub-criteria (a1–3)), and on the other hand consisting of a method to excuse potentially illegal utterances (criterion (b)).<sup>19</sup> As for the background of these elements that constitute the context, the District Court relied on – as described in Section 4.1 of this article – Dutch Supreme Court rulings and European law and case law. I will show below that the context criterion offers much room for strategic manoeuvring, dealing with these opportunities again at both the normative and the factual level.

#### *Manoeuvring at the normative level.*

The legal literature seems to approve of the criteria of the *textual context* to be used for interpreting the statements at issue in a lawsuit. Nevertheless, in my view it is especially sub-criterion (a3) that is problematic and provides much room for strategic manoeuvring (see also Jansen & van Klink, 2016); (a3) is the criterion by which the contested statements should be interpreted in relation to other statements by the accused that are also included in the file. This kind of interpretation method can be used in such a way that it steers towards the outcome one wants to reach. This can be shown with the reasoning of both the Court of Appeal and the District Court.

It was already mentioned in Section 3.2.2 of this article that the Court of Appeal ordering Wilders' prosecution claimed (in 12.1.3) that the right way to assess the context consists of viewing all of Wilders statements at issue in court in their interconnection. In practice, this method boils down to making a list of

18. See Sackers (2009, pp. 226–227) on the artistic context.

19. Janssen & Nieuwenhuis (2012, p. 196) note that the Court's interpretation of 'context' only involves the direct textual context and the context of public debate and not the social climate in which discrimination and violence against Muslims is a reality to a greater or lesser degree. (Compare note 11.)

all the contested statements and seeing whether they reinforce each other or not. In my view, it is to be expected that such a method will inevitably make the statements reinforce each other and increase the interpretation of their vehemence, precisely because many of them are one-liners and because of the repetition that this method entails. This was indeed the outcome of the Court of Appeal's assessment. In contrast, the District Court's interpretation of criterion (a3) was to look in the file for moderate statements that were not specifically at issue in court but were included in the texts in which the contested statements had been made. In practice, then, this Court was looking for statements that could moderate the problematic ones.<sup>20</sup> Here again, it is not surprising that the outcome of this method, which Jansen & van Klink (2016) call 'dilution', is that the problematic statements become less problematic. What this illustrates is that both of the Courts used their own idiosyncratic interpretation of the textual context that appears to be chosen in light of the intended outcome.<sup>21</sup>

Apart from manoeuvring with criterion (a3) regarding the textual context, the *context of public debate* offers space for manoeuvring as well. As is clear from the District Court's description of its third criterion, but also from discussions in the legal literature, the European Court takes a twin-track approach to the specific position of politicians in public debate (Janssen & Nieuwenhuis, 2012, p. 204ff.; Schutgens, 2012, p. 292). On the one hand, there is a line of adjudication that is clear on the special position of a Member of Parliament in public debate, which allows these politicians a very large margin to even 'offend, shock or disturb' (Lawson, 2008, pp. 471–472; Janssen & Nieuwenhuis, *ibidem*; the Court of Appeal ordering Wilders' prosecution in 12.2.2). On the other hand, the European Court emphasizes the special responsibility of politicians in public debate and sets restrictions to their freedom of speech (e.g. Sackers, 2009, p. 231). This divergence in case law, where some verdicts also contain dissenting minority opinions, in itself offers space for selecting those verdicts that serve a judge's purpose: '(...) both the District Court and the Court of Appeal could draw from arguments of the European Court of Human Rights' (van Noorloos, 2011, p. 282).

20. To my mind, it is very surprising that the Court regarded the following statement as a 'diluting' one: 'If Muslims do assimilate, then they are true, valuable citizens, not worth one millimeter less than you or I. Considering the textual context, where Wilders urges Muslims who want to stay in the Netherlands to tear out half of the pages of the Qur'an and throw them away, the pragmatic implication of this statement is that Muslims who do not get rid of their religion have less worth.'

21. Rozemond (2012, p. 289, note 15) agrees with the Court of Appeal's method. The Public Prosecution Service strongly opposed it (Requisitory, 25 May 2011, pp. 43–45; 48–49; see also Nieuwenhuis & Janssen, 2011, p. 193). It claimed that a statement that does not incite hatred or discrimination cannot acquire this meaning by pure repetition.

Moreover, the framework regarding the context of public debate set out by the District Court contains a relatively new element embodied by the reference to Dutch case law. In this case law, the relevance of the context of public debate, drawn from European case law, had been developed with regard to issues concerning Art. 137c on insult. The Dutch case law to which the Court refers concerns three similar cases addressing the question of whether negative statements about homosexuals, which were inspired by religious beliefs, should be classed as insulting in the sense of Art. 137c.<sup>22</sup> In all three cases, the accused who had made the contested statement had been acquitted on grounds of the context of public debate.<sup>23</sup>

It should be noted that applying this case law to the Wilders case resulted in a *double* analogical application: (1) the application of case law concerning Art. 137c to Art. 137d, and (2) the application of case law involving insult on grounds of sexual orientation to insult on grounds of religion. With regard to the second analogy, the Court of Appeal had ruled that the verdicts on religiously inspired statements about homosexuals are not applicable in the Wilders case, because his statements are not religiously inspired (Section 12.1.13). However, Janssen & Nieuwenhuis (2012, p. 194) do not see why a political belief should be treated differently from a religious belief. With regard to the other analogical application of this case law (on insult) to inciting hatred or discrimination, Janssen & Nieuwenhuis (*ibidem*) remark that such an application is not obvious, if only because Art. 137d also penalises inciting violence, which is not likely to be excused by the context of public debate.

Notwithstanding these reservations one could argue that it does not matter that the context of public debate has been made part of the applicable legal framework via Dutch case law, because the relevance of the context of public debate is

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22. Apart from the verdict mentioned by the Court (HR 9 January 2001, *NJ* 2001, 204), the other verdicts are HR 9 January 2001, *NJ* 2001, 203 (where the defendant was Van Dijke, the leader of a Christian party) and HR 14 January 2003, *NJ* 2003, 261 (Pastor Herbig). The result of these verdicts is a 'contextual approach' in three steps that has been used in case law since then: (1) Is the statement insulting in itself? (2) Can the context of wanting to contribute to public debate and wanting to express one's religious beliefs excuse the insulting character? (3) Is the statement unnecessarily hurtful?

23. The contested statements of the 2001 verdicts (see the previous note) had been occasioned by a bill legalising same sex marriages. Sackers (2009) remarks that it is sometimes hard to discern such an occasion, let alone be clear about what kind of occasion would allow a statement to be classed as contributing to public debate. After discussing some potential criteria for defining public debate, she concludes that it is not clear what is meant by this concept (which provides even more room for strategic manoeuvring with this criterion). See also annotator Mevis (2003, pp. 2098–2100), commenting on the Pastor Herbig verdict (mentioned in the previous note).

part of this framework via European case law anyway. The Court itself did not say whether its argumentation – by which it excused Wilders’ statements on grounds of the context of public debate – was based on Dutch or European case law.<sup>24</sup>

*Manoeuvring at the factual level.*

As for the factual level, the manoeuvring concerns the application of the normative framework to the actual statements that were at issue. In this respect, it is remarkable that the Court did not adhere to its own framework. In the first place, as Janssen & Nieuwenhuis (2012, p. 198ff.) observe, the Court had mentioned the Combat 18 verdict as relevant case law concerning the textual context, from which it derived that attention should be given to potential associations that Wilders’ statements may evoke. Combat 18 is an English racist movement; no. 18 stands for the first and eighth letters in the alphabet: A and H, referring to Adolf Hitler. The case concerned the question whether T-shirts with this name accompanied with the words ‘whatever it takes’ and ‘support’ should be judged as inciting hatred or discrimination. In cassation the Supreme Court judged that the meaning of those statements should be determined ‘in the circumstances of the case and in the light of the associations they evoke’ (HR 23 November 2010, ECLI:NL:HR:2010:BM9132). Nevertheless, while engaged in the actual assessment of Wilders’ statements, the District Court did not once look at potential associations that Wilders’ statements might evoke.<sup>25</sup>

Moreover, the Court ignored its own legal framework in a second way by not referring to the limitations to freedom of speech for politicians set by the European Court of Human Rights and mentioned by the Court itself as part of the applicable legal framework. In both lines of the Court’s argumentation – the one concerning hatred and the one concerning discrimination – it is precisely

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24. The reference to this Dutch case law might be explained by the fact that European case law, in contrast to Dutch case law, is very explicit about not allowing statements made by politicians that can be classed as intolerant of minorities. If an accused could be acquitted on the basis of Dutch law, there would be no need to apply this aspect of European law. The latter only comes into play if Dutch law results in limiting freedom of speech (see also note 7). Consideration would then have to be given to whether European law tolerates the limitation of Art. 10 of the Convention.

25. Janssen & Nieuwenhuis (*ibidem*) note that an assessment of statements in view of potential associations they may evoke seems to be in conflict with the strict Cancer criterion drawing a sharp distinction between statements only concerning the religion and statements relating to the followers of that religion. On the other hand, they also observe that the Combat 18 verdict fits in a line of case law concerning hatred and discrimination on grounds of race (i.e. discrimination against Jews through references to Nazism, World War II and the Holocaust) and not on grounds of religion. This observation diminishes the relevance of the Combat 18 verdict for the Wilders case.



the context argument that forms the capstone of the argumentation by which Wilders' statements were judged to be acceptable, when that had not been possible on grounds of the other two criteria. With regard to the Fitna film, the Court was of the opinion that the second part of this film appeared to be instigatory. With regard to statements (5), (6), (7) and (8), it said that they should be classed as discriminatory in character because they propose unequal treatment of Muslims and non-Muslims with respect to immigration and right of residence. The next step by the Court, however, was to apply textual context criterion (a3) by taking account of other statements made by Wilders that downplayed the contested statements' illegal character. And finally, the context of public debate finished off this line of reasoning, resulting in Wilders' acquittal.

The fact that this appeal to the context ignores European case law limiting the freedom of expression of politicians can be regarded as 'remarkable' (Janssen & Nieuwenhuis, 2012, p. 200). Let us now have a closer look at this case law, which is grounded in the second paragraph of Art. 10 and Art. 17 of the European Convention. The second paragraph of Art. 10 sets a limit to freedom of speech on grounds of 'necessity in a democratic society'. Case law on this article rules that politicians should be aware of the effects of their words and are pre-eminently assumed to bear in mind the principles of democracy (Janssen & Nieuwenhuis, 2012, p. 205). They should therefore refrain from statements that may evoke intolerance, especially if the author had time to think about his or her statements (Lawson, 2008, pp. 472–474). Art. 17 prohibits abuse of the rights and freedoms laid down in this Convention. This article covers statements that are racist, anti-Semitic, Islamophobic or xenophobic (Janssen & Nieuwenhuis, 2012, pp. 200–201; Nieuwenhuis & Janssen, 2011, pp. 101–102) or 'seek to spread, incite or justify hatred based on intolerance, including religious intolerance' (Lawson, 2008, p. 477; the quotation comes from ECHR 4 December 2003, *Gündüz – Turkey*). Moreover, the identification of the Islamic religion with Muslim extremism has been judged as an unacceptable 'public expression of attack on all Muslims in the United Kingdom' (ECHR 16 November 2004, *Norwood – UK*; Janssen & Nieuwenhuis, 2012, *ibidem*; Lawson, 2008, *ibidem*) and cannot be justified with an appeal to freedom of speech.<sup>26</sup> Schutgens (2012, p. 293) concludes that the European Court allows much freedom for politicians who criticize the government or defend the

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26. In the *Norwood* case, the applicant had displayed a poster in his window portraying the burning Twin Towers accompanied by the words 'Islam out of Britain, Protect the British People'. The Court of Appeal ordering Wilder's prosecution had also referred to this verdict (12.2.2) and emphasized that the European Court had judged in this case that suggesting a generalisation that all Muslims are criminal is a value statement that should be sustained to some extent with facts. (Compare note 15.)

rights of minorities, but is not at all sympathetic to politicians who may set the majority of a country against a religious or otherwise defined minority.

The above considerations were relevant with regard to the actual application of the legal framework to the Wilders' statements. Moreover, Janssen & Nieuwenhuis (*ibidem*) note that the injured parties had invoked this case law, which means that its applicability had become part of the difference of opinion and should have been addressed. Nevertheless, the District Court did not involve it in its decision. Rather, it referred to the intense tone of the Dutch migration debate, which would allow intensely formulated opinions:

(...) in principle, a politician (...) can rely on much room for raising and highlighting his standpoint. The statements expressed by the accused should be regarded as proposals that he hopes to materialize once he has gained governmental power through democratic elections. From the accused's perspective these statements are necessary in a democratic society. In making them, he challenges matters that he believes to be social problems. (...) at the time that these statements were made, the multicultural society and immigration were prominent topics in public debate. The more intense such a debate, the more space there is with regard to freedom of speech.<sup>27</sup> (4.3.2)

However, the reference to the intense tone of the public debate was also criticised (Janssen & Nieuwenhuis, 2012, p. 195). Wilders himself had been one of the instigators of the debate's intense tone, which would imply that the Court's argumentation would allow politicians to set their own limits (van Noorloos, 2011, p. 281). Moreover, Art. 137c and 137d were developed in 1934 with the aim of moderating public debate (Nieuwenhuis & Janssen, 2011, p. 100). Apart from these criticisms concerning the debate's tone, both van Noorloos (2011, p. 282) and Janssen & Nieuwenhuis (2012, p. 196) criticise the fact that the District Court's judgement allows politicians to propose discriminatory measures. This is a new direction in case law that until then had not been followed by the Supreme Court.<sup>28</sup>

From the above it is clear that in relation to the context argument the District Court allowed itself – again – a large margin for strategic manoeuvring, at both

27. This passage might be considered an implicit reference to the 'margin of appreciation' that each country has regarding the limits to freedom of speech in the migration debate (Lawson, 2008, pp. 478–479; Nieuwenhuis & Janssen, 2011, p. 101; Janssen & Nieuwenhuis, 2012, p. 202; the Court of Appeal in consideration 10). In one of its decisions the European Court acknowledged that the problems with migration and integration depend on historical, demographic and cultural factors and therefore may differ for each country. For this reason, the limits set for the discussion about this issue may also be different for each country.

28. The effect of Wilders' statements is also a concern for Lawson (2008, p. 483) and Maris (2011, p. 108).

the normative and the factual level. At the normative level, the Court used not only a peculiar interpretation of the textual context, but also a double analogy with regard to Dutch case law concerning the article on insult. At the factual level, it ignored precisely those elements of its own legal framework that might lead to a different outcome – i.e. the relevance of the associations some contested statements may evoke and European case law limiting freedom of speech. In this respect it is interesting to note that, despite the Court's own reservation that it would be less likely that the context of public debate could excuse the incitement of hatred (see Section 4.1), it instead allowed this context to excuse every statement. Janssen & Nieuwenhuis (2012, p. 203) claim that convicting Wilders would not have been in clear conflict with European law or, in Lawson's words (2008, p. 471), the European Convention is not an insurmountable obstacle.<sup>29</sup> Schutgens (2012, p. 292) draws an even stronger conclusion: 'From Strasbourg case law it can quite clearly be concluded that the Amsterdam Court could have convicted Wilders; from the viewpoint of the European Convention on Human Rights, acquittal was certainly not necessary.'

## 5. Conclusion

Before the District Court addressed the case, Wilders had complained that he was the victim of a politically inspired trial and that if he were convicted, millions of people would no longer trust the judicial system (Maris, 2011, p. 105). In my view this is a rather implausible claim, if only because the prosecution had to be forced by private individuals in special legal proceedings and even then the Public Prosecution Service stuck to its request for acquittal (see also Buruma, 2010).<sup>30</sup> Nevertheless, it seems reasonable to think that the legal framework in a freedom of speech case does indeed provide room for political motives, not only

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29. They also stress that European law gives a diffuse picture (p. 204). See also Nieuwenhuis (2009, p. 131), whereas Zwart (2009) draws an opposite conclusion.

30. Whether a characterisation of 'political trial' is appropriate depends on the definition one adopts of such a trial. Buruma (2010) calls Wilders' trial political simply because a judge had to assess the conduct of a politician, and because the defence made use of political arguments. According to Rummens (2011), this trial is political because it forced a judge to choose between two concepts of democracy: (1) one in which a limitation of freedom of speech is a hindrance to democratic debate, or (2) one in which any participant in public debate should abide by democratic values of freedom and equality. Indeed, Wilders meant that he had been prosecuted because his political opponents wanted to shut him down. De Roos (2011) mentions some aspects of the course of events in this trial that may have led people, Wilders voters in particular, to believe that a political trial in Wilders' terms was indeed going on.

for conviction but also for acquittal. In the legal literature it has been claimed that the District Court's decision is justifiable, but that an opposite outcome would have been possible or even more obvious (e.g. Rozemond, 2012, p. 289; Schutgens, 2012, p. 294). Schutgens (*ibidem*) actually concludes that the Court seems to have deliberately aimed for the outcome of acquittal.

The institutional preconditions of adjudication regarding the doctrine of freedom of speech provide a judge with opportunities for strategic manoeuvring and thus for finding arguments that can support opposing standpoints.<sup>31</sup> These preconditions are related to the formal constraints on the argumentation in the activity type a criminal trial and consist of national and international law, case law, and methods of interpretation applicable to national law. In a freedom of speech case the preconditions provide a large choice in topical selection from the legal framework because of many vague norms, because of the fact that case law often offers criteria for applying these norms that are also vague and, as a result of all this vagueness, because a judge can freely choose from a range of methods of interpretation. The fact that the European Court takes a twin-track approach to limitations of freedom of speech also creates space for manoeuvring. As Janssen & Nieuwenhuis (2012, p. 207) remark, the Wilders case demonstrates that Arts. 137c and 137d can be interpreted in many different ways because of the history of these rules and because of national and European case law. Finally, the legal constraint that argumentation in a criminal trial should address both the normative level of the interpretation of a legal rule and the factual level of classifying the facts in terms of this rule also offers opportunities for strategic manoeuvring.

I have illustrated the space for manoeuvring by means of an analysis of the argumentation put forward by the District Court that had to judge whether Wilders' statements would fall under the scope of Arts. 137c and 137d of the Dutch Criminal Code. With regard to Art. 137c, on insult, the District Court could use the Cancer criterion entailing a distinction between statements concerning a religion and statements concerning the group of people adhering to that religion. The space for manoeuvring lies in the application of this criterion because, apparently, an explicit reference to the people could still be regarded as a reference to the religion. With regard to Art. 137d, on hatred and discrimination, the Court made use of the same space provided by the Cancer criterion when it applied this criterion, which concerns insult, analogically to the incitement of hatred and/or discrimination. In addition, it was able to manoeuvre with the criterion 'amplifying element' that it had developed with regard to inciting hatred. Because it had not made clear what can be regarded as an amplifying element, it could classify any of Wilders'

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31. See also Lawson (2008, p. 479), who says that case law provides space for policy motives regarding whether or not to prosecute, and also finds that a judge has room for manoeuvring.

statements as not inciting hatred, without giving reasons. Finally, the Court made use of the space provided by several aspects relating to 'context'. It gave a peculiar interpretation of 'textual context' by looking for less severe statements that would downplay the ones at issue. It used a double analogy in another application of case law concerning verdicts excusing insulting statements that can be regarded as contributions to public debate. When it classified Wilders' statements in light of the context criteria, it did not adhere to the legal framework it had set out itself, not only by ignoring Dutch case law ruling that a statement's associations should be taken into account, but also by ignoring European case law ruling that politicians are not allowed to express statements inciting intolerance towards minorities.

The District Court's verdict has been regarded as a remarkable divergence from Dutch case law that had applied until it reached that verdict (Janssen & Nieuwenhuis, 2012, p. 196). The Dutch politician Janmaat was convicted several times in the 1990s for statements that we consider quite harmless nowadays, such as proposing the abolition of the multicultural society. As for Art. 137d, van Noorloos (2011, p. 282) remarks that it remains to be seen whether the current judgement on a restrictive interpretation of Art. 137d will gain a foothold in the scarce case law on this article of law. On the other hand, the judgement on Art. 137c seems to fit in a line of case law on the migration debate that has been taken for some years now, which is predominantly restrictive with regard to offences concerning freedom of speech (as has already become clear from the Cancer verdict) (Mevis, 2010; Sackers, 2009, p. 229, 231; van Noorloos, *ibidem*).

Legal theorists have reflected on the question of whether a Member of Parliament should be prosecuted for his statements at all. On the one hand, prosecution is regarded as a sign of weakness: if someone has opinions that one does not like, one should address them with counterarguments (Buruma, 2008, p. 749; Rozemond, 2012, p. 289; Schutgens, 2012, p. 294). Political debate is the heart of democracy and criminal law should not get involved (Zwart, 2009). Rozemond (2009, p. 2614) fears a downward spiral of not granting one another freedom, i.e. not granting Wilders what he says, not granting Muslims their intolerant statements etc. In his view, prosecuting discriminatory statements shows a lack of confidence in the democratic system. It has also been said that convicting Wilders would have made many people feel they had been silenced (Buruma, 2009, p. 1797; Hartlief, 2009) and that it would lead to electoral benefits for his party (de Roos, 2009; Prakken, 2009, p. 365; Schutgens, 2012, p. 294), also because a conviction would be regarded as a political verdict (Buruma, 2012, p. 750).<sup>32</sup>

32. Whether a characterisation of 'political trial' is appropriate depends on the definition one adopts of such a trial. Buruma (2010) calls Wilders' trial political simply because a judge had to assess the conduct of a politician, and because the defence made use of political arguments.

On the other hand, it has been said that politicians should obey the law just like anyone else (Buruma, 2009, p. 1798) and that the rule of law should enforce its own limits (Lawson, 2009). Moreover, minorities should be protected (Buruma, 2009, p. 1798), which means that racism should not be tolerated under the flag of freedom of speech (Prakken, 2009, p. 366). In this respect, Prakken finds it hypocritical that freedom of speech is a prominent reason for challenging Wilders' prosecution, whereas hardly any protest arose when the EU decided to penalise statements recruiting for terrorist acts. While Schutgens (2012, p. 294) wonders what kind of statements would incite hatred if Wilders' statements do not, Buruma (*ibidem*) has doubts about the Court of Appeal's judgement of incitement of hatred; but then he is satisfied that Wilders will be prosecuted, because this means that a judge will decide on the matter.

In my view, Schutgens (2012, p. 194) is right in observing that it was the legislator who once decided that inciting hatred of persons because of their religion is a criminal act. No Member of Parliament has ever found it necessary to reconsider the law, even after Janmaat's conviction. It was only after Wilders' second trial at the end of 2016 that the Dutch Second Chamber held a debate on the rules restricting freedom of speech.<sup>33</sup> As this debate did not lead to the abolition of these rules, one could start by considering the introduction of defining them in a clearer way (see also Nieuwenhuis, 2011, p. 868; Nieuwenhuis & Janssen, 2011, p. 104).

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According to Rummens (2011), this trial is political because it forced a judge to choose between two concepts of democracy: (1) one in which a limitation of freedom of speech is a hindrance to democratic debate, or (2) one in which any participant in public debate should abide by democratic values of freedom and equality. Indeed, Wilders meant that he had been prosecuted because his political opponents wanted to shut him down. De Roos (2011) mentions some aspects of the course of events in this trial that may have led people, Wilders voters in particular, to believe that a political trial in Wilders' terms was indeed going on.

33. In 2009, the Dutch Liberal Party of Mark Rutte proposed an enlargement of freedom of speech. This proposal immediately received many criticisms because it entails acceptance of pejorative statements about Jews and Holocaust denial. Moreover, such a proposal would be hard to effectuate because of commitments to international law, such as the ICERD convention. (See Nieuwenhuis, 2011, pp. 868–869 and Prakken, 2009, p. 366.)

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