Chapter 8

The Tolerance of Intolerance

An evaluation of the scope of Articles 137c and 137d of the Dutch Criminal Code

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1 Introduction

Mr Wilders: 'Do you want more or fewer Moroccans?'
Audience: 'Fewer, fewer, fewer!'
Mr Wilders: 'We will arrange it!'
These were the words spoken by Mr Wilders, party leader of the political party 'Partij voor de Vrijheid' (Party for Freedom), to his audience on the evening of the City Council elections in March 2014. Was he committing a criminal act or exercising his right to freedom of expression?

The Public Prosecutor's Office has decided to prosecute Mr Wilders for insulting Moroccans on account of their race and for incitement to hatred and discrimination on account of race.[1] This decision emphasizes the thin line between the right to freedom of expression and 'criminal statements',[2] which has also been extensively discussed in the research done by (former) members of the Willem Pompe Institute, such as Brants,[3] Kool[4] and Van Noorloos.[5] In this article we will continue their line of research on this discussion which has resurfaced in the light of recent national and global events such as the anti-IS demonstration which was held in The Hague.[6] From these events the question arises *at what point the freedom to express one's view ends and the expression of one's opinion becomes a criminal offence*. It is interesting to see how this question is answered in Dutch Criminal Law, especially, because

1 'OM vervolgt Geert Wilders wegens discriminatie', www.om.nl/actueel/nieuwsberichten/@87558/vervolgt-wilders/, last visited 29 March 2015.
2 'Rechtbank Den Haag start vooronderzoek over uitspraken Geert Wilders', www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/Rechtbank-Den-Haag-start-voor onderzoek-over-uitspraken-Geert-Wilders.aspx, last visited 2 March 2015.
3 Brants, Kool & Ringnalda, 2007.
4 Ibid.
5 Van Noorloos, 2011.
6 'Anti-ISIS demonstratie in Den Haag verstoord', www.omroepwest.nl/nieuws/10-08-2014/anti-isis-demonstratie-den-haag-verstoord, last visited 31 March 2015.

the Netherlands has gained the reputation of being a tolerant nation in the international community. The acceptance of different opinions, behaviour and cultures among its citizens cannot be absolute and needs to be restrained by the law, as tolerance also implies a responsibility to prevent intolerant behaviour, such as racism, towards vulnerable groups.

In 1967 the Netherlands ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[7] which led to the introduction of Article 137c and 137d in the Dutch Criminal Code (DCC) in their recent form.[8] These provisions penalize insulting statements (137c)[9] and statements which incite to hatred, discrimination and violence (137d).[10]

In this article we will answer *the question to what extent these provisions protect vulnerable groups, especially Jews and Muslims, and in doing so also limit the right to freedom of expression*. We have chosen these two groups, because the case law shows an interesting development, which affects the scope of these provisions, in the protection of these groups during the last two decades.[11] The majority of the cases discussed concern defendants who are often seen as public figures such as politicians. The evaluation of these cases with regard to the scope of Article 137c and 137d DCC are relevant for the upcoming Wilders trial.[12]

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7 International Convention of 7 March 1966 on the Elimination of All Forms of Racial Discrimination, *Trb.* 1966, 237. Another piece of legislation on racial discrimination is Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (*PbEU* 2008, L 328/55). According to the Dutch legislator, Article 137c -137e DCC sufficiently implemented the provisions of this Framework Decision. *Kamerstukken II* 2014/15, 34 051, 4.

8 Wet van 18 februari 1971 tot uitvoering van het Internationaal Verdrag van New York van 7 maart 1966 inzake de uitbanning van elke vorm van rassendiscriminatie (*Trb.* 1966, 237), *Staatsblad* 1971, 96. The provisions have been subject to some small changes since their introduction. See e.g. Wet van 14 november 1991, houdende aanvulling van het Wetboek van Strafrecht met enkele bepalingen tot het tegengaan van discriminatie op grond van ras, godsdienst, levensovertuiging, geslacht of hetero-of homoseksuele gerichtheid, *Staatsblad* 1991, 623. This law also added 'gender' as a ground for incitement to Article 137d CC.

9 'Any person who, publicly – orally, in writing or by means of portrayal – and intentionally, makes insulting expressions about a group of persons on account of their race, religion or belief, hetero- or homosexual orientation or physical, psychical or mental handicap shall be liable to a maximum of one year's imprisonment or a fine not exceeding € 7,600'. (Translation by) Van Noorloos, 2011, p. 181-182.

10 'Any person who publicly – orally, in writing or by means of portrayal – incites to hatred against or discrimination of persons or violence against persons or property on account of their race, religion or belief, gender hetero- or homosexual orientation or physical, psychical or mental handicap shall be liable to a maximum of one year's imprisonment or a fine not exceeding € 7,600*'.* (Translation by) Van Noorloos, 2011, p. 182.

11 However, this does not mean that we will not discuss cases concerning other vulnerable groups if these are relevant to the stated research question.

12 It is important to mention that the goal of this article is not to give a complete overview of the case law, but to shed some light on certain peculiarities with respect to the scope of both provisions.

In order to formulate an answer to the research question we will first provide a brief outline of the right to freedom of expression codified in Article 10 ECHR in Section 2. The case law of the European Court of Human Rights (ECtHR) about Article 10 ECHR is an important point of reference in the case law on Article 137c and 137d DCC and will therefore occasionally be referred to in this article. A brief explanation of the most important elements of Article 137c and 137d DCC follows in Section 3. After that we will examine the manner in which Dutch courts handle cases regarding accusations of insults and incitement in Section 4. In this section we will analyze the most important cases and draw conclusions with regard to the criminalization of indirect insults and incitement, the position and function of the context in light of these articles and the effect of a recent case, named *Felter*,[13] on the scope of both articles. Finally, we will provide a short conclusion of our findings in Section 5.

2 Article 10 ECHR: general framework

Article 10(1) ECHR comprises the right to freedom of expression. According to the ECtHR this right 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment'.[14] However, the right to freedom of expression is not absolute, since Article 10(2) ECHR states that the exercise of this freedom 'carries with it duties and responsibilities' and may therefore, under certain conditions, be restricted. The conditions for these restrictions are threefold and demand that an interference with the right to freedom of expression is prescribed by law, pursues one of the legitimate aims mentioned in Article 10(2) ECHR, and is necessary in a democratic society. The third criterion has been further defined as the existence of a 'pressing social need' to allow interferences with the right to freedom of expression. The Member States may have a wide or narrow margin of appreciation, depending on the reason for the interference and the circumstances in which the interference takes place, in determining the presence of a 'pressing social need'.[15]

On the one hand, the margin of appreciation for restricting political speech or the debate on matters concerning the public interest is relatively narrow.[16] The public debate and political speech relate to the free exchange of opinions and ideas, which is vital for a democratic society.[17] This means that the protection

13 HR 16 December 2014, *NJB* 2015, 160.

14 See e.g. ECtHR 26 February 2002, Unabhängige Initiative Informationsvielfat v. Austria, Appl. no. 28525/95, para. 34.

15 ECtHR 26 November 1991, Sunday Times v. The United Kingdom, Appl. no. 13166/87, para. 50.

16 ECtHR 8 July 1986, Lingens v. Austria, Appl. no. 9815/82, para. 42; ECtHR 23 April 1992, Castells v. Spain, Appl. no. 11798/85, para. 43; ECtHR 25 June 1992, Thorgeir Thorgeirson v. Iceland, Appl. no. 13778/88, para. 63.

17 ECtHR 19 February 1998, Bowman v. The United Kingdom, Appl. no. 24839/94, para. 42.

of the right to freedom of expression also extends to contributions made in the context of the public debate, which 'shock, offend or disturb'.[18] However the ECtHR has also stated that insulting statements need to remain within 'the limits of acceptable criticism in the context of public debate on a political question of general interest'.[19] Hence the 'aim' of the expression is of importance regarding the allowed restrictions on freedom of expression.

On the other hand, a rather wide margin of appreciation is available in case of a clash between the right to freedom of expression and the right to freedom of religion and belief laid down in Article 9(1) ECHR. Member States are considered to be in a better position to determine the necessity of limiting the freedom of expression in light of the freedom of religion, because the view of members belonging to a certain religion on what is seriously offensive differs in time and in place.[20]

3 The two provisions in a nutshell

The term 'insulting expression' in Article 137c DCC needs to be interpreted narrowly. Article 137c DCC only focusses on '[a]ctions which affect the dignity of a group or discredit a group of people *because* of their race, religion or belief'. 'Criticizing beliefs or behaviour of a certain group does not fall within the scope of article 137c DCC'.[21] Furthermore, the insulting expression needs to refer to a group which has a specific objectively recognizable characteristic, such as a shared religious conviction or belief.[22]

The element 'incite' in Article 137d DCC can be explained as attempting to convince others of the opinion that a certain act is desirable or necessary and to arouse the wish to actually perform this act.[23] To be 'inciting', the expressions merely need to be *suitable* for convincing others to establish feelings of hatred, behave in a discriminatory manner or commit acts of violence.[24] The meaning of violence rather speaks for itself and the definition of discrimination can be found in Article 90quarter DCC. However, hatred is not so easily defined. The doctrine often describes it as 'a feeling of grave hostility and aversion to a group of people with a desire to cause them harm'.[25] In case law hatred has also been defined as an 'extreme emotion of grave resentment and hostility'.[26]

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18 ECtHR 12 December 1976, Handyside v. The United Kingdom, Appl. no. 5493/72, para. 49.
19 ECtHR 28 August 1992, Schwabe v. Austria, Appl. no. 13704/88, para. 29.
20 ECtHR 10 July 2003, Murphy v. Ireland, Appl. no. 44179/98, para. 67.
21 *Kamerstukken II* 1969/70, 9724, 6, p. 4.
22 Janssens & Nieuwenhuis, 2008, p. 152.
23 Incitement in Article 137d DCC has the same meaning as incitement in Article 131(1) DCC which criminalizes incitement to commit criminal offences or violent acts against public authorities. Van Noorloos, 2011, p. 183.
24 Rosier, 1997, p. 98; Van Noorloos, 2011, p. 184.
25 Brants, Kool & Ringalda, 2007, p. 70. See also Van Noorloos, 2011, p. 183.
26 Rb. Amsterdam 23 June 2011, *NJ* 2012/370 m.nt. P.A.M. Mevis.

Moreover, Article 137d DCC also requires that the statement incites to hatred, discrimination or violence *because* a person is of a certain race, adheres to a particular religion etc.[27] In other words, similarly to Article 137c DCC, this article demands a causal link between the statement and one of the group characteristics listed in the article.[28]

The Dutch courts use the 'contextual assessment model' to determine whether or not an expression can be classified as an insult. This model consists of three interactive steps which are strongly related. Firstly, the statement needs to be insulting as such, meaning by its nature.[29] Secondly, the court needs to decide if the expression is insulting when placed in its context. This is because the context can have a detrimental as well as an exculpatory effect. The case law of the ECtHR on the public debate in relation to Article 10 ECHR has been influential with regard to this second step. Lastly, the court decides if the statement, considered in its context, is gratuitously offensive. Hence not every contribution to the public debate removes the insulting character of a statement.[30] Except for the last step, the contextual assessment model seems to be applied with regard to cases in which charges are brought on the basis of Article 137d DCC as well.[31]

Section 4.1 discusses the first step of this model. We will focus on the question whether Article 137c and 137d DCC also prohibit indirect insulting and inciting statements. These are statements which do not refer to the people of a certain group, but, for instance, to symbols which can be associated with a certain group.[32] In other words, can a statement which refers to Judaism or Islam also be criminal in light of these two provisions?

4 The case law discussed

4.1 Indirect insults and incitement

4.1.1 Indirect insults (Article 137c DCC)

Race

'Race' needs to be interpreted in line with the 'apparent aim of the enumeration of grounds made in article 1 of CERD', which in addition to race also refers to discrimination on the basis of 'colour, descent and national or ethnic origin'.[33] Literature on this matter states that race can connect a group of people if they

27 In the following sections incitement to hatred, discrimination and violence will be referred to as incitement to hatred.
28 Van Noorloos, 2014, p. 24.
29 HR 9 January 2001, *NJ* 2001, 203.
30 HR 15 April 2003, *NJ* 2003, 334.
31 See e.g. Rb. Amsterdam 23 June 2011, *NJ* 2012, 370.
32 Van Noorloos, 2014, p. 27.
33 *Kamerstukken II* 1967/68, 9724, no. 3, p. 4 (MvT).

are considered by themselves or society as a group of people connected by 'certain common characteristics' such as their traditions, culture or a common history linked to a certain territory.[34] However, these possible common characteristics do not provide a clear definition of race and leave plenty of room for uncertainties and discussions.[35]

Indirect insults on account of 'race' can be criminal, especially expressions relating to Judaism. For example, actions such as wearing a swastika in public to spread the ideas of National Socialism have fallen under the scope of Article 137c DCC regardless of the fact that no explicit reference was made to Jews.[36] Instead the association of Judaism with the use of the swastika during World War II, the threat of National Socialism expressed by wearing the bracelet in combination with the intention of the accused was sufficient to decide that wearing such a bracelet insults Jewish people.[37]

Religion

With regard to religion and belief as grounds for incitement it is important to note that, in contrast to religion, belief does not require believing in the existence of a God or other supernatural power.[38] With regard to indirect insults *on account of religion*, the Supreme Court issued a landmark ruling in 2009.[39] In this case, known as the *Gezwel* (Tumor) case the defendant had put a poster with the slogan 'Stop the tumor called Islam' on his window. The poster made no direct reference to Muslims, but the Court of Appeal still ruled that 'given the connection between Islam and its believers' this statement insulted Muslims. However, the Supreme Court said that the scope of Article 137c DCC should have been interpreted more restrictedly. It stated that: 'The fact that hurtful remarks *about a religion* [italics inserted by authors] also offend the members of that religion is not sufficient to equate those statements with statements about a group of people on account of their religion.' The Supreme Court based this consideration on the parliamentary documentation regarding these articles and stated 'that only actions, which affect the dignity of a group or discredit a group of people because of their religion, are classified as criminal offences'. Consequently, only statements *about* believers fall under the scope of Article 137c DCC whereas statements that are insulting *to* believers, but do not refer

34 Brants, Kool & Ringalda, 2007, p. 67; J.W. Fokkens in Noyon/Langemeier/Remmelink, Wetboek van Strafrecht, artikel 137c, aantekening 3 bij Ras.

35 Brants, Kool & Ringalda, 2007, p. 67.

36 HR 21 February 1995, *NJ* 1995, 452 m.nt. T.M. Schalken.

37 Ibid.

38 J.W. Fokkens in Noyon/Langemeier/Remmelink, Wetboek van Strafrecht, artikel 137c, aantekening 4 bij Godsdienst of levensovertuiging. One reason for adding religion to Article 137c and 137d DCC was the preparation at the time of a new International Treaty on the Elimination of All Forms of Religious Discrimination and Intolerance. However, the UN eventually did not adopt this Treaty. *Kamerstukken II* 1967/68, 9724, no. 3, p. 4 (MvT); Van Noorloos, 2011, p. 211.

39 HR 10 March 2009, *NJ* 2010, 19.

to the believers as such, do not. Hence indirect insults regarding religion do not fall under the scope of Article 137c DCC.

This new criterion established by the Supreme Court was also applied in the *Wilders* case.[40] Wilders, leader of a Dutch political party called 'Partij voor de Vrijheid' made various (harsh) public statements about the Koran, Islam and Muslims.[41] In 2009, just before the ruling of the Supreme Court in the *Gezwel* case, the Amsterdam Court of Appeal ordered the prosecution of Mr Wilders for his statements relating to National Socialism.[42] In its decision the Court of Appeal was of the opinion that the linguistic distinction between 'offensive to a group' and 'insulting a group', is artificial. The case then went to the District Court of Amsterdam, which had to rule on its merits.[43] Basing itself on the *Gezwel* case the court acquitted Mr Wilders, because his statements only referred to a religion (the Islam) and religious symbols (such as the Koran) or merely criticized the behaviour of Muslims. Hence they did not fall under the scope of Article 137c DCC.[44]

4.1.2 Indirect incitement

Religion

Before making the explicit distinction between expressions about a religion and expressions about a group of people because of their religion in the *Gezwel* case the Supreme Court clearly stated that the defendant was prosecuted on the basis of Article 137c and not on the basis of Article 137d DCC. The question which arose from this and which has been intensively discussed in the legal doctrine ever since is whether this distinction also applies with regard to Article 137d DCC.

On the one hand, Van Noorloos has argued that the application of this distinction to Article 137d DCC is possible, considering that both Article 137c and 137d DCC contain the component '*because of their race, religion ...*' and, therefore, both demand a causal link between the statement and the common characteristic of a group. Furthermore, both articles are classified as public order offenses and aim to protect persons belonging to a certain group against

40 Rb. Amsterdam 23 June 2011, *NJ* 2012, 370.

41 Examples of his statements are: 'Tsunami of Islamisation'; 'Muslims will ... cause criminality and nuisance. Their intolerant and violent culture will strike at the heart of the Dutch society and our identity'; 'The core of the problem is the fascist Islam, the sick ideology of Allah and Mohammed as laid down in the Islamic Mein Kampf: the Koran'; 'Enough is enough, forbid the Koran'.

42 Hof Amsterdam 21 January 2009, *NJ* 2009/191. Even though several people reported Mr Wilders to the police, the Public Prosecutor's Office decided not to prosecute Mr Wilders at first. These people then started a so-called 'application procedure', which is a procedure in which, among other things, the decision of the public prosecutor not to prosecute can be overturned by a Court of Appeal.

43 Rb. Amsterdam 23 June 2011, *NJ* 2012, 370.

44 Ibid.

negative imaging.[45] On the other hand, Van Noorloos also states that Article 137d DCC puts a stronger emphasis on the effects statements may have on third parties. These effects can be caused by statements about a religion as much as they can be caused by statements about people on account of their religion.[46] Furthermore, Vermeulen believes that the application of the distinction made in the *Gezwel* judgment to cases brought on the basis of Article 137d DCC is unsuitable. With regard to Article 137c DCC expressions which criticize the content of a certain religion might not necessarily harm the dignity and reputation of the *members* of this religion. However, expressions which incite feelings of hatred etc. by their nature always affect the *members* of this religion and not merely the religion itself, because the result of the expression (hatred, discrimination or violence) is always directed at *persons*.[47]

At first, the case law seemed to agree with Vermeulen. In 2010 the District Court of Utrecht convicted a person for having put several posters on his window, one of which showed a burning church with the words 'burn the'.[48] This poster – in combination with other posters which for instance placed a Christian cross on equal footing with a swastika – incited to violence against property *on account of religion*. The fact that the posters referred to Christian symbols and Christianity as a religion, but not to Christians, did not prevent the court from convicting the defendant on the basis of Article 137d DCC.

However, in the *Wilders* case the District Court of Amsterdam did not follow the course of the District Court of Utrecht and applied the distinction made in the 2009 *Gezwel* case to an Article 137d DCC charge as well.[49] On the basis of the parliamentary documentation the court decided that the legislator only meant to criminalize incitement of hatred *against* or discrimination *of people* and not expressions about a certain *religion*.

Moreover, the District Court of Amsterdam did not merely apply the interpretation of Article 137c to Article 137d DCC in the *Wilders* case, but also narrowly interpreted the component 'incitement of hatred against or discrimination of *persons because of their religion*'. The expression in which Mr Wilders linked the fact that one in five Moroccan youngsters is registered as a suspect with the police to their membership of a violent religion, the Islam, is not considered as an expression which incites hatred against persons. According to the court, these expressions are directed against the religion and not against Muslims, even though the statements refer to Islamic Moroccan youngsters.[50]

45 Van Noorloos, 2014, p. 44-45.
46 Ibid.
47 Vermeulen, 2011, p. 663-664. However, in our opinion, where discrimination and violence will indeed always affect persons, one could argue that (theoretically) hatred could merely be directed towards a religion.
48 Rb. Utrecht 26 April 2010, *NJFS* 2010, 231.
49 Rb. Amsterdam 23 June 2011, *NJ* 2012, 370.
50 Ibid.; Janssen & Nieuwenhuis, 2012, p. 188-189.

Race

Now the question remains whether the *Gezwel* case is also applicable if the defendant is accused of incitement of hatred on account of race? The *Combat 18* case concerned T-shirts on which the text 'Combat 18'[51] and 'Whatever it takes' were printed.[52] No explicit reference was made to Jewish people by the texts on these T-shirts. The Court of Appeal acquitted the defendant, because the expressions as such did not incite to hatred or discrimination of Jews on account of their race. However, the Supreme Court decided that the statements should not be considered in isolation. Instead, in order to determine whether or not these texts incited to hatred or discrimination on account of race they needed to be assessed 'in light of the circumstances of the case and the possible associations to which the texts on the t-shirts could give rise'. The distinction made in the *Gezwel* case was not mentioned by the Supreme Court. However, regardless of this the District Court of Amsterdam in the *Wilders* case still stated with regard to incitement on account of race that 'the answer to the question whether the defendant's statements referred to people was irrelevant, because the element 'on account of their race' could not be proven'.[53] This suggests that the District Court, in contrast to the Supreme Court in the *Combat 18* case, was of the opinion that the distinction made in the *Gezwel* case should be applied with regard to charges brought on the basis of race as well. Hence it can be concluded that the District Court took a different direction in the *Wilders* judgment than the Supreme Court did in the *Combat 18* case. Why it chose to do so remains unclear.

4.1.3 Evaluation

It follows from the previously mentioned *Gezwel* judgment and the *Wilders* case that an extra step has been added to the contextual assessment model, in cases concerning the ground 'religion', by demanding that the statement needs to be *about* a group. This conclusion cannot be drawn with regard to race as can be derived from the *Swastika* and *Combat 18* cases. Consequently, statements which affect Jewish people on account of their race can more easily be qualified as insulting and inciting to hatred than statements affecting other groups of people, such as Muslims, on account of their religion. Hence indirect insults and indirect incitement regarding religion do not fall under Article 137c and 137d DCC, which narrows their scope.

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51 The one and eight in the statement refer to the A and H (Adolf Hitler) of the alphabet.

52 HR 23 November 2010, *NJ* 2011/115 m.nt. P.A.M. Mevis. The defendant was prosecuted on the basis of Article 137e DCC. However, the argumentation of the Supreme Court concerned the element 'incitement to ... on account of their race', which is also an element of Article 137d DCC.

53 Rb. Amsterdam 23 June 2011, *NJ* 2012, 370.

This difference in the degree of protection could be explained by the fact that the CERD obliges states to penalize racial discrimination and therefore emphasizes the protection that needs to be granted to people belonging to a certain race. The Convention does not explicitly oblige states to criminalize statements which insult or incite to hatred on account of religion.[54] Furthermore, no other piece of international or European legislation exists which prescribes such an obligation.

In addition, the analyzed case law with regard to race only concerns Judaism. An explanation for the higher degree of protection for this specific group can be found in the tragic events which occurred in the history of the Jewish people. Certain symbols (such as the swastika and Combat 18) and historical facts (such as the Holocaust) are inherently linked to the Jewish community and Jewish people identify themselves with these symbols and tragic events. Denial of these events or wearing these kinds of symbols is therefore prohibited on the basis of Article 137c or 137d DCC.[55] As Rosier said: a special group with a special history is granted special protection.[56]

However, in our opinion, the association of Muslims with Islam could under certain circumstances be as obvious as the link between the swastika or Combat 18 and Judaism. In the end, Muslims are Muslims because they adhere to the religion of Islam. Furthermore, in our view it seems logical that the comparison of Islam to cancer (*Gezwel*) and the Koran (a symbol of Islam) to the fascist book *Mein Kampf* could also affect Muslims – after all they believe in this 'tumor' and read that 'fascist book'. The strict interpretation of 'on account of religion' by the Supreme Court, which excludes the protection of Article 137c and 137d DCC against indirect insults or incitement on account of religion, is therefore unfair and undesirable. It leads to situations in which the three steps of the contextual assessment model are not applied simply because the statement does not refer to the members of a religion. In our opinion, the aim to avoid the criminalization of statements which are not sincerely insulting or inciting to hatred could be achieved by the three steps of the contextual assessment model, which forces judges to take the nature of the statement and the context into account, as well. The fact that a statement does not refer to members of a religion can be a factor which is considered in this model, but should not be such a strict criterion as it is now. The next section shows how consideration of the relevant context could, for instance, have led to another outcome in the *Gezwel* case if the strict distinction had not prevented its assessment. This distinction allows politicians such as Mr Wilders to make the statements that he makes without fear of a conviction as long as he does not explicitly refer to Muslims.[57]

54 *Kamerstukken II* 1967/68, 9724, no. 3, p. 4 (MvT).
55 Janssen & Nieuwenhuis, 2012, p. 199.
56 Rosier, 1997, p. 54-56.
57 Annotation P.A.M. Mevis to HR 10 March 2009, *NJ* 2010, 19.

4.2 The influence of the context

After discussing the first step of the contextual assessment model with regard to the criminalization of indirect insults and incitement, we will now turn to the second step of this model: the context. The context has been the 'hot potato' in the case law, revealing the thin line between freedom of speech and criminal statements. The context can have an exculpatory or detrimental effect to the case of the defendant under both Article 137c and 137d DCC.

4.2.1 A detrimental effect

The previously discussed *Swastika* case provides an example of the detrimental effect that the context can have.[58] In this case the wearing of the swastika became a criminal insult under Article 137c DCC, because it was worn during a demonstration of a neo-fascist group. Furthermore, in the *Combat 18* case the Supreme Court stated that statements which by their nature do not incite to hatred can become criminal in light of the associations they give rise to.[59]

The context in the *Gezwel* case could, in our opinion, also have had a similar detrimental effect if it had been taken into consideration. The time in which the poster was shown was characterized by violence against Muslims, mosques and Islamic schools after Theo van Gogh, a public figure, was assassinated by a radical Muslim. Besides, the poster which the defendant had put on his window urged the members of the public to join the 'Nationale Alliantie', a right-wing extremist political movement.[60] These circumstances were taken into consideration by the Court of Appeal in light of the context and resulted in a conviction. However, the Supreme Court then stated that the Court of Appeal had interpreted Article 137c DCC too broadly and in addition stated that a distinction had to be made between direct and indirect insults and incitement. In our view, the exclusion of the application of the contextual assessment model in cases of indirect insults or incitement is too strict, because the reasoning of the Court of Appeal shows that a consideration of the context could lead to a conviction.

4.2.2 The exculpatory effect of the public debate

A short explanation

In general, the public debate is often decisive for the question whether the context has an exculpatory effect in cases brought on the basis of Article 137c and 137d DCC. In the *Herbig* case the public debate was one of the elements

58 HR 21 February 1995, *NJ* 1995, 452.
59 HR 23 November 2010, *NJ* 2011, 115, m.nt. P.A.M. Mevis; Van Noorloos, 2014, p. 24.
60 Veraart, 2010, p. 727-728.

emphasized by the Supreme Court.[61] In this case, the defendant, a pastor, had labelled homosexuality as a 'dirty, filthy sin' in an open letter, published in a daily newspaper. The Court of Appeal decided that such a statement is insulting to homosexuals, which was confirmed by the Supreme Court. Two interesting points can be derived from this judgment. Firstly, the Supreme Court does not provide an objective test for the decision whether a statement contributes to the public debate. Instead, in order for the context to have an exculpatory effect it appears to be sufficient and of importance that the statement *in the opinion of the defendant* contributes to the public debate. However, allowing 'intent' to influence the question whether the statement contributes to the public debate diminishes the normative character this criterion should have.[62] Secondly, it remained unclear to which public debate the defendant wished to make a contribution, because at the time no public debate about homosexuality existed.[63] Thus, the *Herbig* case did not set any clear objective and substantive criteria to establish if a statement contributes to the public debate.

The *Cartoon* case of 2012 slightly clarified the role of the public debate.[64] The Supreme Court confirmed the judgment of the Court of Appeal which stated that the intent of the accused was not the only (decisive) factor in the assessment of the question whether or not a statement contributes to the public debate. The court ruled that the intent to contribute to the public debate needs to be foreseeable for third parties. Nevertheless, this judgment still leaves the questions if and under which circumstances a statement contributes to the public debate unanswered.

Its effect on Articles 137c and 137d DCC

It is important to note with regard to Article 137d DCC that the degree of influence of the context of the public debate may vary depending on the question whether the statement incites either to hatred, discrimination or violence. It is, for instance, hard to imagine a situation in which the public debate could have an exculpatory effect if the statements incite others to commit violent acts such as attacking a Jewish school.[65] However, according to the District Court of Amsterdam the context of the public debate can have an exculpatory effect in situations concerning incitement to hatred and even more in situations concerning incitement to discrimination.[66]

61 HR 14 January 2003, *NJ* 2003, 261.

62 Brants, Kool & Ringalda, 2007, p. 62-63.

63 In contrast to the *Herbig* case, in the *Van der Wende* case homosexuality was an important topic in the public debate, because at that time gay marriages were being legalized. HR 9 January 2001, *NJ* 2001, 204.

64 HR 27 March 2012, *NJ* 2012, 220.

65 Janssen & Nieuwenhuis, 2012, p. 194; Van Noorloos, 2014, p. 23-24.

66 Rb. Amsterdam 23 June 2011, *NJ* 2012, 370.

In the *Wilders* case the context also exclusively had an exculpatory effect.[67] According to the Court the defendant's statements, such as 'We will close the borders that same day for non-western immigrants', were political propositions *contributing to the public debate* or points of criticism regarding government policy (plans). However, it is interesting to see that approximately twelve years before the *Wilders* case another politician, Janmaat, was convicted on the basis of Article 137d DCC for stating during a demonstration 'We will abolish the multicultural society, the moment we have the possibility and power to do so'.[68] In his case the context of the public debate was not even mentioned as a possible exculpatory factor, even though his statement could be read as a political proposition as well and is far less extreme than the ones Mr Wilders has made. This shows that the public debate, which needs to be considered as a factor in light of the second step of the contextual assessment model, has narrowed the scope of Article 137d DCC.

An explanation for the fact that in the *Janmaat* case the public debate was not mentioned as an exculpatory factor is that the debate about immigration and the multicultural society was less fierce or did not even exist in those days. In the *Wilders* case the Court also emphasizes that the statements were made at a time in which the 'multicultural society and immigration had a prominent role in the public debate'.[69] However, at the time the pastor of the *Herbig* case made his statements, homosexuality was not an important topic in the public debate, but it still had an exculpatory effect.

From the above it can be concluded that the public debate plays an important role in cases decided on the basis of Article 137c and 137d DCC. The exculpatory effect it can have results in a broad protection of the right to freedom of expression, which can be explained by the fact that the Netherlands is a very tolerant state which generally believes that the opinion of minority groups should be heard as well. Another important explanation for this broad protection of the freedom of expression by the public debate is provided by the case law of the ECtHR referred to in Section 2. The ECtHR has stated several times that the public debate consisting of the free expression of opinions and ideas is of great importance to a democratic society.[70] However, this broad protection of the freedom of expression does not extend to statements in which the Holocaust is denied or to the propagation of national-socialism. The Court has stated that in those cases, a person cannot rely on Article 10 ECHR, because the statements or actions are considered as an 'abuse of right' under Article 17 ECHR.[71]

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67 Ibid.
68 HR 18 May 1999, *NJ* 1999, 634. See also Janssen, 2014, p. 1815-1816.
69 Rb. Amsterdam 23 June 2011, *NJ* 2012/370.
70 See e.g. ECtHR 19 February 1998, Bowman v. The United Kingdom, Appl. no. 24839/94, para. 42.
71 See e.g. ECtHR 13 December 2005, Witzsch v. Germany, Appl. no. 7485/03.

Even though we understand that being free to contribute to the public debate is an important good, we can also conclude on the basis of the evaluated case law that no clear criteria for the assessment of 'a contribution to the public debate' have been developed. Consequently, the public debate has become a broad and undefined factor. This gives rise to the risk that the desirability of a certain outcome is (to a certain extent) decisive for the question whether or not a statement contributes to the public debate. After all, whether or not a statement contributes to the public debate can in many cases be argued both ways. The limit to the exculpatory effect of the public debate seems to be set by the third step of the contextual assessment model which is whether or not a statement is gratuitously grievous or in case of Article 137d DCC 'unacceptable'.[72] However, case law shows that these last steps hardly ever prevent the context of the public debate from having an exculpatory effect in a particular case. In the legal doctrine it is argued that 'It should be understood that the question whether or not an insult is unnecessarily offensive is no more than a correction mechanism in case of a too indiscriminate application of the context'.[73] Hence the broad scope of the public debate and the marginal function of the third step raise the question whether the two provisions actually provide sufficient protection to the vulnerable groups listed in these articles. Still, in the next section we will elaborate on a case in which the Supreme Court seems to restrict the exculpatory effect of the public debate and extends the protection offered by the third step.

4.3 Incitement to intolerance

The decision of the Supreme Court in the *Gezwel* case in 2009 as good as blocked the possibility to convict Mr Wilders for his statements on the basis of Article 137c and 137d DCC in 2011. Today, approximately four years later, Mr. Wilders again faces prosecution for making certain statements on the basis of the same two provisions.[74] Interestingly enough, in contrast to the first case against Mr Wilders in 2011, the Supreme Court has recently decided a case which broadens the scope of Article 137d DCC and thereby increases the chance of a conviction of Mr Wilders on the basis of this provision in his upcoming trial.

The case concerned a politician, Mr Felter, who was accused of incitement of discrimination of homosexuals for making statements such as: 'those people with those sexual deviations should actually be fought by heterosexuals' and/

72 This requirement is a proportionality test introduced in the *Wilders* case. The court stated in that case that political propositions which are made in the context of the public debate only become criminal when they are 'unacceptable'. However, it remains unclear if this proportionality test will be consistently used by other courts in the future as well. Janssen & Nieuwenhuis, 2012, pp. 195-196.

73 Janssens & Nieuwenhuis, 2008, p. 393.

74 See Section 1 of this Article.

or 'I don't need to accept the homosexuals'.[75] He was acquitted by the Court of Appeal, because the statements he had made in his capacity as a politician contributed to the public debate, since they addressed a matter of public interest, namely 'the position of homosexuals in our society and especially in parts of the public administration'. The statements did not have a sufficiently threatening or intimidating character and neither could they reasonably be considered as inciting to hatred or violence, according to the Court of Appeal.

The case then went to the Supreme Court which discussed both Article 137c[76] and 137d DCC on the basis of the 'contextual assessment model'.[77] It stated that whether or not the expression, made by a politician as a contribution to the public debate, is gratuitously grievous needs on the one hand to be assessed in light of the necessity to allow a politician to express his opinion with regard to matters of public interest even if his opinion is offensive, shocking or disturbing. On the other hand it needs to be taken into consideration that a politician has a responsibility to refrain from statements 'which violate the law and the foundations of a democratic society'. Interestingly the Supreme Court added to this that statements which violate the law or foundations of a democratic society are not merely those which incite to hatred, discrimination or violence, but also those which incite to intolerance.

Two important points can be made with regard to the reasoning of the Supreme Court. Firstly, by adding intolerance to Article 137d DCC, the Supreme Court has broadened the scope of this provision. This addition could be explained on the basis of the case law of the ECtHR. For instance, in the *Erbakan* case the ECtHR stated that inciting to intolerance may be penalized in order to protect minorities in a democratic society.[78] One of the consequences of adding intolerance to Article 137d DCC can be that in contrast to the judgment of the Supreme Court in the 2009 *Gezwel* case, which was to the benefit of Mr Wilders, the 2014 *Felter* case might work to his disadvantage in the new procedure against him.

Secondly, while the suitability of the use of the first two steps of the contextual assessment model for cases brought on the basis of Article 137d DCC is open for discussion,[79] the application of the third step to these cases seems utterly misplaced. This third step fits perfectly with Article 137c DCC, which focuses on the insulting character of the expression and puts the emphasis 'on the effect of the insult on a group *because of the group'*.[80] Yet, the emphasis of Article 137d DCC is on the link between the expression about certain people and the

75 HR 16 December 2014, *NJB* 2015, 160.

76 However, the meaning of this judgment for the scope of Article 137c DCC is, in our opinion, completely unclear and will therefore not be further discussed.

77 HR 16 December 2014, *NJB* 2015, 160.

78 ECtHR 6 July 2006, Erbakan v. Turkey, Appl. no. 59405/00, para. 56.

79 Janssen & Nieuwenhuis, 2012, p. 194-196.

80 Annotation P.A.M. Mevis to Rb. Amsterdam 23 June 2011, *NJ* 2012, 370; Janssen & Nieuwenhuis, 2012, p. 182.

effect it is intended to have on third parties. Its goal is to protect people against feelings of hatred, acts of discrimination and acts of violence resulting from statements which incite third parties to such feelings and actions.[81] Whether or not the statement is gratuitously insulting is not and, considering the goal of Article 137d DCC, should not be a decisive factor for cases brought on the basis of this provision. Applying this step would, in our opinion, result in an undesirable restriction of the scope of Article 137d DCC, because not all expressions which could incite to hatred, discrimination or violence are by definition gratuitously grievous.

5 Conclusion

The following can be concluded with regard to the question mentioned in Section 1: To what extent do Article 137c and 137d DCC protect vulnerable groups, more specifically Jews and Muslims, and in doing so limit the right to freedom of expression?

Firstly, according to the *Gezwel* case individuals are allowed to make statements which are indirectly insulting or inciting to hatred on account of religion, which results in a restriction of the scope of Article 137c and 137d DCC. As we mentioned before, we believe that the distinction made in the *Gezwel* case with regard to the ground religion is too harsh and inappropriate in a country like the Netherlands which is known for its tolerant attitude towards minorities. The broad right of freedom of expression could in our opinion lead to an acceptance of intolerance against religious groups and these days especially against Muslims.

However, the *Swastika* and *Combat 18* cases seem to indicate that a similar restriction of the scope of the two provisions does not apply with regard to statements constituting indirect insults or incitement to hatred on account of race. Hence on the basis of the evaluated case law it can be concluded that the contextual assessment model appears to grant more protection to the ground of race, especially with regard to Judaism, than to the ground of religion, more specifically Muslims.

Secondly, the case law shows that the context is often an important factor in the decision whether a statement falls under the scope of one of the provisions. On the one hand, the context can have a detrimental effect which results in the qualification of a statement as a criminal insult or as inciting to hatred. This detrimental effect most often appears in cases in which the Holocaust is denied or references to national-socialism in relation with Judaism are made. On the other hand, the public debate in light of the context can have an exculpatory

81 Ibid.

effect, of which the *Herbig* and *Wilders* cases are important examples. The important role of the public debate can also be explained on the basis of the case law regarding Article 10 ECHR.

Except for the *Cartoon* case in which the Supreme Court stated that the intent to contribute to the public debate should be foreseeable for third parties, it has not set any other guidelines for the lower courts regarding the question what exactly constitutes a 'contribution to the public debate'. This could give rise to a risk of arbitrary decision-making in this regard, because whether or not a statement contributes to the public debate can often be argued in both directions. It can also be concluded that the broad scope of the factor 'contribution to the public debate' narrows the scope of Article 137c and 137d DCC. This is all the more so, since the third step of the contextual assessment model, which could halt the exculpatory effect of the public debate, is hardly ever applied.

Hence it can be concluded that, certainly with respect to statements about religion, the scope of Article 137c and 137d DCC is rather narrow. The previously discussed case law shows the tendency to protect the freedom of expression to encourage an open and free public debate. This is why the judgment in the *Felter* case, which broadens the scope of Article 137d DCC by adding intolerance to the possible results of a statement, is so peculiar. Furthermore, in light of the evaluated case law it becomes difficult to predict a possible outcome for the new Wilders case. On the one hand, his comments are not very different from the ones he previously made, which were accepted in light of the public debate. On the other hand, the Wilders case shows similarities to the *Felter* case in which the Supreme Court decided that the public debate cannot have an exculpatory effect if the comments incite to intolerance. Thus the decision of the District Court in the upcoming trial will hopefully provide new insights with regard to the scope of Article 137c and 137d DCC.

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