The Wilders case: a politician on trial

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When Dutch parliamentarian Geert Wilders was prosecuted on accounts of hate speech against and group defamation of Muslims in 2008, the world took notice. What had happened to that famed characteristic of Dutch society: its toleration of ethnic, cultural and social diversity? By then, however, this dream of post political social harmony had long been scattered with the assassination first of Dutch politician Pim Fortuyn by an animal activist; and later of film director and professional polemicist Theo van Gogh, who was killed by a muslim fundamentalist. What both had shared was a deep suspicion of the role of Islam in Dutch society, as well as a highly critical attitude towards the 'failed integration' of Muslims into it. Thus, when Wilders was put on trial, many feared this was a dangerous legal attempt to restore whatever was left of social harmony at the expense of the very freedom of speech. The trial provoked a heated debate, both nationally and abroad, about the limitations to a politician's right to free speech. The dominant argument was that none such were called for, since political opinions ought to be tried in the 'court of public opinion', not a court of law. When Wilders was therefore finally acquitted of all charges, most commentators rejoiced at this reaffirmation of the right to free expression.

Almost two years have passed since the positive verdict in what Dutch commentators had dubbed 'the trial of the century'. Now that the initial jubilation has ebbed away, two important questions arise: to what extent has the *outcome* of the trial -perhaps fortunately- obscured our understanding of a potentially deeper tension underlying it between two basic assumptions about liberal democracy? And to what extent has this tension been resolved in the Wilders trial? Rule of law suggests that no one is above the law. If the law puts certain limitations on freedom of public speech however, as is the case in Dutch law, we are left with the uncomfortable situation that it cannot *in principle* be objectionable for politicians to be held legally accountable over potential breaches of the law; even if we would rather see politicians be judged within the court of public opinion. Moreover, if we go beyond the actual outcome of the Wilders case and closely reexamine its context and proceedings, it seems that our initial enthusiasm must be curbed by doubts over the seemingly unsatisfactory way in which the trial tried to resolve this tension.

Freedom of speech and its limitations

Let us briefly reiterate the argumentative framework underlying freedom of speech. The case for extensive rights to free expression is well known. Human dignity suggests that human beings should be free to hold, examine, express and exchange basic convictions about the world without

forceful intervention from the state. Moreover, a well-functioning democracy requires both ethically and practically that citizens are able to exchange opinions and to persuade one another about them. A right to free speech ensures that citizens can voice concerns or convictions which may otherwise go unheard. Similarly, we may recall Mill's argument for free speech: public debate ensures that all possible information is exhanged, tested and enhanced, utilising the 'wisdom of the crowds'.

So, what could be reasons to limit this fundamental freedom? A clear limitation is incitement to violence, or the subversion of the social order. This is nicely illustrated by the well-known phrase in the American regime of free speech jurisprudence on the insistence of 'a clear and present danger.'[1] Other limitations generally bar discrimatory statements or affronts to reputation or dignity, such as slander and libel; and privacy issues, which in Europe are protected through article 8 of the ECHR. Moreover, Dutch law also has laws relating to group defamation or hate speech on basis of religion, ethnicity, or sexual orientation: criticism on the basis of a group' identity irrespective of the content of its beliefs or attitudes is culpable.

Limitations on freedom of free speech potentially raise a tension between conflicting goals and aims embodied in legislation. Recognizing this, as well as the fundamental importance of freedom of expression in the public debate, European legislation and jurisprudence -upon which Dutch jurisprudence ultimately rests- generally support a very robust understanding of politicians' right to freedom of expression. Although the European Court has on occassion addressed the particular responsibilities of politicians within the public debate, it generally follows the line of reasoning that any limitation on a politician's freedom of expression must be 'necessary' for the preservation of the democratic process, and as such serve a 'social pressing need', which is 'specified by law.'[2]

Another tension underlying free speech cases

However, even though European jurisprudence shows awareness of the tension between potentially conflicting aims of legislation, there exists a second fundamental source of tension which makes the prosecution of politicians a limit case within the framework of liberal democracy. This tension arises out of the respective roles of the politician and the judge within the system. Democratic accountability rests upon the ability of politicians to freely express their opinions and put forward political proposals, and therefore puts great emphasis on the importance of public debate and evaluation through the so called ´court of public opinion'. Simultaneously, liberal democracy requires the separation of powers and stresses the importance of an independent, impartial judiciary in administering rule of law. One could argue that it is in its very ability to diverge from public

1 Schenck vs United States, 249 U.S. 47(1919).
2 ECHR, article 8 sub 2; idem, article 10, sub 2; and the related jurisprudence, e.g. ECHR, *Sunday Times* vs *United Kingdom*, 1979; ECHR, *Erbakan* vs *Turkey,* 1998.

opinion, that the judiciary proves its independence from the political pressures and public sentiments.

These two roles come into potential conflict when the law puts certain limitations on freedom of expression, and a court is asked to legally evaluate whether or not a politician has breached these. Such cases not only demand that a court establish to what extent a politician has breached the rules surrounding the very basic freedom upon which she relies for her political function but may also pit two forms of evaluation against one another: the verdict of an independent, but (within the European context) generally unelected judiciary versus the verdict of (democratic) public opinion. As such, a court must overcome the discretion inherent in any legal verdict – but particularly in free speech cases – by establishing the extent to which an act does or does not fall under the laws in question. This discretion can be lessened through a robust and for the public satisfactory legal justification underlying a verdict but never entirely resolved once and for all.

The existence of this tension has various important consequences. It suggests that the 'political' argument for the importance of freedom of expression as a foundation for the democratic process can in itself not satisfactorily resolve this tension. One may object *in principle* to limitations on free expression but such objections are part of another debate. If, on the other hand, one *does* accept that there are valid limitations to the right of free expression, one must accept that we can ease but never fully resolve the above suggested tension.[3] Moreover, it also highlights the importance of sound legal justification, particularly in cases relating to a politician's freedom of speech: divergence from or convergence with public opinion in itself cannot validate a legal judgment. Often, we focus on the political relevance of free speech cases, but rarely we do justice to the very difficult circumstances such cases raise for the judiciary, particularly in the limit case of 'the politician on trial.' Here, divergence with public opinion over the liability of a (popular) politician may put the independence of the judiciary in jeopardy, regardless of the soundness of its movitation.

A tension unexamined

The debate surrounding the Wilders trial illustrates our priority with this political perspective in free speech cases. Some argued that he should never have been tried, because the laws in question do not belong within a properly liberal constitution. However valid this 'argument from principle' may have been, it did not properly discuss the particular case at hand. Others maintained that it was wrong to try Wilders in court, since politicians should be tried within the 'court of public opinion'.

3 Limiting the right to freedom of expression merely to active propagation of violence, as some libertarians argue, would for instance allow for discrimination, which is otherwise considered to be a foundational principle of liberal democracy.

A legal trial would potentially stifle political debate. Again, although this is an important argument from a political perspective, it does not address the legal issue at hand whether or not Wilders may have breached the law. It is only consistent if one holds that it is entirely clear that Wilders' statements were legally uncontroversial, which seems hard to maintain as most would accept the fact they are -if anything- controversial; or if one has serious doubts about the impartiality of the judiciary in reaching a verdict, which would put the system itself in jeopardy. Within the dominant camp arguing for acquittal, the only commentators who did in fact raise the legal question, were those arguing that Wilders should indeed be acquitted because he had not in fact breached the particular laws in question.[4] We will see further below, that as the trial proceeded, this legalistic perspective became increasingly hard to hold on to, as the case itself became murkier. This did prevent the debate from exploring more thoroughly the assumption underlying this third standpoint: that it is not *in principle* incorrect to legally evaluate public, political statements as well as the consequences this has for the relation between politics and the judiciary.

Trials and tribulations: Dutch politicians on trial

Before we discuss the Wilders trial, it is instructive for our understanding of the existence of the above outlined tension, to briefly address a precedent in Dutch jurisprudence for 'the politician on trial'. In 1996, extreme-rightwing politician Hans Janmaat was tried -and convicted- for incitement to hatred and discrimination on basis of race[5]. Janmaat was convicted in particular for a statement during a party rally: "As soon as we will have the opportunity and get in power, we will get rid of the multicultural society."[6] Admittedly, Janmaat was controversial: he was in possession of a criminal record for similar charges and spearheaded an extreme-right party several of whose members had criminal records. In many ways he was 'your average eighties and nineties extreme right-wing politician' with marginal popular appeal. So when he was convicted, few took notice or objected. What is quite extraordinary in hindsight, however, is the actual justification supporting this verdict. This gives us an interesting insight into the margins of discretion involved in legal verdicts but may also serve as a reminder of the importance of judicial restraint in free speech cases.

The statement itself was not disputed. The question was whether Janmaat had meant it in a

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4 In his excellent analysis, Ankersmit combined the argument that rule of law in principle does not preclude politicians from standing trial, with his rejection of the justification underlying the decision to prosecute Wilders in this particular case. Frank Ankersmit, 'Heel, heel erg dom', *Trouw*, 02 January 2010.
http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/1080707/2010/01/02/Heel-heel-erg-dom.dhtml
All websites last accessed, 24 September 2012.

5 Art. 137d, Dutch Penal code. A full definition will follow in the section on the Wilders trial, see footnote 10.

6 Dutch High Council, 18 May 1999, nr. 108 960 (In Dutch).
Note, the citations are taken from the verdict of the Dutch High Court, which includes the literal indictment and justification of the court which had initially convicted Janmaat. The High Court, which judges on matters of correct legal procedure (rather than substantive), upheld the case. Translations are mine.
http://www.annefrank.org/ond_upload/Downloads/Janmaatarrest.pdf

racist way. In order to establish this the court pointed to the wider context of the party rally. During his speech two other party members had in fact uttered discriminatory statements.[7] Janmaat maintained perhaps somewhat disingenuously that he had not heard them.[8] Combined with his prior conviction, the context definitely raised suspicions about what the politician had in fact meant himself. Nonetheless, the fact that the court put such emphasis on this context in its justification underlying the verdict makes it hard to evade the suggestion that it fallaciously reasoned from means to end: from the context back to the statement, rather than the other way around. The court literally argued that "the uttered statement 'a multiracial society' cannot be interpreted in any other manner than meaning a society consisting of various groups, amongst which minorities."[9] Note that these were not even Janmaat's own words. Moreover, "Nothing detracts from the fact that these groups are not named, nor that it is not further specified which characteristic are meant." Thus, first the court interpreted – or more correctly – replaced 'multicultural' with 'multiracial', and then went on to interpret Janmaat's statement as meaning exactly (and only) that, even though the court itself recognized that he himself had not specified the particular characteristics that might have warranted such an interpretation. By doing this, the court selected out of various alternative interpretations the one fitting the crime. Again, Janmaat may very well have intended his words in precisely that way. Still it remains deeply questionable whether the justification underlying the verdict indeed succesfully established such a motive, or whether the particular statement under scrutiny was legally offensive in itself.

As such the Janmaat case highlights the importance of sound justification underlying a verdict, especially in cases involving limitations on freedom of speech pertaining to politicians. This is imperative not merely in cases where a legal verdict might contradict public opinion but equally where the verdict itself is in accordance with public sentiments, as it was with Janmaat. In addition, we are reminded of the limit conditions of cases like these: they are not merely political because of their consequences for individual politicians or political debate generally but also – and this is often easily forgotten- because of the immense pressure they put on the judiciary to reach a verdict on the legality of particular statements. Nonetheless, that the verdict of a court of law is in accordance with the verdict of the 'court of opinion' does not in and of itself make it just.

Wilders on trial

Twelve years after the Janmaat case Geert Wilders found himself in court over similar charges: group defamation; and incitement to hatred and discrimination. The first is defined in Dutch law in article 137c of the Dutch Penal Code as: "He who publicly, verbally or in writing or image,

7 Ibid, page 1. The two statements were: "Full is full; "The Netherlands are for the Dutch."
8 Ibid, page 1.
9 Ibid, page 2.

deliberately expresses himself about a group of people based on their race, their religion or belief, their hetero- or homosexual nature or their physical, mental or intellectual disabilities, shall be liable to a prison sentence of a maximum of one year or pecuniary fine of the third category."[10] The second charge, related to article137d of the Dutch Penal Code, which is essentially identical in wording, with the exception of the offence itself: "He who publically incites hatred or discrimination or violence against individuals or property of individuals on basis of...etc.."[11]

The context of the Wilders trial could hardly have been more different than the Janmaat case. Where Janmaat had only represented a marginal group in society, Wilders' party at the time held 9 seats out of 150 in parliament. Moreover, Wilders' politics cannot be characterised in classically right-wing terms: he is not xenophobic, publicly supports the Jewish cause and upholds gay rights.[12] Perhaps most importantly, Dutch society itself had changed in the wake of 9/11 and the murder of Fortuyn and Theo van Gogh. The integration debate, which had been a cause of the ostracization of Janmaat, had become mainstream in Dutch politics. These factors may help to explain why the Wilders trial caused such a stir internationally.

Let us first outline the factual contours of the case since these will help us explore its implications more fully below. In 2008 the public prosecutor's office started an investigation into a series of potentially legally offensive statements made by Wilders, notably in a series of newspaper interviews and in his Islam-critical documentary *Fitna.* It concluded that such a case was bound to be unsuccessful and therefore decided not to pursue prosecution. The prosecutor's office maintained that, though controversial, Wilders' statements were part of public discourse and would therefore be protected by the existing regime of free speech jurisprudence. Moreover, it argued that Wilders had consistently maintained the difference between religious criticism and group defamation on basis of religious background, where only the latter constitutes a criminal offence. However, several individuals took offence and went to court to seek redress and push for prosecution. Dutch law grants this opportunity to those potentially affected by a criminal offence which goes unprosecuted.[13] This led to the interesting circumstances where the Court of Amsterdam, which heard the case, upheld their plea and demanded that Wilders be prosecuted after all. In other words, as a consequence of Dutch law a court pressed for prosecution, while both the prosecutor and defendant were going to request acquittal.

Things would get increasingly complicated from here. Even more so than in the Janmaat

10 English translation, Verdict Wilders trial, 23 June 2011, page 5. All citations below are taken from this source unless specified otherwise. http://www.rechtspraak.nl/SiteCollectionDocuments/Translation%20verdict%20Wilders%20230611.pdf

11 Ibid, page 7.

12 In the 2010 parliamentary elections, Wilders' *Freedom Party* won 24 seats out of 150; and in the most recent September 2012 elections, it maintained 15 seats.

13 Article 12 of the Dutch code of Criminal Procedure.

case, the court was put in a very difficult position: not only did it have to legally evaluate Wilders' statements, it also had to decide whether or not he should be prosecuted. If it decided he should indeed, it would be absolutely crucial to provide a robust justification for such a verdict and also strike the right tone. It failed on both accounts. Some commentators straightaway noted the accusatory tone maintained throughout the document, as if the court had sought to incriminate Wilders rather than to dispassionately evaluate his statements.[14] Another critic argued that the court was practicing politics in the courtroom through its desire to intervene in public debate, and had thereby overstepped its legal responsibilities.[15]

Perhaps more disconcerting was the legal justification underlying the court's decision. This was weak at places, and other others in flagrant disregard, of jurisprudence under development by the High Council, the highest court of law in the Netherlands. The court rejected what it perceived to be an artificial distinction in the prosecutors' argument between statements that are 'offensive for a group' and those that are 'offensive about a group'. The court maintained that because Muslims identify themselves in terms of their religion, this distinction was unwarranted. Incidentally, parliamentary records show that the legislator *did* intend the law to have a 'limited scope', only covering the latter, rather than the broader scope utilised by the court.[16] Therefore, it came as no surprise that in a related case the High Council upheld this distinction, incidentally putting a central part of the justification underlying the decision (and the trial itself!) in jeopardy.[17]

This verdict allowed the prosecutor to retain a similar line of reasoning to the one it had previously developed to request acquittal. In 2011, a Dutch television documentary argued that the office of the prosecutor may have had other reasons besides legal ones to push for acquittal.[18] In a series of interviews that the makers conducted with senior officials from the office of prosecution, it becomes quite clear that the organisation was afraid of risks to its reputation if it were to pursue such a high profile case and lose. Moreover, despite its decision to push for acquittal, there was no unanimity amongst several senior officials working on the preparation of the case. Two officials working closely on the case actually argued that there were sufficient grounds to prosecute Wilders. Ironically, one of them later handled the case in the court of appeal, where he had to defend the opposite standpoint. After the case was closed, he is supposed to have invited various attendees to the bar 'if they were interested to hear his real opinion about the case.'

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14 Fennema, Meindert (2009). 'Noot bij de uitspraak van het gerechtshof te Amsterdam van 21 januari waarin het strafvervolging van Geert Wilders beveelt.' *Strafblad, 7*(3), 198-208.

15 Ankersmit, 2010.

16 See e.g. Verdict Wilders trial, paragraph 4.2; and footnotes 8, 9 and 11.

17 Dutch High Council, 'Het Gezwel Arrest', 10-03-2009.

18 Human, '*Het proces Wilders*', 3 part public broadcasting documentary. Part 1, '*Fitna Gate*', first aired 5-12-2011; Part 2, *'Ingreep van Hogerhand'*, first aired 12-12-2011; part 3, '*Diner met Nasmaak*', first aired 19-12-2011. (In Dutch).
http://www.human.nl/hetproceswilders

Wilders for his part remained silent in court throughout the proceedings of the trial but lost no opportunity to share with the media his scathing criticism of what he deemed to be a political trial "aimed at silencing a politician" overseen by a "North Korean court".[19] And indeed, he was at least partially justified in his resentment, because the justification of the court had done little to take away any suggestions of partiality towards him. Still, his continuous and emphatic unwillingness to distinguish between the justification of the court of repeal (which had brought him to trial), and the (other) court which oversaw the actual trial, was in itself a dangerous rhetorical excercise at discrediting judicial impartiality.[20] Things got another twist for the worse when on the last day of the trial Wilders succesfully invoked his right of reversal, or the right to replace the judges presiding over the trial in case of the suggestion of partiality. This was motivated by the refusal of the court to allow Wilders hearing a particular witness. The witness in question, however, was none other than one of the judges presiding over the court of repeal that had demanded Wilders' initial prosecution. According to the defendant's party this judge had on occassion tried to influence another witness in the trial. It remains doubtful to what extent this actually was the case but that did not prevent a retrial from becoming reality: a nightmare scenario for public trust in the impartiality of the judiciary.

The Verdict in the Wilders trial

On the 23th of June 2011, the verdict in this retrial followed. Wilders was acquitted of all charges. The court argued that Wilders was not guilty of group defamation, since he had generally aimed his criticism at Islam. Other statements, such as "I am talking about what comes to the Netherlands and what multiplies here", it found "blunt and humiliating" but not inciting hatred.[21] Of one statement it argued that "[t]he suspect balances on the border of what is accepted pursuant to criminal law..." This was in relation to Wilders' statement that:

"I do know that there is no Islamic majority in a couple of decades. However, the number is growing. With aggressive elements, imperialism. Walk in the street and see where this ends. You feel that you are no longer living in your own country. A conflict is going on and we have to defend ourselves. In due time, there will be more mosques than churches!"[22]

Still, the court argued that, though subversive, the statement did not cause the deep sense of resentment necessary for it to classify as incitement to hatred. The court actually found at least one statement to be discriminatory. This was Wilders' suggestion in an interview that -once in office- he would have: "the borders closed, no more Islamic people coming to the Netherlands, a lot of

19 Ibid.

20 The documentary also established that various members of the Court of Amsterdam had received death threats during the trial.

21 Verdict Wilders trial, page 14.

22 Ibid, page 13.

Muslims exiting the Netherlands, denaturalization of Islamic criminals…"[23] Nonetheless, the fact that this statement could be read as a political proposal within the context of public debate, ensured it fell within the limits of the Dutch regime of free speech jurisprudence. Thus it could not "...be regarded as incitement to discrimination..."[24] With Wilders' acquittal, one of the most tumultuous trials in Dutch history had come to an end.

An examination of the verdict

What does the above sketch of the Wilders trial reveal? The verdict seemed to be in line with the dominant standpoint in the debate, as it reaffirmed Wilders' basic right to extensive freedom of expression. Moreover, in the wake of it public trust in the judiciary increased with 5% from 57% to 62%; with an increase of 9%, from 34% to 43%, amongst voters of Wilders' *Freedom Party*[25]. In other words, the result was favourable to the principal actors involved: from judiciary, through prosecutor, which had requested acquittal, to Wilders himself.

As such, however, it prevented us -perhaps fortunately- from closely examing the troubling question what might have happened if Wilders *had* been convicted - even if there might have been proper grounds for doing so. In short, what our preoccupation with the verdict has obscured is the question whether the court paid enough attention to the importance of sound justification as a way of easing the tension inherent in free speech cases relating to politicians.

For, if we go beyond the verdict itself, the actual proceedings leading up to it give reason for concern. For instance, the court of repeal failed to provide a sufficiently robust legal justification and thus to overcome any doubts about its political impartiality. Not only did it put a politician on trial – in itself a daunting act – on basis of a questionable justification, it also raised doubts about the credibility of the independent judiciary as such. This cast a political shadow over the ensuing trial which only faded when the court decided to acquit. Indeed it is not unthinkable that a conviction – even one on sound legal footing- would have sparked social unrest. For Wilders it would have been a personal tragedy, adding to the immense burden of permanent security. Politically, it would have resulted in a clash between the parliament which supported Wilders as one of its members, and the judiciary. So, from a personal, social and political perspective the outcome was arguably the desirable one.

A case that never fully was?

And yet, from a legal perspective acquittal hardly seems the unequivocal outcome that the court's

23 Ibid, page 11.
24 Ibid, page 13.
25 *NRC Handelsblad*, 'Meer vertrouwen in rechtspraak naar vrijspraak Wilders', 13 July 2011. http://www.nrc.nl/nieuws/2011/07/13/meer-vertrouwen-in-rechtspraak-door-proces-wilders/

verdict suggests it was. The fact that the court of repeal failed to provide an adequate justification for Wilders' prosecution, does not mean that there was not a much more rigorous case to be made. One could argue the same for the prosecutor. Like the defendant's party, it based its push for acquittal on the generally sound legal distinction between religious criticism and group defamation: Wilders had consistently upheld this important distinction. In fact, one can point to several instances where this is emphatically not the case but where Muslims are in fact identified not as adherents of the religious beliefs he criticises but as a social minority as such. For instance, in a newspaper article on 24 January 2007 Wilders stated:

"Two Muslims in the government is a sign of the fact that by now there are one million Muslims in the Netherlands. This is logical if you look at the relative numbers. But I don't want there to be more Muslims in the Netherlands, I would rather like there to be less. So I want to close the borders for migrants from Muslims countries. Moreover, I want to encourage Muslims to leave the Netherlands on a voluntary basis. The demographic development must be such, that the chances decrease of there again being two in the government. Now, there is too much Islam in the Netherlands."[26]

This is part controversial but legitimate political proposal ('closing borders'); part Islam criticism ('too much Islam'). However, here -and elsewhere- he fails to distinguish between his criticism of Islam, or criticism of Muslims as adherents of the religious attitudes and beliefs which he legitimately may find 'totalitarian', and Muslims as a social group as such. Even if he meant that he wanted to limit the influence of Islamic beliefs on government, this is clearly not what he said. The above quotation states that he wants to keep Muslims -without further specification- out of office. Similarly, the statement referred to above about 'what comes and multiplies here' cannot be meaningfully understood as merely criticising those adhering to the tenets of Islam.

In other words, even if we condemn the justification of the court of repeal and side with the proper line of reasoning of the defendant and prosecutor, it is hard to maintain that Wilders consistently upheld the crucial distinction. If we refer back again to the parliamentary notes on article 137c, these clearly state that very strong criticism of attitudes and behavior of social groups is allowed, but not singling them out merely on basis of their shared creed. In other words, if we apply these guidelines to interpretation of the article in question to Wilders' statements we might very well conclude that these did constitute sufficient reason for legal inquiry, even if we had objections about the existence of the law as such. Reading the final court verdict, one gets the impression that this type of argument is stepped over too easily.

Moreover, in its judgment, the court actually did argue that Wilders had discriminated in at least one instance. This is in line with a more general pattern one discerns: Wilders initially states he has nothing against Muslims per se, but then goes on to argue that their continued participation

26 *NRC Handelsblad*, 'Het koninkrijk van Allah zal er nooit komen", 24 January 2007. Translation mine. http://vorige.nrc.nl/binnenland/article1773212.ece/Het_koninkrijk_van_Allah_zal_er_nooit_komen
N.B. this actual claim was not part of the statements under legal scrutiny. It is included here a) for illustrative purposes; b) to underline the criticism of the complaining parties vis-a-vis the Prosecutor that it had been selective in its choice of statements under scrutiny.

in society must be judged on basis of ulterior (extra-legal) actions: “If Muslims want to participate [in our legal order] they must abandon this Quran”, or on another occasion “We want...many Muslims exiting the Netherlands...” Again, Wilders does not uphold the distinction between criticising Islam as a set of ideas and beliefs but suggests that Muslims as a group must meet additional criteria to continue to be part of society. It is true that on various occassions Wilders hints at the criteria he adopts, distinguishing between those closely adhering to the tenets of Islam he rejects and those who don't. Yet, throughout he makes it clear that he is talking about significant numbers: “We have a huge problem with Muslims...”[27], “In twenty years they [Muslims] will be everywhere”, “the number of Muslims in any European country is becoming more than problematic”, “millions, tens of millions of people”[28] most of which do not specify further conditions, suggesting that is it Muslims as group, not Islam as a set of ideas, which Wilders finds problematic. Rarely does he clearly specify the characteristics necessary to distinguish, and where he does, these are often contradictory and sometimes discriminatory. On the one hand he continuously stresses that he has nothing against law-abiding Muslims, yet on the other he continuously stresses that this he is worried about the demographics of Muslims in Western European countries. As the demographics change, the dominance of Islam will increase, putting the very values on which our society depends in jeopardy. However, the only way to render this argument consistent is by stating that the adherence even of law-abiding-Muslims in the West, is contingent upon them being a demographic minority, rather than them embracing the validity of these values: they are never entirely above suspicion, even if they comply with the law.

The court did find one of Wilders' statements discriminatory but argued this was mandated within the context of public political debate. European (and consequently Dutch) jurisprudence holds that if social debate is intense, this allows for statements which may 'offend, shock and disturb.'[29] Moreover, the particular statement was “not of such a nature that it transgressed the boundaries of the legally permissible and should therefore be excluded from public debate.”[30] The court, however, did not further specify what these boundaries would consist in. European jurisprudence stresses that any limitations to free speech require the importance of a 'pressing need', specified by law, which must serve a necessary purpose within a democratic society. One could argue that discrimination legislation fulfills both criteria. Therefore, the court did hint that Wilders had not meant to target 'every muslim', thereby taking away the discriminatory character of his statement. However, as we noted above, it is not clear whether Wilders did in fact sufficiently

27 Verdict Wilders trial, page 11.

28 Geert Wilders, interview with *De Pers*, 27 November 2007; Geert Wilders, 'De Islamitische Invasie', Column at *Geenstijl.nl,* 6 February 2007; Interview on DR 2, Danish Public Television, June 13, 2009, http://www.youtube.com/watch?v=1YBdB5cXHcs

29 European Court of Human Rights, 26 April 1979, 'Sunday Times.'

30 Verdict Wilders trial, page 12.

uphold such a distinction consistently.

Again, we see the discretion underlying judicial verdict at work: there are boundaries to what is permissible and the court must decide whether these have been transgressed. To apply the law and to decide whether or not a particular statement is, or is not, covered by a particular rule, it is guided by existing jurisprudence on previous applications of this rule. However, this body can in itself never exhaust the totality of possible statements and therefore always leaves open a margin of interpretation. In the context of the Wilders trial, one could argue that the court did not provide sufficient justification for how it arrived at its acquittal of incitement to discrimination. It failed to properly address an important question: if incitement to discrimination is a legal offence, and Wilders' statement had indeed had a 'discriminatory' *and* 'provocative' character which the context did not take away (as the Court argued), to what extent does public debate warrant the issuing of such statements?[31] Particularly since the court argued that Wilders had issued his statement as a political proposal. However, political proposals are not empirical statements, but plans to bring about a particular state of affairs. It argued that the particular statement in question lacked the vehement expression of ressentment to classify it as incitement to hatred, yet in a previous paragraph stated that for discrimination charges this amplifying effect is not necessary.

In short, the court insufficiently justified what standard it used to demarcate the boundaries of the law. One assumes the court had good arguments to justify its conclusion, but the fact that it did not sufficiently provide these in the verdict, leaves open a margin of discretion which a judgment is generally is supposed to overcome, particularly in free speech cases.

In conclusion

None of this is meant to incriminate Wilders a posteriori. Indeed, the court has acquitted him. As we stated before, this was arguably the most prudent outcome; for Wilders personally and for social and political stability in the Netherlands in general. Nonetheless, if our reconstruction holds any merit, it would point to several very serious consequences. Even though in two important free speech cases, the judicial verdict may have been in accordance with public sentiments at the time, we have argued that in neither case this conclusion was sufficiently supported by a robust legal justification. However, we pointed to the fundamental importance, particularly in free speech cases, of a robust legal justification, in order to ease the inherent discretion in application of the law. If liberal democracy requires both democratic accountability as well as justice through the sound, impartial and independent application of the rule of law, our analysis of the 'trial of the century' provides a sobering footnote to our initial enthusiasm over its reaffirmation of the freedom of expression.

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31 Ibid, page 14.