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# Entangled Rights of Freedom

*Freedom of speech, freedom of religion  
and the non-discrimination principle  
in the Dutch Wilders case*

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**FORUM**  
INSTITUTE FOR  
MULTICULTURAL  
AFFAIRS

# ENTANGLED RIGHTS OF FREEDOM

*FREEDOM OF SPEECH, FREEDOM OF RELIGION  
AND THE NON-DISCRIMINATION PRINCIPLE  
IN THE DUTCH WILDERS CASE*



Eleven International Publishing  
The Hague  
2010

FORUM is an independent knowledge institute and centre of expertise for multicultural affairs. The frame of reference in which FORUM operates is one that is rooted in a democratic constitutional state, with social cohesion and shared citizenship. The institute gathers knowledge on the wide field of integration, and disseminates it and applies it to practical methods and products.

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# FOREWORD

As soon as the Amsterdam Court of Appeal ordered the criminal prosecution of the Dutch parliamentarian Geert Wilders feelings in both the Netherlands and abroad started to run high. For several reasons, this case is extremely complicated, not in the least because it involves several fundamental rights. The clash of constitutional rights, the role of judicial ‘lawfinding’ in these kinds of cases or the nature of the interests involved: these are all matters which even well-informed lawyers and professors find mind-boggling. It is therefore not hard for us to imagine that these issues are more complicated to outsiders. FORUM deems it to be one of its primary tasks to generate objective information, based on facts, for organisations, institutions, the media and those others abroad who are involved with the Netherlands. In the wake of Geert Wilders’ prosecution, FORUM has received a vast amount of requests for information and interpretation in the recent past. Such an interpretation should commence with an explanation of the fundamental orientation of our democratic constitutional state, based on the rule of law (‘rechtsstaat’). Many journalists who have contacted us live in countries which – to put it euphemistically – have not chosen the same form of society as we have, and thus have to cope with a deficit in terms of constitutional rights and rule of law. Therefore, it is of utmost importance for a well-balanced image of the Netherlands to explicate, in a comprehensive manner, the facts and details of the procedure in the Wilders case. In the European and Arabian media the developments in the Netherlands are being followed with Argus eyes. It is essential to ensure that wrong impressions do not arise as a result of inadequate information or incorrect insights into the Dutch situation.

The rule of law in a democratic constitutional state such as the Netherlands is the binding and connecting principal. For a full understanding of the Dutch context and well-informed news coverage, this should always be taken into account. The law which springs from these democratic and constitutional principles is not based on a certain ideological belief, religion or political preference, nor on the public morality of the majority. It is the result of a centuries long process of civilisation. The democratic constitutional state protects plurality of values, which does not imply that values and freedoms cannot conflict with each other, or even lead to social tension. The principles of democracy, constitutionalism and the rule of law grow in importance in a society in which the diversity of the population is increasing and ideological beliefs and lifestyles continue to diverge. Therefore, the importance of the democratic constitutional state provides ultimate legitimacy to this publication. After all, knowledge of the legal context is vital for public debate, a debate that is necessary in a democratic society and one that influences the image of Netherlands abroad. This publication explains how freedom of speech, freedom of religion and the non-discrimination principle are entangled. It is descriptive and contains no qualifications on the desirability of the prosecution or morality. The publication endeavours to be an informative product. It targets primarily foreign organisations and journalists who want to express an opinion on the lively Dutch debates relating to the prosecution of a politician. For this reason the publication is published in English. FORUM anticipates that this publication will provide a modest contribution to a well-balanced image of the Netherlands. Furthermore, we will use this publication as part of our social diplomacy activities through which we maintain relations with several organisations, institutions and NGOs in order to uphold the good reputation of the Netherlands abroad. Central to these activities is the belief that the principles and workings of our democratic constitutional state must be seen as the supreme good, worthy of ongoing and consistent elucidation.

Sadik Harchaoui

Chair of the Board of Directors FORUM

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# INTRODUCTION

On 21 January 2009, the Amsterdam Court of Appeal ordered the criminal prosecution by the Public Prosecution Service [PPS] of parliamentarian Geert Wilders. After complaints about several of Wilders' statements about Muslims and their religion, the Court of Appeal stated that the public prosecutor must subpoena Wilders for 'inciting hatred' and 'group defamation', both of which are criminal offences. Subsequently, the case was brought before the court and started in early January 2010. The case is legally complex and emotions are running high, both in the Netherlands and abroad. The international media are focussing attention on the prosecution of the Dutch politician.<sup>1</sup> Many advocates of freedom of speech are also keeping a close eye on developments.<sup>2</sup>

The best illustration of the international interest in Wilders is perhaps the commotion and disagreement that arose when Wilders decided to accept an invitation from several members of the British

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1 Cited below are a number of examples: 'Islam film Dutch MP to be charged', BBC (<http://news.bbc.co.uk/2/hi/europe/7842344.stm>); 'Far-right MP Geert Wilders on trial for discrimination against Muslims', *The Times* ([www.timesonline.co.uk/tol/news/world/europe/article6994396.ece](http://www.timesonline.co.uk/tol/news/world/europe/article6994396.ece)); 'Dutch MP to be tried for views on Islam', *The Independent* ([www.independent.co.uk/news/world/europe/dutch-mp-to-be-tried-for-views-on-islam-1488654.html](http://www.independent.co.uk/news/world/europe/dutch-mp-to-be-tried-for-views-on-islam-1488654.html)); 'Times Topic: Geert Wilders', *New York Times* ([http://topics.nytimes.com/top/reference/timestopics/people/w/geert\\_wilders/index.html?scp=1-spot&sq=geert%20wilders&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/w/geert_wilders/index.html?scp=1-spot&sq=geert%20wilders&st=cse)); 'Anti-Muslim Dutch Lawmaker's Trial Tests Freedom of Speech', *Time* ([www.time.com/time/world/article/0,8599,1958902,00.html](http://www.time.com/time/world/article/0,8599,1958902,00.html)).

2 See for example: [www.religionnewsblog.com/24045/islam-critic-geert-wilders-goes-on-trial-in-netherlands](http://www.religionnewsblog.com/24045/islam-critic-geert-wilders-goes-on-trial-in-netherlands); [www.internationalfreepressociety.org/2010/01/the-trial-of-geert-wilders-a-symposium/](http://www.internationalfreepressociety.org/2010/01/the-trial-of-geert-wilders-a-symposium/)

House of Lords to show his film, *Fitna*, there.<sup>3</sup> He was initially denied access to the United Kingdom by Home Secretary Jacqui Smith, even though he had actually travelled to England. Wilders successfully appealed this rejection with the British *Asylum and Immigration Tribunal*, following which he used the opportunity to show his film in the British House of Lords.

Wilders' visit to England showed that his actions cause emotions to run high, but it also shows that opinions vary on the legal context in which his actions are conducted. Home Secretary Smith took the position that Wilders' presence would pose a danger to public safety. The British Tribunal to which Wilders lodged a successful appeal, however, determined that there was no substantial evidence for this position. And even if there were such differences in opinion, the question of whether a restriction on entry was necessary remained, according to the Tribunal.

Varying legal interpretations and a court that settles the argument: exactly the same situation as in the Dutch criminal proceedings against Wilders. Lawyers set forth various compelling arguments that all support priority in the criminal law proceedings. Ultimately, the criminal court will decide, as befits a state under rule of law.

In the Wilders case, it is both the effect and the constitutional importance of several fundamental rights that play an important role. For instance, Wilders invokes the right to freedom of speech as laid down in the Dutch Constitution and in international conventions. This right is allegedly an obstacle to criminal prosecution: after all, in a democratic society politicians ought to have ample opportunity to freely express their opinions. At the same time, the complainants point out that they feel offended and discriminated against on the grounds of their religious beliefs. Consequently, freedom of

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3 See for example: 'Banned from Britain, Dutch campaigner against Islam', *The Independent* ([www.independent.co.uk/news/uk/home-news/banned-from-britain-dutch-campaigner-against-islam-1606309.html](http://www.independent.co.uk/news/uk/home-news/banned-from-britain-dutch-campaigner-against-islam-1606309.html)); 'Britain deports Dutch "provocateur"', *New York Times* ([www.nytimes.com/2009/02/12/world/europe/12iht-britain.4.20152350.html](http://www.nytimes.com/2009/02/12/world/europe/12iht-britain.4.20152350.html)); 'Far-right Dutch MP refused entry to UK', *The Guardian* ([www.guardian.co.uk/world/2009/feb/12/far-right-dutch-mp-ban-islam](http://www.guardian.co.uk/world/2009/feb/12/far-right-dutch-mp-ban-islam)).

religion and the non-discrimination principle also come into play in this case.

What is the relationship between these fundamental rights? How do these fundamental rights relate to the criminal law framework of the offences for which Wilders is being prosecuted, i.e. group defamation and spreading hatred? And what are the principal legal arguments in favour of and against a conviction of Wilders?

Freedom of speech is the starting point in answering these questions. As will become clear in the chapters ahead, the question arises in the Wilders case of whether the contested statements fall within the scope of said freedom of speech and, if so, whether this freedom – in the context of this specific case – can be restricted by the provisions of criminal law. In interpreting these provisions of criminal law, freedom of religion and the non-discrimination principle play an important role.

What exactly is the definition of freedom of speech? Neither the Dutch Constitution nor international conventions such as the ‘Convention for the Protection of Human Rights and Fundamental Freedoms’ [ECHR] define the scope of the concept precisely. Article 7 of the Dutch Constitution provides that no person requires prior permission for the contents of any thoughts or feelings to be published. Article 10 of the ECHR provides that the right to freedom of speech entails the freedom to have an opinion and the freedom to receive information or ideas without interference from any public authority. However, this freedom is not unlimited: it can be subjected to restrictions. Nevertheless, from the ‘restrictive clauses’ formulated in the articles it is not clear which expressions are protected and which are not.

In spite of the above, the importance of freedom of speech in a democratic society is emphasised on a regular basis. For example, the European Court of Human Rights states in virtually every case concerning freedom of speech that it is one of the most fundamental values in a democratic society, and that therefore any restrictions of freedom of speech must be reviewed with the utmost care. However,

freedom of speech is not the only value that is defended in a democratic society. Certain expressions can be so damaging in terms of other values (for instance the ban on discrimination) that freedom of speech must yield. At the same time, freedom of speech is intended as a guarantee: everything that is deemed important should be allowed to be expressed.<sup>4</sup> Therefore, at first glance it seems that freedom of speech does not protect all expressions, but only those we deem significant. However, when making such statements, one should also take into account other values that play an important role in a democratic society.

It is precisely *because* there are no general criteria available as to what is significant that the right of one person to freely express himself is limited by the right of another person to develop. This free development can be found in the right of the other person to freedom of speech, but also in other fundamental interests, such as the right not to be discriminated against or the right to religious freedom. Neither in the Dutch Constitution nor in the ECHR is there any hierarchy of fundamental rights: therefore, one right does not take precedence over another.

In the Dutch system, this contradiction between freedom of speech, freedom of religion and the non-discrimination principle primarily becomes clear from several criminal law provisions that impose a statutory limit on freedom of speech. Freedom of religion and the non-discrimination principle play an important role in the elaboration of these criminal law provisions. If freedom of speech is also invoked in criminal cases, one essentially sees a collision of fundamental rights. Both the meaning and scope of fundamental rights and their application, such as those in the provisions of the Penal Code, are of great importance to understanding this contradiction and will be dealt with below. Due to the considerable influence of

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4 Rosier 1997, p. 253. Or as Salman Rushdie stated during the first Freedom Lecture in Leiden on 18 June 2010: Man is a narrative creature who understands himself and the world through stories. Therefore, the telling of stories in freedom is one of his most essential needs and must be considered a fundamental right of man. Consequently, freedom of speech deserves far-reaching protection.