

10 Case law on racism and extremism in 2007

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This chapter deals with cases of discrimination on which the courts have already given a ruling. There are relatively few of them. The structure of complaints of racial discrimination can be seen in terms of a pyramid. At the very bottom is *perceived* discrimination. Most victims let it go at that, while some report their complaint to family and friends. If the incident is experienced as serious *and* the victim does not want to let it pass, the complaint sometimes makes its way to a functionary (liaison officer) or, even higher in the pyramid, to an institution (complaints commission). Only a small number are reported to the police, and only a very small number of these reported complaints finally result in a court judgement. This court ruling is the top of the complaints pyramid. Studying the top of the pyramid is important for two reasons. First, court judgements have considerable influence on legislation. The police and the Public Prosecution Service (Openbaar Ministerie; OM) as well as the public and their legal counsel are guided by this case law in the actions they take. Second, these cases are important because there have been special circumstances – such as material injury – that have made ordinary citizens decide to press on to the top of the complaints pyramid, or basic cases that are significant to a larger number of people. The striking common feature of these cases is that they form the proverbial tip of the iceberg (or pyramid) that is indicative of the type of legal problems with which we as a society are being confronted. The purpose of this chapter is to examine that tip and to discuss the most important Dutch case law on racial discrimination from 2007.

10.1 Obstacles to lodging complaints

Almost no research has been done on the way people deal with complaints of racial discrimination in the Netherlands. What we do know is that when it comes to racial discrimination, the obstacles for victims are higher than for those who have complaints about other things (work, housing).¹ At first it seemed as if in addition to the well-known obstacles to lodging complaints (time, money and bother) there were other factors at play such as fear of "victimisation,"² shame and pride.³ Qualitative research conducted as part of the *2005 Racial Discrimination Monitor* shows, however, that in the case of racial discrimination, the most important reason for not reporting is the expectation that it will not help anyway (38%).⁴ In the end, according to the research, three quarters of those questioned took no further steps in response to the discrimination they

¹ Also see A. Böcker, "A pyramid of complaints: the handling of complaints about racial discrimination in the Netherlands," *New Community* 1991, p. 608.

² *Het jaar 2004, Jaarverslag CGB* (Annual report of the Equal Treatment Commission for the year 2004), Utrecht: Commissie Gelijke Behandeling 2005, p. 4.

³ M.A.J. Leenders, "Procesrecht en handhaving van de AWGB" (Procedural law and enforcement of the Equal Treatment Act), in: T. Loenen (ed.), *Gelijke behandeling: oordelen en commentaar 1999* (Equal treatment: judgements and comments). Deventer: Kluwer 2000, p. 69.

⁴ Harry van den Berg & Jeanine Evers, "Discriminatie-ervaringen 2005" (Experiences of discrimination in 2005), in: I. Boog (ed.), *Monitor Rassendiscriminatie 2005* (2005 Racial Discrimination Monitor). Rotterdam: Landelijk Bureau ter bestrijding van Rassendiscriminatie [etc.] 2006, pp. 15-47 and see p. 30.

experienced, and "only" 7% were afraid of the consequences of reporting the incident. Of all the individuals who feel discriminated against, 8% go to the police and only 4% to an anti-discrimination agency (antidiscriminatievoorziening; ADV).⁵ As an indication: 4,247 individuals went to an anti-discrimination agency in 2007, less than two thousand of whom had complaints of racial discrimination.⁶ In response to questions about the Annual Memorandum on Integration Policy, 2007-2011, the Minister of Housing, Communities and Integration answered that she wanted to achieve a doubling of the number of reports made to anti-discrimination agencies by 2011.⁷

In 2007, 107 court decisions concerning the criminal discrimination prohibitions (art. 137c – 137g of the Criminal Code and art. 429quater of the Criminal Code) were handed down.⁸ These also concerned cases (admittedly a minority) that were settled on grounds other than that of race. It is unknown how many court decisions on criminal offences aggravated by discriminatory behaviour (that is, "ordinary" offences such as assault and arson) with discriminatory aspects took place in 2007. These offences are not registered under the heading "discrimination" by the Public Prosecution Service, so they cannot be searched as such.⁹ We compiled 51 cases concerning "criminal offences aggravated by discriminatory behaviour" for the year 2007.¹⁰ In this study both types will be discussed.

The goal is not to see that all complaints on discrimination are brought to court. But it is important to know how large the entire iceberg is and what we can learn from the tip sticking out of the water.

10.2 Hate speech

The sections on hate speech are articles 137c - 137e of the Criminal Code. The choice of court decisions made here is based on cases that are indicative of legal problems that sometimes occur or cases that entail a continuation of an existing line of legal precedents. We also looked for cases that were regarded as important socially – because the incident received a great deal of media attention, for instance. In response to the WODC report on blasphemy,¹¹ the government concluded the following in October 2007:¹²

⁵ The percentages in the police region of Noord-Holland are even lower. *Discriminatieklimaat Noord-Holland Noord* (Climate of discrimination in Noord-Holland Noord), Art.1 Bureau Discriminatiezaken Noord-Holland Noord, June 2007.

⁶ I. Boog & M. Coenders, *Kerncijfers 2007. Jaaroverzicht discriminatieklachten bij antidiscriminatiebureaus en meldpunten* (Key figures for 2007: Annual summary of complaints of discrimination reported to anti-discrimination agencies and hotlines). Rotterdam: Landelijk Bureau Art.1 2008. The exact number was 1,986 persons.

⁷ *Kamerstukken II* (Official Reports of the House of Representatives of the States General) 2007/08, 31 268, no. 5, p. 36.

⁸ For the text of the articles see Appendix I.

⁹ See chapter 9, "Investigation and prosecution in 2007," section 9.6.

¹⁰ Case law on racism and extremism is compiled by the Documentation Centre of the Anne Frank House and stored in a database. The full text of the decisions stored in the database can be accessed through the Documentation Centre.

¹¹ B.A.S.M. van Stokkom (et al.), *Godslastering, discriminerende uitspraken wegens godsdienst en haatuitingen, een inventariserende studie* (Blasphemy, discriminatory remarks against religion and expressions of hatred, an inventory). WODC, Meppel: Boom Juridische Uitgevers 2007.

"Statements that are intended to incite hatred, to discriminate or seriously to harm other members of society must be strongly opposed. The policy of the Public Prosecution Service is expressly focused on this effort."

The examples given in the memorandum, however, suggest that the attention of the government is mainly centred on remarks having to do with jihadist radicalisation.

10.2.1 Expression of opinion

With the internet, access to information and opinions is virtually unlimited in the literal sense. But as far as other people are concerned there certainly are limits to the internet, such as those having to do with the *admissibility* of discriminatory statements. A case was brought against a twenty-year-old resident of Koewacht in Zeeland who acted as manager of a website. The approximately thirty-five young people ("Lonsdale youths") who had signed up for the site egged each other on by means of discriminatory comments to commit violence against "foreigners." The youths exchanged statements such as "foreigners should piss off, we have to show those Moroccans that we won't put up with any bullshit."¹³ The police court ruled that the manager of the site had incited discrimination and violence against people on account of their race (art. 137d of the Criminal Code).¹⁴ On these grounds a sentence of thirty hours' community service or fifteen days' imprisonment was handed down. The case is illustrative of the diversity of verbal discrimination on the internet against persons of Moroccan origin.¹⁵

In comparison with the number of punishable hate speech offences on the internet that the Public Prosecution Service registered in 2006 (13) and 2007 (22), this one court decision that surfaced in 2007 is a remarkably feeble score. A study of the settlement of internet cases in the period 2001-2004 shows that the percentage of cases on the internet that were not prosecuted (dismissals) was above average.¹⁶ Although there are no hard figures for recent years, this trend seems to be continuing. In 2007, for example, seven of the thirteen reports made to the Complaints Bureau for Discrimination on the Internet (Meldpunt Discriminatie Internet; MDI) were dismissed.¹⁷ So far the tougher approach that the judicial authorities were going to take seems to have yielded only one scant result in 2007.

In May 2006, a war monument in Klaaswaal was vandalised. Two underage youths – aged 14 and 16 – along with a 21-year-old man were arrested. They confessed to having daubed a swastika and the text "Wir sind zurück" (We are back) on the monument during the night of 4-5 May, the Dutch Days of Remembrance. The incident was one of a series of vandalistic attacks on wreaths and war monuments that occurred around the time of the 4 May commemoration in 2006. Although the incident in

¹² *Kamerstukken II 2007/08*, 31 200 VI, no. 8, p. 7.

¹³ *BN/De Stem* 7 February 2007.

¹⁴ Middelburg District Court, 6 February 2007, public prosecutor's office no. 12/706668-06.

¹⁵ Complaints Bureau for Discrimination on the Internet, *Jaarverslag 2007* (2007 Annual report), p. 8.

¹⁶ Speech by Rodrigues given at the ten-year anniversary of the MDI on 17 March 2008.

¹⁷ Complaints Bureau for Discrimination on the Internet, *Jaarverslag 2007*, p. 15.

Amsterdam-Osdorp received the most media attention, vandalism also occurred in Hoogeveen, Zandvoort, Renswoude, Lekkerkerk and, as noted, in Klaaswaal.¹⁸ The perpetrators in Klaaswaal were told by the city that the cost of cleaning the monument (4,000 euros) would be passed on to them. The police court judge found the 21-year-old perpetrator guilty of three separate anti-Semitic insults. He was sentenced to a sixteen days' imprisonment for one offence and to a suspended prison sentence of three months with a probation of two years for the other.¹⁹ A condition of his sentence is that he must submit to social rehabilitation. In addition, this perpetrator has to pay financial damages of almost 7,000 euros to the city. One of the minors in the Klaaswaal case was given a nine-day nonsuspended sentence by the juvenile court judge and a one-month suspended sentence in juvenile detention. The other minor was found to have more anti-Semitic offences on his record and was sentenced to sixteen days in youth detention, two months of which were suspended. Both youths were ordered to undergo social rehabilitation under supervision and to pay damages.²⁰ The two minors took the case to a higher court. The court of appeals increased the sentence of the district court by imposing 20 hours of a study order (*leerstraf*).²¹ The court took a serious view of the fact that the anti-Semitic vandalism had been committed at the time of Remembrance Day, and that the messages daubed on the monument were evidence of National Socialist sympathies, which is so threatening to people of the Jewish community. The issue of damages to the city was judged to be too complex and was dismissed on appeal in both cases.²² The anti-Semitism that is in evidence in these cases seems virtually timeless, and the glorification of National Socialism plays an important role. The figures from the Public Prosecution Service show that the number of registered punishable offences involving anti-Semitism decreased in 2007 (from 33% to 19%).²³ These grounds for discrimination always stood out because of a relatively high percentage of criminal registrations at the public prosecutor's office.

Views can also be expressed by means of demonstrations. The limits of this freedom to demonstrate that are imposed on extremists are discussed in detail by Loof in chapter 5 of this Monitor report.²⁴ In 2007 two judgements were given on the freedom to demonstrate that illustrate the current state of affairs. The established case law according to legal precedent now asserts that demonstrations cannot be simply prohibited beforehand, not even if it can be argued that they pose a threat to public order.

At the present time the main emphasis is on the limitations being imposed on demonstrators. They may have to do with the slogans and symbols to be carried, the songs to be sung or the route to be followed. It was the Netherlands People's Union

¹⁸ Meir Villegas Henriques, *Antisemitische incidenten in Nederland, overzicht over het jaar 2006 en de periode 1 januari – 5 mei 2007* (Anti-Semitic incidents in the Netherlands, overview of the year 2006 and the period 1 January – 5 May 2007). Den Haag: CIDI 2007.

¹⁹ Dordrecht District Court, 4 December 2006, public prosecutor's office no. 510206-6.

²⁰ Information derived from the judgements in appeal.

²¹ The Hague Court of Appeals, 13 July 2007, public prosecutor's office no. 11-500326-06.

²² The Hague Court of Appeals, 13 July 2007, public prosecutor's office no. 11-510207-06.

²³ See chapter 9, "Investigation and prosecution in 2007," section 9.6.3.2.

²⁴ See chapter 5, "Demonstrations by right-wing extremist groups in the Netherlands and Germany."

(Nederlandse Volks-Unie; NVU) in particular was successful in bringing legal action against restrictions on demonstration routes and schedules.²⁵ The NVU is not always given favourable judgements, and restrictions are imposed because of the disorderliness expected.²⁶ What is striking in this case is that the judge attached importance to the promise that the police would not take action against the wearing of the Celtic cross (this will be discussed further in the next section).

10.2.2 Symbolism

Of all the symbols used by extremists, the swastika is probably the most well-known. When Germany was chairman of the European Union, it campaigned in vain for a European prohibition on the swastika.²⁷ These efforts encountered a great deal of resistance from the Hindu community because in their tradition the swastika is a symbol of peace. In the Netherlands, established case law lays down that wearing a swastika with the intention of "propagating the ideology of National Socialism" is in itself an expression that is insulting to Jews "because of their race."²⁸ As Schalken states in his commentary on this judgement of the Supreme Court, the propagandistic nature of the circumstances under which the symbol is exhibited in public determines its discriminatory character. A man who wore a sticker with a swastika on his clothing that was conspicuously placed was convicted by the police judge of Den Bosch on 20 April 2007 on the grounds of art. 137c of the Criminal Code.²⁹ He was fined 500 euros. There is no doubt that the man's purpose was to propagate National Socialist ideology since he was part of a group that had walked through Eindhoven with swastikas on their clothing as well as pictures of Hitler, SS skulls and White Power symbols while chanting anti-Jewish insults.³⁰

The Celtic cross is not only less known than the swastika but it is also less controversial. This results in some ambiguous case law. For instance, a young man was convicted of vandalism because he spray-painted a Celtic cross on a bus shelter without adding any other marks.³¹ On the other hand there was no evidence of a racist insult because the symbol, according to the court, is still too unknown to be perceived as insulting by any group. The court ruled that if in the future the Celtic cross were to become known by the average spectator as a symbol of racist ideology, it could lead to a conviction. In my mind, this loses sight of the fact that even a single swastika, without further connotation, does not result in criminal liability in accordance with the aforementioned judgement of the Supreme Court. So the same would have to apply to the Celtic cross. In 2005 the district court in Den Bosch also convicted a young man on the basis of the prohibition on

²⁵ Zutphen District Court, 26 January 2007, LJV AZ7212 (LJV = National Case Law Number; the number under which judgments of Dutch courts are published on the website www.rechtspraak.nl).

²⁶ The Hague District Court, 30 August 2007, LJV BB2615.

²⁷ *NRC Handelsblad* 17 January 2007; Press releases, 29 January 2007

<http://www.eu2007.de/en/News/Press_Releases/January/0129bmJantiracism.html>.

²⁸ Supreme Court 21 February 1995, E.R. van Eck et al., (eds.), *Rechtspraak rassendiscriminatie 1995-2000* (Case law on racial discrimination, 1995-2000). Rotterdam: Landelijk Bureau ter bestrijding van Rassendiscriminatie, no. 359 esp. Schalken.

²⁹ Den Bosch District Court, 20 April 2007, public prosecutor's office no. 01/826775-06.

³⁰ Den Bosch District Court, 15 September 2006, public prosecutor's office no. 01/826774-06 and nine other identical judgements.

³¹ Rotterdam District Court, 30 May 2007, public prosecutor's office no. 10/612066-07.

distributing discriminatory messages (art. 137e of the Criminal Code); he had made a Celtic cross in the snow.³² That brought him a fine of 500 euros. So far, the Court of Appeals in The Hague is the highest court that has ruled on the meaning of this symbolism (2007). What precipitated the arrest was a skinhead who was on his way to Zoetermeer to an extreme right gathering. On his bomber jacket and on his rings he sported a great variety of right-wing extremist symbols, such as the swastika, White Power signs, an SS skull and a Celtic cross. He said that that day he wanted to demonstrate against "Muslim radicals." Both the district court and the court of appeals were of the opinion that in this case the symbols lacked any offensive character, so he was acquitted of violating art. 137c of the Criminal Code.³³ The appeal to the Supreme Court that has been brought against the judgement of the court of appeals is quite promising, in my estimation. Indeed, in the case of the skinhead various symbols were combined, so that together they unmistakably conveyed National Socialist ideology, along with the racist character that is part of such thinking. Or is such an act not offensive in this particular context, since the man said he only wanted to demonstrate against Muslim radicals? This argument is far from convincing, and according to the judgement of the Supreme Court what the man did is still insulting to Jews (and other victims of the Second World War and their relatives). *Prior* permission to wear Celtic crosses, as in the demonstration in The Hague mentioned above, seems premature in this case. Indeed, the context determines whether wearing these crosses is a discriminatory insult or not.

10.2.3 Islamic radicalism

The Monitor project also extends to fundamentalist extremism, provided that the extremism has aspects in common with racial discrimination or has a negative impact on interethnic relations. It should be noted that the dividing line between Muslims and "nonbelievers" is not only religious in nature. Earlier it was argued that Muslim identity also has a strong cultural-ethnic component.³⁴ On the grounds of these reflections, certain remarks or activities that are extreme fundamentalist in nature may fall within the scope of our research area. On the basis of these criteria, two lawsuits have been found that ought to be discussed.

The first case concerns a Muslim woman who, according to the Public Prosecution Service, entertains more than the normal interest in Jihadistic-Salafistic ideology. She also actively propagated this interest by way of the internet by posting various pieces there under her Islamic name, Fadoua. According to the district court, two short pieces she posted in this way were seditious (art. 132 of the Criminal Code).³⁵ The text "Poisoning the Ummah" is mainly a collection of statements made by Abdullah Azzam, with passages such as, "The sword is the only way to clear away the obstacles and to build up the Islamic state;" and:

³² Den Bosch District Court, 25 April 2005, public prosecutor's office no. 01/836092-05.

³³ The Hague Court of Appeals 24 May 2007, LJN BA5702.

³⁴ P.R. Rodrigues, "De meervoudigheid van moslimdiscriminatie" (The multiplicity of Muslim discrimination), in: Anita Böcker et al. (eds.) *Migratierecht en rechtssociologie. Liber Amicorum Kees Groenendijk* (Migration law and sociology of law. Liber Amicorum Kees Groenendijk). Nijmegen: Wolf Legal Publishers 2008, p. 486.

³⁵ Rotterdam District Court 30 October 2007, LJN BB7174.

"Terrorism is a duty in the religion of Allah, and Allah says, 'And bring together whatever power and battle steeds you can muster in order to terrorise the enemies of Allah and your own enemies'."

The text with the title "The dogs bark and the caravan moves on" is an excerpt from a document written by Sheik Abu Mohammed Al-Maqdisi, which contains the following passage:

"But for you, good Mujahideen, the best answer to those bad people is to ignore them and to continue engaging in Jihad, and to continue to kill and to fight every enemy of Allah. Ignore their point of view. The caravan moves on and the dogs bark."

The district court ruled that these passages were seditious because it is now clear enough that if those who are being addressed were to carry out this activity, it would result in punishable offences. It should also be noted that the same can be said of the web manager from Koewacht mentioned above. He was only sentenced to do community service, however, on the grounds of art. 137d of the Criminal Code. Fadoua had a clean criminal record, but nevertheless she was given a one-month nonsuspended prison sentence. The possible discriminatory aspect – that she was suspected of inciting hatred, discrimination or violence against nonbelievers (art. 137d of the Criminal Code) – was entirely overlooked in the district court, even though the Minister of Justice deems this provision of importance in dealing with "written material that glorifies violence."³⁶ An appeal was brought against the judgement.

This last question – concurrence with art. 137d of the Criminal Code – was expressly addressed in the appeal of the Hofstad Network (Hofstadgroep). The Court of Appeals of The Hague ruled that the Hofstad Network was not a criminal or terrorist organisation.³⁷ No sustained and structured collaboration could be found, nor a commonly shared ideology. The court also could find no evidence that the suspects as a group were intending to commit acts of violence or crimes of sedition. The court studied various writings in which the view was expressed that nonbelievers must be hated and that hostility must be shown towards them, without also inciting readers to commit punishable offences or to undertake violent action against public authorities. The court concluded from the writings that "the nonbelievers" included those who do not recognise Allah as the only sovereign power. In the opinion of the court, article 137d of the Criminal Code aims to protect certain minority groups on account of their vulnerability, including on account of their religion or personal beliefs. According to the court, "the nonbelievers" can scarcely be regarded as such a vulnerable group.

The judgement of the court of appeals stirred up a wide range of reactions, but Loof was the first to point out that the question was whether art. 137d of the Criminal Code did not protect majorities.³⁸ This article of the law was introduced in 1971 pursuant to the obligations to which the Netherlands had committed itself by ratifying the International

³⁶ *Kamerstukken II* 2007/08, 31 200 VI, no. 161.

³⁷ The Hague Court of Appeals, 23 January 2008, LJN BC2576.

³⁸ *NRC Handelsblad*, 26 January 2008.

Convention on the Elimination of All Forms of Racial Discrimination (ICERD). At the time, the point of departure was indeed the protection of minorities.³⁹ The grounds for discrimination, however, are all rather neutrally formulated (race and religion or personal beliefs), or are even explicitly two-sided such as gender and hetero- or homosexual orientation. Only the ground "disability," which was added to art. 137d of the Criminal Code in 2006, seems to lack this neutrality.

In practice, this neutral formulation means that in the case of inciting hatred on the ground of gender, both women and men can derive protection from this provision, and in the case of race, both ethnic minorities and native people can do so as well. In the practice of criminal law the latter rarely occurs.⁴⁰ Given the nature of the views expressed by the members of the Hofstad Network, the question is whether there is evidence of inciting hatred, discrimination or violence against people on account of their religion. There is such evidence if "religion" can be understood to include the absence of a (proper) religion. This is my opinion, and I believe that an atheist is also protected under these grounds for discrimination. In the literature, it is generally assumed that the criminal discrimination prohibitions also extend to majority groups.⁴¹ Van Noorloos shares this view, and in her analysis of the judgement of the Hofstad Network she argues that the appropriate grounds for discrimination might also include race. I think that religion is better geared to this case, however. This can be seen in the conclusion from the court of appeals, which is mainly based on the rights to freedom of expression and freedom of religion contained in the European Convention on Human Rights (ECHR). While the district court in the case of Fadoua was of the opinion that she was inciting people to engage in a punishable armed struggle (jihad), the court of appeals in the Hofstad case said that the anti-democratic and fundamentalist views of the group's members were within the limits of the criminal statutes.

10.2.4 *Insulting the police*

In recent years, the number of registered insults against investigating officers was not as high as it was in 2007: 18.⁴² Of these 18 registered incidents, few have made their way into case law: only one case from 2008. The police judge in The Hague ruled that the perpetrator verbally abused the officer with a racist insult in public.⁴³ The remark was insulting to white people because of their race and resulted in a suspended prison sentence of four weeks. This is the only known judgement in which the "white" *majority group* was given protection on the grounds of art. 137c of the Criminal Code. It is unknown what the exact insult was. It seems, however, that the police are quite capable of writing up a signed official report of discrimination if people add discriminating swearwords.

Sometimes there is a difference of opinion as to whether a single word or gesture can be regarded as insulting. The district court of Den Bosch, for instance, ruled that calling

³⁹ *Kamerstukken II 1969/70*, 9 724, p. 3.

⁴⁰ In 2006 there were three such cases, according to the figures of the Public Prosecution Service.

⁴¹ Marloes van Noorloos, "De 'Hofstadgroep' voor het Haagse hof: over de vrijheid van radicale uitingen in het publieke debat" (The "Hofstad Network" before the court of appeals of The Hague: on the freedom of radical statements in public debate), *Delikt & Delinkwent 2008*, pp. 490-492 with further source reference.

⁴² See chapter 9, "Investigation and prosecution in 2007," table 9.11.

⁴³ The Hague District Court, 14 August 2008, public prosecutor's office no. 09-535483.

someone a "homo" was not insulting.⁴⁴ Things are different, according to the district court, if the word "homo" is accompanied by negative adjectives or used in a series of negative statements. A few days after the ruling, the Assen district court arrived at a different judgement. There, insulting a police officer by calling him a homo resulted in a 220-euro fine.⁴⁵ Using the single word "Jew" as an insult against the police is an entirely different matter.

The Hague court of appeals rule in that regard as follows.⁴⁶

"In this case, the suspect screamed 'Jews' in public at a passing police van without any provocation and for no apparent purpose. It emerges that the suspect's earlier contacts with the police had been negative for him and he deeply dislikes the police. It can be deduced from the court's ruling that calling out 'Jews' was meant to humiliate and thus can be qualified as insulting under the present circumstances."

The underaged perpetrator was sentenced to a 100-euro fine. The convictions were not based on 137c of the Criminal Code, however, but on art. 267 of the Criminal Code (insulting an official while on the job). Verbally abusing a (white) policeman by calling him "kaaskop" (cheesehead) resulted in a "mere" fine of 300 euros on the basis of art. 267 of the Criminal Code, while no mention was made of discriminatory defamation.⁴⁷

10.3 Crimes of exclusion

In addition to the crimes of expression there is a second category of illegal discrimination prohibitions that ought to be discussed: crimes of exclusion. This has to do with discrimination in exercising an office, practising a profession or running a business. If such discrimination occurs intentionally it's a felony (art. 137g of the Criminal Code); without intention it's a misdemeanour (art. 429quater of the Criminal Code). The number of discriminatory offences that the Public Prosecution Services registers each year under this article of the law is modest. In 2007 there were 16 registrations under article 137g of the Criminal Code, and non under 429quater. Generally these are cases in which admission to an establishment in the nightlife and catering industry was refused and to a lesser degree discrimination during job interviews or on the job. In 2007 ten of the 16 registered discriminatory offences had to do with discrimination in the nightlife and catering industry, four with work, one with recreation and one with an investigating officer. Legal precedents, however, are almost nonexistent.

This is especially remarkable when it comes to discrimination in the nightlife industry because of the frequency with which this form of exclusion still occurs.⁴⁸ This can be seen in the complaints from 2007 lodged with the anti-discrimination agencies, where

⁴⁴ Den Bosch District Court, 21 August 2007, LJN BB2083.

⁴⁵ <www.nu.nl/news/1207235/15/Homo_roepen_tegen_agent_in_Meppel_wel_strafbaar.html>. (6 August 2008)

⁴⁶ The Hague Court of Appeals, 12 October 2007, LJN BB5880.

⁴⁷ Amsterdam Court of Appeals, 20 February 2007, public prosecutor's office no. 23-003679-06.

⁴⁸ Also see P.R. Rodrigues & S. van Walsum, "Ras en nationaliteit" (Race and nationality), in: J.H. Gerards (ed.), *Gelijke behandeling: oordelen en commentaar 2006* (Equal treatment: judgements and commentary, 2006). Nijmegen: Wolf Legal Publishers 2007, pp. 33-34.

"nightlife industry and entertainment" takes sixth place, with 4.6% of the complaints (195),⁴⁹ but also in the practical tests that are conducted somewhat regularly. A practical test in Amsterdam conducted by MP Dibi in the spring of 2007 resulted in a great deal of publicity⁵⁰ and parliamentary questions.⁵¹ In September 2006 the Den Bosch Court of Appeals sentenced a manager of a café on the grounds of art. 137g of the Criminal Code to a suspended fine of 500 euros, and the customer who had been turned away was granted damages of 250 euros.⁵² The perpetrator invoked necessity because he could only guarantee the safety of his public by refusing entrance to visitors of Moroccan origin. The court ruled that this measure – despite the serious incidents that had taken place – did not satisfy the principles of proportionality and subsidiarity. He could have asked for police assistance or closed the café. My view is that introducing an admission ticket system for every visitor would have been a more efficient way to keep out troublemakers.

On 15 June 2007 the police judge in Zutphen sentenced a doorman to 40 hours' community service and suspended imprisonment for deliberate racial discrimination against three persons.⁵³ In two cases, discriminatory comments were made when the persons were refused entrance to the club. In the third case, an asylum seeker's identity card (a so-called W-document) was rejected as insufficient ID, which cost the doorman 300 euros in damages.

Finally, a decision was rendered in the case about recreation. An customer of a fitness club was talked to by one of the gym instructors regarding his body odour, which the instructor related to his Surinamese origin. The customer had initially filed a criminal complaint on account of discrimination, but that was dismissed in May 2007. The complaint was rejected by the Den Bosch court of appeals in October 2007 because, according to the court, there was no intention to discriminate.⁵⁴ This raises the question why the court did not order prosecution on the grounds of art. 429quater of the Criminal Code, where no intention is required. In the end it was the Equal Treatment Commission (Commissie Gelijke Behandeling; CGB) that ruled that this behaviour constituted illegal racial discrimination, as did the subsequent denial of access to the fitness club.⁵⁵

10.4 Criminal offences aggravated by discriminatory behaviour

In the past, a study of sentencing for racial violence was conducted as part of this Monitor project.⁵⁶ The main conclusions from this study were that the public prosecutors

⁴⁹ I. Boog & M. Coenders, *Kerncijfers 2007. Jaaroverzicht discriminatieklachten bij antidiscriminatiebureaus en meldpunten*.

⁵⁰ *Het Parool* 29 May 2007.

⁵¹ *Aanhangsel Handelingen II* (Appendix to the Official Acts of the House of Representatives of the States General) 2006/07, 2635.

⁵² Den Bosch Court of Appeals, 22 September 2006, LJN AY8700.

⁵³ Actualiteiten Rechtspraak.nl: 15 June 2007.

⁵⁴ Den Bosch Court of Appeals, 30 October 2007, LJN BD6453.

⁵⁵ CGB 2007-46.

⁵⁶ W. Wagenaar & P.R. Rodrigues, "Strafmaat bij racistisch geweld" (Sentencing in cases of racial violence), in: J. van Donselaar & P.R. Rodrigues (eds.), *Monitor Racisme & Extremisme; zevende rapportage* (Racism & Extremism Monitor; seventh report), Amsterdam: Anne Frank House / Leiden University 2006, pp. 208-233.

evidently did not know how to deal with a suspect's extreme right-wing background, and that at the same time the obligatory 25% increase in sentences was seldom explicitly advocated.⁵⁷

The WODC study of illegal discrimination also looked into criminal offences aggravated by discriminatory behaviour.⁵⁸ This study shows that in many cases (two thirds) alcohol is involved, and that these offences are often committed in groups (40%). The perpetrators are usually young ethnic minority men between the ages of 18 and 35. In December 2007, in response to the study, the government announced that the instruction to increase penalties by 25% should be brought to the attention of the chief public prosecutor.⁵⁹ The government also demanded that the police and the Public Prosecution Service do a better job of registering criminal offences aggravated by discriminatory behaviour, a problem that the Monitor project has long been calling attention to.⁶⁰

Next we will discuss two categories of criminal offences aggravated by discriminatory behaviour: assault (art. 300 of the Criminal Code) and arson (art. 157 of the Criminal Code). And finally we will look at racism as an "aggravating circumstance" in these cases.

10.4.1 Assault

Three men assault an autistic ethnic minority man and throw him in a pond. One of the men – known as a right-wing extremist – takes his case to a higher court. The Den Bosch court of appeals rules that the man is guilty of being a joint principal.⁶¹ He lured the victim to the scene of the crime and called one of the other perpetrators. The three men had agreed earlier that the victim would be "given a good roughing up." In view of the severity of the punishment, the court also took the following into account:

- a. the fact that the suspect, according to the extract from the Criminal Records Register concerning him dated 22 January 2007, had already been convicted of criminal offences in this connection, in which – like the case in question – there were racist overtones;
- b. the fact that the suspect knew that the victim was disabled.

An interesting aspect of this case is that the court of appeals took into account the fact that there was evidence of a criminal offence aggravated by discriminatory behaviour and increased the severity of the sentence as a result. This rarely happens so explicitly.⁶² In addition, the fact that the victim was disabled also led the court to increase the sentence. In cases of discrimination on several grounds the concept of

⁵⁷ For more on the *Discrimination Instructions* see chapter 9, "Investigation and prosecution in 2007," section 9.3

⁵⁸ C. Brants, R. Kool & A. Ringnalda, *Strafbare discriminatie* (Illegal discrimination). Den Haag: Boom Juridische Uitgevers 2007, chapter 5.

⁵⁹ *Kamerstukken II* 2007/08, 31 200 VI, no. 97, p. 4.

⁶⁰ Also see Renée Kool & Mirjam Siesling, "Aandacht voor strafbare discriminatie" (Focus on criminal discrimination), *NJB* 2008, pp. 1152-1156.

⁶¹ Den Bosch Court of Appeals, 16 February 2007, LJN BA1900.

⁶² Observed for the first time with regard to a racist attempted suicide, Dordrecht district court, 5 October 2006, LJN AY9559.

"intersectionality" is sometimes evoked, which raises questions concerning the level of protection and sanctions.⁶³ In this case, the court explicitly considered this twofold discrimination in determining the severity of the punishment. The perpetrator is a recidivist, moreover, and was sentenced to four months' suspended imprisonment. He was also ordered to submit to social rehabilitation under supervision, was sentenced to 120 hours' community service and was forced to pay the victim 380 euros in damages.

A confrontation is often spontaneous, but sometimes organised street violence is also of a more or less racist or extreme right wing character. There are several parties involved, usually groups of youths, who get into fights at school, at places where they hang out or at a nightspot. Often perpetrators and victims are not easy to tell apart. In recent years there has been a steady increase in confrontations, which seem to have passed their apex in 2007.⁶⁴

A similar confrontation occurred between a group of about twenty skinheads and a group of mainly dark-skinned skaters in a sports park in Zoetermeer. The district court found one of the skinheads guilty of attempted grievous bodily harm.⁶⁵ The man and his companions were dressed as "Lonsdalers," according to the court,⁶⁶ with symbols applied to their clothing such as swastikas, SS symbols, Celtic crosses and White Power and Ku Klux Klan logos. The group got into a fight with a group of skaters and began to strike mainly the dark-skinned skaters with sticks. At the same time, several of the victims were kicked in the torso and head. According the judge, the fact that no one was seriously wounded was more luck than anything else. The court blamed the perpetrator for the fact that the victims were assaulted only because they were not white. In addition, the man had previously been found guilty of anti-Semitic defamation (art. 137c of the Criminal Code). This perpetrator, too, was a recidivist and was sentenced to 200 hours' community service and three months' imprisonment, three months of which were suspended.

The Education Inspectorate puts out an annual report on "the state of the educational system." The 2006-2007 report shows that discrimination and racism between pupils is a common phenomenon.⁶⁷ The schools indicated whether they had had to deal with certain problems in the form of a few incidents per year. The results for discrimination and racism varied from 54% at the upper secondary levels to 70% at the level of vocational training.⁶⁸ Schools rarely have to deal with religious extremism, whereas

⁶³ See, among others, Sandra Fredman, "Double trouble: multiple discrimination and EU law," *European Anti-Discrimination Law Review*, 2005, no. 2, pp. 13-18 and Sarah Hannett, "Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination," *Oxford Journal of Legal Studies* 2003, pp. 65-86.

⁶⁴ For more on confrontations see chapter 2, "Racial and right-wing extremist violence in 2007," table 2.1 and section 2.4.

⁶⁵ The Hague District Court, 23 August 2007, LJN BB2246.

⁶⁶ Also see Jaap van Donselaar (final ed.), *Monitor Racisme & Extremisme. Het Lonsdalevraagstuk* (Racism & Extremism Monitor. The Lonsdale problem). Amsterdam: Anne Frank House / Leiden University 2005.

⁶⁷ 'De staat van het onderwijs 2006-2007' (The state of the educational system, 2006-2007). See <www.onderwijsinspectie.nl>. Also see G. Mohebbi, *Allochtonia – Autochtonia. Twee werelden apart* (Aliens and natives. Two worlds apart). Zoetermeer: Betelgeuze 2008.

⁶⁸ *Ibid.*, p. 206.

"white" extremism is more problematic. This varies from 9% at the upper secondary levels to 27% at the level of vocational training.⁶⁹ According to the report, Lonsdale youth have a negative attitude towards ethnic minorities, and sometimes they engage in active confrontations with ethnic minority youth.

At a school in Naaldwijk, for example, three extreme right-wing skinheads deliberately attacked an ethnic minority student, who was stabbed several times with a pair of scissors. The student, 16 years old and of Moroccan origin, was saved by the intervention of the school's caretaker. The district court established that the perpetrator, who was joined by another boy, got into a fight with a foreigner, as he himself put it.⁷⁰ In determining the punishment, the court took into account that the perpetrator had no criminal record and sentenced him to 120 days' juvenile detention, 77 of which were suspended, under the condition that he follow the rules and instructions of juvenile rehabilitation.

The striking thing in this case is that the obvious racist dimension was not taken into account in the form of an increased sentence. In his indictment, the public prosecutor said that racism as a motive was not apparent in the dossier. According to the *Discrimination Instructions*, however, proof of a racist motive – always difficult – does not have to be produced: demonstrating the discriminatory aspects of the offence is sufficient.

Finally, an incident occurred at a primary school in which a woman was told by her two daughters that they had been bullied by children of Turkish origin. The mother, a native Dutch Haarlem woman of 47, lost her temper and went right up to the Turkish mothers, whom she found at a nearby playground. The woman set her dogs on the mothers while making rude comments such as, "F*** Muslims, go back to your own f*** country." Someone who happened to be passing by witnessed the scene. The women reported the incident to the police, and the police court convicted the women of threatening with violence and of racist and religious insults. She was sentenced to 40 hours' community service.⁷¹ The police court judge was quite clear in making the connection between race and religious as grounds for discrimination. The discriminatory insult was handled on the basis of art. 137c of the Criminal Code and not art. 266 of the Criminal Code (simple defamation).

It is commonly assumed by the Public Prosecution Service that conviction on the grounds of art. 137c of the Criminal Code is only possible if there is evidence of "defamation of a group of people," and that therefore the insulting must be directed at more than one person.⁷² This distinction does not strike me as correct. Nor is it consistently applied. The rude comment "F*** homo, you're all [*jullie zijn* in Dutch – second person plural] a disgrace to society" in combination with "Nigger, you're [*je bent* in Dutch – second person singular] a disgrace to society" does not result in a conviction on the grounds of art. 137c of the Criminal Code, according to the Amsterdam district

⁶⁹ Ibid., p. 211.

⁷⁰ The Hague District Court, 9 August 2007, LJN BB2554.

⁷¹ Haarlem District Court, 29 October 2007, public prosecutor's office no. 15/660636-06.

⁷² Gardine Dankers & Paul Velleman, *Handboek Discriminatie 2006* (2006 Discrimination Handbook), Amsterdam: Landelijk Expertise Centrum Discriminatie 2006, pp. 74-78. This work by the Public Prosecution Service is not available to the public.

court, but to conviction on the grounds of art. 266 of the Criminal Code.⁷³ The second person plural form *jullie zijn*, however, would have resulted in a conviction on the grounds of art. 137c of the Criminal Code. If the sentence had been, "(***) , you're [second person singular] a disgrace to society," art. 266 of the Criminal Code would have applied. This difference is no longer accepted by legal experts. Back in the 1990s Pospel wrote that every person from a particular group will experience the comment in question as insulting. Indeed, the reason why someone is insulted in the first place is because he belongs to a particular group.⁷⁴ The grounds for discrimination apply by definition to group characteristics (whether supposed or not), and they also apply to every individual member of the group. Janssens explains this in his dissertation as follows:⁷⁵

"Denying the dignity of a single individual can be specifically based on one of the group characteristics found in art. 137c of the Criminal Code and is then punishable on the grounds of that provision. From this point of view the contents of the notion of defamation in art. 137c of the Criminal Code differs little from that in art. 266 of the Criminal Code."

The task now is for the judiciary and the public prosecutors to eliminate from the criminal discrimination prohibitions their current practice of distinguishing between singular and plural insults based on group characteristics. Support for this view can also be found in the Supreme Court judgement of 1984 in which personally insulting a Jewish woman was qualified as a group insult.⁷⁶ The singular insult not only has a lower maximum penalty (three months as opposed to twelve months for discriminatory defamation) but is also an offence that is only subject to prosecution after a civilian complaint has been filed. It is my feeling that in the case of insult based on prohibited group characteristics, prosecution based on art. 137c of the Criminal Code should be offered by virtue of legal certainty and for a proper explanation of discrimination based on group characteristics.

10.4.2 Arson

In 2007 there were eleven cases of arson or attempted arson.⁷⁷ This is the same number as in 2006. Two fires attracted a great deal of publicity and both resulted in judgements in 2007: the burning of a mosque in Edam and of a synagogue in Almere.

Three young people from Edam were held accountable for the arson in Edam: two men and a woman. One of the men was tried separately. In the case of the man and the woman, the district court found that they had thrown a Molotov cocktail against the wall of the mosque.⁷⁸ This Molotov cocktail had been made shortly before the incident in a garage, where the two had gathered with other Lonsdale youth. In this garage, a number of those present discussed the plan to set the mosque on fire. Then the three drove to

⁷³ Amsterdam District Court, 8 November 2007, public prosecutor's office no. 13/412395-07.

⁷⁴ Utrecht District Court, 9 October 1992, RR 1995, 298, esp. Pospel, and also see J.C.M. van der Neut, *Discriminatie en strafrecht* (Discrimination and criminal law). Gouda: Quint 1986, p. 68.

⁷⁵ A.L.J.M. Janssens, *Strafbare belediging* (Criminal defamation). Amsterdam: Thela Thesis 1998, p. 394.

⁷⁶ Supreme Court, 26 June 1984, RR 1995, 69.

⁷⁷ See chapter 2, "Racial and extreme right-wing violence in 2007," table 2.1 and section 2.4.

⁷⁸ Haarlem District Court, 31 May 2007, LJN BA6136 and BA6137.

the mosque, bringing the Molotov cocktail with them. When they arrived at the mosque, they found that the light was still on. So they drove around for a while, and after half an hour they returned to throw the Molotov cocktail at the mosque. The building caught fire immediately, while four men were present in the mosque. That nothing more serious happened is mainly owing to the fact that one of the four men ran through the fire, grabbed a fire extinguisher and managed to put the fire out. The district court assumed that the light in the mosque was still on when the suspects returned. So the three knew, or in any case took into account the fact that at that point there were still people in the mosque, for which the court gave them full blame.

The district court and the public prosecutor were of the opinion that this behaviour was clearly discriminatory. In throwing a Molotov cocktail at a building that is meant for religious activity, such a conclusion is inherent – regardless of what was actually behind the perpetrators' conduct and regardless of the extent to which they were willing or able to examine the social and political consequences of their action. They were guilty of deliberately setting fire to a house of prayer, an act that can be seen as a direct infringement of the fundamental right to freedom of religion. It was clear that the discriminatory character of the act would be taken into account in the sentencing. The court rightly stated that in order to reach a sentence it was not necessary to ascertain the motives of the perpetrators: the decision to attack an Islamic house of prayer was sufficient to establish discriminatory motives. This judgement was one of the few to include such pointed comments about discriminatory motives by the judge, which occurs especially when the public prosecutor has focused attention on it in his indictment.

The perpetrators were sentenced to twelve months' imprisonment, half of which was suspended. They were also ordered to submit to social rehabilitation and to 240 hours of community service.

In the separate case against one of the arsonists, it was found that he had already been found guilty of desecrating Jewish graves in an earlier case. The boy had an anti-social personality disorder and for this reason was regarded as less than fully accountable for his actions. There was also evidence of an addiction problem and an extreme right-wing background. The court sentenced the young man – on the basis of the same offences as those for which his accomplices were tried – to twelve months' imprisonment, half of which was suspended.⁷⁹ He was also ordered to submit to social rehabilitation under supervision and to treatment for his addiction.

In another case of arson, the district court sentenced a group of eleven young men with extreme right-wing sympathies to nonsuspended imprisonment of from seven to sixteen months, among other penalties.⁸⁰ All eleven youths were acquitted of setting fire to a former home improvement centre in Almere, with which they had been charged. They were convicted of threatening the squatters living in the building with gross maltreatment on 20 February 2007. In its decision, the court stated the following:

"In determining the punishment to be imposed, the court seriously took into account the feelings of social unrest brought about by the raid on the former Formido

⁷⁹ Haarlem District Court, 17 August 2007, public prosecutor's office no. 15/40110-07.

⁸⁰ Zwolle District Court, 4 September 2007, LJN BB2830, BB2832, BB2832.

building. The court also took into account the fact that at this point in time, actions that are extremist in nature, no matter from which side, can contribute to further radicalisation, and is of the opinion that this must be dealt with vigorously."

Five of the suspects were also convicted of two cases of attempted arson (in an Islamic school and in a synagogue in Almere), of vandalising and causing damage to an Islamic supermarket in Almere and of setting fire to a squat in Amsterdam. The two minors who were part of the group were sentenced to 200 hours of community service and suspended juvenile detention.⁸¹ The sentence is worth noting because the court condemned extremist actions – regardless of the ideological background – due to the risk of further escalation and radicalisation.

10.4.3 Aggravating circumstances

The *Discrimination Instructions* stipulate that in the case of criminal offences aggravated by discriminatory behaviour, the public prosecutor must demand a 25% increase in punishment if a discriminatory dimension is present.⁸² It is rare to see this increased sentence explicitly expressed in case law, and usually it only occurs after the public prosecutor has asked for it in his indictment. Attention is also paid to the sentence increase in attempts to harmonise criminal law against discrimination within the European Union. In the EU proposal for a *Framework decision on combating racism and xenophobia*, the preamble states the following in point 6:⁸³

"Racist or xenophobic motivation should be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect."

The racist motive, which is often difficult to prove, is included in the *Framework decision*.⁸⁴ The *Discrimination Instructions* set less severe requirements, however: demonstrating a discriminatory dimension is sufficient.⁸⁵

The European Court of Human Rights (ECtHR) has also given its opinion of racially motivated violence. In Bulgaria, a Romani man was beaten up and stabbed by a group of seven boys. The man died of his injuries. The criminal investigation took a very long time, and as a result no one was prosecuted. The ECtHR found that there was no evidence whatsoever of an effective investigation of the death of the victim.⁸⁶ The fact that Bulgarian criminal law does not have a specific provision for racially motivated murder or assault did not constitute a violation according to the ECtHR, but the absence of specific charges against the seven youths of racially motivated crimes did. Despite the fact that one of them had promptly confessed racist motives, the Bulgarian judiciary did

⁸¹ Zwolle District Court, 4 September 2007, LJN BB2836 and BB2838.

⁸² *Staatscourant* 2007, 233.

⁸³ PBEG C 75E/269 of 26 March 2002.

⁸⁴ Also see chapter 9, "Investigation and prosecution in 2007," section 9.2.

⁸⁵ C. Brants, R. Kool & A. Ringnalda, *Strafbare discriminatie* (Criminal discrimination), p.161.

⁸⁶ ECHR, 26 July 2007 (Agelova and Iliev vs. Bulgaria), *European Human Rights Cases* (EHRC) 2007, 108.

nothing with this confession. The ECtHR ruled that such a failure constituted a violation of art. 14 of the ECHR.

The court held, among other things, the following (115):

"[...] Moreover, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. [...]"

In an earlier case, the ECtHR had already made it clear that when an assault was committed by an individual on the basis of art. 14 of the ECHR, the government had a special duty to expose any racist motives.⁸⁷ Carelessness in this regard can result in the member state in question being found in violation of the prohibition on discrimination in art. 14 of the ECHR. Once again, the incident here had to do with the gross maltreatment of a man of Romani origin by several skinheads.

It seems to me that considerations having to do with penalty increases for criminal offences aggravated by discriminatory behaviour can no longer be implicitly contained in judgements made by Dutch courts. Not only is it almost impossible to determine whether those considerations took place at all, but because they are implicit it is impossible to verify judgements made on this point. This seems to be in violation of ECtHR case law. From now on, public prosecutors ought to incorporate their request for an increased sentence in their indictments, and the courts ought to indicate in their judgement whether they are granting this request or not.

10.5 Conclusion

There are two sides to the discussion of freedom of expression and crimes of expression. On the one hand, it is rightly argued that the prohibition on discrimination should not lead to a situation in which individuals cannot freely express themselves within their responsibility before the law. On the other hand, there is a whole spectrum of measures aimed at remarks made by Islamic radicals in which a stricter standard seems to have been applied. This imbalance can also be found in various policy documents in which most of the attention is focused on hate mongering by Islamic radicals, while insufficient light is shed on the extreme right.

The danger of right-wing extremism should not be underestimated, however. The discussion of criminal offences aggravated by discriminatory behaviour shows that quite a few serious cases can be found at that end of the ideology spectrum. Furthermore, not only should the impact of the crime on the victim be taken into account, but so should the fear and insecurity that members of the surrounding community experience as a result. The argument that only a few serious cases of discriminatory violence ever take

⁸⁷ ECHR, 31 May 2007 (Šečić vs. Croatia), ECHR 2007, 92 with case note by Henrard.

place is a failure to appreciate the effect that these deeds have on members of the minority groups concerned.⁸⁸ Not only that, but recidivism in cases of racial violence is by no means exceptional.

It should be emphasised that general prevention is one of the goals of criminal law, which should be better expressed in cases of racial violence. Public prosecutors should explicitly include the 25% increase in sentences for criminal offences aggravated by discriminatory behaviour in their indictments. Subsequently, judges should be explicit when granting this demand. In this way, the fact that our society does not tolerate these forms of violence in particular is given expression.

The ECtHR interprets the discrimination prohibition in the same way. One misconception is the idea that the Public Prosecution Service has to prove the discriminatory *motive*. Our regulations, expressed in the form of the *Discrimination Instructions*, demand only that the discriminatory dimension be demonstrated. In the words of the Haarlem district court: "In throwing a Molotov cocktail at a building that is meant for religious activity, such a conclusion is inherent." Such a pragmatic approach is quite sufficient.

Despite the fact that the largest part of the iceberg is under water, there is enough sticking out to teach us something. The Minister of Housing, Communities and Integration would like to encourage the public – ethnic minorities and native Dutch – to report discriminatory incidents. To make this happen, the public needs to understand that there is a point to complaining about racial discrimination. The best way to increase the public's willingness to report these incidents is to make them aware of successful cases. By learning about these cases, people will come to realise that reporting discriminatory incidents can produce results. For criminal law this means that the police and the Public Prosecution Service must conduct an active policy on racial discrimination. Stimulating new case law (law formation) and taking the initiative (in an official capacity) are part of this effort. Case law should be given as much publicity as possible and should be made known to the public at regular intervals by way of the media, both new and conventional. In short: we need stories.

⁸⁸ Renée Kool & Mirjam Siesling, "Aandacht voor strafbare discriminatie" (Focus on criminal discrimination), NJB 2008, pp. 1152-1156.