

## DISCRIMINATORY ASPECT AS AGGREGATED CIRCUMSTANCE

Figures and experiences

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### Summary

The Minister of Justice and Security promised to submit a study to Parliament to what extent the policy intensifications of recent years have contributed to the proper application of the policy for aggravation for offenses with a discriminatory aspect. It will also be examined whether other policy intensifications are conceivable to improve the current working method.

Articles 137c to 137g and Article 429quater of the Criminal Code criminalize the basic forms of discrimination, namely insulting in public because of race, religion, belief, sexual orientation or disability (Article 137c), inciting hate, discrimination or violence (art. 137d) to make public, send and disseminate statements that offend a group of people; this also includes objects such as books, magazines, images and image and sound carriers that offend people (art. 137e); participating in and supporting discriminatory activities (art. 137f) and professional discrimination (art. 137g and 429quater). However, we also have so-called common offenses with a discrimination aspect. This form of discrimination is not anchored as such in criminal law, but may play a role as a motive or reason for a criminal offense. Specific attention is, however, drawn to these offenses in policy rules of the Public Prosecution Service. In the current Discrimination Instruction (2018A009), common offenses with a discrimination aspect - abbreviated to CODIS facts - are described as follows:

This concerns, for example, crimes such as assault, public violence, simple insult, threat, sedition, vandalism, arson or manslaughter in which a discrimination aspect under article 137c Criminal Code has been used as a motive or reason, or has been used to commit the offense more penetratingly. Even if the discrimination aspect lies in a gender identity that does not suit the birth gender, this is considered a criminal offense with a discrimination aspect.

The aim of the study is to examine to what extent policy intensifications in the legal approach to discrimination since 2015 have contributed to the more intensive inclusion of a discrimination aspect in the criminal charges and sentencing and the transparency thereof. The results of the study will examine to what extent there is reason to include a discrimination aspect as an aggravating circumstance in law.

We first briefly present the research methods used, namely: desk research, registry research, interviews and attending court hearings.

**Desk research.** In particular, use was made of the annual publications of the police and the Public Prosecution Service in the field of discrimination. In addition, 63 verdicts published on [www.rechtspraak.nl](http://www.rechtspraak.nl) have been studied.

**Registry research.** The police discrimination case overviews for the years 2017 and 2018 have been linked to data from the Public Prosecutor's Office and the Judiciary by using the official report number. In this way, it has been investigated which cases of the discrimination reports from the police are labeled as specific discrimination offenses or CODIS offenses by the Public Prosecution Service. The Public Prosecution Service has also made a datafile of all incoming discrimination offenses (specific and CODIS) available.

**Interviews.** Two interviews were conducted with the police and eleven with (assistant) prosecutors, working for eight out of ten District Prosecutors. Finally, six judges working at five courts were interviewed. The interviews were held partly face-to-face and partly by telephone.

**Attending court hearings.** We attended nine court hearings. These sessions took place in Dordrecht (two sessions), Rotterdam (three sessions), The Hague (two sessions), Haarlem and Amsterdam. The hearing in Amsterdam has been a hearing of a Full Court; in other cases it concerns courts with one judge (a so-called police judge).

Part of the criminal discrimination reported to the police is recognizable in the Police Registration System. The police additionally search their registration system for keywords based on queries and these overviews are manually cleaned by experts. However, some of the cases with a (possible) discrimination aspect are not captured by the queries, so we do not see them in the discrimination case overview of the police. In principle, cases in which one or more suspects have come into the picture are sent to the Public Prosecution Service. However, the "discrimination label" of the police does not play a role in awarding the classification Discrimination by the Public Prosecution Service. At the other hand, a case that has not been picked up by police queries can be registered with the Discrimination Classification at the Public Prosecutor's Office.

### **Specific discrimination**

How many specific cases of discrimination are registered with the police cannot be determined, because the nature of the police administration does not allow us to distinguish between specific cases of discrimination and CODIS cases. We do know how many specific discrimination offences are registered at the Public Prosecution Service in the years 2015 to 2018. A total of 532 specific discrimination offenses entered in the period 2015 to 2018, with a distribution over these four years as follows: 142, 163, 144 and 83 offenses. Specific discrimination offenses mainly concern group insult (Art. 137c Sr). In the years 2015 to 2018, approximately 80 percent of the registered specific discrimination offenses was registered under this article. About half of the specific discrimination offenses are sent to court by the Public Prosecution Service in the period from 2015 to 2018. The distribution fluctuates per year.

### **CODIS offenses**

How many CODIS cases are registered with the police cannot be determined for the same reason as mentioned in the specific discrimination cases. A total of 901 CODIS offenses were registered by the Public Prosecution Service in the period from 2015 to 2018, with a respective breakdown per year as

follows: 168, 232, 189 and 312 facts. CODIS offenses usually concerns an insult (Article 266/267 of the Criminal Code), as well as threats, violence and vandalism.

### **Not registered as a CODIS-offense at the Public Prosecution Service**

There are many cases of the discrimination case overview of the police that do not receive the classification Discrimination from the Public Prosecution Service. The registry research shows that about 5 percent of inflowed offenses (after filtering out the specific discrimination offenses) that appear on the police discrimination overview, are registered as a CODIS-offense at the Public Prosecutor's Office.

There are two main explanations for this major difference. On the one hand, there are considerable differences in opinion about what should now be seen as a CODIS-offense. On the other hand, registration with the Public Prosecution Service leaves much to be desired. Besides the difference of opinion about what constitutes a CODIS-offense, there is also regularly no Discrimination classification given in the system.

### **The settlement of CODIS-offenses and the consideration of the discrimination aspect**

In our research, we followed 3,540 suspects who were sent to the Public Prosecution Service for a case that appears on the police's discrimination case overview. Of these, 190 suspects (5.4 percent) were registered with the Public Prosecution Service for one or more CODIS-offenses. In addition, 95 suspects (2.7 percent) were registered for one or more specific discrimination offenses. And there are twelve suspects (0.3 percent) registered for both CODIS and specific discrimination offenses and finally, most suspects, namely 3,243 (91.6 percent), are registered with the Public Prosecution Service without the label Discrimination even though the offenses of these suspect do have the label Discrimination on the police case overview.

### **Settlement of CODIS facts**

The 190 suspects are suspected of 233 CODIS-offenses. The settlement of nine facts is still unknown. A quarter of the facts have been dismissed, mostly due to a lack of evidence. Of the other facts, 14 percent were settled at first instance with punishment by the public prosecutor (24 facts), but seven facts were opposed and the case was still brought to court. A large majority of the CODIS- offenses have been brought before the courts. If we disregard the dismissed cases, 83 percent of the CODIS-offenses are brought to court by the Public Prosecution Service.

In the interviews, the public prosecutors indicate that a case will be brought to court if it is a (relatively) serious case. The attitude of the suspect (confess or not) and the victim (willing or not to have mediation) also play a role. Some officers also cite efficiency as a reason; punishment by the public prosecutor relieve the police judge. Finally, attention is also drawn to the public interest. If it is important to send a signal that such behavior is not tolerated, then going to court is obvious because of the public nature of a court hearing.

### **Discrimination aspect and the sentence**

The public prosecutors indicate in the interviews that many elements play a role in determining the sentence and that the aspect of discrimination is one of them. If a case has been designated as a CODIS-offense, the discrimination aspect is also mentioned by the prosecutor and the aspect is taken into account in the demanded sentence. However, it is not the case that multiple aggravating circumstances are added together indiscriminately, because that would in many cases lead to a disproportionate sentence that the judge will not agree with. In their demanded sentence, officers often anticipate what they expect the judge to consider fair.

If a case is not registered as a CODIS-offense with the Public Prosecution Service, but does appear on the police's case overview of discrimination, sometimes the discrimination aspect in the demanded sentence is sometimes taken into account; this "sometimes yes and sometimes no" is not easy to quantify. We have found 56 judgments on rechtspraak.nl of cases that appear on the police overview. In thirteen of these 56 judgments the discrimination aspect is mentioned (23 percent) and in six of these judgments (11 percent), the discrimination aspect is taken into account in the sentence. If these cases are representative of all cases that are on police overviews, but that are not assigned a CODIS qualification by the Public Prosecution Service, then in about 10 percent of those cases the discrimination aspect would be taken into account in the sentence. It is doubtful, however, whether these cases are representative of all cases, as the judgments relate to Full Court, while the majority of cases are brought before a police judge.

### **Sentencing policy of judges**

Just as many elements play a role in the demanded sentence of the public prosecutor, it also applies in determining the sentence by the judge that various aspects play a role, and that the final punishment is not a straightforward sum. In the police overviews of discrimination cases, many cases relate to discriminatory insults. Most prosecutors believe that insults in terms of "filthy gay" should be seen as a form of insult, but they do not attach any discrimination aspect to it. And, this is in line with how the judges view this. In general, they believe that "gay shouting" is seldom a reason for an increased sentence. It is important for judges whether the words gay, Jew or black are used as general insult or whether these words are deliberately chosen to hurt the victim even more. Consciously racist insult is seen as more offensive by judges than gay insults, because skin color is a visible characteristic. Some of the judges interviewed also indicate that the intensity of the insult is important, but that this is not directly related to the use of discriminatory insults.

### **Discrimination aspect taken into account and the sentencing practice for CODIS-offenses**

In total, the verdict of thirteen suspects (in eight lawsuits) of CODIS-offenses is studied. In all these cases, the public prosecutor has mentioned the aspect of discrimination in court and has been considered in the sentence. Where this is made explicit, an increase of 50 to 100 percent is required. In one of the cases, the judge is of the opinion that although the incident has been a nasty experience for the victim and that the statements of the suspects point to a discriminatory nature of the violence, it is not proven that such a *motive* was also the reason for the incident. Therefore, the court does not

include the discrimination aspect as an aggravating element in the judgment. In all other cases, the judge does agree with the officer's position that there is a discrimination aspect.

We have not been able to determine how the judge ultimately weighs up the discrimination aspect in the sentencing. And it is probably not possible to determine this either, because the final punishment is not a mathematical sum. We can, however, see to what extent the verdict corresponds to the officer's demanded sentence. In two out of eight cases, the judge fully follows the officer's demand. In two cases, the judge follows the officer's demand for non-prison terms. The judge punishes a little milder with prison sentences. In four out of eight cases, the judge punishes more leniently compared to the officer's demand.

The final conclusion is that the discrimination aspect in CODIS-offenses is mentioned in court and is taken into account. In most cases, the judge agrees that there is a discrimination aspect. The judge regularly punishes milder than what the officer demands. We have not been able to determine to what extent this can be attributed to milder weighting of the discrimination aspect.

### **Effect of policy intensifications**

The introduction of the classification Discrimination in 2014 has ensured that CODIS-offenses have become more visible. In the annual report of LECD (Expert Center Discrimination of the Public Prosecution Service), attention is now also paid to CODIS-offenses, and the new Discrimination Instruction also devotes considerable attention to this. The LECD assists colleagues in the country with advice and assistance. However, there is still a lot to be desired on this point. For the discrimination officers at the public prosecutor's offices, the discrimination portfolio is a task accent for which no working time is allocated, as is also the case for other portfolios. In addition, these officers have little insight into the cases that are sent from the police overviews to the Public Prosecution Service. Moreover, it is not sufficiently monitored whether the classification Discrimination is included in GPS (Registration System of the Public Prosecution Service) . Furthermore, the discrimination officers have no systematic insight into the settlement of discrimination cases in their district. With regard to the LECD, this part of the Public Prosecution Service organization has demonstrably failed at sometimes due to a lack of capacity; this is certainly the case where the training of new discrimination officers is concerned.

### **Possible further policy intensifications**

The introduction of the classification Discrimination in the registration systems of the Public Prosecution Service has ensured that common offenses with a discrimination aspect become visible for policy purposes. It then appears that there is a big gap between the number of cases on the discrimination overview of the police and the offenses that are classified as discrimination at the Public Prosecution Service. This could be an important reason for further tightening of the policy. We are thinking here of aspects that play a role in the four points below.

1. Definition of CODIS-offenses
2. Case selection by the police

3. Linking discrimination overviews of the police to the administration of the Public Prosecution Service

4. Completion of the discrimination portfolio

It is, of course, true that the judge is independent and that therefore no policy intensifications are imposed by the minister. Having said this, it is striking that discrimination has so far not been included as an aggravating circumstance in the so-called LOVS guidelines for judges. We do see, however, that judges to a certain extent follow the prosecution's demand when an aggravated sentence is requested because of a discrimination aspect. If discrimination were included in the guidelines, this would probably provide the judge with more guidance in assessing and taking this aspect into account. Ideally, there should be agreement across the criminal justice system (police, prosecution and judiciary) as to when there is a discrimination aspect.

Finally, the interviewed prosecutors and judges were asked about the possible advantages and disadvantages of a legal aggravation ground for a discrimination aspect in penal law offenses. The benefits mentioned by the interviewed prosecutors include the building up of case law and a greater awareness that a discrimination aspect can be regarded as aggravating. The disadvantage is that it curtails the freedom of action of judges. The judges interviewed partly point to the same advantages and disadvantages as the officers. The comparative legal research of a possible legal anchoring of the discrimination aspect that is being conducted in parallel to our research, is expected to provide more information that can be involved in answering the question of its desirability.