

Executive summary on race equality directive
State of play in
THE NETHERLANDS
19 November 2003
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Introduction

The Netherlands has experienced large migratory movements since the 1950s from former colonies, mainly Indonesia and Surinam, but also from the Dutch Antilles, which are still part of the Kingdom of the Netherlands. Since the 1960s, the Netherlands has also attracted even larger numbers of labour migrants from countries like Italy, Spain, Portugal and Yugoslavia, as well as Turkey and Morocco. Migrants with a background from Turkey and Morocco now constitute, together with migrants from Surinam, the largest migrant groups. As in many Western European countries the Netherlands has seen a large influx of refugees and asylum seekers since the beginning of the 1980s.

The Government and Parliament, as well as society as a whole in general have as a stated objective ensuring the integration of (im-)migrants in society in a non-discriminatory way, in line with their obligations under international human rights law. However, the extent of latitude with which rights are granted and protection and social security are provided varies with the perceived state of the economy and the perceived capacity of society to absorb newcomers.

For a long time the fight against racism was seen as an issue of moral conviction, rather than enforcing rights. However, at the beginning of the 1980s, legal instruments to fight racism were "re-discovered" when the Government, Parliament and NGOs realised that integration of migrants in Dutch society would have to include a policy to fight discrimination and racism with legal means as well. This awareness resulted *inter alia* in the establishment of the National Bureau against Racial Discrimination (Landelijk Bureau Racismebestrijding, LBR), an independent, non-governmental organisation combating discrimination, legal tools and the adoption, in 1994, of the Equal Treatment Act (ETA) and the establishment of the Equal Treatment Commission under the ETA.

Legal action has proved to be an effective way of dealing with racism and discrimination on a case by case basis in a society which sees itself as a society based on the rule of law. However, it can be time-consuming, costly and frustrating as well. Nevertheless, the conviction remains that legal means and the proper application and implementation of these means can be important weapons to prevent crises with racist overtones, of which we have had too many in the last few years in Europe.

Legislation and regulation is also being used for positive action. In recent year labour legislation was enforced with the aim of bringing about a situation whereby the percentage of the workforce who are ethnic minorities within an organisation is approximately equivalent to the percentage of ethnic minorities within the region. However, evaluation of the experience with this legislation shows that a lot remains to be learned about how legislation can be used effectively for a policy of affirmative action. The legislation on positive action is an example of legislation which has been debated widely in society, not only between the Government, Parliament and NGOs, but also among and with social partners.

The debate on effectiveness of equal treatment and non-discrimination legislation is from time to time rather heated. However, the transposition process of the two Directives by way of amending the Equal Treatment Act of 1994 has not been a subject of public debate. There are no fundamental issues at stake, since those were taken care of by introducing the ETA in 1994. Furthermore, the changes in the ETA that need to be made due to the Directives are mostly of a technical nature, which requires a certain level of expertise.

1. Main legislation

The Constitution establishes the general principle of equal treatment and non-discrimination, which is that “All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or any other grounds whatsoever shall not be permitted.”

Dutch law cannot be tested against the Constitution, but laws can be tested against international treaties such as the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD), so the priority of the principle of equality is ensured.

The main definition of racial discrimination can be found in the Criminal Code:

"Discrimination or discriminating shall be defined as any form of distinction, any exclusion, restriction or preference, the purpose or effect of which is to nullify or infringe upon the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social or cultural fields or any other field of social life."

The definition of the Criminal Code is modelled on the definition of CERD, but speaks of “discrimination”, rather than “racial discrimination”, since it is designed to cover also discrimination on grounds such as gender, sexual orientation, religion and belief and social status. It should be noted that the terms “race” includes ethnic and national origin, descent and colour. The term race can even include foreigners, aliens or asylum seekers.

The Criminal Code deals with discriminatory expressions, the distribution of discriminatory expressions in writing and otherwise, and with discrimination in the exercise of an office, a profession or a trade. The criminal law provisions apply to discrimination in all sectors of social life, but do not include private life, since this would be seen as interference through criminal law in the private sphere and infringe upon an individual's constitutional right of privacy.

Dutch civil law provides in two ways for remedies against racial discrimination: (1) on the basis of general civil law, using the Criminal Code definitions as point of reference, and (2) on the basis of the Equal Treatment Act.

As to general civil law, the following applies. Discrimination can constitute an infringement of one of the various general, “open” norms in legislation such as *good faith*, *good employer*, *apparent unreasonable dismissal*, and *proper administration*. Most important of all, discrimination can constitute a *wrongful act* under the provision on *tort*.

With regard to the Equal Treatment Act (ETA) of March 1994, which was already referred to several times, the following applies. The ETA elaborates upon the equal treatment principle

of the Constitution, not by referring to discrimination by referring to direct and indirect *distinction*:

- a. direct distinction: distinction between persons on grounds of religious or other consciously held beliefs, political opinion, race, sex, nationality, hetero or homosexual orientation or civil status;
- b. indirect distinction: distinction on grounds of "any other qualities or practices than referred to under b., leading to direct distinction".

These definitions are considered to be in line with the definition of the Directives.

Administrative Law does not contain a provision on equal treatment, but equal treatment is one of the General Principles of Proper Administration (*Algemene Beginselen van Behoorlijk Bestuur*), incorporated into law and hence applied by the administrative courts as law.

2. Main principles and definitions

The transposition of the Racial Equality Directive and the Employment Equality Directive, are part of the same process, although the instruments are partially different.

The main instrument to transpose the Racial Equality Directive is amending the *Equal Treatment Act* (ETA) of 1994. The plenary debate in Parliament on the Government proposals for the implementation of the two Directives by way of amending the ETA has taken place early October 2003. The *Implementation bill ETA* was adopted by the Second Chamber at October 9th 2003 and is being discussed by the First Chamber at this moment. This means that the transposition process for the Racial Equality Directive will probably not be formally completed before the end of the year.

For the transposition of the Employment Equality Directive, the Government has introduced amendments to the ETA, but has also introduced two new laws: a law on *Equal Treatment on the ground of age in employment* as well as a law on *Equal Treatment on the ground of disability or chronic illness*.

The ETA of 1994 already included the concepts of direct and indirect discrimination (see above, main legislation, civil law). Harassment, instruction to discriminate and victimisation were not expressly included in the ETA, but are included in the amendments of the ETA proposed by the Government in the transposition process.

3. Material scope

The present Equal Treatment Act covers most of the fields of application mentioned in the Directives, in both the public and private sectors.

However, the ETA needs to be amended in so far that servicing by, for example, interim agencies for (access to) employment and labour conditions needs to be brought *explicitly* under the scope of the ETA. The Government proposes in its draft law amending the ETA to include an explicit reference to servicing by employment agencies and to labour conditions in the ETA.

Unlike the Race Equality Directive, the present ETA does not cover membership of and involvement in an organisation of workers or employers, or any organisation whose members

carry on a particular profession, including the benefits provided for by such organisations. Therefore, the Government proposes including a provision in the ETA to the effect that distinction is prohibited “with regard to the membership of or involvement in associations of employers or workers or an organisation whose members carry out a particular profession, including the benefits resulting from the membership of these organisations and associations.”

It is important to note the following. The proposed amendment also includes the provision that an organisation or association founded on religious or ideological principles is still free to impose requirements on (potential) members that are necessary to realise its aims and safeguard its founding principles and can therefore require that (potential) members subscribe to the founding principles which can be related to a certain political, religious or other belief. These requirements may not, however, result in distinction on one of the other grounds. The reason is, as stated by the Government, that without this provision for example Christian employers associations, Islamic shop-owners associations, communist trade unions or social-liberal administrators associations could no longer require from their members that they subscribe to the founding principles of the organisations.

This exemption is parallel to the exemption allowed under the Directives in relation to genuine occupational requirements and strikes a reasonable balance with the freedom of association.

The material scope of the Dutch law goes beyond the Directives in the sense that nationality is also covered. The principle in Dutch law is that “all persons in the Netherlands shall be treated equally in equal circumstances”, as provided for in Article 1 of the Constitution.

The protection provided by criminal law, civil law, including the Equal Treatment Act, and administrative law applies to any person on the territory of the Netherlands.

The present as well as future ETA goes beyond the requirements of the Directives by explicitly prohibiting distinction on the ground of nationality. The exception is that the distinction on the ground of nationality is not forbidden if based on generally binding regulations (i.e. laws and decrees), as well as written or unwritten rules of international law. The prohibition will also not apply in cases where nationality is a determining factor (national football team!).

The *Implementation bill ETA* does not only cover the grounds mentioned in the Directives, but also covers the other grounds of the ETA (political opinion, sex, nationality, marital status). Also in this sense the Dutch law goes beyond the requirements of the Directives.

4. Equality bodies

The Equal Treatment Act of 1994 establishes an *Equal Treatment Commission*, which is also the designated specialised body for the transposition of the Racial Equality Directive. The Commission's mandate is to investigate and to rule on whether there has been unequal treatment or discrimination within the scope of the Act and the Equal Treatment of Men and Women in Labour Act. The Commission can also investigate on its own initiative whether there is structural unlawful distinction within a public service or within a (certain) sector(s) in society.

A written application for a ruling can be made by:

- a) anyone who feels that he/she is being discriminated against in the sense of the two Acts

- b) a natural or legal person or competent authority, wishing to know whether they are making an unlawful distinction in the sense of the two Acts
- c) anyone who is responsible for deciding on disputes concerning discrimination
- d) a workers' council which thinks that discrimination is or might be taking place within its organisation
- e) a legal person (organisation or society) who has the formal aim of defending the interests of those to whom the two Acts apply.

The Commission can make recommendations in addition to its rulings and can take cases to court, unless the person(s) who is (are) affected by the subject matter object(s).

Legal enforcement of a Commission ruling and claiming damages and other remedies, is only possible through a court of law, either through submission by the Commission or the applicant, but a favourable ruling by the Commission on Equal Treatment will increase the prospect of obtaining a positive ruling and subsequent damages in a court of civil law.

The Equal Treatment Commission is not a general court of law. It only has the powers specified in the Equal Treatment Act itself. The Commission can demand information, but cannot for example, unlike a regular court of law, summon the personal appearance of a witness.

5. Enforcing the law

Like the Civil Code, the Equal Treatment Act contains the provision that a foundation, an association or a body, which fulfils (partly) governmental tasks, can institute a legal action to protect the interests of others, as long as the person concerned does not object and the organisation fulfils formal statutory conditions.

The Equal Treatment Act does not provide for a conciliation or mediation procedure. It does not, however, exclude it.

There are quite a few advantages to the Equal Treatment Commission procedures over the regular court procedures. The main difficulties in using the regular legal system are, as in almost every country in the world, the costs of litigation and the length of procedures. The procedure before the Equal Treatment Commission addresses most of these implementation problems. Another advantage under the Equal Treatment Act, now to be amended, has been the application by the Equal Treatment Commission the rule of "reversal of the burden of proof", thereby alleviating the requirements of proof for the victim. Of course the Racial Equality Directive and consequently the amended Equal Treatment Act now requires the application of the reversal of the burden of proof also by the regular courts.

In addition, as stated above, the procedure before the Commission is free of charge and no legal representation is needed, although plaintiffs can seek the assistance of specialists, such as representatives of the National Bureau against Racial Discrimination or a local anti-discrimination bureau.

However, the ETC has no sanctions or powers to enforce their rulings. In order to seek enforcement of a ruling of the ETC, one has to go to a court of law.

The only sanctions included in the ETA itself are that termination of an employment contract in violation of the ETA can be annulled and provisions in contracts in violation of the ETA are void.

A summary overview of the experiences with the ETA:

- a) The lack of specific sanctions limits the Act's effectiveness. On average, fifty percent of the rulings of the ETC have been followed by the parties concerned. Parties can go to court to seek enforcement of the ruling.
- b) Plaintiffs in labour cases feel like they have lost, even if they win, due to the lack of possibility for compensation.
- c) Protection against victimisation currently exists only in cases of dismissal.
- d) The fact that the ETA allows only statutory exceptions, formulated in the ETA itself, prompts the Equal Treatment Commission (ETC) sometimes to resort to objective justification in cases of indirect discrimination.
- e) The public at large is rather unfamiliar with the ETA.
- f) Local anti-discrimination bureaux are an important channel for bringing racial discrimination cases to the ETC; they provide assistance to almost half of the plaintiffs in racial discrimination cases before the ETC.