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Discrimination beyond the Courtroom

Alex Brenninkmeijer*

It is an honour and a pleasure to be here at this important conference about Equal treatment and non-discrimination in European Law.

I am the Dutch colleague of Mr. Otakar Motejl, Ombudsman of the Czech Republic, and I am very pleased to share my ideas about equal treatment and non-discrimination with you. It is a part of our culture in the Netherlands, given that we live in a very flat land, that we say, "If you raise your head above the level of the blades of grass you risk getting your head chopped off." A common saying is: "Just behave normally." This attitude is part of the flat land, the "polder" culture of the Netherlands. I just used the word "normal," and normality is one of the distinctive elements of the Dutch culture. I took this background picture of the Dutch landscape with me to Prague, because, in my view, the notion of non-discrimination and equal treatment is, on the one hand, as the conference title says, something "from the Platonic Heaven" and, as such, a very general notion which can be applied all over Europe. But, on the other hand, non-discrimination is also intimately linked with the national culture; not only the national legal culture or the culture in society, but also the culture of the institutions behind the legal system and how those institutions implement the idea of equal treatment and non-discrimination.

I would like to share with you some very modest ideas about equal treatment and I am introducing these ideas in order to inspire you on the occasion of this conference. If we look at the subject of equal treatment, the legal framework is very important, and this legal framework nowadays consists of international law and European law as well as national law. On the other hand, aside from the legal framework, equal treatment policy is also extremely important for the development of the notion of equal treatment and non-discrimination. To what extent is equal treatment policy important in the view of the different political parties? Do political parties see equal treatment and non-discrimination as a must? As something you cannot avoid? Is it an element of the Platonic Heaven or not? What is the position of employers and employees with regard to equal treatment? And what is the role of the media?

Another question is: in what way is equal treatment part of social life? Is unequal treatment "not done," meaning does it violates unwritten rules of polite social intercourse? If so, is it not done to discriminate, or is it not done to treat people in an unequal way? Or, conversely, is equal treatment accepted in daily social life? We see that these elements are quite important and I will now discuss something about the Dutch background of equal treatment in order to inspire you and to raise questions about this subject in Czech society.

* The National Ombudsman of the Netherlands. This paper is an edited version of a key note address made at the conference 'EQUALITY IN EUROPEAN LAW – A PLATONIC HEAVEN?', Prague, 30 April 2009.

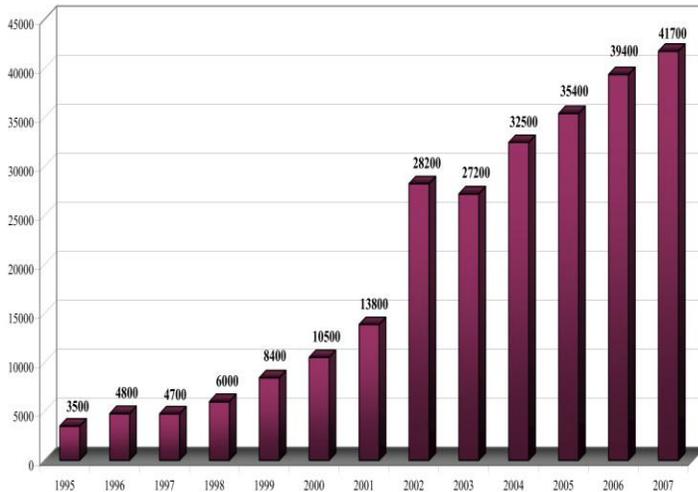
What about equal treatment in Dutch society? The background of Dutch society is tolerance. Dutch people happen to be quite tolerant. In the more distant past we have had some long lasting conflicts related to religion (Protestants versus Catholics). But in our modern society tolerance is very important. And I think that, from an outsider's perspective, many people get the impression that quite some things are possible in Dutch society. On the other hand we have to take into account the impact of the terrorist attacks in the United States referred to as 9/11. After 9/11, President Bush introduced the war on terrorism and he divided the world into good and evil. As a landmark in social life, 9/11 had a considerable impact on social and political life in the Netherlands. The character of the political debate changed after 9/11 and became focussed on the role of Islam. We have seen that one of our right-wing politicians, Mr. Wilders, was quite effective in popularising the subject of the threat of Islam. He linked the notion of Islam to fear and threat. In this way he has mobilised doubts in our society about the role of Islam. We have seen the international impact of the publication of his film "Fitna." Mr. Wilders made this film to illustrate his thesis that Islam is a threat to a peaceful society. He connected this issue with 9/11 and he said, "the Koran is a threat to modern society and the Koran is evil."

On the other hand, in the Netherlands we have witnessed a number of protests against Mr. Wilders. I have illustrated here a humoristic approach to the idea of the dangers of Mr. Wilders. A man was walking around with this placard stating: "Mr. Wilders as an extremist, who [like smoking] seriously harms you and others around you." This man was arrested by the police in Rotterdam. Subsequently, he complained to me and I said, "Arresting him is an obstruction of the right to demonstrate."

Looking at another element of equal treatment in Dutch society and in the Netherlands, we have witnessed quite a strong discussion about the value of the multi-cultural society. Dutch society is made up of quite some people from different cultures and up to a certain time – I think it was 4 years ago – the basic idea was tolerance and we did not discuss the real-life effects of living in a multi-cultural society. To a certain extent we can see that what Mr. Wilders is doing now is simply bringing it up for discussion, but in a way which we, or at least I personally, find regrettable. What we can see in the Netherlands is a polarisation of the political debate and, in my view, polarisation of the political debate is not helpful for the development of democracy. Of course, debate is a fundamental element of democracy, but if the debate is polarised you can see that the partners in the debate do not listen to each other. Rather, they are just talking at each other, and the media are blowing up this effect. In the end, you have a polarised society in which it is very hard to maintain democracy and the rule of law, and especially equal treatment and non-discrimination.

If we take a look at the effect of national and international law in the Dutch legal order we can see that international law has direct effect and European law shares in this development. So, the non-discrimination and equal treatment provisions of international law can be applied directly by Dutch courts. Our Constitution however, has no direct effect in relation to parliamentary laws. These laws cannot be tested against the Constitution. And for that reason international law and European law become more and more important. What we can see in the courts is that they apply international law, and especially article 26 of the International Covenant on Civil and Political Rights. What could be noted is that, for

instance, in relation to social welfare benefits, unequal treatment was an issue and the courts have decided that this unequal treatment was contrary to article 26 of the International Covenant. This has led to the adjustment of those provisions in national law, and has led to political debate in the Netherlands. In this way international law has had a catalyst effect on the discussion about equal treatment in the Netherlands.



If we look at the role of courts, I include a statistical table of the European Court of Human Rights, and the situation may be more or less the same at the Court of Justice in Luxembourg. One of the major issues in courts is the development of their workload. We have seen this in the Netherlands, and you can see it in Europe, that the majority of cases is quite difficult to decide on. So, in practice, it is very hard to finalize legal proceedings. I have been a judge for 20 years, and one of the major reasons I am not a judge anymore is that I became dissatisfied with the fact that no matter how clever my decisions might be, and no matter how much effort I put into them, these were pronounced several years after the beginning of the case. For me, an important question was the practical relevance of my decisions several years after the fact. I got interest for the question how can human rights be protected beyond the courtroom. That is my major issue in relation to the question: how can you prevent discrimination, how can you support the idea of equal treatment beyond the courtroom?

I have developed some thoughts about this. From the Dutch perspective we can see that we have a relatively low litigation rate. For example, compared to a part of Germany – Nordrhein Westfalen - to a certain extent comparable with the Netherlands – we can see we have a proportionately lower number of judges, and the numbers of lawyers is significantly lower than in Germany. In our culture we have a tendency to seek pragmatic solutions for problems.

There is a tradition of negotiation and even mediation is increasingly applied as a tool of dispute resolution. At the same time, besides negotiation and mediation, court proceedings

are important. You need court decisions as landmarks: you need case law which draws the lines on the subject of equal treatment. In the Netherlands we have two other institutions outside the courts. One is the Equal Treatment Commission. It is an independent commission and this commission can deal with complaints about equal treatment. Equal treatment is part of our constitution and is given effect through legislation elaborating the different elements of equal treatment (gender, race, religion etcetera). In addition, the National Ombudsman can also play a modest role in supporting non-discrimination and equal treatment.

Looking now at the notion of equal treatment, I would like to show the two faces of equal treatment. On the one hand, there is the legal approach to the issue of equal treatment. If we are working with the legal concept of equal treatment it is important to know what the legal position is of individuals in our society. And how can we protect their legal position. But we are talking now about human rights and the expression human rights has two elements: not only rights, but also the human element. For that reason, and from the point of view of the Ombudsman, I lay stress on the human face of equal treatment. And then the question is: How can we define the relationships between the state and citizens and between individuals? The case law on equal treatment is important, as are the protection of rights and effective enforcement, and the development of equal treatment instruments elevating equality to the level of a countervailing power in the legal system, and even a countervailing power in the political process. If equality is contained in EU law, if it is international law, then even in a democracy the powers of the legislator and the power of the executive are limited and they may not act contrary to the basic ideas of equal treatment and non-discrimination. In the same way as we can name this whole legal sphere of equal treatment – as is traditional – as part of the constitution of a state, we the same way we can also mention the constitution of a human being. And contrasting, on the one hand, the basic idea of the constitution of a state and, on the other hand, the idea of the constitution of a human being, both together being the subject matter of human rights, including equal treatment and non discrimination, then I think you have identified the two faces of human rights.

I understand that new legislation is pending in the Czech Republic which will give the Czech Ombudsman the powers which, in the Netherlands, are entrusted to a separate body, the Equal Treatment Commission. It is important to note that the Equal Treatment Commission is an independent body, that its work is governed by specific legislation, namely the Law on Equal Treatment. Their decisions have no binding effect. One can see its position as an advisor in public law, in labour law cases, and also in public law relationships. The effect of its non-binding decisions and opinions is primarily that they provide case law on the practical application of equal treatment law. The Equal Treatment Commission is also working on the issue of mediation. This has come about because it became clear that, although quite some people who address the Equal Treatment Commission were successful in their application to the Commission, they lost their jobs or otherwise suffered serious problems. So, now the Commission tries to bring parties together and to negotiate about equal treatment issues. Mediation in equal treatment matters is quite effective and I support the idea of applying mediation in, for example, labour law relationships and other relationships in our society. Is there an additional role here for the National Ombudsman? Well, to start with there is a strong cooperation between both institutions and we have

jointly conducted some investigations where we combined our knowledge to come to a result.

So what is the Ombudsman doing in the equal treatment field? I would like to discuss a few cases we have been dealing with as National Ombudsman. The first one is about the so-called 100% checks at Amsterdam airport. The second is about discrimination within the police force, and the third one is about border control by our military police.

The 100% checks at Amsterdam airport are focussed on passengers who swallow bulbs filled with cocaine and import drugs by carrying after swallowing them. So the human body is used as a container for drugs trafficking. These drug-filled bulbs show up clearly on a body scan and the checks are quite strict and moreover, the border control authorities also use sniffer-dogs. The basic idea of the 100% checks for drugs trafficking at Amsterdam airport is that no drugs should pass through the airport. As you can imagine, for people who are involved in these checks, this is quite a nuisance and they are hindered in their travelling rhythm. In addition, it is also an invasion into privacy and if, in the end, they are considered to be suspects of drugs trafficking then they have to undergo a rigorous procedure in which they are checked in a very precise way. In my view as an ombudsman, I identify drugs trafficking as a humanitarian problem.

People are using their body as a container for drugs, and they are placing themselves in serious danger. Carrying cocaine in bulbs in the human body is very dangerous. I consider this method of trafficking to be a humanitarian problem. Because those people are just poor people from the Caribbean area. For that reason I am in favour of this 100% checks. But on the other hand, the question arises whether these checks imply discrimination. They are applied specifically to all passengers on flights coming from the Caribbean area. This appears to be the most favourite route for drugs trafficking. But if we take a look at the people who come by this route to Amsterdam airport we can see that 95% of them are non-white. And they feel very seriously discriminated against in this procedure. They feel selected on the basis of the colour of their skin. A major issue in our investigations was the question whether there are objective criteria for these drugs checks and whether those criteria were applied in a correct manner. At the end of our investigations our finding was that we could be quite positive about the criteria which were applied. Skin colour or ethnic origin were not involved in the selection system for the checks on drugs trafficking.

In the course of this investigation the prosecution office informed the ombudsman that it would be possible to install new body scanning technology which is not dangerous for the human body. This would allow officials to see within one minute whether someone was carrying bulbs in his body. The prosecution service asked the ombudsman whether he was positive or negative about placing a body scan at Amsterdam airport. We at the National Ombudsman office decided to advise on this subject because it was quite important for everyone involved. In the end, we said that we were in favour of installing the body scan. However, certain conditions are really very fundamental in this situation. You can not consider everybody coming from the Caribbean area to be a suspect of drugs trafficking and, for that reason, you cannot force everybody to go through the body scan. You have to select people on the basis of objective criteria. Eventually, they installed the body scan and

now we have the ability to monitor, year by year, whether the border authorities are applying those selection criteria in an objective, non-discriminatory way. This is the first example.

Now I come to the second example, which concerns discrimination in the police force. This case involved a number of policemen with different ethnic backgrounds in the Dutch police force. There were several incidents involving middle-ranking police officers. These officers complained that they were hindered in their career within the police force on the basis of their ethnic background, and they asked the ombudsman for protection of their legal position. We started our investigations in cooperation with the Equal Treatment Commission because they have special knowledge about identifying equal treatment in labour law relationships. On bases of our investigation our conclusion was that there was no discrimination. We followed the career of these non-white police-officers and concluded that what had happened in their careers was comparable to what had happened to others, although we did have some critical remarks. We said to the police force: what are your safeguards against discrimination within the force? I also identified what I call the white-staff syndrome. The senior management of the police force is white and, in my view, if you have white senior officers it is very, very difficult, in your decision-making about careers of police officers, to prevent discrimination and unequal treatment. Initially, the response of the police force was, "There is no finding of discrimination so, ombudsman, we are very content with the final result. While your remarks are interesting, they do not really concern us." However, at the end I they changed their mind and they said, "you are quite right and it is really important that we work on developing a more mixed senior staff." The same concerns arose in relation to women in the senior staff of the police force and the Dutch Minister of the Interior has now drafted a programme on achieving a more balanced situation within the higher ranks of our police force.

My next example concerns two men of non-Dutch descent who were arguing at Amsterdam airport. They were shouting and displayed a certain amount of aggression. The Military Police intervened and sent the Moroccan-Dutchman on his way. The other man, an African-Dutchman, was asked for his identity documents and his passport was taken from him. He was physically escorted outside the airport building. This man brought a complaint to the Ombudsman and my conclusion was that this was a situation of intimidation by the Military Police. I considered that the actions of the Military Police were discriminatory and I recommended that the Military Police pay more attention to discrimination in their activities. I also recommended that they "just make an apology." In my experience, making an apology is quite difficult for public administrations. It is a subject of special interest to me. For ordinary people it is very important that they receive an apology if it is appropriate. This recommendation led to quite some discussion with the commander of the Military Police force. There was substantial discussion about the interpretation of the facts as well. The Military Police maintained that there had been no discrimination whereas I remained convinced that there had been. After our discussions, the commander concluded that it is important that the ombudsman have the opportunity to express his views on discrimination and non-discrimination to his personnel. So he invited me to an annual gathering of the Military Police, which was attended by three hundred members of the force. I had the opportunity to address them on the subject of equal treatment and non-

discrimination. I am convinced that this contact between the Ombudsman and the Military Police is quite helpful in supporting the protection of equal treatment and non-discrimination in daily practice.

Another incident at the border was quite simple. It also happened at Amsterdam airport. A woman from Great Britain travelling to the Netherlands passed the passport control of the Military Police and they asked her, "What are you going to do in the Netherlands?" She complained that this question was only put to her because she is black. Other people in the queue were not asked for the purpose of their trip to the Netherlands. She said that she had felt discriminated against. Our conclusion was the following. Whether it is discrimination on basis of skin colour or not is very hard to decide. However, the question about the purpose of her visit to the Netherlands is an unjustified question under European law. And for that reason it is unjustified discrimination, because you may not make a difference between people from the Netherlands or Great Britain within Europe. Free movement of persons was the basis for this decision.

In summarizing the approach of the Ombudsman: we do not have a one-sided focus on legal positions. In the view of the Ombudsman, discrimination is about more than correct application of the law. It is about maladministration and it is about fair treatment of people. Some observations of the Ombudsman take place in what I call "the shadow of the law." It is not only about questions of strict application of the law, but also about why we have this particular legislation. What is the basic idea of non-discrimination? What is the basic idea of equal treatment and how can we enhance these ideas in society? By posing these questions we define the relationships between the State and the citizen. We can put items on the agenda. For instance, for the border control at Amsterdam airport, for non-discrimination within the police force, and for the attitude of our Military Police. Those items have been put on the agenda by the Ombudsman and have been discussed with officials and I think that this dialogue is important. And, in my view, the Ombudsman facilitates equal treatment in daily life situations. For instance, by advising on installing or not a body scan at Amsterdam airport for the 100% checks procedure. The Ombudsman proposed some guidelines for the prosecution office to use this scan in a proper way.

We can compare the role of courts and the role of the ombudsman. Of course, court decisions can be enforced and recommendations of the Ombudsman can not be enforced. Courts develop case law. Ombudsmen deal more with social occurrences and comment on such events. Courts are case-based. Ombudsmen can have a social antenna, they can watch developments in society and identify issues which are important to address. Courts are working with legal positions while an ombudsman, in my view, should work with a focus on social positions and relationships. An ombudsman should be very keen on finding out what is relevant for the development of society in relation with maladministration and in relation with human rights, in relation with discrimination and equal treatment. And he should address those issues. The court can come to a dictum which is binding, while an ombudsman can come to a recommendation and in my experience those recommendations are at least as effective as dicta from judges.

My conclusion concerns the added value of the Ombudsman in relation to the courts. He can put items on the agenda, he can facilitate the application of human rights. And at the end of the day, and that is something which is very important in my view, he can stress the two faces of human rights. On the one hand legal questions, the legal terms. But on the other hand he can define the special relationship between the State and its citizens. Thank you for your attention.