



Executive Summary

Country Report The Netherlands 2011 on measures to combat discrimination

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1. Introduction

The Kingdom of the Netherlands has the highest population density in the European Union. Immigrants predominantly come from Turkey, Morocco, the Dutch Antilles (although, admittedly, people from the Dutch Antilles cannot really be described as 'immigrants') Surinam and Indonesia. The main religions are Roman Catholic 30%, Protestant 20%, Muslim 5.8%, other 2.2%, none 42% (2006).¹

The Government type is that of a representative democracy premised upon a bicameral system. The official head of the State is the Queen (Beatrix). The Prime Minister is the leader of the Government. Government always consists of a coalition of different political parties since there are a multitude of parties that get elected into Parliament and none of them ever gets absolute majority (more than half of the 150 seats).

The Netherlands is party to all of the important international agreements relevant for combating discrimination such as: The European Convention on Human Rights (including *inter alia* Protocol No. 12), the International Covenant on Civil and Political Rights ICCPR), the Optional Protocol to the Covenant; the Covenant on Economic, Social and Cultural Rights (ECOSOC), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (including the Optional Protocol to this Convention) and the Convention of the Rights of the Child. The Netherlands have signed but not yet ratified the International Convention on the Rights of Persons with Disabilities. The above-mentioned instruments constitute part of the domestic legal order after they have been published in the official Journal of Laws and can be applied directly by domestic courts if the provision at stake is sufficiently clear and precise for direct application.

2. Main legislation

International law: The Constitution bars the Dutch Supreme Court from exercising Constitutional review of formal statutory acts. However, the Netherlands adheres to a 'monist theory' of international law. This means that the Dutch courts can apply international standards of equal treatment and non-discrimination directly also when it concerns statutory acts.

¹ The World Factbook figures for 2006.



The Constitution: A non-discrimination clause is contained in Article 1 of the Dutch Constitution. It covers the grounds religion, philosophy of life, political convictions, race, sex and ‘any other ground’.

This Article can be invoked by an individual applicant against acts by the Government and by private institutions and between individuals.

Criminal law provisions: There are several provisions in the Criminal Code prohibiting discriminatory speech and prohibiting discrimination in the social and economic sphere.

General civil law: Provisions in the Civil Code may offer protection against unlawful discrimination, e.g. on the basis of the provisions concerning tort and provisions concerning labour law.

Employment Conditions: The Act on Working Conditions (“Arbeidsomstandighedenwet”) contains provisions concerning (sexual) harassment, aggression, violence and discrimination at the workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment.

Statutory equal treatment acts: The relevant (civil law) equal treatment acts are the 1994 General Equal Treatment Act (GETA) as amended in 2004; the 1980 Equal Treatment Act for Men and Women in Employment, amended in 1989 and in 2006 after the implementation of Directive 2002/78; the 2003 Disability Discrimination Act (DDA); and the 2004 Age Discrimination Act (ADA). The GETA covers the following grounds: religion, belief, political opinion, race, sex, nationality, hetero or homosexual orientation and marital status. The DDA covers disability and chronic disease, whereas the ADA provides protection against age discrimination. These acts flesh out Article 1 of the Constitution for horizontal relations. In addition, they must be perceived as transposition measures of equality guarantees contained in EU Directives.

In the context of the implementation of the Directives 2000/43/EC and 2000/78/EC it is presumed that the Dutch legislator has in some regards fallen short of EU requirements. The European Commission has started an infringement procedure, inter alia about the definitions of direct and indirect discrimination and about the fact that in case of religious organisations the law allows for too much space for justifications for direct discrimination. Some of these issues were solved by an amendment of the equal treatment laws in 2011. In other respects the Dutch legislator has gone beyond what is strictly required by the Directives. For example, the protection against discrimination on the grounds of religion and belief and sexual orientation also applies in the area of goods and services.



Given the scope of this report, the discussion hereinafter will be limited to GETA, the DDA and the ADA in the light of the implementation of Directives 2000/43/EC and 2000/78/EC.

3. Main principles and definitions

The Dutch Equal Treatment Laws (GETA, DDA and ADA) cover the grounds mentioned in Article 19 TFEU and some other grounds, like nationality and marital status. In contrast to any other realm of Dutch anti-discrimination law and in contrast to EU law, these Acts are centred on the concept of distinction (“onderscheid”) instead of discrimination (“discriminatie”). Distinction does not have the same negative connotation, and it may suggest that it is possible to justify such distinctions.² In practice, however, the laws are interpreted in line with the Directives and the case law of the CJEU. In 2008, the Dutch government has announced that it will bring the language of all equal treatment laws in line with the Directives when a new GETA will be adopted, which integrates inter alia the DDA, ADA and the GETA. A bill for this integrated GETA is expected to be sent to Parliament in 2012.

Direct discrimination – Since 2011, the definition of direct discrimination in the equal treatment laws copies the wording of the Directives, except for the usage of the word ‘distinction’ instead of ‘discrimination’. Although this is not explicitly included in the definition of direct discrimination in the Directives or the (amended) Dutch equal treatment laws, the possibility of discrimination by association has been acknowledged by the Equal Treatment Commission (ETC).

Indirect discrimination – Since 2011, indirect discrimination is defined in the GETA, ADA and DDA in a similar way as in the Directives, except for the usage of the word ‘distinction’ instead of ‘discrimination’.

Harassment – Before the implementation of the Directives, the ETC treated ‘harassment’ as an instance of direct discrimination with regard to ‘employment conditions’. Post implementation, ‘harassment’ is explicitly defined as a form of discrimination which can never be justified. The current definition of ‘harassment’ in the GETA, DDA and ADA is mirroring the one in Directives. However, the latter definition is stricter than the one that was used by the ETC in its pre-implementation case law. Hence, the Dutch approach falls short of the Directives’ *non-regression clause*.

Instruction to discriminate – Pre-implementation, the prohibition of the ‘instruction to make a distinction’ was already implied within Dutch equal treatment legislation. In the implementation process, this implication has been made explicit within the GETA, DDA and ADA. Both the person who *instructs* (e.g., the employer) and the person who carries out the instruction (e.g., a recruitment agency) act in contravention of the

² In this report, we consequently use the word discrimination.

law. If the instruction has been given within a hierarchical employment relationship (a boss instructing an employee to discriminate) it is only the person in charge (the boss, not the employee) whom an individual victim can hold (vicariously) liable. The Dutch approach arguably in this respect reflects an unduly narrow interpretation of the concept as contained in the Directives.

Reasonable accommodation – This concept has only been enshrined in the DDA. The law speaks of ‘effective’ instead of ‘reasonable’ accommodation: the accommodation sought must have the pursued effect(s), which means that the accommodation must be both ‘appropriate’ and ‘necessary’. It must also be reasonable, in the sense that it may not impose a disproportionate (financial) burden upon the employer. The duty to make an ‘effective accommodation’ is not a generic obligation: it must be clear for the employer, for example, that an accommodation is needed and what kind of accommodation that should be. Lastly, the duty can never have the effect that employers must hire people who cannot fulfil the essential job requirements.

Exceptions – The GETA, DDA and ADA all enshrine exceptions to the central norm. In the first two Acts these exceptions are explicitly and exhaustively listed by the legislator within the Acts themselves as far as direct discrimination is concerned. These exceptions are interpreted restrictively by the courts and the ETC. The ADA offers more flexibility for (semi-)judicial interpretation: both direct and indirect age discrimination may be ‘objectively justified’ and only certain exceptions have been *a priori* and explicitly listed within the Act itself. Overall, the exceptions in the equal treatment laws are in line with the ones that are possible under the Directives, especially since the Government made some corrections due to an infringement procedure by the EU Commission. The exception for religious organisations to require that people subscribe to the ethos of their organisation is very much debated, especially in relation to the ground sexual orientation. As a consequence of the announced infringement procedure, the government has stated that it will also bring the wording of the latter exception in line with the wording of the Directives. However, until the beginning of 2012, no bill to this effect has been submitted in Parliament.

4. Material scope

The GETA applies to the areas of employment and occupation, provision of goods and services (including education) and, only in the context of racial discrimination, the areas of social security, social protection, and healthcare. All guarantees flowing from the Directives also apply in the area of the provision of goods and services. The DDA applies to employment, professional education, housing and primary and secondary education. In addition, the Act provides that on a date still to be determined by the legislator it shall also apply to the area of public transport. It is announced that this will happen in the summer of 2012. The ADA is most limited in its material scope: it only applies to employment and employment related education. It is noted that until 1 January 2008 at the latest, the ADA shall not apply to the military service.



'Employment' in all three Acts must be understood broadly: it covers both public and private sector employment; it ranges from the recruitment stage to dismissal including *inter alia* promotion, employment conditions, employment mediation and (vocational) training. In addition, self-employment is covered by all three Acts.

The boundaries to the GETA's scope are: 1. it is not applicable with regard to the internal affairs of churches and religious communities; 2. it remains without prejudice to already existing sex discrimination law; and 3. it is not applicable to the internal affairs of associations (this follows implicitly from the constitutionally guaranteed freedom of association). Also, the law is not applicable to unilateral acts of public officials or governmental bodies (i.e. acts of regulation and legislation and acts by which such rules are executed). This limitation to the scope does not apply to statutory social security provisions (only covered for the ground race / ethnicity).

The prohibition of age discrimination in the ADA is inapplicable with regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and with regard to actuarial calculations for pension provision.

5. Enforcing the law

Neither the GETA, nor the DDA or ADA contains compulsory judicial procedures. Normal civil or administrative procedures can be used to enforce the equal treatment standards. All of these procedures lead to a legally binding decision. In practice, the equality norm is in most cases enforced through a special low threshold procedure before the ETC.

The ETC is a semi-judicial independent body (see also the next section) whose case law is *non-binding* but nevertheless authoritative. No legal representation in cases before the ETC is required. Both under the ordinary civil and administrative law procedures and the ETC procedure interest groups (NGO's and other associations) have legal standing. Besides, the ETC may conduct an investigation on its own initiative. All parties involved in any investigation by the ETC are under the duty to provide the ETC with all requested information. A failure to do so may result in criminal law proceedings. Both the ETC and the ordinary courts accept situations testing.

The 'partially reversed burden of proof' applies in procedures before the courts and is applied by the ETC as well. With regard to sanctions, the GETA, DDA and ADA only stipulate that discriminatory dismissals (and victimisation dismissals) shall be void and that contractual provisions which are in contravention of the equal treatment acts shall be null and void. Under the ordinary court procedures, if an employee has been dismissed contrary to equal treatment law, the termination of the contract can be invalidated and the employee can thereupon claim wages. He or she can also claim to be reinstated in the job. Alternatively, he or she can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law.



The law's complicated and in fact limited arsenal of sanctions raises doubts about whether the Directives' requirement that sanctions be 'effective', 'proportionate' and 'dissuasive' is met. In addition, the statutory non-discrimination acts contain (softer) 'sanctions' which can only be imposed by the ETC and not by the courts. Thus, the ETC can make *recommendations* to the party who has discriminated someone. It may also forward its findings in an Opinion to the Minister concerned and to organisations of employers, employees, professionals and the like.

Moreover, but this has never been used, the ETC may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.

6. Equality bodies

The ETC is the main officially designated equality body (on the basis of article 13 of the Directive 2000/43/EC). Its mandate covers conducting surveys and issuing reports and recommendations. It does not cover the task of assisting victims of discrimination. This latter function is seen as contradictory to the main task of the ETC, which is to hear and investigate cases of (alleged) discriminatory practices or behaviours. This task takes most of the time and resources of the ETC.

The ETC also operates in a consultative fashion (e.g. to the government when drafting or amending equality laws or to employers when developing new policies) and it performs informative and research activities (e.g. through its annual bulletins and assigning research projects to independent institutes, see <http://www.mensenrechten.nl/>).

In short, the ETC (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination. The ETC Members are all legal experts and all have an independent status. The (expert) Members are installed by the government for a fixed period of time (5 years). Members of the staff have the same position as civil servants working for a Ministry but are only accountable to the Director of the ETC (not to a Minister). The ETC is funded by the government (from the budget of five different Ministries). It is accountable to the government by means of an annual report and by independent financial auditing. Every 5 years an internal and an external evaluation report is published (and send to government and parliament). The annual budget of the ETC amounts to 5 million Euro. It has 9 Members and a Chair and a staff of approximately 45 persons (mostly academic lawyers). The ETC deals with all non-discrimination grounds in the GETA, DDA, ADA as well as more specific equal treatment grounds (like the type of duration of the employment contract). All reports, advices and *Opinions* (judgements in individual cases) are published on the Commission's web site: <http://www.mensenrechten.nl/>.



In 2011, the ETC was officially integrated into the Dutch Human Rights Institute (which up to then was missing in the Netherlands). The role of the new Institute will not change as compared to the ETC. The Institute will therefore *inter alia* continue to hear individual complaints about discrimination, to give advice and to investigate possible instances of structural discrimination on its own accord.

A Dutch non-discrimination NGO called “Art. 1”. (After Article 1 of the Constitution) has also been designated by the Government as an equality body in terms of the Directives. This organization covers all of the Art. 19 TFEU non-discrimination grounds. Its main role is to assist victims and to monitor developments with respect to (non-)discrimination in (Dutch) society in a broad sense. Also, it co-ordinates and supports the work of many local anti-discrimination bureaus, which are funded by local governments. All local governments are obliged by law to have such an anti-discrimination bureau in place. One of the functions that these organizations fulfill is situation testing, mostly in the area of bars and discotheques.