

Prof. Dr. Arjen van Rijn

Equal Rights Without Discrimination

The European Court of Human Rights and the protection of human rights in the Dutch Caribbean

Dear Ladies and Gentlemen,

Thank you for your invitation to speak at this conference and the opportunity to contribute to a discussion regarding a theme that is highly important to all of us.

I would like to summarize the core theme of the conference and how we can ensure governments to remain focused on accurately performing their tasks:

- In the best interests of their citizens
- With respect for their citizens
- Subservient to their citizens
- Indiscriminately
- In short: as proper governors

Around the world there exists a discrepancy between the governments' pursuit of their noble goals and what they actually accomplish. This is due in large part to the differences of opinion towards political decisions in what government believes is good for its citizens and what the citizens believe. Often, general interests do not align with the interests of individuals, thereby creating obstacles. Managing those obstacles within this discrepancy is a part of human existence, whether we are officials within a government organization or not. We have to take into account that we all have our own lives to live and own interests to pursue.

Every now and again, citizens find themselves between a rock and a hard place, running the risk of being crushed by malfunctioning governance. We have created all sorts of procedures and mechanisms to address, correct, and prevent the likelihood of errors and lapses made by the government. The ombudsman plays a vital role in this system of protection, as you must have experienced yourselves.

An adequate level of protection of the fundamental rights of citizens is just as important for a well-functioning government and society. Through these fundamental rights, we can claim space free from negative governmental influences and repel encroachment on our personal lives.

I would like to explain how this has been accomplished in St. Maarten and what role the European Convention on Human Rights plays in the framework of human rights' protection. This is evident by means of one concrete fundamental right which is protected in article 14 and in Protocol No. 1 of the European convention: the equality principle respectively the ban on discrimination.

As most of the foreigners among you may know, St. Maarten is part of the Kingdom of the Netherlands. This slightly unusual association is a part of the last sequel of colonial times. In the 17th century, a large fleet of the Republic of the Seven United Netherlands – as it was called at the time – sailed and conquered faraway lands on strange continents. These include the current New York, Indonesia, Suriname, and also a number of islands in the Caribbean: Aruba, Curacao and Bonaire at the coast of Venezuela, St. Maarten, Saba, and Saint Eustatius in the north-east of the Caribbean. The

colonial era ended in 1950 and the colonial ties between – then – Suriname, the six Netherlands Antillean islands and the Netherlands were converted into a more equal relationship. The Kingdom of the Netherlands was transformed into a kind of federation with its own democratic constitution called the Statute. Back then, there existed a relationship of co-operation rather than domination.

As of 2010, the Netherlands Antilles has completely ceased to exist. The islands of Bonaire, Saint Eustatius, and Saba have become an integral part of the Netherlands. St. Maarten and Curacao have each become an autonomous country within the Kingdom, a step taken by Aruba in 1986 already. A referendum supported by the St. Maarten population decided that the island would remain part of the Kingdom. This was a free choice on the basis of self-determination and has never been doubted.

The European Convention on Human Rights also applies to St. Maarten, Curacao, and Aruba because they are a part of the Kingdom of the Netherlands. The Statute, as the federal constitution of the Kingdom of the Netherlands requires that the important human rights treaties apply equally to all countries of the Kingdom. Drafted in 1950 by the newly formed Council of Europe, the convention officially came into existence on September 3, 1953.

The Convention established the European Court of Human Rights (ECtHR). Any person who feels his or her rights have been violated under the Convention by a state party can take their case to the Court. Judgments finding violations are binding on the States involved and those States are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments to ensure damage compensation payment amounts awarded by the Court have been distributed to applicants accordingly. The establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights. It gives the individual an active role on the international arena. The European Convention is still the only international human rights agreement providing such a high degree of direct individual protection. Also State parties can take cases against other state parties to the Court, although this power is rarely used.

An individual can only approach the European Court of Human Rights after he or she has exhausted the national judicial remedies. That is, people should first present their case to the national judge before they can address the Human Rights Court.

This is a significant, but necessary threshold, because the European Court of Human Rights would otherwise become a victim of its own success. And firstly: the member states must become a chance to fix a human rights problem themselves in this respect before bringing it to the international level. Fortunately, the citizens of member states can appeal directly to the protection of the European Treaty with their own national judge. The national judge is obligated to apply this Treaty directly to the case submitted to him. Each individual in St. Maarten can appeal to the European Treaty before a judge in St. Maarten. This also holds true for people in Curacao, Saba, or the Netherlands, being a federal rule, based on article 5 of the Statute, the constitution of the Kingdom of the Netherlands as a whole, which refers to article 93 of the Grondwet, which is the national constitution of the Netherlands, the European part of the Kingdom. Thus, the prime responsibility in respect to the protection of human rights lies with the national authorities.

Naturally so, also the constitution of St. Maarten contains a provision that forbids discrimination for any reason whatsoever, as is also the case for the constitution of the other Caribbean countries in the Kingdom and in the Netherlands.

Section 16 of the Constitution of Saint Maarten states: "Everyone in Saint Marten is treated equally in every case. Discrimination on account of religion, life philosophy, political ideas, race, color, sex, language, national or societal origin, membership of a national minority, capital, birth, or on any grounds whatsoever is not allowed."

However, the European Treaty offers an additional level of protection. The European judge in Strasbourg handles cases from all over Europe, from Ireland to Russia and Turkey. This has allowed the European judge to develop a general trend that forces national institutions to be more disciplined. Admittedly, the Strasbourg judge grants the national government a certain margin of appreciation. However, the judge will intervene if necessary; something the Netherlands also regularly notices. Our country is a major supporter of human rights throughout the world. Nevertheless, the Netherlands is sometimes also blind to its own faults.

The Dutch parliament includes a small Christian party that opposes the women's passive right to vote for religious reasons. This party, the SGP, possesses only two of the 150 seats in parliament, and therefore poses no real threat to the democratic process as a whole. The SGP belongs to the Dutch democratic folklore and received a subsidy for its activities until recently, just as all other parties with seats in parliament. A female group filed a complaint against this. They felt that the SGP discriminated against women who wanted a seat in parliament via the list of this party. The Dutch government disagreed because the freedom of religion was at stake, but the national judges in the Netherlands agreed with the women's organization. The European court on Human Rights has recently confirmed the ruling of the Dutch judge.

It considered:

70. As the Court has stated many times in its case-law, not only is democracy a fundamental feature of the European public order, but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a "democratic society" (...).

71. The Court has also held that a political party may, under the Convention, pursue its political aims on two conditions: firstly, the means used to those ends must be legal and democratic; secondly, the changes proposed must themselves be compatible with fundamental democratic principles (...).

72. Turning to the present matter, the Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention (...).

73. Moreover, the Court has held that nowadays the advancement of the equality of the sexes in the member States of the Council of Europe prevents the State from lending its support to views of the man's role as primordial and the woman's as secondary (...).

Therefore, the Dutch government was no longer allowed to issue a subsidy to a party that rejected women's right to run for office.

Every country has its own blind spots that need to be acknowledged and addressed.

All Men are Created Equal

The American declaration of independence phrases this as follows: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”. These are magical words that still apply today. However, we know how difficult it is to actually treat every citizen equal with regard to his/her rights. Fundamental rights cannot be separated from the time and society we live in. After those magical words from 1776, it would still take nearly one hundred years before slavery was abolished. This long road to emancipation was also experienced in St. Maarten. In addition, married women only received full legal capacity in 1957 in the Netherlands and in 1976 in the Dutch Antilles. Before that time, they could only enter into agreements with permission from their husband. A woman who entered in to marriage lost her job, unless she was the queen. In hindsight, we strongly disagree with these facts. On the other hand, are we any wiser *nowadays* than we were *then*? Each era has its distinct issues; and change from the status quo always meets with resistance. One of the issues of the current era is gay marriage. And as we can learn from the past, there is never a final situation.

The European Court has developed a decision tree to establish whether discrimination exists in a given case.¹ That decision tree is represented as follows:

The ban on discrimination means that equal cases must be treated equally, but that different cases have to be treated differently, depending on the level of inequality. Therefore, the following question arises: is this case equal to the other case? Is a red BMW equal to a blue BMW because they are both BMWs, or are they different because they have different colors?

In addition, also when cases appear to be equal, an unequal treatment is not always disallowed. Distinguishing between people is not viewed as discrimination when this can be *objectively and reasonably justified*. That is, in case of a legitimate goal and if the chosen means that results in unequal treatment is suitable to reach this goal.

I hope that you have been able to follow along because the decision tree is not yet finished. When choosing the goal and the means, the government has a certain *margin of appreciation*, as I mentioned before. When the grounds for distinction need to be marked as *suspicious*, this margin is smaller and the legal control is stricter. We are now approaching the core issue. A distinction based on *individual* characteristics such as birth, marital status, sex, sexual orientation, religion, nationality, race, color or ethnic origin, is suspicious. These are characteristics that you cannot change and cannot be distanced from without denying a vital part of yourself. In case of unequal treatment, where one of these *suspicious* characteristics is at issue, *substantial* reasons must be present in order to ensure an objective and reasonable justification. The European Court has decided, “No difference

¹ See P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (ed.), *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford: Intersentia 2006, (hereafter referred to as: Van Dijk et al.) p. 1027-1051, p. 989-992.

in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a democratic society built on the principles of pluralism and respect for different cultures".² Furthermore: "Where the difference in treatment is based on race, color or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible".³

This is the reason that the blunt deportation without any reservation of Roma from France in the Spring of 2010 caused such a scandal. Such a measure against certain people *simply* because they are part of a certain population is *evidently* contrary to the ban of discrimination.

Age is viewed as less suspicious because this is a socially accepted classification criterion and not a fixed personal characteristic: people who are old now, were once young. But is this true? Age does change throughout the course of your life, eternal youth is still merely a fantasy, but how old you are today or tomorrow is biologically determined; you cannot influence this in any way. This is completely outside of your control. Therefore, we must consider these kinds of arguments with the necessary skepticism. Be that as it may, the Netherlands Supreme Civil Court believed that Martinair pilots could be asked to retire when they turned 56 to make way for the younger generation. Knowing this, how much longer do you have to work? However, I would like to make the following prediction: this will change and the judge will take issue if someone must retire early just because of his or her age.

Governments generally have significant freedom concerning *socio-economic and tax-related choices*. We believe that, if people make more money, they should also pay a higher income tax. This begins with the assumption that people with a high salary and those with a low salary are not equal cases. You *have* to levy more taxes from the people with higher incomes. Otherwise, you are not treating them equally. For example, the judge also deems it acceptable that a man who has lived with his unmarried sister all his life and inherits her belongings, pays a higher inheritance tax compared to the amount paid by married or registered partners. Brothers and sisters living together does not constitute an *affective relationship* that is recognized by the state. However, does that actually make a difference when you have always shared your life with someone? Is every relationship between wife and husband affective? I think not. In this way, lawyers are constantly wrestling with their arguments.

Finally, making an *indirect* distinction can also be illegal. You always have to look beyond the façade. For years, married men in the Netherlands Antilles have earned 10% more than women and unmarried men. The argument was that married men were responsible for earning a livelihood for their families and therefore needed more money. The judge deflated this argument. This distinction boiled down to a major distinction between men and women: the latter received less money for the same work. Naturally, this was not lawful. The Antillean judge came to this conclusion on the basis of the decision tree that Strasbourg employs. Strasbourg provided the arguments.

It is clear that the European judge closely observes the national process. Admittedly, the government maintains some freedom, but it has to be wary of mistakes. It cannot function on autopilot. It has to listen to the society it represents.

² EHRM 13 november 2007, *LJN BC1897, NJ 2008, 380 (D.H. vs. Tsjechië*; m. nt. E.A. Alkema), *EHRC 2008/5*, paragraaf 176 (m. nt. A.C. Hendriks).

³ *Id.*, paragraaf 196.

I would like to close with the pièce de résistance of today: same-sex marriage. Fifteen years ago, the illegality of same-sex marriages was not considered as discrimination. Nowadays, gay marriage has been legalized in a large number of countries in western civilization, and the movement to make it legal in more countries continues. Both the national judge and the judge in Strasbourg still accept that each national culture must make its own choice in this matter. Nevertheless, they do increasingly feel that the consequences of not being able to get married cannot fundamentally differ from the position of heterosexual couples, at least not from the position of heterosexual unmarried couples. The ban on discrimination provides a bottom line for unequal treatment that cannot be exceeded. The ban on discrimination does not yet mean that same-sex partners should be able to get married, but rather that they cannot be treated differently than heterosexual partners because of their sexual orientation, just as this is not allowed according to the European Court in Vladivostok. There is no room for unequal treatment on the basis of sex and sexual orientation in the eyes of Strasbourg.

The highest judge within the Kingdom of the Netherlands still feels that the Caribbean countries of the Kingdom can choose whether or not to implement gay marriage. However, those countries must recognize gay marriage from the Netherlands. The federal constitution demands that all official deeds from the various parts of the Kingdom must be recognized mutually, and gay marriage cannot be an exception to this. In other words: Dutch choices must be respected in the Caribbean, and the other way around of course. How long will it be before a judge demands that the legislator of a country who forbids gay marriage is already discriminating because he forbids this?

Changes that are demanded by the discrimination ban are sometimes uncomfortable. If we, just as the European Court of Human Rights, believe that it's worth to live "*in a democratic society built on the principles of pluralism and respect for different cultures*", we have to go through this time and time again. This applies to St. Maarten, Aruba, and Curacao because they are part of the Kingdom of the Netherlands. Eventually, I assume, this will not be any different for the rest of the Caribbean. It's the dynamics of human rights protection.