

Rechterlijke toetsing aan het gelijkheidsbeginsel

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Summary

The principle of equality is valued by all of us. Unfortunately, application of this principle is not always possible and violations are inevitable. Each statute or regulation will impose special burdens upon or grant special benefits to groups or classes of individuals, while in daily life it can hardly be expected that each individual treat all others in the same way. In some instances, differential treatment is reasonable, but not always. If someone is deprived of opportunities as a result of prejudice or gross stereotyping, or if unequal treatment results in disproportionate impairment of interests, this cannot be considered permissible. It is therefore essential that each classification or distinction can be objectively and reasonably justified.

In practice, courts and tribunals are often presented with cases of unequal treatment, which they must test against the general principle of equality. The judicial application of this principle must be as predictable, objective and thorough as possible: only then can justice be done to the principle's significance.

The existence of clear, general rules increases the predictability and objectivity of judicial review. In many legal systems, however, such rules are lacking: mostly, equality provisions apply exclusively to a number of specific cases or are designed to prohibit discrimination on specific grounds, such as gender or race. Furthermore, many legal provisions elaborating on the principle of equality lack clarity and precision. As a consequence, the courts find little support in legal texts in deciding on complaints about unequal treatment. Mostly, they must rely on broadly formulated provisions laid down in constitutions or international treaties or have to apply the general, unwritten principle of equality. As a result, the courts enjoy a large degree of discretion in interpreting and applying the principle of equality. It is possible, therefore, that in concrete cases judges employ disparate standards of review, which may result in a lack of predictability and legal certainty. An additional problem is that, due to this lack of clear, pre-defined testing standards, prejudices and personal views may influence the court's judgment.

To prevent such problems, it is necessary to set high standards for the reasoning of the judgment. Well-structured and comprehensive judicial reasoning may bring out the angle and personal perspective on which the court has premised its decision. This enables the parties, the general public, and possibly a superior court, to probe the decision properly. Furthermore, a well-reasoned judgment, in which a number of fixed and clear standards of review have been taken into account, will greatly enhance outcome predictability and legal clarity.

The above factors have led to the conclusion that there is a need for a decision model, which can be used in applying the general, unwritten principle of equality. Such a model may aid judges in reaching a decision and provide a framework for judicial reasoning. The aim of this dissertation has been to develop such a model. The research has been premised on the idea that judicial application of the principle of equality is conducted in three phases. In the first phase, the court must establish whether there is indeed a case of unequal treatment. The burden of proof primarily rests with the appli-

cant, who must demonstrate that there are genuine grounds for his complaint. When a case of unequal treatment has been established, the court proceeds to the second phase, in which a justification test is applied. In this phase, the court has to ascertain whether there are convincing and appropriate grounds for the distinction, while the defendant must adduce evidence to demonstrate that the distinction is justified. If the court establishes that the distinction is not sufficiently justified - and therefore incompatible with the principle of equality - it will have to determine the consequences of that conclusion in the third and final testing phase. It may decide, for instance, to annul the litigious decision, to declare the discriminatory rule not binding, or to award damages.

Judicial review in equality cases is always characterised by a certain degree of intensity: unequal treatment can be strictly scrutinised, but it is also possible to use a neutral or even a marginal test. The court, prior to the assessment of the distinction itself, will therefore have to select the factors that determine the level of scrutiny and ascertain which of the factors it deems decisive in opting for a specific intensity. As the intensity of the review may be of great importance for the outcome of the proceedings, it is essential that the court expressly state its choice for a particular level of scrutiny and provide well-founded arguments for this choice.

In this study, a number of theoretical standards have been developed, both for judicial application of the principle of equal treatment and determination of the level of scrutiny. On the basis of theoretical literature, a number of elements were identified which the court should ideally involve in its review in order to arrive at a just decision. In addition to this, research was conducted into the factors that ought to play a role in optimally determining the level of scrutiny. The research produced a hypothetical decision model, containing several standards of review, and various standards for balancing the factors that determine the level of scrutiny. However, the theoretical research also made clear that the various criteria and factors required further defining and refining in order to be of practical use.

For this reason, an examination has been made of the methods and criteria that are presently used by a number of important judicial bodies in applying the principle of equality. An analysis was made of the case law of the European Court of Human Rights, the European Court of Justice, the US Supreme Court and several Dutch (semi-) judicial bodies. The analysis served to study the standards of review employed by the different courts during the first and second phase, as evidenced by their reasoning. The factors used in determining the level of scrutiny and the ways in which these factors are balanced were also examined.

On the basis of a combination of the theoretical decision model and the criteria and factors involved in practice in judicial review, a general model has been created for assessing cases of unequal treatment. This model can be employed in all cases in which the court has to apply the general, unwritten principle of equality. This means that it is not only applicable to distinctions contained in general rules ("regulatory classifications"), but that it may also be used in assessing distinctions brought about by the exercise of authority (as in the case in which a tax exemption has been granted to person A, but not to person B). In addition, it makes no difference as to the applicability of the

model whether the distinction was made by the government (vertical relation) or by an individual or enterprise (horizontal relation). Moreover, the court can employ the model not only in case of "formal" and direct distinctions, but also in case of substantive and indirect distinctions. Finally, it is important to note that the model may be used for all grounds of distinction and in all conceivable contexts.

According to the general decision model, the court must determine the strictness of its review before proceeding to the assessment of the distinction presented to it. Three "levels" of strictness can be distinguished: a marginal test (the variant in which the court uses the most restraint), a neutral test (an intermediate form of review) and an intensive test (or "strict scrutiny": the most intensive form). The court will have to administer a neutral test, unless there are circumstances in the case in hand justifying the choice for either a marginal or an intensive test. The intensive test can only be chosen when, on the basis of a number of factors relating to either the distinction as such or the impairment of interests inflicted by it, it can be suspected that the decision-making process leading to the distinction was affected by inappropriate considerations, e.g. inherently discriminatory or prejudicial considerations. This will often be the case if the distinction is based on a "suspect" ground, such as race or skin colour; several factors and criteria have been identified to determine "suspectness", such as the societal irrelevance and immutability of the personal trait on which the distinction is based. There will also be reason to doubt the fairness of the decision-making process if it is probable that the distinction is based on prejudice or prompted by antipathy towards a socially underprivileged and politically insignificant group, or if fundamental rights of the group in question have been seriously violated.

If there are no arguments in favour of strict scrutiny, the court must subsequently decide whether a neutral test can be applied, or whether there are reasons for administering a marginal test. Again, this choice depends on the presence of various factors. In the first place, factors relating to the seriousness of the impairment and the context within which the distinction was made, may tip the scales towards either a neutral or a restrained test. There may be reasons to conduct a marginal test rather than a neutral one, if the injurious act has no serious consequences for the applicant, for instance, because he has feasible alternatives. Good reasons for a more restrained form of review will also obtain if the decision-making organ enjoys a large degree of discretionary freedom or if it is in a better position than the court to judge the necessity of the measure. Finally, the court may wish to exercise restraint if the distinction has been made within the context of an emergency situation or in a situation outside "ordinary life" (e.g. a classification in a prison regulation).

When, based on the factors discussed briefly above, the court has determined the level of scrutiny, it will have to hold on to this level for the remainder of the review.

As discussed above, the court must proceed to the first testing phase after having established the level of scrutiny. In this first phase, it will have to ascertain whether there is a case of unequal treatment, which in effect warrants justification. From studying the theoretical literature and as a result of case law analysis, it was found that, in this first testing phase, regular use is made of the test of comparability. In applying this test, the

court examines whether comparable cases have been treated differently ("formal" unequal treatment) or whether incomparable cases have been treated in the same way (substantive unequal treatment). A close study has revealed, however, that comparability is not an appropriate standard of review for a number of reasons. In the first place, judicial bodies prove to have great difficulty in finding an appropriate criterion for determining the relevance of the differences and similarities present in concrete cases of unequal treatment. Secondly, the relevant case law in the legal systems under study reveals that the courts do not always exercise prudence in determining such relevance. This creates the risk that considerations of a subjective nature slip in and have a major impact on the decision of the case. A third drawback of the comparability test is that its application often results in a lack of transparency in the judicial reasoning. This is mainly due to the fact that the test inevitably overlaps the justification test used in the second testing phase. When comparability is established, the purpose of the distinction is often already taken into account as a standard of comparison, whereas the purpose test, as will be seen below, also forms an important part of the justification test. Such overlap may cause confusion, as a result of which an important objective of the general decision model, namely the guarantee of transparent and objective testing, can hardly be achieved. A final reason not to opt for the comparability test as a standard in the first testing phase is its flawed selective function. The conclusion that two cases are comparable does not automatically entail that their unequal treatment is not permissible: to reach this outcome, it must first be established whether such treatment can be objectively justified. The same applies to the opposite conclusion, namely that the cases at issue are *not* sufficiently comparable. Whereas it would seem to be logical that unequal treatment of unequal cases is permissible, this will not always be the case: the difference in treatment may not stand in a rational or proportional relationship to the differences between the cases, or the classification may be an unnecessary or ineffective means to achieve the aims pursued by the defendant. If the comparability test is chosen as a standard in the first phase, it is therefore always necessary to investigate the justification advanced for the difference in treatment. First-phase testing, however, derives its value precisely from its selective function: the test applied must make it possible to dismiss cases in which there is no need for justification, so that the burden of demonstrating arguments in defence of the distinction may only be demanded of the defendant in genuine cases. The comparability test therefore cannot be regarded as a suitable standard of review in the first phase of testing.

In this regard, it is of importance that the analysis of the case law of various judicial bodies produced an appropriate alternative to the comparability test: the disadvantageous treatment test. This test implies that the court must ascertain whether the applicant has been disadvantaged as compared to another person (or group of persons). The applicant's interests must have been actually impaired by the unequal treatment, and the interest impaired must be objectifiable (i.e. a legally relevant interest). In the case of *direct* unequal treatment, the disadvantage can usually be directly inferred from the effects of the regulation or action: what has to be ascertained is merely whether the applicant has suffered actual disadvantage, such as not experienced by another person or group of persons. In the case of *indirect* unequal treatment, determining possible disadvantage is somewhat more complicated. In these cases, the applicant must not

only prove that a specific regulation or action has led to an impairment of interests or rights, but he must also demonstrate that such disadvantage disproportionately affects a clearly definable group of persons. If, for instance, the applicant wishes to demonstrate that a remuneration scheme for part-time workers constitutes indirect differentiation on the ground of sex, he must not only demonstrate that the scheme disadvantages part-time workers, but also that the group of part-time workers consists predominantly of men or women.

If it has been established that there is a case of direct or indirect disadvantage (i.e. a *prima facie* violation of the principle of equal treatment), the court will have to proceed by applying the second-phase justification test. If no disadvantage has been established, it should reject the claim.

Assessment as to whether a classification or distinction is objectively and reasonably justified must take place on the basis of five criteria. First, the courts must establish whether the distinction was made in pursuit of a legitimate aim. Point of departure for this test are the objectives put forward by the applicant. Only in specific circumstances (e.g. in cases of strict scrutiny), should the court investigate of its own motion whether there are reasons for the distinction other than those put forward by the defendant. After having determined the objectives underlying the classification, the court must render judgement on their legitimacy. In so doing, it must assess, among other things, whether the aim is consistent with national and international law (as construed by the courts); whether it could be pursued without exceeding powers; whether it was inherently discriminatory, and whether its pursuance fulfilled a genuine need of the defendant. Apart from these and a number of other criteria developed in the dissertation, the courts themselves may develop other standards, specifically relevant to the policy area in question or a particular equal treatment provision.

If the court concludes that the aim is not legitimate, it will, in principle, have to decide that the classification or distinction is not consistent with the principle of equal treatment. However, in many cases more than one aim is pursued. If, in such cases, one of the aims that have been put forward is considered illegitimate, the court cannot automatically draw the conclusion that the distinction is not permissible. In such cases it is conclusive whether the classification or distinction can be sufficiently supported by the remaining, legitimate, aims, even when no account is taken of the illegitimate objectives.

Once the court has established that a legitimate aim is pursued, it must assess the relation between the aim and the means elected in pursuing the aim, i.e. the distinction made. This relation may be tested on the basis of four criteria. Preferably, these criteria are to be tested in the order given below, but it is not necessary to adhere to this order when this would prove to be impractical or undesirable in the case at issue.

The first criterion for the assessment of the relation between aim and means can only be used in cases in which the complaint is directed at a regulatory classification (i.e. a classification contained in regulatory mechanisms, such as statutes, municipal regula-

tions or pension schemes in enterprises). The criterion is meant to be used in assessing the precision with which the classification has been defined.

In this context, the court must first investigate whether the lawmaker has made use of a "proxy". In creating laws or regulations, the lawmaker, for reasons of implementability, sometimes opts for another, more concrete, differentiation criterion than would be actually desirable. For example, in social security cases the proxy "breadwinner" has often been used to replace the broader, more appropriate criterion "need". The criterion selected in such instances is an approximation, a "proxy", for the actual criterion of differentiation. If the lawmaker has made use of such a proxy, the court will have to assess whether virtually the same group has been selected by using the proxy, as would have been the case if the actual criterion had been employed. The distinction is not permissible, if the court reaches the conclusion that the criteria in question lack sufficient similarity.

The existence of a reasonable proxy is not sufficient, however, to conclude that the distinction has been formulated with adequate precision. To do this, the court will also have to examine how the classification has been defined in relation to its purpose. Classifications can both be "overinclusive", namely if the group has been defined too broadly in relation to the aim pursued, and "underinclusive", namely if the group has been defined too narrowly. Both over- and underinclusiveness can be problematic. In case of overinclusiveness, some persons or groups will be disadvantaged, while they, with regard to the aim pursued, should not receive such disadvantageous treatment. Underinclusiveness is also undesirable, as it has the consequence of denying favourable treatment to persons or groups who, with regard to the aim of the regulation, should have been afforded such treatment. However, it is clear that a perfect fit between the definition of the classification and the aim pursued by it can never be reached: a certain measure of misfit must be allowed. The degree of either under- or overinclusiveness deemed permissible must be contingent on the level of scrutiny: in cases in which a strict test is applied, there should be an almost perfect fit, whereas in cases in which the judge applies a neutral or marginal test, a relatively large misfit can be allowed. If an intolerable measure of misfit appears to be present, the classification must be deemed to be in violation of the principle of equal treatment.

If the court considers the distinction to be defined with sufficient precision, it will have to assess the appropriateness of the distinction. This criterion implies that the court has to investigate whether the distinction constitutes an effective means to achieve the aim pursued. The precise modalities of this test are mainly contingent on the level of scrutiny. In cases in which a marginal test is used, the effectiveness of the measure may be presumed, unless it is evident that the means chosen is not suitable, or the applicant convincingly demonstrates its inappropriateness. On the other hand, if strict scrutiny is applied, the defendant may be expected to submit concrete and controllable facts from which effectiveness can be objectively inferred. In the absence of such information, the court may assume that the distinction was not appropriate and that, in consequence, the principle of equality was violated.

If the court deems the distinction to be an appropriate means to achieve the aim pursued, it must proceed to the next component of the model: the test of necessity or subsidiarity. The circumstances of the case and the level of scrutiny determine whether either a subsidiarity test or a test of necessity must be applied: in case of strict scrutiny, the distinction must be tested against the subsidiarity criterion, whereas in cases in which a marginal or neutral test is chosen, it is also possible to make use of the necessity test. In applying the necessity test, the court must determine whether the distinction may be generally regarded as a necessary or indispensable means to attain the aim pursued. If, on the other hand, a subsidiarity test is applied, the court must investigate the availability of less burdensome alternatives to the distinction made and ascertain whether the defendant could have been expected to opt for one of the alternatives. If the court decides that the distinction is not necessary, or that suitable, less drastic, alternatives exist, the distinction is not permitted.

Upon having scrutinised the distinction on the basis of the above criteria, what remains for the court to be done is to assess whether the distinction meets the proportionality requirement. In so doing, it must ascertain whether the defendant has reasonably balanced the interests that are served by the distinction, i.e. the aim pursued, against the interests that are impaired by the distinction. This test will consist of several elements. First, the court must determine which interests are at stake. To this end, it can rely on the disadvantage suffered by the applicant, as established in the first testing phase, and on the aim of the distinction, as established in the second phase. Subsequently, the court has to determine the weight of these interests, taking into account such criteria as the seriousness of the impairment and the objective weight of the interest affected (by examining, for instance, whether a fundamental right has been infringed). Finally, the court will have to assess whether the defendant's balance of interests is to be regarded as sufficiently reasonable. For this assessment, the intensity of the review is once more decisive. When applying a marginal test the court may, for instance, only determine whether the weighing of interests is essentially arbitrary or evidently unreasonable, whereas in strict scrutiny cases, the court must ascertain whether the interests adduced by the defendant are sufficiently convincing and weighty to support the impairment of interests caused by the distinction. Only if the court reaches the conclusion that the distinction was based on a reasonable balance of the interests involved, can the distinction be deemed sufficiently justified and compatible with the principle of equality. If no sufficient degree of proportionality is found, the court's conclusion must be that the principle of equality has been violated.