

The Honourable Emily de Jongh-Elhage
Prime Minister of the Netherlands Antilles
Fort Amsterdam
Curaçao
Netherlands Antilles

Port of Spain, 11 April 2006

I was requested to comment on a draft Bill circulated by the Dutch Minister of Alien Affairs and Integration containing additional measures regarding Antillean and Aruban “at risk youths” and some provisions as to compulsory integration of Dutch nationals of Antillean and Aruban descent. I most willingly comply with this request.

My comments are in furtherance of my letter to your predecessor, the Honourable Etienne Ys, of October 6th, 2005, in which I gave my views on earlier pronouncements of the aforementioned Minister encompassing ideas similar to those contained in the draft Bill. My comments should therefore be read in connection with that earlier opinion by which I still stand and to which I will refer hereafter with some regularity.

The draft Bill covers mainly three areas.

(a) introduction of a discretionary power for the Minister to order the expulsion of certain Antillean and Aruban “at risk youths” between the ages of 16 and 24 from The Netherlands to one of the other countries within the Kingdom (the Netherlands Antilles or Aruba respectively) and a corresponding power to refuse them entry into The Netherlands (sections 1, 2 and 3);

(b) introduction of a provision which allows the Dutch courts, when sentencing Dutch nationals of Antillean and Aruban descent in criminal cases that carry a sentence of imprisonment, to direct that such sentence will

not be served if the convicted person left The Netherlands within a prescribed time and did not return until a stipulated period of two or three years had expired; such special provision may be imposed only where the convicted person is Antillean or Aruban (within the meaning of the Bill) provided that the person at the time of committing the crime had been registered as a resident in the Netherlands for less than two years (section 6), and

(c) introduction of compulsory integration programmes for Antillean and Aruban Dutch nationals (section 7).

I will endeavour to address these subjects as methodically and analytically as possible, and in the order as summarized above.

(a) Admission and expulsion

At first blush the Dutch Government seems to have abandoned the idea of creating an admission regulation as they are now primarily seeking to establish a law which will enable them to order Antillean and Aruban youngsters “to leave the country and return to their own” (the Netherlands Antilles or Aruba, as the case may be). This appears, however, to be deceptive. The text of the draft is, to say the least, rather ambiguous on this point. Although the draft Bill seems to suggest that the right of entry into the Netherlands as such is in no way affected by the proposed law and that such entry will mainly be refused to those who despite having been expelled under the law purport to enter the country before expiration of their stipulated period of exile, section 3 (c) of the draft Bill clearly indicates that such refusal is also to be expected for those who prima facie qualify for expulsion.

When this section is read in connection with sections 1(4) and 1(6) it becomes clear that, upon entering the Netherlands, Antilleans and Arubans of the aforementioned age group will be required to present proof of such matters as their level of formal education (as evidenced by diplomas), their being registered at a recognized institute of education, their being employed (as evidenced by proper documents), or their intention to return to their “own country” within three months (as evidenced by a return airline ticket).

According to the Explanatory Note to the Bill (p. 18) the proposed law is intended to “discourage” these youngsters from emigrating to The

Netherlands without proper preparation and their entry will therefore consequently be checked (at any rate) at Schiphol Airport where virtually all Antilleans and Arubans arrive and where “their entry can be prevented.” The power to refuse entry seems to be placed in the hands of law enforcement officers, notably the Royal Marechaussee Corps. The measure apparently does not require any decision of the Minister and does not seem to be subject to any judicial review which appears to be reserved for cases in which expulsion is ordered.

It is quite clear that this proposed law, if enacted, will create substantial differential treatment between Dutch nationals in the age group of 16-24 years as, upon or after entry into the Netherlands, only those with an Antillean or Aruban background will have to comply with certain conditions and provide the authorities with proof thereof, lest they be refused entry into or be expelled from The Netherlands. This differential treatment will only be deemed non-discriminatory and thus constitutional and in compliance with relevant Human Rights Conventions (notably article 26 ICCPR) if the differences can be considered to have an objective and reasonable justification. Such justification would be lacking if the differentiation does not seem to pursue a legitimate aim or cannot be considered fitting and proportionate, in other words: if it cannot be deemed a proper means to realise that aim.

The Dutch Government claims to agree with this approach but it is their opinion that the proposed law is in conformity with these criteria. They submit that the law aims at preventing the youngsters, who ultimately will be singled out for expulsion, from descending into a pattern of criminal behaviour which is expected to occur due to their insufficient schooling and presumed inability to integrate into Dutch society. In the view of the Dutch Government it is appropriate to single out these youths because, according to them, these are the very youngsters who are creating or are likely to create a disproportionate amount of social problems in Dutch society. The extent of these problems would be such as to constitute a pressing need to deal with them in the rigorous manner contemplated by the proposed law. The Dutch Government also argues that these steps have been taken after all other efforts and measures to address the problems had failed, leaving no alternative but to introduce these measures. The measures, it is alleged, will only affect a limited group, leaving most Antillean and Aruban youngsters untouched as they will, eventually, be allowed to enter and remain in The Netherlands. And after three years of legal residence every one of them will

be for ever outside the danger zone in accordance with section 1(2) of the draft Bill. It has to be noted also that Antillean and Aruban youths who are already residing in The Netherlands will not be touched by the proposed law which, if and when in force, may be applied retrospectively only from the day the Bill would have been officially introduced to Parliament.

I disagree with the position of the Dutch Government.

Before setting out my views, however, I must again refer to my earlier legal opinion in which I endeavoured to unravel some of the perplexities of the constitutional structure of, what is called, the Kingdom of the Netherlands. And here I should make mention of another enigmatic feature of that arcane legal complex: although the subjects of the Dutch Sovereign are all Dutch nationals they do not constitute one Dutch nation in the sense of being “the Dutch people”. The truth is that Her Majesty’s subjects comprise several “peoples” as is acknowledged by the Kingdom Act on the swearing in and inauguration of the King of 1992, which clearly mentions “the peoples of the Kingdom.”¹ The confusion which is caused by this conundrum (Antilleans and Arubans are Dutch in terms of nationality but they are not Dutch in terms of being “a people”) has to be kept in mind when going through the arguments as advanced by the Dutch Government.

Like many Western European countries with a colonial past (and present) The Netherlands has seen over the years a constant influx of people from the (former) colonies streaming into the country. These people usually have very different ethnic, social and cultural backgrounds and their mother tongue is not always the same as spoken in the “Mother Country”. Needless to say, this can contribute to and usually does cause a myriad of social problems and tensions. In the last few years these tensions have been intensified by 9/11 and other related problems, notably the “Muslim problem”. The Netherlands is no exception. The societal situation has hardened remarkably and traces of xenophobia, racism and growing intolerance have become and are still becoming more and more visible. It is against this background that pressure has been mounting from the electorate for politicians to take strong positions and even stronger measures (“throw them out!”). And it is, in my view, against this background that the proposed law has to be understood.

¹ Wet beëdiging en inhuldiging van de Koning, Rijkswet van 27 februari 1992, Stb. 1992, 121, houdende bepalingen inzake de beëdiging en inhuldiging van de Koning, articles 1 and 2.

Although the reasons for taking the proposed measures have been cast in terms of compassion with these “poor youngsters from the West” who, reluctantly if not willingly, should be prevented from becoming criminals and who should therefore be sent back to their country of origin where they can live in stable and familiar surroundings and thus be much less inclined to resort to crime in that unfamiliar, complex, modern and bewildering society of The Netherlands, the overriding idea is clearly, as very harshly but aptly characterized by Jessurun d’Oliveira, “good riddance to bad rubbish”.²

It is, of course, only human to try to get rid of “bad rubbish”. And although “bad rubbish” can be found anywhere, it is contended by the Dutch Government that within the age group of 16-24 years, the Dutch from the Caribbean have, at least percentage wise, much more of that “rubbish” than any other group of Dutch nationals and, furthermore, that the real, perceived or expected problems caused by this “rubbish” are of such a magnitude that the strong measures as contemplated by the draft Bill are called for.

The Explanatory Note cites some research reports in order to show that the Caribbean group has one of the highest percentages of registered persons suspected of crimes. In the age group 12-17 years that percentage is said to have been 10,1 % (against 2% of the “authentic” Dutch) and in the age group of 18-24 years 13% (as compared to 3.8% of the “authentic” Dutch). Of all those arrested on a charge of possessing illegal firearms 13% were said to be “of Antillean descent” (no age group mentioned) which is 18 times their share in the total Dutch population. Be that as it may, I fail to appreciate the relevance of these percentages and the more so since, apparently, no distinctions have been made for example as to where these persons were born, where they were raised and how long they have been residing in The Netherlands. More importantly, higher percentages of criminal involvement of first or second generation immigrants with a different ethnic, social and cultural background are not at all unusual as is shown by these same reports. The differences in percentages between these groups are only gradual and do not reveal a distinct inclination towards a life of crime within the Antillean and Aruban group. It is, one would have thought, common knowledge that higher crime rates within ethnic minority groups are linked to factors like poverty, under- or unemployment, poor or inadequate education and a demeanour of constant reaction against injustice or racism, perceived or otherwise.

² H.U. Jessurun d’Oliveira, Tweederangs Nederlanders: de Antillianen (not yet published)

Intriguingly but unsurprisingly, no absolute figures are mentioned in the Explanatory Note. This would, of course, have made clear that the Antillean and Aruban groups are merely a fraction of the total population of 16,5 million people in the Netherlands. The Dutch ministers, however, did provide absolute figures in their written answers to questions from the Lower House on 10 November 2005³, where they revealed that experts (who were not named) had estimated that the group of Antillean and Aruban “problematic or at risk” youths living in the Netherlands would be between 2.000 and 10.000 persons. The figure of 2.000 represented the number of “criminal youths” who had been detained or taken in for questioning, while the figure of 10.000 appeared to have been the result of an unsubstantiated and rather mysterious rule of thumb indicating that of the 40.000 youngsters “of Antillean descent” between 15 and 29 years said to be living in the Netherlands, 25% would be at risk of turning to crime or anti-social behaviour. It has to be noted, however, that according to the Dutch ministers “(b)oth estimates include youngsters (one assumes: of Antillean descent) born in the Netherlands Antilles, Aruba and The Netherlands.”

These numbers can hardly be seen as impressive or substantiating a pressing need for drastic action. But, one might ask, is it maybe then that recently, hordes of Antillean and Aruban “bad rubbish” youngsters have started to flood the Low Countries in such numbers as to cause acute and enormous problems calling for immediate and vigorous action? The figures mentioned in the Explanatory Note (p. 15/16) do not support such a contention at all. On the contrary, the information which is given is that in 2004 the total number of Antilleans and Arubans, aged 18-24, who immigrated into The Netherlands was 1.226, whereas of that same group 730 emigrated from The Netherlands constituting a migration surplus of a mere 496. The figures also show a clear decline of emigration to The Netherlands in this age group: 2.564 in 2000, 2.231 in 2001, 1.854 in 2002 and 1.509 in 2003. The figures (of 2002/2003) further indicate that an ample majority of these youngsters have come to The Netherlands for study or work (61% and 8%, respectively). Also noteworthy is the fact that of all immigrants who entered The Netherlands in 2000, 10.167 had come from the Netherlands Antilles and Aruba, whereas in 2003 that number had already dwindled down to 4.273. In 2004 the number declined even further to a mere 3.043, whilst

³ Migratie Antilliaanse jongeren. Verslag van een schriftelijk overleg, Tweede Kamer, vergaderjaar 2005-2006, 26 283, nr 27

more persons (3.940) emigrated from The Netherlands. These figures, it would appear to me, leave one puzzled as to the urgency and the rationality of the proposed measures as one has to keep in mind that these measures will not affect the youngsters who are already in The Netherlands but are solely meant for those who might desire to go there in the future.

The timing of these measures is even more incomprehensible given the fact that the Netherlands Antilles after years of lethargy have finally awoken and have commenced, with financial and technical assistance from The Netherlands, to implement recently created compulsory social education programmes in order to tackle the problem of poorly educated youths.

The proposed law has, however, more fundamental flaws. In my earlier legal opinion I stressed the importance of the obligation “as a sacred trust” accepted by, among others, The Netherlands (a) to promote to the utmost ... the well-being of the inhabitants of their (former) colonies and (b) to ensure their just treatment and their protection against abuses. That “sacred trust” will be severely violated if The Netherlands persists in enacting and executing the proposed law. While, given the limited migration numbers, those measures will produce very little relief for The Netherlands, they may in the long run prove to be disastrous for the Netherlands Antilles and Aruba as the effect of the measures, if efficiently applied, could be a thorough separation of the wheat (the many capable young people from the Caribbean countries of the Kingdom who may, and a vast majority of which in effect will, stay in the Netherlands) from the chaff (the less capable and socially weak who will stay or be sent back to those countries). In such a scenario the Netherlands Antilles and Aruba, being the reluctant recipients of “bad rubbish” could with some right be designated as human “dumping places”⁴ as they will slowly be degraded from “equal countries” to what by some has been perceived as faintly reminiscent of, what in another time and another place might have been called, “homelands” or “tuislande”. Even if one considers this an exaggeration, which it probably and hopefully is, it brings home in no uncertain terms the ultimate and ugly consequences and thus the very gist of the proposed law. I will return to this point later.

⁴ It has been argued that in the current situation The Netherlands is being used as a “dumping place” of this sort. However, the negative effects of this “dumping process”, although felt, are dwarfed by the negative effects such “dumping” has or will have on small scale, financially weak and economically ailing communities like the Netherlands Antilles and Aruba.

Before discussing the manifest inequalities, and with that the most discriminating elements, of the proposed law, it would seem necessary to say something about the criteria that are used to define Antilleans or Arubans for the purpose of the intended measures. This is of some importance because these criteria define the outer limits of the group within which ultimately the “bad rubbish” must be identified, whereas any other “rubbish”, equally bad or even worse, outside that group will be left untouched.

Apart from the fact that the measures will not be applied to other age groups or to those (of any age) who had already been registered as resident in The Netherlands for three years or more, the measures will be applicable to Dutch nationals born in the Netherlands Antilles or Aruba or Dutch nationals with a parent born in one of those countries who, before registering as a resident in The Netherlands, have been resident in one (or both) of the countries mentioned for ten years or more. The measures will also be applicable to Dutch nationals who obtained their Dutch nationality while residing in one of the two Caribbean countries of the Kingdom. Exemptions are created for (a) those employed and receiving a subsistence wage, (b) those following a recognised or paid education or study, (c) those who qualify for family reunification and (d) those who will only stay for a period of less than three months. As mentioned before those claiming that they qualify for an exemption will have to offer proof thereof and they too therefore are treated unequally compared to other Dutch nationals.

It should further be noted that the latter group, that is categories (a)-(c), will (have to) be monitored during their first three years of residence in The Netherlands as their exemptions will only be valid for as long as their situation does not change to the extent that they do not longer qualify.

Although it would appear that most of the youths the Dutch Government is trying to target will be captured by the criteria as mentioned, many others will not. The underlying assumption of the legal drafters seems to have been that Antilleans or Arubans somehow only move around within the Kingdom, but this is clearly erroneous. There are, for example, those who after having become a Dutch national by naturalisation in one of the Caribbean countries, move on to live in some other country. Many of these people do not speak Dutch (which is not a requirement for naturalisation, as I explained in my first legal opinion). Their children will probably not speak or understand Dutch either, at least not when born and/or (mainly) raised outside the Kingdom. Nevertheless, according to the proposed criteria, these children

will be free to enter The Netherlands unfettered as their parents were not born in the Netherlands Antilles or Aruba and they themselves have not been resident in those countries for ten years or longer.

A Colombian, Venezuelan or Dominican mother might decide to divorce, or just leave, her Antillean or Aruban husband and return to her own country taking her children with her. If these are young children they will not have resided in the Netherlands Antilles or Aruba for ten years or more before leaving, which means that they fall outside the group identified by the proposed law. And although they will have no or little knowledge of Dutch language and culture, they too will be free to enter the Netherlands without any restrictions. Had they stayed in their country of birth and gone to (secondary) school, however, then they would, even after having acquired ample knowledge of Dutch, not have qualified for such unrestricted entry into The Netherlands. And then there are, of course, many “authentic” Dutch nationals who may marry a foreign partner in foreign lands and whose children, although officially Dutch, do not speak a word of Dutch and do not have the slightest idea of Dutch culture. They, too, will be entitled to an unencumbered entry into The Netherlands,

This brief description should suffice to establish that even at the outset, inequality of treatment - without an objective justification - between Dutch nationals of diverse backgrounds and, consequently, arbitrariness abounds in the proposed measures. But I would respectfully submit that the situation is even worse than that. As I have pointed out before, Dutch nationals are also, and as of right, European citizens irrespective of their place of birth or place of residence.⁵ Restricting their right to enter and reside in the territory of The Netherlands, which is one of the Member States of the European Union, comes down to treating these citizens not only differently from other Dutch nationals but also from European citizens from other Member States who do not have Dutch nationality. The Netherlands by virtue of European law will admittedly have to allow these other European citizens into their territory. It is my view, however, that this does not constitute an objective justification for treating them differently from Antilleans and Arubans, who are also European citizens (residing within the Kingdom but outside the European Union), because The Netherlands was not forced, but voluntarily undertook, to be part of these European legal arrangements.

⁵ I already expressed this in my earlier opinion. See also the very recent opinion of the Advocate General Tizzano in the joint cases C-145/04 and C-300/04 of 6 April 2006.

Accordingly, this freedom of movement bestowed upon European citizens should also be enjoyed by Antilleans and Arubans at a minimum. It is clear, however, that the proposed law will in many respects not meet such minimum requirements. For example, a European citizen in order to be entitled to entry and residence in a Member State does not need to show that he already has employment in that State “provided that he pursues or wishes to pursue an effective and genuine activity as an employed person.”⁶ Nor may such a citizen be refused entry or be expelled on the mere basis of being a “security risk”. Measures of this kind can only be taken on grounds of public policy or of public security “and shall be based exclusively on the personal conduct of the individual concerned”. Furthermore, “previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.”⁷ Even leaving aside the notion that Antilleans and Arubans will on these lenient conditions have to be accepted by all European States save their own, the very inequality of treatment that emerges from this state of affairs as caused by the proposed law will constitute a violation of article 26 of the International Convention on Civil and Political Rights (ICCPR) and thus of section 1 of the Dutch Constitution which emphatically prohibits discrimination. The consequence of this is that the proposed law cannot properly be enacted and, in case it nevertheless is, it will run a great risk of being set aside by the Courts.

Even more fundamental is the following observation. It is very clear that in the last decade or so Dutch society has been plagued by a relatively small but persistent group of underprivileged, insufficiently assimilated youngsters, most of them with Dutch nationality, unskilled, poorly educated and unemployed and as such at risk of becoming involved in criminal behaviour (many of which eventually do become criminals). This group is obviously much larger than the youths with an Antillean or Aruban background. Youngsters of Moroccan descent especially have achieved some notoriety and this group is far more voluminous than the former one. One cannot help recalling the predecessor of the current Dutch Minister of Alien Affairs and Integration, Mr Nawijn, who in August 2002, not even four years ago, ventured to suggest a study on the possibilities of expelling “criminal Moroccans with a Dutch passport” to Morocco, and the strong negative reactions which that suggestion drew from even the right wing of

⁶ Levin/Staatsecretaris case 53/81 [1982] ECR 1035

⁷ Council directive of 25 February 1964 (64/221/EEC), article 3. For a more extensive examination of this subject: see H.U. Jessurun d’Oliveira (note 2 above)

the Dutch Parliament. The opposition parties were at the time reported to be perplexed by the very idea of expelling Dutch convicted criminals from The Netherlands as this would constitute discrimination between Dutch nationals.⁸ Times do change indeed.

All of this raises the question even more why it is that only the Antilleans and Arubans are being singled out for expulsion and deportation. It seems to me that the sole plausible answer to that question would be that Antilleans and Arubans are the only Dutch nationals who have a “homeland” to which they can be expelled. And although it is true that Moroccans and many others who have dual nationality also have a country where they could be sent to, and international customary law only prohibits States from expelling their nationals “if they have no other place to go to”⁹ The Netherlands is prohibited from expelling them since, again, it voluntarily entered into and ratified the Fourth Protocol to the European Convention on Human Rights, article 3 of which clearly states that “no one shall be expelled ... from the territory of the State of which he is a national.” As the Netherlands entered a reservation as to that provision with respect to no other country but the Netherlands Antilles (at that time still including Aruba), only Dutch nationals of Antillean (and probably Aruban) descent are deemed to “have another place to go to.” It cannot, however, be assumed that this constitutes an objective justification for treating Antillean and Aruban youngsters differently from other Dutch youngsters with the same or even worse predisposition to anti-social conduct, the simple reason for that being that The Netherlands has not been forced to limit the reservation to Antilleans and Arubans but voluntarily chose to do so, thereby unnecessarily tying their own hands. This would make the singling out of Antillean youngsters for measures of this kind ipso facto discriminatory.

The discriminatory character of this arrangement becomes even more prominent if it is appreciated that according to the draft Bill the Dutch Minister has complete discretion in deciding the length of the period of expulsion and is in no way restrained by a fixed maximum. Furthermore, a recently published advice by the Association of Dutch Municipalities¹⁰ to the Dutch Minister, makes it quite clear that in order to be effective further legislation will have to be introduced and additional, costly, measures will

⁸ Reformatorisch Dagblad, internet editie: Nawijn wil criminele Marokkaan uitwijzen, Balkenende: Voorstel in strijd met Grondwet, 24-08-2002

⁹ Oppenheim's International Law, Ninth Edition, p.857-859

¹⁰ Brief Vereniging van Nederlandse Gemeenten aan Minister Verdonk, 9 maart 2006.

have to be taken to ensure effective control and enforcements of the rules. And all this for the sole purpose of getting a grip on an extremely arbitrarily chosen group that in recent years has dwindled down to very small numbers of persons. Even if this group would appear to be a hard nut to crack, it can hardly be accepted that a legal sledgehammer of this magnitude and weight would be necessary to do that job.

(b) exile as a new mode of sentencing

This criminal law component as introduced by the draft Bill is in my view inconceivable. According to the Explanatory Note this provision (section 6 of the draft Bill) does not amount to an unjustified violation of any fundamental right of the convicted person. However, I am unable to see why this provision would be anything else than unjustified.

The Dutch Government submits that sending a convicted person of Antillean or Aruban descent into exile for two to three years has to be seen in the context of “special prevention” with the (positive) “side effect” that Dutch society will be spared further criminal behaviour (by this particular person). This explanation can, with all due respect, hardly be taken seriously and borders, at face value, on blatant hypocrisy.

The Dutch Government correctly points out that the Dutch Criminal Code does offer a legal basis for attaching “special conditions” to conditional sentences in section 14c of that Code and also correctly indicates that such conditions should not be such as to deprive the convicted person from his political rights and liberties, such as the right to vote and the freedom of assembly. However, they submit that such rights and liberties will not be infringed by the proposed measure of exile, a submission which cannot be accepted as it is clear that Antilleans and Arubans as soon as they have been registered as residents in The Netherlands, as any other Dutch citizens, have the right to vote in Dutch and European elections, and that they, according to current legislation, will lose that right as soon as their residence in The Netherlands has (been) ended.¹¹

Truly incomprehensible is the contention of the Dutch Government that this provision does in no way constitute a violation of the principle of equality under the law “as the sanction is solely created for a limited group of persons defined by descent.” One would have thought that any difference in sentencing on the sole ground of descent would constitute clear

¹¹ There might be some changes in sight, see the Opinion of the Advocate General Tizzano (note 5 above).

discrimination, especially where in most cases this, racially or ethnically based, descent is not something one can be held responsible for. The argument put forward by the Dutch Government that it is not unusual to create criminal sanctions which can only be applied to or can only be useful for certain groups is extremely weak. The only groups they are able to mention in this context are drug addicts who by way of a special sentencing condition were regularly “persuaded” to undergo compulsory treatment instead of imprisonment. The group of drug addicts, however, being a group of truly indiscriminate composition, clearly cannot be compared to a group whose only distinction through no fault of their own is to be of a certain racial or ethnic descent.

Apart from being blatantly discriminatory this provision also leads to the absurd result that only small or middle range criminals could be exiled but hardened criminals will be allowed to stay in the Netherlands. This is due to the fact that in accordance with the Dutch Criminal Code conditional sentences can only be imposed if the sentence does not go beyond three years imprisonment, whereas more severe sentences can only be imposed in an unconditional form. This would mean that a recently arrived and officially registered Antillean having committed a petty crime could be sentenced to, for example, six months imprisonment completely conditional under the requirement of compliance with an exile order for up to three years, but that the same Antillean having committed a very serious crime and sentenced to for example six years imprisonment will be “rewarded” with permanent residence as he will be released after four years and, consequently, having been for more than three years residing in (one of Her Majesty’s Prisons in) The Netherlands cannot be expelled under the provisions of sections 1 and 2 of the proposed law.

Finally I have to remark that it strikes me as odd that although the Explanatory Note abounds with arguments that purport to establish grounds for zooming in on the group of “at risk youths” in the age group of 16-24 years, the criminal law approach of section 6 has not been limited to that group but has been extended to all Antilleans and Arubans during the first two years of their residence in The Netherlands. This is even more remarkable as no reasons are given for this extension. A minor remark would be that due to the way the provision is phrased (“registered less than two years”) a strict interpretation of the words would lead to the conclusion that unregistered Antilleans would not fall under the provision, which is just one example of the sloppy way in which the proposed law has been drafted.

(c) Compulsory integration

After all that has been said, I can be very brief on this point. It will be no surprise that I deem this part also discriminatory. This follows from my arguments under (a) and here I would, again, like to refer to the advisory opinion of the Council of State of July 1st, 2005,¹² which clearly supports my conclusion. It would seem to me that the points made by the Council in that opinion have not been sufficiently addressed by the Dutch Government in the current draft Bill. I would therefore assume that the Council will advise against this proposal too.

In conclusion, I would advise your government to take a firm and principled stand against these proposals. In the end, of course, all governments will have to cooperate in order to solve the problems which the measures contained in the draft Bill attempt to tackle. Those are problems that concern all the countries of the Kingdom. The mere fact, however, that one of the countries, being (depending on one's views) the former or present colonial power, clearly calls the shots, does not mean that the other countries should allow that country to flout the fundamental rights of their people. It is my view that this draft Bill will die a dishonourable death at the stage of the Council of State as this august body, although imbued with a natural appreciation for the political aspects of any proposed law, is a well respected "fountain of justice." In case I am wrong in this respect or in case the Dutch Government were to decline to follow a negative opinion of the Council of State, relief can still be sought in the Dutch courts and, eventually, in the European Court on Human Rights or, for that matter, in the European Court of Justice.

One of the reasons why I think these proposals will not be enacted into law is that it would put Her Majesty, Queen Beatrix, in an extremely awkward and embarrassing position. It should be realised that the Dutch Sovereign is not only the Constitutional Head of State (the Kingdom) but also the Constitutional Head of Government of both The Netherlands and the Netherlands Antilles and Aruba. She is therefore the sole Dutch authority with a direct and special, both functional and personal, bond with all the

¹² Advisory opinion on the Integration Bill (Tweede Kamer der Tweede Kamer der Staten-Generaal, Vergaderjaar 2005-2006, 30 308, nr. 4.

peoples of the Kingdom. According to the oath formula¹³, it is her sacred duty to defend and uphold the Kingdom Charter and the Constitution (prohibiting discrimination) and she is bound by oath to protect the liberty and rights of all Dutch nationals and all residents. But as the Constitutional Head of the Dutch Government she is also called upon to assent to Bills approved by the Dutch Parliament, her signature being necessary to complete the enacting process. Thus, to submit to her for her signature a Bill that is blatantly discriminatory and therefore in clear violation of the Constitution, or at least extremely controversial and detrimental to her subjects in the Netherlands Antilles and Aruba, would be totally irresponsible with regards to the Sovereign who owes allegiance to all her subjects irrespective of race, ethnic background, descent or place of residence. One could just hope and pray that the Dutch Government will see the wisdom of avoiding such a situation.

Justice Jacob Wit¹⁴

¹³ To be found in article 1 of the Wet beëdiging en inhuldiging van de Koning (see note 1 above).

¹⁴ The author of this legal opinion is currently a Judge of the Caribbean Court of Justice. He is a former Judge of the Joint Court of Justice of the Netherlands Antilles and Aruba, in which capacity he served from 1986 till July 2005. Before that, from 1984-1986, he served as a Judge in the District Court of Rotterdam in The Netherlands.