Expulsion and integration: Erecting Internal Borders within the Kingdom of the Netherlands

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The Kingdom of the Netherlands consists constitutionally of three countries, one located in Europe called *the Netherlands*, and the other two in the Caribbean, the *Netherlands Antilles* and *Aruba* respectively [1]. The Caribbean parts of the Kingdom are remnants of the colonial past. Since the end of the slavery trade, these islands have not been very important to the Dutch. And even in the colonial days, the East Indies (present-day Indonesia) were very much more important. Small wonder that the Dutch have consistently held as a majority opinion throughout the post-war period that we had better get rid of these islands by granting them independence. The inhabitants of the Caribbean part of the Kingdom, however, have in repeated referenda always and in huge majority expressed the wish to remain within the Kingdom of the Netherlands.

There has always been migration from the Antilles towards the Netherlands, which is facilitated by the fact that the one and same Netherlands nationality is constitutionally guaranteed equally to Antilleans, Arubans and European Dutch. [2] There used to be a clear relation between migration and the economic climate in the Antilles. Immigration has increased the size of the Antillean population residing in the Netherlands (the European part of the Kingdom) from 82 000 in 1994 to 130 000 in 2005 (the total population in the Netherlands is 16 million). But since 2004, in reality there has been a net emigration from the Netherlands to the Netherlands Antilles, although the economy of the Antilles has not been faring stronger than that of the Netherlands. The explanation cannot really be the economic climate in the Antilles, which has not changed significantly during the last few years, nor has the economic climate worsened in the Netherlands. The negative attitude towards persons of non-European origin may perhaps be more of an explanation this time. [3]

Within the group of 130 000 Antillians (and Arubans) residing within the Netherlands (with some 200 000 living in the Netherlands Antilles and Aruba), [4] there is a relatively small group mainly of first generation young men, most of which come from the largest of the Dutch Caribbean islands, Curaçao, and who are socially quite problematic. They tend to be unemployed, have had very few years at school with usually no formal education after primary school, and are strongly over-represented in the crime statistics.

On 30 January 2006, the Dutch Minister for Immigration and Integration published a legislative proposal (including an explanatory memorandum) for an Act On Additional Measures Regarding the Residence in the Netherlands of Antillean and Aruban Youth At-Risk [5] and Regarding The Civic Integration Of Dutch Citizens Of Antillean And Aruban Origin (*Wet houdende aanvullende maatregelen inzake het verblijf in Nederland van Antilliaanse en Arubaanse risicojongeren en inzake inburgering van Antilliaanse en Arubaanse Nederlanders [6]*). We shall, in

accordance with the true intention of the Bill, refer to it as the Bill on the Expulsion and Civic Integration of Antilleans and Arubans in the Netherlands.

At the time of writing, the Dutch cabinet has sent its proposal to the Council of State for an advisory opinion. This Bill is, for now, the last in a series of rather problematic proposals regarding an 'obligation to integrate' - which entails following a mandatory programme of integration and passing an integration exam testing the command of the Dutch language and knowledge of Dutch society - for Dutch nationals and aliens born outside the Netherlands who want to settle in the Netherlands.

The subject matter concerns the very core of citizenship and citizens' rights. As regards the obligation to integrate, which brings Antilleans and Arubans under the Civic Integration Act (*Inburgeringswet*), this is inherent in the measure: one is considered not to be enough of a 'citizen' (*burger*) and must therefore 'integrate' (*inburgeren*) further. And, as regards the expulsion measures, it is a question of how citizenship rights translate into one of the most fundamental civil rights: the right to reside in the country of which one is a citizen.

This paper argues that in an age of globalisation, integration and disappearing external borders, the Bill seeks to erect new internal borders within the Kingdom. Just when the European state which until recently had retained the greatest variety in colonial civil statuses, the United Kingdom, has abolished the distinctions of citizenship and rights of abode for most of its overseas territories, in the Kingdom of the Netherlands previously inexistent borders are erected, which aim to exclude Caribbean Dutch nationals from citizenship in the polity, by introducing new differentiations in access to civil rights between European Dutch citizens and Caribbean Dutch nationals.

The order of treatment in this paper is as follows. First of all, a summary will be given of the history of integration measures, as this will shed light on a number of legal problems that the Bill on Expulsion and Civic Integration of Antilleans and Arubans raises.

Subsequently, a short analysis will be given of the tenability of these measures; first the proposals on expulsion and next the obligation to integrate will be discussed. [7]

I The Context: Civic Integration Measures in the Netherlands

1. From social policy via immigration measure to expulsion measures

Once upon a time, civic integration was a programmatic social measure that had the objective of contributing to a solution of a social problem - a problem that was and is a serious one, and has not changed in nature: it was and remains primarily a social problem.

In the early 1990s, a set of policy instruments was developed, with the nature of 'soft law', mainly in the form of a set of financial instruments for the benefit of municipalities towards developing and implementing courses aimed at facilitating the integration of minority groups in the Netherlands. These consisted of programmes to train members of these groups in obtaining certain linguistic and social skills, in order

to improve access to the labour market and to reduce their social and cultural isolation.

In 1998, these social policy measures were turned into hard law, sanctioned by fines, in the 1998 Act on the Civic Integration of New Immigrants (*Wet inburgering nieuwkomers*). [8] In essence this Act prescribes an integration programme of 600 hours of language training and general knowledge of Dutch society for 'newcomers', aliens and Dutch nationals born outside the Netherlands who are aged 18 years and older and who have come to the Netherlands for the first time in order to reside there for an indefinite period. Among the persons exempted from this measure are non-Dutch EU citizens, those who come to the Netherlands only for a limited time for a specific reason (for instance, those who work for a limited time), and those 'who on the basis of provisions of treaties or decisions of international organisations cannot be obliged to participate in an integration programme'. [9] The sanction for *not participating*in the programme is an administrative fine. [10] The Act entered into force on 30 September 1998 and is at the moment of writing still in force, but is to be replaced by a new Civic Integration Act (*Wet inburgering*), which we mentioned in the introduction above and on which we will say a few words below. What is important to notice is that with the Act on the Civic Integration of New Immigrants (*Wet inburgering nieuwkomers*) of 1998, integration measures were changed from social policy measures into hard legal measures, imposing legal obligations enforced with pecuniary sanctions in the form of fines. From primarily social measures they became legal measures. Still, the legislative measures designed and defended by ministers in charge of minorities, which was at the time the Minister of the Interior, the Minister of Education and the Sciences, and the State Secretary for Health, Welfare and Sports.

The legal 'solution' to the social problem again changed drastically in nature with the 2005 Act on Civic Integration Abroad (*Wet inburgering buitenland*), which applies to third-country nationals who need a visa, and whom are subjected to a (simple) computerized test concerning a very basic knowledge of the Dutch language and society. From a piece of legislation in the field of social measures, aimed at solving a social problem, civic integration became a measure of immigration law aimed at halting the entry of migrants. Since the entry into force of this Act, the sanction attached to the obligation to integrate is mainly to be found in the area of residence permits: those who are not 'integrated' do not have a right to settle permanently. The Act thus canonizes the view that a social problem is and can be solved by way of immigration law sanctions. [11] In charge of the legislative project were no longer the ministers dealing with minorities and education, but the Minister for Migration Affairs [Dutch: *Vreemdelingenzaken*, which is literally: Aliens Affairs] and Integration, who resides in the Ministry of Justice.

This 2005 Act requires third-country nationals who come from countries for which a visa requirement exists [12] to pass an oral test in elementary Dutch and social knowledge while still abroad. The test (which is quite elementary) is to be assessed with the use of a computer at a Dutch embassy or consulate general in the country of residence, and costs approximately €350. The sanction *for failing to pass*the test - which is required for the visa - is that a visa may be refused. Note that the sanction is no longer limited to failing to participate in the courses, but failing the exam. Note also that those who have passed the test and are admitted to the Netherlands, next

have to follow the integration programme under the 1998 Act - it is intended as an extra hurdle before being able to come to the Netherlands. This Act on Civic Integration Abroad was passed on 22 December 2005 and entered into force on 15 March 2006.

The fact that civic integration is no longer a social policy measure aimed at solving a social problem within the Netherlands, but has become an immigration measure, explains how it is at all possible to combine in one Bill measures aimed at the expulsion of Caribbean Dutch nationals and measures aiming at their civic integration. Discourse about integration has become discourse about admission and residence, and is now even extended to be a discourse about expulsion.

This last issue, expulsion, is a new sanction that, so far, the government has not wanted to impose on non-Dutch migrants, neither newcomers nor settled immigrants who failed to live up to integration standards. It is reserved for Dutch nationals who were born outside the European parts of the Kingdom of the Netherlands. Expulsion - a migration instrument *par excellence* - is presented as a measure that is intimately connected to integration.

It may be added that in this new bill, the Dutch government dares to make explicit what was defined in earlier proposals as ‘Dutch nationals born and raised outside the Netherlands’: there may be many more such persons, but it was really always mainly the Antilleans and Arubans that they had in mind. This was disguised in previous proposals, although the careful reader cannot have failed to see whom the government really intended.

As the Bill on Expulsion and Integration of Antilleans and Arubans, in its integration part in essence extends the pending Civic Integration Act to Antillean and Aruban Dutch citizens, we must devote some words to this proposed Act, which was adopted by the Lower House on 7 July 2006, the day that an interim cabinet was formed due to a political crisis caused by the architect of the legislation on civic integration, minister for integration and migration affairs Rita Verdonk. The bill for the Civic Integration Act is now pending in the Upper House, but must be treated in order to understand the measures aimed against the Antilleans and Arubans.

2. The 2005 proposal for a general Civic Integration Act

After publishing proposals calling for the subjection of ‘all persons born outside the European part of the Kingdom of the Netherlands’, regardless of nationality, to the requirement of passing a civic integration test, and subsequently having to withdraw these for its draconic simplicity which made it conflict with the Constitution, EC law and non-discrimination clauses in a series of human rights treaties, [13] the government introduced a new bill for a Civic Integration Act in the Lower House in September 2005. The bill proposes the introduction of a new civic integration system, which draws heavily on the 2005 Act on Civic Integration Abroad (*Wet inburgering buitenland*) which we described above. It is to replace the 1998 Act on the Civic Integration of New Immigrants (*Wet inburgering nieuwkomers*) with a more compelling obligation with stricter sanctions and is to apply to both newcomers and settled immigrants.

It takes as its starting point a general obligation to integrate for, in principle, anyone from the ages of 16 to 65 who is allowed to settle permanently in the Netherlands, and who has not attended school in the Netherlands for at least eight years while residing here, and does not possess certain (Dutch) diplomas or certificates. For our purpose, it is important to note that initially the bill was also meant to apply to Antilleans and Arubans that wanted to settle permanently in the Netherlands. The Council of State [*Raad van State*], however, had issued an advisory opinion which at first sight seemed to have brought the government to change its mind, at least with regard to that particular proposal.

In a - not very usual - meeting with the minister, the Council had already taken the opportunity to point out the strong objections of the Council regarding the unequal treatment of Dutch citizens in comparison to other EU citizens (who are exempted) that the bill proposed. [14] These objections were elaborated in the eventual advisory opinion of the Council of State on this bill. They concerned the proposed applicability of the obligation to integrate to 'Dutch nationals born outside the Netherlands'. This comprises not only a significant number of naturalised Dutch citizens, but also most Antilleans and Arubans. The objections, put succinctly, pertained to the fact that there is no adequate justification for subjecting Dutch citizens to the proposed obligation to integrate, when at the same time, as the bill proposes, a general exception is made for non-Dutch EU citizens.

The Council of State pointed out that *EC law* does not prohibit so-called 'reverse discrimination', meaning cases in which a Member State, in a purely national context (outside the scope of EC law) treats its own citizens less favourably than citizens of other Member States. There are, however, many treaty provisions prohibiting discrimination and a Constitutional principle of non-discrimination, which each and all stand in the way of the unequal treatment of Dutch citizens, also in comparison to other EU citizens, without an adequate justification. The Council of State, in this context, pointed to Article 1 of the 12th protocol ECHR, Article 14 ECHR - in conjunction with Article 8 ECHR - and Article 1 of the Netherlands Constitution. The Council of State gave the, not so unlikely, example of a Dutch citizen, who, before coming to the Netherlands, lived in the French part of Saint Martin (which is EU territory) and is therefore exempted from the obligation to integrate, and someone who lived in the Dutch part of Saint Martin - one of the five islands of the Netherlands Antilles consisting of a French part and Dutch part separated by an open border - and is therefore subjected to that obligation.

According to the Council of State, the bill leads to an unjustifiable inequality of treatment among Dutch nationals, and between Dutch nationals and other EU nationals. [15]

This critical advisory opinion resulted in a reconsideration of the bill. The provision on Dutch nationals with an obligation to integrate - *de facto* Antilleans and Arubans - was for the present taken out of the bill and it was decided that specific civic integration legislation would be drafted for the Antilleans and Arubans. [16]

3. Caribbean Dutch nationals: the hidden measures

But this was far from the end of the story. Instead of a general obligation to integrate for all Antilleans and Arubans, in a new Article 58 of the Bill a provision was added as a result of which Antilleans and Arubans who come to the Netherlands for the first time were still to be subjected to the existing 1998 Act on the Civic Integration of New Immigrants. Compared to the 2005 proposal for a Civic Integration Act, one can say that a milder regime was to apply to this category of Dutch citizens. Not all Antilleans and Arubans were subjected to the integration obligation, but only the 'newcomers'. Moreover, the original 2005 proposal was much stricter: it has the obligation to *pass* for the exams on pain of a fine, whereas the 1998 Act only had an obligation to *participate* in the courses. Furthermore, the 1998 Act contained the possibility of exemptions on the basis of diplomas or degrees, on the basis of which Antilleans and Arubans with secondary school diplomas were exempted. [17] So the proposed Article 58 of the Bill did create an obligation to integrate for Antilleans and Arubans, but a somewhat milder one. However, the very principle of subjecting only this group of Dutch nationals to a treatment to which other Dutch nationals cannot be subjected, quite obviously meant a form of unequal treatment which required special justification which the Council of State had be calling for and itself not finding one considered unlawful. The 2005 bill for the Civic Integration Act did not offer any - as, by the way, it had not done under the 1998 Act either.

Although therefore legally not uncontroversial - parliament did not pay any particular attention to this clause in the Bill [18] - again this was not the end of the story. After the introduction of the Bill containing this separate somewhat milder clause for Antilleans and Arubans, the minister proceeded to extend the stricter obligation to integrate of the Civic Integration Act to Caribbean Dutch nationals who come to the Netherlands for the first time to settle there permanently (Caribbean '*newcomers*'), including the obligation to *pass* integration exams and its sanctions (the obligation would not extend to the Carribean Dutch already settled in the Netherlands), or at least the minister made an attempt to do so. This attempt was made in the second set of governmental changes to the Bill, introduced in April 2006. [19] This crass proposal, would it be adopted by Parliament, amounted to the reversal of the government's pretension to follow the Council of State's opinion that this would constitute an illegitimate infringement of non-discrimination clauses in human rights treaties and the Constitution. Not a word was spent on this reneging on its statements made to the Council of State and the Head of State on not extending the Civic Integration Act to Caribbean Dutch citizens.

In the parliamentary treatment of the Bill, the fate of the Caribbean Dutch citizens subsequently became intertwined with that of other Dutch nationals who the government wanted to subject to mandatory integration requirements. In the original version of the 2005 Bill as introduced in parliament, the obligation to integrate was also extended to certain groups of *naturalized*Dutch citizens, to wit: those enjoying a social security benefit, those with underage children, and those with a religious office. [20] This plan was - at least temporarily - to suffer defeat in the Lower House. A number of political parties, also from the government coalition, had doubts as to the lawfulness of unequal treatment of Dutch nationals among each other (those who are born with the Dutch nationality and those who have acquired it later) and of Dutch nationals as compared to non-Dutch EU citizens (who are exempted from the civic integration measures). A number of exchanges between the minister and members of the Lower House led to a compromise according to which the Council of State would

be consulted on the Bill as it had come to read after the various sets of changes on the part of the government. In particular the Council of State was to give its opinion on the lawfulness and constitutionality of the provision which imposes the obligation to integrate on (certain) Dutch citizens contained in the original Article 3 of the Bill (and on 10 further amendments proposed by members of the Lower House). [21] Members of the Lower House took this to mean that the provision on the obligation of *Dutch nationals* to integrate was for the time being, or at least until the Council of State shall have handed down its advisory opinion, was for all intents and purposes temporarily 'removed' from the Act or at least shelved.

This, however, was not quite the way in which the compromise was translated into the text of the Bill. Instead of a provision specifying the groups of Dutch nationals who are under the obligation to integrate, the minister inserted in the so-called 'fourth set of changes' to the Bill a broad clause which delegates to the government the power to determine by Order in Council the groups of Dutch nationals who are to submitted to the obligation to integrate. This Order in Council can, under this provision, only be issued after a draft has been placed before both Houses of Parliament, each of which can block the Order. If one of the Houses blocks the issue of the Order, the government is under the obligation without delay to introduce a bill to amend this Article in the Act, in order to provide a basis in an act of parliament for this extension of the Act's scope. [22] Obviously, the Order can cover not only certain categories of *naturalized*Dutch citizens, but also of Dutch citizens from the Netherlands Antilles or Aruba. Thus, the provision gave the government free play also as to the treatment of Caribbean Dutch nationals (albeit, with parliamentary scrutiny).

At the moment this 'compromise' was reached, the text of the Bill still contained the clause on the continued application of the 1998 Act only to Caribbean Dutch 'newcomers'. Although it is hard to trace the precise origin of the reversal, at the last moment the minister changed course on this point. She introduced a last minute 'fifth set of changes' to the Bill, which was presented to the Lower House at the very beginning of the final plenary debate on the Bill. [23] It contained one provision which directly concerns Caribbean Dutch nationals: instead of the provision retaining the 1998 integration obligation for the newcomers among them, it contained the provision: 'The 1998 Act on the Civic Integration of New Immigrants is repealed.' [24] This releases the Antillean and Aruban newcomers from all obligations to integrate under the 1998 Act. The official explanation was that the compromise on the other Dutch citizens was inspired by doubts as to the justification of the unequal treatment of Dutch nationals *inter se* it might imply. As this also applies to Caribbean Dutch citizens,

'the Bill now proposes no longer to base the obligation to integrate on the 1998 Act on the Civic Integration of New Immigrants, but in the same manner as the obligation to integrate for naturalized Dutch nationals on the basis of Article 3 [Article 4 of the Bill as eventually sent to the Upper House after adoption in the Lower House]. This means that the 1998 Act on the Civic Integration of New Immigrants does not need to be adapted as proposed in the second set of changes to the Bill [...], but can be repealed.' [25]

As a matter of fact, this somewhat oblique reasoning is an admission that the imposition of the obligation to integrate on Caribbean Dutchmen is questionable. And

this did not merely remain an admission, it actually led to the removal of the *existing* obligation to integrate. But this should not lead us to think that the minister has given up on her plans to impose this obligation on Antillean and Aruban Dutch nationals. This transpired from the only question which was raised by an MP on this change of course. He asked what this would mean for the Bill on Expulsion and Integration of Caribbean Dutch nationals. The answer was brief: the Bill is still under consideration at the Council of State, and

'[t]he fifth set of changes to the Bill I have made it possible to extend the obligation to integrate to these Dutch citizens by Order in Council on the basis of Article 3 [Article 4].' [26]

This actually means that the minister did not wish thus to exclude Antillean and Aruban Dutch nationals from future obligations to integrate in whatever form. So there is no reason not to take the separate Bill which makes Antilleans and Arubans liable to expulsion from the European territory of the Kingdom and imposes the obligation to integrate in accordance with the pending Civil Integration Act very seriously. We now turn to this Bill by making some general remarks, to be followed by an in-depth analysis.

4. The Bill on expulsion and integration: some general remarks

The specific civic integration legislation aimed at Dutch Antilleans and Arubans has been published in the shape of a proposal for an Act on additional measures regarding the settlement in the Netherlands of Antillean and Aruban at-risk youth and regarding the civic integration of Dutch citizens of Antillean and Aruban origin. It consists of four elements:

The 'sending away' of Antillean or Aruban youths between the ages of 16 and 24 who have not had the proper schooling (*administrative expulsion*). [27]

The 'ending of residence in the Netherlands' - expulsion - as a special condition accompanying a probational sentence for every Antillean or Aruban, regardless of age, for a crime committed within a period of residence in the Netherlands of less than 2 years (*penal expulsion*). [28]

The obligation to pass civic integration exams for all Antilleans and Arubans (between the ages of 16 and 65) wanting to settle in the Netherlands for the first time; the Civic Integration Act, that was brought before the Dutch House of Representatives in 2005, is declared applicable to them in the Bill. [29]

The creation of a criminal sanction for those persons present in the Netherlands, although they are subject to an administrative expulsion measure. [30]

The explanatory memorandum accompanying the Bill, refers to the

'group of extremely problematic youths with very few perspectives in the field of education and work, partly due to an insufficient command of the Dutch language. These youths do not often stay in one place for long and regularly change their place of residence within the different regions, they have little or no income and live in a

criminal environment. The crime rate amongst Antillean and Aruban youths is four times as high as the average for youths in the Netherlands.' [31]

5. The order of measures

The Bill combines various measures in an interesting way. The double focus on expulsion and integration goes along with the surprising combination of tasks that the Minister has, namely immigration - which in the present day situation means deporting or keeping outside the Netherlands as any many people as possible - and at the same time promoting integration; two tasks that cannot plausibly be reconciled in one person. The order of, firstly, regulating the expulsion of Antilleans and Arubans, and doing this in progressive degrees from an administrative measure to a criminal sanction, with their integration sandwiched in between expulsion and with a penalty for illegal residence as its final provision, illustrates how negatively the Government views these Dutch citizens. Integration is, apparently, meant as something even worse than expulsion as a penal measure and something that must be followed by a criminal law provision regarding illegal residence.

We now to turn to the expulsion measures proposed, and some of the legal problems they run into, particularly the requirements of the rule of law in the form of the principle of legality which requires executive action to have a basis in an act of parliament, and the conformity with the fundamental right to equal treatment.

II Expulsion

1. Deportation and non-admission

The government makes it seem that the proposed arrangements are not admission arrangements, such as those discussed in previous governments. The Bill aims at 'a clearly defined group of at-risk youth without a job or an education' and, so the Minister says, is 'of a very different order than the generic admission arrangement that the previous cabinet had in mind.' [32] From a certain point of view it is, indeed, not a *generic* measure. However, for the group that is potentially exposed to the measure of *expulsion* - we shall see that it is different in the case of the obligation of civic integration - it is of course an admission arrangement in disguise. If one can be deported at any moment for not having a certain diploma, it cannot be said that one has been allowed to settle permanently.

The explanatory memorandum accompanying the Bill tries to state that it is not an admission arrangement, since admission is not literally the object of the bill. Still, in several places, the explanatory memorandum uses language that indicates a regulation of the influx of Antilleans and Arubans. [33] A glance at recent parliamentary documents confirms that, also in The Hague, the plans for expulsion are considered as immigration law regulating the influx of Antilleans and Arubans. The fact that, in reality there, has been a trend towards a net outflow of Antilleans for years (in 2005: 4763 emigrants and 2424 immigrants), is something that, under the influence of politicians (of every political colour) driven by populism, is not heard or understood.

As regards the proposed *expulsion measures*, it is difficult to maintain that it only concerns 'deportation' and therefore not 'admission' in a technical sense. What the

government tries to hide by suggesting it is not a ‘generic admission arrangement’, is that in fact the proposed measure implies the erection of boundaries, new internal borders within the Kingdom which did not exist.

2. Administrative expulsion: a breach of the principle of legality

The Bill lays down in Article 1 that an Antillean or Aruban youth

‘can be sent back to the overseas territories of the Kingdom if he does not comply with education requirements to be determined by way of an Order of Council.’

That’s all. No other requirement need be fulfilled in order to be banished, other than not having had education at a level which remains unspecified in the Act. On the basis of the proposed provision the government is completely free to determine what education this would be, whereupon the minister [34] is free to banish anyone, who has not had this education, to the Kingdom’s overseas territory where the person concerned has a right of residence.

The third paragraph of Article 1 does provide that the measure of expulsion is not applied as long as the youth is ’self-sufficient through work’, pursues an education, or resides in the Netherlands for reasons of family reunification, or for less than three months. Other than that, no requirement is to be found in the proposed legislative text that some form of misbehaviour has occurred, for instance the person has been involved in criminal activities (as demonstrated by the imposition of criminal sentences), or in any other form of wrong doing. It follows from the text of the Bill as it is now that, apparently, the government considers not having a formal education and not being self-sufficient as such a great error that it requires removal from society. Getting into or causing trouble, seems to be the theme of the explanatory memorandum, but does not appear in the legislative text itself. The lack of such a condition, as well as the blanket delegation given to the government regarding the required level of education is in breach of the principle of legality. Since the end of the 19th century, it has been an established principle of Netherlands constitutional law that the act of parliament itself must provide citizens guarantees, and in the case of such far-reaching measures as are at issue they must not leave the criteria for implementation to the complete discretion of the executive power.

3. Unequal treatment: belonging to a certain group as a criterion

The justification of the proposal to introduce the possibility of expulsion, lies fully in the significant social problems caused by a relatively small group of youths from the island of Curaçao who have settled in the Netherlands. The explanatory memorandum focuses completely on this. The Bill, however, is not sufficiently tailored to this. There is, for instance, no beginning of a trace of an answer to the question of what problems *Arubans* cause in the Netherlands, nor the inhabitants of the other islands of the Netherlands Antilles. Introducing a very far-reaching measure that applies to a group that is much larger that the group of those who are actually targeted, makes the measure disproportionate (disproportionality due to *over-inclusiveness*).

This over-inclusiveness is confirmed by the (very worrying) statistics on crime involving fire-arms, adduced by the government in the explanatory

memorandum. [35] The memorandum points out that the problem occurs ‘in particular with young men coming from Curaçao and have recently come to the Netherlands (and have been born in the Antilles). If it mainly concerns youths from Curaçao, than a measure aimed at *all* Antillean and Aruban youths is too wide and therefore disproportional.

More fundamentally, what is at issue is an *individual measure* that can only be imposed on the *members of a certain group*, on a group criterion. With regard to the legislative measure it is the *group character* - the fact of belonging to a group of Antillean and Aruban youths - that is decisive. In applying the legislative measure it is *not* individual ‘misbehaviour’ (i.e. failing to have certain diplomas or education and not being self-supporting) that is decisive, but this very fact of belonging to a certain group: origin and birth are decisive for being liable to administrative expulsion; what is decisive is where you come from.

This is a problematic approach. [36] After all, many individuals that are guilty of the same behaviour cannot be sent away only because they are not part of the defined group of Antilleans and Arubans. There is youth that is not of Antillean or Aruban origin as defined in the proposed legislation, has not enjoyed a certain level of education as determined by the government, and is not self-sufficient (nor qualifies for any of the other exceptions); this group cannot be banished like Antillean and Aruban youths, even though (apart from birth and origin) it is in exactly the same situation. The explanatory memorandum itself, for instance, gives statistics on Moroccan youths, who are in many ways similar to the targeted group of youths from Curacao. The statistics adduced by the government suggest that the problems among Moroccan youths are actually even worse. Yet they cannot be expelled like the Antillean and Aruban youths. This means that the measure is disproportional also because the measure is too limited (*under-inclusive*) and therefore arbitrary.

5. The criminal law measure of expulsion

The Bill seeks to introduce the possibility that when an Antillean or Aruban person is given a probational sentence for committing a crime within two years of entering the Netherlands for the first time, the condition can be imposed that the person convicted be ’sent away’ to the Netherlands Antilles or Aruba.

When reviewing the proposal in light of the requirement to treat equal cases equally (art. 1 Dutch Constitution, art. 26 ICCPR, art. 1 12th Prot. ECRH) the most important groups with which a comparison should be made are foreigners and Dutch citizens born outside the Antilles or Aruba, respectively.

With regard to *foreigners* the question arises why a foreigner who has been given a probational sentence cannot be expelled to a country where he has a right of residence as a condition of his sentence and an Antillean or Aruban Dutch national can? An answer to this question is not given.

In the explanatory memorandum, a reference is made to a judgment of the Dutch Supreme Court [*Hoge Raad*], that considered imposing a similar condition of expulsion with regard to a foreigner (a national from Ghana) inadmissible. The

memorandum points out that the judgment did not concern Dutch nationals. The government seems to overlook that this made the proposal even more unacceptable.

As of yet there is no justification that can be given for this distinction between Antilleans/Arubans and foreigners.

Concerning the comparison with Dutch nationals not born in the Antilles or Aruba, the measure resembles a street or area ban (an order prohibiting someone from entering a designated street or area.) Legislation regarding the possibility of expelling non-Antillean or Aruban Dutch nationals who have a right of residence in the Netherlands Antilles or Aruba, however, does not exist. This absence indicates an unwarranted distinction. Why can a Dutch national who was born in the Netherlands and has a right of residence elsewhere not be sent there as a condition of his sentence? Should thís Dutch national be allowed to continue endangering the public order in the Netherlands?

This last issue raises the question of the connection to the Netherlands: it could be said of a Dutch national born in the Netherlands that the birthright also brings with it a right of residence. By being born there, an indissoluble connection with the country itself is created. This cannot, however, be said of a non-Antillean/non-Aruban Dutch national born outside the Kingdom of the Netherlands: why would such a Dutchman - born *outside* the Kingdom - have the privilege not to be sent away as a condition of a probational sentence, whereas Antillean and Aruban Dutch nationals born *within*the Kingdom of the Netherlands are exposed to this? Why would an Antillean or Aruban Dutch national born *within*the Kingdom of the Netherlands have less rights than a Dutch national born *outside* the Kingdom?

6. Other issues

It is remarkable that the criminal law expulsion is not linked to age. This means that the measure cannot be justified by referring to the over-representation of *youths* in statistics.

What’s more, the imposed condition of expulsion is of shorter duration in the case of minors (two years) than in the case of adults (three years), while the statistics that are presented in the explanatory memorandum indicate that minors are statistically more often suspected of a crime than adults (respectively five and four times as often as Dutch nationals born in the Netherlands).

Also the paradox arises that only crimes for which a probational sentence can be imposed, can lead to imposing the condition of expulsion, so that in the case of more serious crimes this condition cannot be imposed. This breaks the link between the severity of the crime and the sanction of ending the residence in the Netherlands. It also upsets the parallel that the explanatory memorandum draws between this type of ’sending away’ and declaring someone an undesirable alien (see below).

7. European law

Both forms of expulsion - both administrative and penal expulsion - proposed in the Bill seem to infringe EC law. EC law applies to Antillean and Aruban Dutch citizens

because of their Dutch nationality when they are within the territorial remit of EC law (the EC Treaty does not apply to the territories of the Netherlands Antilles and Aruba, but does apply to Antilleans and Arubans when they are in the Netherlands or another member state). An expulsion measures as proposed, exposes an Antillean or Aruban Dutch citizen to a sanction to which EU-citizens who exercise their free movement rights, as well as their family members (whether or not EU-citizen), cannot be subjected under EC law.

Regarding the administrative as well as the criminal law expulsion, it must be noted that, under Article 27, paragraph 2 of Directive 2004/38/EC (the Residence Directive), the measure of expulsion may be imposed once the following conditions have been fulfilled:

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

The Bill clearly relies on considerations of general prevention. Moreover, they are not based exclusively on the personal conduct of the individual concerned, but also on his belonging to a group that is defined according to origin.

This creates a problem in two manners.

Firstly, the fact that the expulsion could not be imposed on non-Dutch EU citizens, implies necessarily that Dutch citizens are discriminated as compared to such EU citizens. The Netherlands Constitution and a variety of non-discrimination and equal treatment clauses in human rights treaties binding on the Netherlands prohibit such unjustified unequal treatment or discrimination. This is an infringement of Dutch law.

Secondly it is a problem under EC law for the Antillean or Aruban Dutch national, who makes use of the free movement of services between the EU Member States, being an EU citizen (because of his Dutch nationality), falls within the scope of EU law. Expulsion would then be a discrimination not merely under Dutch law as just spelt out, but also under EC law. The principle of non-discrimination must be observed by the Member States as a general principle of Community law (Article 6 paragraph 2 EU Treaty). Also, expulsion as proposed is directly in conflict with the Regulation just quoted.

8. The internal borders of the Kingdom

In the expulsion proposals we can see a new trend towards erecting internal borders within the Kingdom of the Netherlands. These borders only exist for Antilleans and Arubans. Neither foreigners nor Dutch nationals born outside the Kingdom abroad can be subjected to the sanctions.

The explanatory memorandum is very clear on wanting to treat Antilleans and Arubans worse than other Dutch nationals. Evidently, the government's intention is to make Antilleans and Arubans like aliens, including the possibility to declare them *personae non gratae*, through the measures of either administrative or penal expulsion.

In two different places, the explanatory memorandum mentions the criminal law aspects of expulsion as being parallel to an order declaring someone an undesirable alien. First, it is stated that Antilleans and Arubans cannot be declared an undesirable alien ex Article 67 Vreemdelingenwet 2000 (Aliens Act 2000). [37] Secondly, the explanatory memorandum explicitly models the penal sanction on not complying with an administrative expulsion measure on the sanction for the sanction for aliens that have been declared undesirable. [38] Here it is made openly clear what the government has in mind: the possibility to treat an Antillean or Aruban youth as if he were an alien. Deportation from the Netherlands for the duration of an expulsion decision or condition, is the same as treating Dutch nationals as if they were aliens: by introducing these measures 'internal borders' are erected within the Kingdom of the Netherlands. This is indeed for the duration of the expulsion measure only, and to that extent they may seem to be treated more favourably than foreigners. In reality, however, the measures go even further. The measures can, after all, as we have seen, only be applied to Antillean and Aruban Dutch nationals, and not to foreigners who are in the same situation: Antilleans or Arubans who are in the same situation as foreigners, are treated *worse* than foreigners. The 'internal borders' are, for Antilleans and Arubans, more insuperable than the 'external borders' that exist between the Kingdom of the Netherlands and the outside world are for foreigners.

III INTEGRATION

The plans for introducing an administrative and criminal law measure of *expulsion* in the Bill on additional measures regarding the settlement in the Netherlands of Antillean and Aruban at-risk youth and regarding the civic integration of Dutch citizens of Antillean and Aruban origin, have drawn attention in the press. In the following part of the paper, the *obligation to integrate*, that is proposed in the Bill and has received less attention, will be discussed. We shall try to make clear that this deserves at least as much critical attention as it reinforces the borders which the government intends to erect.

The following points will be made:

The Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk*, the constitutional document regulating relations between the countries of the Kingdom of the Netherlands) does not stand in the way of granting certain citizenship rights and obligations specific to the various countries within the Kingdom ('country citizenship', *landsburgerschap*)

The proposed obligation to integrate does not so much concern the creation of citizenship rights and obligations, but rather equates Antilleans and Arubans with foreigners from 'third countries', i.e. non-EU citizens, and thus undermines the principle of the common citizenship based on the common nationality, on which the Charter for the Kingdom is based;

The obligation to integrate infringes the Dutch Constitution and international treaties, in particular the principle of non-discrimination laid down therein;

The discrimination mainly lies in the unjustified distinction that is made between on the one hand Antillean and Aruban EU citizens with Dutch nationality and on the other non-Dutch EU citizens (and other comparable foreigners);

That other third country nationals, such as the Japanese, are exempted from the obligation to integrate is extremely painful from the point of view of citizenship and Kingdom Relations.

The implementation problems that the proposed obligation to integrate will run into, will not be discussed. Such problems may, for instance, occur with regard to the criterion of a ten years domicile in the Antilles or Aruba, and the registration of relevant groups of Antilleans and Arubans that have settled in the Netherlands in the municipal register and a register which the Civic Integration Act aims to introduce to identify persons who potentially require 'integration'.

The proposal

The central provision on civic integration is the proposed Article 7:

Article 7 (unofficial translation)

1. The obligation to integrate applies to:

a. Dutch nationals born in the Kingdom's overseas territories and who have had their main residence there for at least ten years;

b. Dutch nationals born from a parent with Dutch nationality who was born in the Kingdom's overseas territories and who have had their main residence there for at least ten years;

c. Persons who have become Dutch nationals through naturalisation, who had their main residence in the overseas territories of the Kingdom in the time period immediately preceding their nationalisation.

2. The Civic Integration Act applies to the obligation to integrate *mutatis mutandis*. [...] [39]

The reference to the Civic Integration Act implies amongst others that the obligation to integrate applies to persons from the age of 16 to 65.

The explanatory memorandum accompanying the Bill states that it entails a legal measure for newcomers and Antilleans and Arubans who are already in the Netherlands ('old comers' in the integration jargon of the politicians) 'if it is likely that they will run into problems integrating in Dutch society because of their lengthy residence in the Antilles or Aruba'. [40] Given the very large group targeted, the government assumes that anyone who himself or whose parents have lived in the Antilles or Aruba longer than 10 years will run into problems (would this be a

depreciation of these persons or of the social climate prevailing in the Netherlands?). The obligation to integrate is presented as 'specific mandatory social training':

'Where the possibility of sending back young people with no future is proposed, there is all the more reason to also impose mandatory social training for the so-called «settled immigrants» [*oudkomers*] who struggle with the same language and education problems and whose return is not a realistic solution. Certain special categories of Antilleans and Arubans can be offered a programme of integration that is adapted to their situation. The special problems of certain groups of Antilleans and Arubans, which mainly stem from an insufficient command of the Dutch language, insufficient knowledge of Dutch society and poor education, is for a large part the result of the uncontrolled immigration from the Antilles. This supports the idea of regulating the issue in the framework of the Bill in question. For this special category of Dutch nationals, both newcomers and settled immigrants, with insufficient oral and written skills in Dutch and little knowledge of Dutch society, in line with the proposal of the Council of State, a specific mandatory social training is proposed.' [41]

One cannot fail to see that, while theme of the whole explanatory memorandum seems to be measures against at-risk youth, the obligation to integrate seeks to affect a much larger group of Antilleans and Arubans. As a matter of fact, the government is in effect saying that the problems of unemployment and criminality extend to all Antilleans and Arubans in the Netherlands.

The substance of the obligation to integrate

It must be recalled that the content of the obligation to integrate is not dealt with in this Bill but in the Civic Integration Act, which at present is before the Upper House of Parliament. To recapitulate, it lays down the obligation to *pass* an exam in which knowledge of the Dutch language and society is tested, on pain of an administrative fine or a lowering of social benefits. Every Antillean or Aruban who fails this exam will thus be exposed to a fine or a lowering of social benefits. [42]

Admission arrangements?

We have seen above that the measures of expulsion that the Bill seeks to introduce are indeed meant to regulate the *migration* of Antilleans and Arubans, and hence is an indirect admission policy. Deportation is by definition the opposite of *admission.*Only those who do not have a right to remain after being admitted into the country can be deported: as a result of the possibility of deportation, admission becomes critical.

For the *obligation to integrate* - to which this part of the paper will be limited - this is, however, not the case. The sanction for failing or not taking the civic integration exam does not affect the rights of residence as they cannot lead to deportation or otherwise affect there right of being in the Netherlands.

To whom does the obligation to integrate apply?

Under the Civic Integration Act the obligation to integrate will, in principle, apply to all aliens, *except*

those who have lived in the Netherlands during at least eight years of having the mandatory school age;

non-Dutch EU citizens, and their (also third-country nationality) family members;

third-country nationals that are priviliged on the basis of a convention containing a clause on their treatment equal to the most-favoured national or national treatment, which is the case with the Japanese, United States, Australian, Canadian and Swiss nationals.

The Act furthermore initially was intended to apply also to a limited group of Dutch nationals (Dutch nationals who were naturalised before April 2003, and who either receive government benefits, are raising children or are holders of a religious office). But we saw above (Part I) that this clause has been changed into a delegation of power to the government to determine the group of Dutch nationals to be subjected to the civic integration obligation.

The Antilleans and Arubans on whom the Bill imposes the obligation to integrate under the Civic Integration Act we just mentioned. It is evident that the Bill essentially equates the Dutch nationals in question (Antilleans and Arubans and Dutch nationals that were naturalised in the Antilles or Aruba) with *aliens*. The only difference is that, strictly speaking, no sanctions related to residence permits can be attached to not complying with the obligation to integrate (foreigners cannot obtain a permit for long-term residence as long as they haven not passed their civic integration exam).

(The sanction of expulsion that is also proposed in the Bill is, on the other hand, justified by equating Antilleans and Arubans with foreigners.)

The primarily *monetary* sanction applies to the Antillean and Aruban Dutch nationals in the same way as to foreigners.

Citizenship under the Charter for the Kingdom

Relations between the three countries which together constitute the Kingdom of the Netherlands, are subject to the constitutional rules contained in the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*). It distinguishes in a quasi-federal manner between affairs for the whole realm (*koninkrijksaangelegenheden*) which can only be decided with the consultation of the Caribbean countries, and matters which belong to the autonomy of each of the three countries and are as a consequence decided upon by each autonomously.

Some commentaries asserted that, according to the Charter for the Kingdom of the Netherlands, the Kingdom has an indivisible citizenship. This would be irreconcilable with the proposals that have been made. This calls for further explanation.

It is correct to state that the Dutch citizenship is a Kingdom affair to be conducted in cooperation by the Netherlands, the Netherlands Antilles and Aruba, [43] and that there is one, indivisible, Dutch citizenship. The official commentary to Article 3, paragraph 1, introduction and sub (c) of the Charter - the provision that makes

Netherlands nationality a Kingdom affair - however, expressly states that '*a regulation of citizenship is left to the countries if they so desire*.' The constitutional history of the Charter and its official commentary makes clear that the citizenship referred to in this quotation was a 'country citizenship', *landsburgerschap*, as distinguished from and juxtaposed to national citizenship.

What the drafters of the Charter had in mind with this 'country citizenship' seems to be a formal status that could only be given to 'local nationals'. Yet, it was not the formal status, but the rights attached thereto which were the main concern. As far as can be concluded from published sources, this goes back to Resolution XIV of the Netherlands-Surinam-Curaçao Conference of 1948. [44] A notable detail is the fact that this Resolution also stated as a principle of the regulation of Dutch nationality and citizenship that

'Dutch nationals cannot be deported from the country of which they are a citizen or in which they reside.' [45]

This principle has not been included in the Charter in so many words, but it would make the measures of expulsion that are now being proposed impossible.

According to the main collection of documents of the negotiations on the Charter by Van Helsdingen, the report which was at the basis of this Resolution states that:

'Regarding the citizenship of one of the countries within the kingdom and the rights to be granted on the basis of this, regional factors play such a large role, that in common legislation [for the whole realm] only the main structure can be laid down.' [46]

This is an indication that the main rights pertaining to country citizenship were considered a matter for the whole realm and not a merely autonomous matter, but at least with regard to the citizenship rights which could be asserted within the (European part of the) Netherlands. This is apparent from a provision which has been repealed since the transfer of sovereignty over New Guinea to Indonesia, Article 60 of the Charter. The inhabitants of the Netherlands East Indies had a special status different from Dutch nationality. The latter - Dutch nationality - would have granted them citizenship rights within (the European part of) the Netherlands, especially rights of abode and electoral rights. In the 19th century, this was not considered fitting, and hence they were granted the status of 'Dutch subjects', *onderdaanschap*, as distinct from Dutch nationality. This status of 'Dutch subject' - which then only remained for New Guinea - was by the Charter declared to be a matter for the whole realm (*koninkrijksaangelegenheid*), and hence a matter which could not be decided unilaterally by the Netherlands alone.

None of the three countries that form the Kingdom have introduced 'country citizenship' as a *formal*status, nor is there any common legislation regulating the matter. This, however, does not detract from the fact that *substantively*legal differences exist between the countries with regard to *citizenship rights*. I will clarify this.

Citizenship rights are usually understood to be fundamental rights that are directly connected to, and dependent on, the fact of a person belonging to a certain political

community. This belonging to that group is usually formalised in a status. This status is often - but not always - that of nationality, or citizenship. Typical citizenship rights are the right to vote and stand for election and the right to access and permanent residence in a country (or part of it).

What we see in practice is that formal citizenship entails different substantive rights in the different parts of the Kingdom. The Charter, for instance, gives only general minimum rules regarding the *right to vote and stand for election* for the whole of the realm, which have been further elaborated in every country. The Charter itself states that 'residents of the country concerned' shall have the right to vote in the election of representative assemblies. The right to vote does not exist on the level of the Kingdom but is limited to the countries themselves, as there is no (directly elected) Kingdom parliament exists. [47] The legislation on electoral rights does lead to problems, because the Dutch legislature has chosen to draw up the Electoral Act [*Kieswet*] in such a way that every Dutch national of 18 years and older has the right to vote for the Dutch parliament and the European Parliament, except Dutch nationals living in the Netherlands Antilles and Aruba. [48] As regards the right to vote for the Dutch parliament, this is justified for the legislation which only affects the European part of the Kingdom, and to the extent that persons residing habitually in the Netherlands have the right to vote. As regards the legislation which also affects the Caribbean part of the Kingdom, this seems less easily justifiable. However, that Dutchmen residing outside the Netherlands, not being the Netherlands Antilles and Aruba, have the right to vote for the Dutch and the European Parliament is, however, hard to justify as it discriminates against persons living in the Netherlands Antilles or Aruba. As regards the European Parliament, a case is pending at the European Court of Justice. It has been asserted that the residence requirement is a manifest case of unequal treatment which cannot be justified since an Antillean living in the French part of Saint Martin, or New York or Patagonia, does have voting rights for the European Parliament, but when they happen to live in the Netherlands Antilles or Aruba they are withheld the right to vote. The European Court of Justice will soon hand down its ruling - at the time of writing, the Advocate General has already come to the conclusion that it is a case of discrimination, the consequence being that the Electoral Act infringes general principles of European Community law. [49]

Also the right to reside in the various countries has a differentiated legal regime. As of old, the Netherlands Antilles, and, since becoming a separate entity within the Kingdom, also Aruba, have a Country Ordinance on Admission and Deportation [*Landsverordening Toelating en Uitzetting*] which (in short) makes it necessary for certain European Dutch nationals wanting to settle in the Antilles and Aruba to obtain a residence permit - this in order to protect the labour market of the vulnerable island economies of these countries against the possibility of an 'invasion' and domination of the local island economy by European Dutch investors. (The practice under this Ordinance is by official Antillean governmental sources said to be such that a residence permit can under normal circumstances no longer be refused to European Dutch nationals. The enormous asymmetry between the small Caribbean islands on the one hand and the Dutch part of the Kingdom on the other - which is taken fully into account in the Charter of the Kingdom - makes it of course impossible to use the mere existence of the Antillean and Aruban Ordinances as a justification for the introduction of an admission and expulsion regulation by the Netherlands government. Nevertheless the proposals under discussion have borrowed their

definitions of Antilleans and Arubans subject to the proposed measures from this Antillean Ordinance - would the minister have had in mind to give the Antilleans and Arubans a taste of their own medicine?)

To return to the proposal for the expulsion and integration of Antilleans and Arubans which is the object of this study, we must say, that in fact it aims to create special privileges for the Dutch nationals who reside either in the Netherlands or elsewhere. This group of Dutch nationals, to the exclusion of Antillean and Aruban Dutch nationals, have the privilege not be subjected to the measures of expulsion and of the obligation to pass a civil integration exam; they are fully citizens that do not need to prove their citizenship by passing for an exam and have full and unconditional residence rights which cannot be removed from the country for reasons of lack of education or as an 'internal' banishment or deportation. In principle, the conferral of these privileges of citizenship on certain persons means that the persons to which they are granted, enjoy the 'country citizenship' of of the Netherlands as one particular country within the Kingdom.

The Charter itself does not stand in the way of creating such 'country citizenship' and its consequences, such as the erecting of 'internal borders' within the Kingdom. However, the specific nature and form of the proposed form of substantive citizenship can indeed infringe the principles at the basis of the Charter and may conflict with other higher legal norms - which is in fact the case with the proposed measures.

The criteria for country citizenship undermine the concept of national citizenship of the Kingdom of the Netherlands

The proposed obligation to integrate means that the group of Antillean and Aruban Dutch nationals concerned will not only be differentiated from other Dutch nationals, but, what's more, that, these Antillean and Aruban Dutch nationals are equated with *non*-Dutch nationals, *foreigners,*'third-country nationals', who do not want to have or have ever had any special ties with the Netherlands. *This* is the real problem regarding the civic duty that the government wants to introduce. Antilleans and Arubans are not merely second rate Dutch nationals (as in colonial times), they are equated to *aliens,* to be precise *least favoured*aliens.

As a consequence adopting the proposed measures means *de facto*splitting the personal substrate of the Kingdom itself, the inhabitants of the Kingdom, into insiders (nationals) and outsiders (aliens). An interior or inside and an exterior or outside are created, in which the outsiders no longer have a more privileged connection with the Netherlands compared to other foreigners; worse, the outsiders have a less privileged connection with the Netherlands than many other foreigners (e.g. the non-Dutch EU citizens and their third-country nationality family members, Japanese, Canadians, Americans, Australians and Swiss).

The 'outsiders' that it concerns in this context, are *formally*Dutch nationals, but they are not Dutch nationals in full until they have proved their civil rights, on pain of a fine; this on the same footing as other least favoured foreigners. The 'internal borders' in the Kingdom that are formed as a result of the citizenship of one of the countries within the kingdom, in fact turn out to be 'external borders'. Although formally Antilleans and Arubans are Dutch nationals, exposing them to the obligation of civic

integration - and a number of them to the sanction of removal from Dutch territory - means emptying out the meaning of formal nationality, thus undermining the idea of one commonly shared concept of being Dutch [*Nederlanderschap*], which is at the basis of the Charter for the Kingdom. So far we have called this in this article 'nationality', but the signatories of the Charter in their official commentary on that constitutional document were adamant that this be not merely a formal status, but one of substance:

'[Charter for the Kingdom of the Netherlands, Article 3, first paragraph] c. We have explicitly used the expression 'the status of being Dutch', *Nederlanderschap*, and not of 'nationality' in order to make clear that for the three parts of the Kingdom *Nederlanderschap* is the common and only nationality.' [50]

Discrimination and unjustified unequal treatment

In the following paragraphs we will test the compatibility of the obligation to integrate with the principle of non-discrimination and the prohibition of unjustified unequal treatment. [51]

The problem of unequal treatment and discrimination arises because of the implicit or explicit categorical exemption of certain Dutch nationals and third country nationals.

We can distinguish

a) Antilleans and Arubans, who had their main residence outside the Kingdom for ten years or more;

b) other Dutch nationals who were born outside the Kingdom and had their main residence outside the Netherlands for ten years or more;

c) non-Dutch EU citizens and their family members, including those family members who may be third country nationals qualifying under EC law; and

d) those who are privileged as a result of a most favoured nation or national treatment clause in a bilateral treaty or agreement (in practice Japanese, Canadians, Australians, Americans).

Antilleans and Arubans, who had their main residence outside the Kingdom for ten years or more fall outside the group that is subject to the obligation to integrate (group a). An example could be Dutch Antilleans who live in the French part of St. Martin, or the child of a Dutch Antillean mother who has moved to Venezuela (or another non-Dutch Caribbean island, as occurs very frequently also among poor and not highly educated women) and lived there for more ten years. These persons are not subject to the obligation to integrate. This is an arbitrary distinction and therefore unjustified.

The same goes for Dutch nationals who, for whatever reason, have had their main residence outside the Kingdom for ten years or more (group b). They too are not subject to the obligation to integrate, even though this does not mean that their knowledge of the Dutch language or society is sufficient to avoid integration problems.

Non-Dutch EU citizens

Under the Civic Integration Act there will be a categorical exemption for non-Dutch EU citizens, and those who can be equated to non-Dutch EU citizens, that is citizens of EEA countries and the Swiss (group c in the list above). [52] Furthermore, also their family members who are third country nationals will be exempted from the obligation to integrate (in line with secondary EC law). [53]

Regarding the non-Dutch EU citizens themselves (and EEA citizens and Swiss) who do not have sufficient knowledge of the Dutch language and society, no satisfactory objective justification can be given of why they should be exempted from the obligation to integrate while Dutch Antilleans and Arubans are not, except that EC law forbids the EU citizens' subjection to such an obligation. The Council of State held in its advisory opinion on the original text of the Civic Integration Act that by subjecting Antillean and Aruban Dutch nationals to an obligation to integrate, 'Dutch nationals are placed in a disadvantaged position in comparison to other citizens of the European Union, and that this is difficult to reconcile with the principle of equality.' [54] The Council came to the conclusion that the act would have to be amended in such a way as to exempt Dutch nationals from the obligation to integrate on the same footing as non-Dutch citizens. [55] It pointed out that according to the case law of the ECrtHR (particularly the *Matthews*case [56]) the mere existence of a treaty obligation cannot justify an infringement of the provisions of the ECHR, including the 12th Protocol which forbids discrimination on any grounds in the same terms as Article 1 of the Constitution of the Kingdom and Article 26 ICCPR.

This reasoning of the Council of State (it spoke of 'major objections') concerning the initial text of the Civic Integration Act also applies to the present proposal. The explanatory memorandum does not make the faintest attempt to explain in substantive grounds why it should be justified to grant these non-Dutch nationals a more privileged position with regard to the obligation to integrate, than Antillean and Aruban Dutch nationals.

The escape route of EC law

It has been suggested that Antilleans and Arubans can escape from the obligation to integrate by making use of the fact that they are themselves EU citizens, [57] and hence when using their free movement rights under EC law, they cannot be subjected to the integration measures. Making use of the services of an airline of a Member State in order to be flown to another Member State falls under the free movement of services within the meaning of the EC Treaty. For this reason is has been stated that an Antillean or Aruban who flies from another Member State to the Netherlands, should be exempted from the obligation to integrate for this reason alone. I doubt whether this is so.

It is unquestionable that no one can be punished for making use of his EC freedoms when returning from another Member State where he resided (the famous *Singh* case of the European Court of Justice). [58] It is, however, uncertain whether flying via another Member State in order to settle in the Netherlands for the sole purpose of escaping from the obligation to integrate is protected under the free movement of services. Besides reasons of abuse of rights, it can also be questioned whether the

involved party is in a worse position after having made use of his EC rights (this is the ratio of the *Singh* judgment and other, similar, ECJ cases). Is a (Antillean or Aruban) Dutch national who is subject to the obligation to integrate in a more unfavourable position as a result of making use of his EC rights then when he did not (as was the *ratio* of the *Singh* judgment)? Probably not: he was, after all, already subject to the obligation to integrate beforehand.

This does not, however, detract from the fact that imposing the obligation of civic integration is discriminatory and therefore cannot be allowed.

Privileged third country nationals

Amongst those who are exempt from the obligation to integrate are also third country nationals, who are granted an exemptionon the basis of treaties of friendship and other international agreements (group d in the list above). [59] These are Japanese, Americans, Canadians and Australians.

As we pointed out above, this exemption implies granting to these aliens, who have no political link with the Netherlands at all, a more privileged treatment than Dutch inhabitants of the Kingdom, who were born in the Kingdom and have had their main residence there. Apparently, Antilleans and Arubans are considered ‘less favoured’ than these aliens.

The Charter of the Kingdom is based on a shared citizenship. It is part and parcel of the rhetoric of the European Dutch nationals that this shared citizenship should be more than the paper and plastic that make up the Dutch passport alone. The Charter also presumes this. It was at the time a deliberate choice not to follow the British in their development towards a loose commonwealth approach in which citizenship, as well as admission, residence and voting rights would be disconnected from citizenship of the Kingdom of the Netherlands. This is also the reason why the report at the basis of Resolution XIV of the 1948 Conference, which mentioned the possibility of a country citizenship next to the citizenship of the Kingdom, speaks of a ‘common arrangement’ on citizenship. [60]

The extent to which the Dutch government wishes to empty the notion of a shared citizenship of all substantive meaning becomes evident from the fact that the Japanese and other third country nationals are given privileges, which the government does not want to give some of its own citizens. It is a painful illustration of the manner in which the Dutch government regards political and constitutional relations within the Kingdom.

IV CONCLUSION

The proposals for introducing a general obligation to integrate for a group of Dutch nationals on the same footing as for third country nationals, while creating a categorical exemption for non-Dutch EU citizens (and persons treated as such) and some non-European third country nationals, as well as the proposals on administrative and penal expulsion, are untenable. ‘Rather a Japanese than an Antillean or Aruban’, seems to be the Dutch government’s point of view implied in the proposals on civic integration. ‘Rather a Moroccan youth than an Antillean or Aruban youth’ seems to be

the government's view implied in the proposals on administrative and penal expulsion.

The proposals seem particularly well suited to turn political relations within the Kingdom sour and to promote its further disintegration. The proposals effectively erect new, previously inexistent borders within the Kingdom. First, second and third rate citizens will be distinguished. It is clear that the Antilleans and Arubans who have had their main residence in the Caribbean parts of the Kingdom, do not belong to the first rank Dutch citizens. But neither are they second rate citizens, as they are preceded by non-Dutch EU citizens, but also the Japanese, Americans, Canadians and Australians are of higher rank.

Aruba

The erecting of such borders within the Kingdom has in no way contributed to an improvement of the future of the Caribbean parts of the Kingdom. It cannot contribute to a solution for the problems that the Netherlands faces in its relation to the Caribbean parts of the Kingdom, just as little as it can contribute to a solution for the social problems that have existed for years for a relatively limited group of Antilleans in the Netherlands, and for whom (not very well coordinated) social measures at municipal have been announced, but of which it is unclear what has been done and how. [61] Aruba is the one who suffers here. In none of the statistics or in any other way has any problem been observed with regard to the 'quality' of the immigration from Aruba to the Netherlands. Just because the official commentary to the Charter of the Kingdom states that regarding admission and deportation 'the countries should not discriminate between Dutch nationals who do not come from the country concerned' the Bill intends to place the Arubans in the same unfavourable position as the Antilleans. A neat example of non-discrimination.

The future: or where to go from here?

The political bickering about the admission and deportation arrangements that has gone on for years now at the political level, has not brought much in the way of positive results to any of the countries in the Kingdom. It is therefore a better idea to change course radically.

There is no satisfactory justification for this equating of Antillean and Aruban Dutch nationals with foreigners from third countries regarding the obligation to integrate and to subject them to expulsion measures as proposed. Saying these proposals must be withdrawn is not to say, however, that nothing should be done at all. There are indeed great problems mainly with a relatively small group of (first generation) Antilleans in the Netherlands. But the most urgent of these are not solved by an obligation to pass a civic integration exam, nor by exporting these problems back to the Antilles. Much more is called for to solve this social, economic, labour market and educational problem, although no solution shall be easily obtainable - as is usually the case with difficult problems. Common sense suggests that these problems are solved with social, economic, labour market and educational measures. The requirement of passing a civic integration exam is at best merely symbolic politics, and a sign of unwillingness to solve the real problems. At worst it is an effort at excluding fellow nationals from citizenship.

We have learnt in Europe that free movement contributes to economic and social well-being (although we seem to have to learn this all over again with every enlargement of the EU with a non-Western European country). Within the Kingdom this lesson has still not been learnt. It would be wise, especially now the Netherlands Antilles are on the verge of dissolving, to codify the free movement of workers, or, more generally, the free movement of persons within the Kingdom as a constitutional principle (which may allow for safeguard measures in the case of severe economic or labour market crises in the island economies).

The Dutch Supreme Court has already established in its case law that the principle of free movement of workers is an unwritten constitutional principle that applies between Aruba and the Netherlands Antilles. [62] It should also be laid down, after the future negotiations, for all the islands of the Antilles once the Netherlands Antilles are dissolved. It is time to apply this principle in relation of the Caribbean islands to the Netherlands as well.

This may very likely be painful in the beginning to the Antilles and Aruba who will have to bid farewell to the possibility of protecting their island economies against the Dutch presence on the labour market. It will also be painful for the Dutch politicians who believe that social and economic problems should be solved by symbolic measures that in no way contribute to a solution.

Footnotes

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This article reflects the situation of the legislative itineraries of the various legislative proposals as it was on the 15 July 2006.

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[2] Article 3 (1) sub c, Charter for The Kingdom of The Netherlands, Staatsblad 1954, 503: '1. Without prejudice to provisions elsewhere in the Charter, affairs of the Realm shall include: ... c. Netherlands nationality'. The constitutional history of this provision makes clear that there was to be one, single and uniform nationality for all citizens within the Realm. This matter is subsequently uniformly regulated in detail in the Act for the Realm on the Dutch Nationality, *Rijkswet op het Nederlanderschap*.

[3] Particularly the poorer ones have generally been called 'the *allochtonous*', (Dutch: *allochtonen*). The negative attitude towards the *allochtonous*, elsewhere called xenophobia, is not merely a social phenomenon since Pim Fortuyn's breaking of ethnic taboos, but is in the opinion of this author based on a government policy shared and supported throughout a broad spectrum of politics since the political turmoil caused by Fortuyn's sudden appearance and huge populist success and his dramatic disappearance from the political scene into a new form of 'political correctness'.

[4] Henceforth, we speak of 'the Netherlands' always intending the European part of the Kingdom; the expression 'the Kingdom' always comprises the whole of the Kingdom, that is, including the Netherlands Antilles and Aruba.

[5] That is, youth deemed at-risk of engaging in delinquent or anti-social activity.

[6] The draft of the proposal (in Dutch) can be found at:

http://www.justitie.nl/

[7] This paper will not discuss practical or implementation problems. For a discussion of the limited practical value of the criminal law measure of expulsion and a number of administrative objections to the proposed provisions on the shorter time period for reaching a judgment (Article 4, paragraph 3 of the Bill), see Raad voor de Rechtspraak (Council for the Judiciary), advies 2006/14, 19 april 2006.

[8] Staatsblad 1998, 261.

[9] *Wet inburgering nieuwkomers*, Art. 1 (1) a.

[10] This fine is in principle 20% of the relevant social assistance benefit (*Bijstandsuitkering*), which is a sum that may vary depending on the family situation from (at the time of writing) approximately €114 to €240; the fine is doubled if within 12 months from the imposition of a first fine, an individual still has not complied with the duty to register and take part in an integration programme; see *Boetebesluit*inburgering nieuwkomers, Staatsblad, 1998.

[11] This turn towards tackling social integration through migration law, was laid down in a policy document in April 2004, which was called the *Contourennota*(Outline Policy Document); See parliamentary documents TK 29543, no. 1-2, Herziening van het inburgeringsstelsel. It developed the idea of the sanction on not passing these tests would be a prohibition to settle permanently in the Netherlands and/or an administrative fine.

[12] This concerns the *machtiging tot voorlopig verblijf*, an authorisation for temporary residence that has to be obtained in the country of origin. These countries coincide with the countries within the Schengen visa policy, on the list for which a visa requirement may be imposed. In practice this means all third country nationals (i.e. who are not EU-citizens or EEA citizens) except nationals from the USA, Canada, Australia, Japan, Vatican and Switzerland.

[13] See footnote 8. For an overview of the legal problems, see Leonard F.M. Besselink, 'Inburgering, gelijke behandeling en verblijfsrecht van vreemdelingen in Nederland', Reeks voorstudies ACVZ, nr.7, 4-2005, Ministry of Justice, the Hague, which can also be found at http://www.acvz.com/publicaties/VS-ACVZ-NR7_2005.pdf.

The phrase '*born outside the European part of the European Union*' was, furthermore, clearly not intended for the French citizens of La Réunion or French Guiana (respectively the most western and most eastern part of the EU), but solely and exclusively for Antilleans and Arubans [See parliamentary documents TK 29543, no. 1-2, p. 5 and 6, and most significantly page 23, footnote 2 of annex 1 of the Contourennota.]- and of this group really only the small number of at-risk youth from Curaçao that gets into trouble and causes trouble in the Netherlands that was targeted.

[14] See Advisory opinion of 1 July 2005, parliamentary documents TK 2005-2006, 30308, no.4, p. 1.

[15] *Ibidem*, p. 4.

[16] *Ibidem*, p. 4.

[17] *Regeling overzicht Nederlands-Antilliaanse en Arubaanse opleidingen en diplomavergelijking Nederlandse nieuwkomers* (Ministerial Decree giving an Overview of Netherlands-Antillean and Aruban Education and Comparison of Diplomas of Dutch newcomers)of 17-09-1998, Staatscourant 1998, 183,which is based on Artcle 1 (1) c, and (2) *Besluit opleidingseisen Nederlandse nieuwkomers*(Order in Council on Educational Requirements of Dutch newcomers), which in turn is based on Article 3 (1) b of the *Wet Inburgering Nieuwkomers* (1998 Act on Civic Integration of New Immigrants).

[18] The *Permanente Commissie van Deskundigen in Internationaal Vreemdelingen-, Vluchtelingen- en strafrecht*, (Permanent Committee of Experts in International Law on Migrants, Refugees and Criminal Law; also know as the *Commissie Meijers*, the Meijers Committee) - an authoritative NGO whose advisory opinions usually are read with care by Dutch MPs (and others) had drawn attention to this, but this particular point was not taken up. The advisory opinion of 23 Jaunary 2006 (in Dutch only) can be found at < www.commissie-meijers.nl >.

[19] *Kamerstukken TK* 2005-2006, nr. 17, pp. 6-8 and 15-16.

[20] With this later category, the government primarily intended imams, of course, but also Roman Catholic priests, monks and nuns and the occasional Jewish rabbi - all of which are in short supply - in the Netherlands are affected, although were not the primary target of the measure.

[21] See *Kamerstukken Tweede Kamer*[Parliamentary Documents of the Lower House] 2005-2006, 30308, nr. 73, letter from the minister, p. 1 and 30308, 56, letter from the Speaker.

[22] This has become Article 4 of the Bill as introduced in the Upper House after adoption in the Lower House. See *Kamerstukken TK*, 30308, nr. 71, of 22 June 2006, containing the fourth set of governmental changes to the Bill.

[23] *Kamerstukken TK*, 30308, nr. 83, received by the Lower House on 27 June 2006.

[24] Ibidem, p. 2, G. Article 62: 'De Wet inburgering nieuwkomers wordt ingetrokken.'

[25] *Ibidem*, p. 3: 'Aangezien het bij de inburgeringsplicht van Antilliaanse en Arubaanse Nederlanders eveneens gaat om onderscheid tussen Nederlanders onderling, wordt voorgesteld deze inburgeringsplicht niet langer op de Wet inburgering nieuwkomers te baseren, maar op dezelfde wijze als voorgesteld ten aanzien van de inburgeringsplicht voor genaturaliseerde Nederlanders op artikel 3 van het onderhavige wetsvoorstel. Dat betekent dat de Wet inburgering

nieuwkomers niet zoals voorgesteld in de tweede nota van wijziging (Kamerstukken II 2005/06, 30 308, nr. 17) aanpassing behoeft aan de systematiek van het onderhavige wetsvoorstel, maar kan worden ingetrokken.'

[26] Minutes, *Handelingen Tweede Kamer*27 juni 2006 TK 95, p. 5872: 'De Raad van State heeft nog niet geadviseerd over wat de heer Dijsselbloem de Antillianenwet noemde. Met de vijfde nota van wijziging heb ik het mogelijk gemaakt dat een inburgeringsplicht voor deze Nederlanders in de AMvB op grond van artikel 3 wordt opgenomen.'

[27] See Article 1 of the Bill

[28] *Ibidem,*Article 6.

[29] *Ibidem*, Article 7.

[30] See the final provision of the Bill.

[31] Explanatory memorandum, p. 1.

[32] Explanatory memorandum, p. 6.

[33] Explanatory memorandum, p. 8, 17, 12.

[34] Article 2, paragraph 1 of the Bill.

[35] Antilleans are 18 times overrepresented when it concerns crime with fire-arms, Explanatory Memorandum p.4.

[36] One consideration might be that the measure constitutes indirect discrimination on the basis of race or origin, but the case law of the Dutch Supreme Court [*Hoge Raad*] suggests that the chances of having this recognized in court are slight, assuming that the Supreme Court will adhere to its judgment in the*Matos* case of 21 November 2001. Mere differentiation on the basis of nationality does not constitute

discrimination on the basis of race according to the Dutch Supreme Court, see Hoge Raad 13 December 1991, *NJ* 1993, 363; on the other hand, characteristic of geographical descent can in some cases lead to the conclusion that there is discrimination, see HR 13 June 2000, *NJ* 2000, 513, paragraph 3.5.2. With regard to the Antillean Country Ordinance on Admission and Deportation [*Landsverordening Toelating en Uitzetting*], which (in short) makes it necessary for certain European Dutch nationals wanting to settle in the Antilles and Aruba to obtain a residence permit (see below), the *Hoge Raad* rejected the allegation of discrimination on the basis of race. In the *Matos* case, it ruled that for a distinction in the context of the implementation of this admission ordinance, the term 'race' does not refer to the groups as defined in the ordinance, but has an 'ethnographic' meaning: 'the term «national origin» does not have the political-legal meaning of nationality or citizenship, but an ethnographic meaning'.

[37] Explanatory memorandum, p. 20.

[38] Explanatory memorandum, p. 23 on Article 9 of the Bill.

[39] The proposal added: 'The Articles 3, 58 and 60 of the Civic Integration Act do not apply.' Presumably, the events during the last stages of the legislative itinerary of the Civic Integration Act in the Lower House have made this sentence redundant.

[40] Explanatory memorandum, p. 3.

[41] Explanatory memorandum, p. 12-13.

[42] Articles 29 to 46 of the Bill of the Civic Integration Act as pending in the Upper House.

[44] Van Helsdingen, *Het Statuut voor het Koninkrijk der Nederlanden*, 1957, p. 56.

[45] Van Helsdingen, p. 56.

[46] Ibidem

[47] Acts for the whole realm are made by the Dutch parliament, with consultation of the overseas parliaments, and if necessary the right to speak for members thereof (the latter does not occur in practice, the former takes the form of asking the overseas parliaments for their views, but they regularly fail to come with substantive views); the plenipotentiary minister of each of the overseas countries has a vote in the Council of Ministers regarding such legislation, and also the right to speak in the Dutch parliament when the legislation is discussed in the plenary assembly.

[48] Article B1 of the Electoral Act [Kieswet].

[49] Opinion of Advocate General Tizzano, 26 April 2006 in case C-145/04.

[50] Official commentary: '«Letter c. Uitdrukkelijk wordt hier van Nederlanderschap en niet van nationaliteit gesproken, ten einde te doen uitkomen, dat voor de drie Rijksdelen de gezamenlijke en enige nationaliteit is het Nederlanderschap.'

[51] Discrimination arises when a group of persons (or an individual, for that matter) is subjected to a certain measure on the basis of is a prohibited discriminatory criterion such as race, religion, origin for which there is no justification or only rarely so. When the criterion itself is not prohibited, but in practice leads to mainly persons of a certain religion, race or origin being affected by a certain measure, this constitutes indirect discrimination, unless the measure can be justified objectively. This justification has to live up to the requirements that a) the measures has a legitimate aim; b) the measure is suitable and appropriate for the intended aim; c) the measure is proportionate in light of the interests served by the objective pursued by the measure. Prohibited unequal treatment exists a distinction made cannot be objectively justified, as just defined. The common element in these definitions is that the differentiated treatment cannot be justified. In the following, I will not further differentiate between these three forms of illegal behaviour.

[52] Article 4, paragraph 2 of the Civic Integration Act, TK 2005-2006, 30308, no. 2.

[53] Ibidem.

[54] Tweede Kamer 2006-2006, 30308, no. 4, p.2.

[55] Ibidem, p. 3-4.

[56] ECHR 18 February 1999, Matthews v. the United Kingdom, paragraphs 31-35.

[57] Article 17 EC Treaty.

[58] Judgment C-370/90 of 7 July 1992, ECR p. I-4265. The Civic Integration Act also provides for this exception and would therefore also apply to an Antillean or Aruban who has made use of his free movement rights in another Member State and then settles in the Netherlands.

[59] Article 4, paragraph 2 of the Civic Integration Act.

[60] Van Helsdingen, p. 56.

[61] This at least is the complaint of an association of Antillean Dutchmen in the Netherlands, OCaN,

[62] HR 12 November 1993, AB 1994, 404.