Shadowboxing: legal mobilization and the marginalization of race in the Dutch metropole, 1979-1999

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4. Nonperformative intent? Creation of the Landelijk Bureau Racismebestrijding

4.1. Need for a national institute (1983-1985)

The Landelijk Bureau Racismebestrijding (LBR) was a government-made creature. The Lubbers cabinet announced its creation along with the definitive *Minorities Policy Note* to the Dutch parliament in September 1983. The Ministry of Justice provided the vast majority of its funding and had the ability to approve its budget and the composition of its board of directors. In this way, it was not dissimilar from other welfare and advisory organizations created under earlier 'minorities policies'. What made the LBR different, was the promise implied by its name. Unlike organizations which were created to address addressed mostly 'socio-economic and cultural disabilities' (*achterstanden)* imputed to certain groups of people, the very name of the National Office to Combat Racism implied a recognition that one of the barriers to social and economic equality for people racialized as non-white in the Dutch metropole was, in fact, unfair and destructive treatment by people racialized as white. Funding an institution like the LBR implied that the Dutch state bore at least some responsibility for changing that situation.

The promise of the LBR's title was a cynical one, however, because the organization was never intended to address the types of institutional racial discrimination that most impacted the lives of people racialized as non-white living in the Dutch metropole. Instead, the cabinet of then prime minister Ruud Lubbers limited the LBR's organizational mandate to the version of racial discrimination legally enshrined in criminal law, consciously and intentionally discriminating against a person on the basis of race. The government further impaired the LBR from achieving even this limited goal by a funding mechanism that discouraged the LBR from pursuing court cases or other collective legal action.

Activists at the time argued that the Lubbers government constructed the LBR to be a *zoethouder* not a *doorbijter* (a pacifier rather than a problem-solver).[444]

[444] Hugo Durieux, "Anti diskriminatie instituut: Zoethouder of doorbijter?," *Afdruk*, January 12, 1985, Instituut Sociale Gescheidenis Amsterdam (title roughly translates into 'Antidiscrimination institute: pacifier or change-maker'.).

This chapter establishes the accuracy of that assessment, arguing that the Dutch government created the LBR, not to seriously address the material reality of racial discrimination in the metropole, but as part of its practice of nonperformative antiracism, defined by critical scholar Sara Ahmed as a policy that claims to combat racism but fails, as a matter of design, to do so.[445] Ahmed argues that non-performativity of a policy or project like the LBR is not 'a failure of intent or even circumstances' but is in fact the purpose of such policy; 'It works because it fails to bring about what it names.' [446] As in the previous chapter, I argue here that the purpose of a nonperformative policy in this context of the LBR was to maintain the status quo racialized hierarchy in the Dutch metropole, while quieting demands for something to be done to change that hierarchy. This chapter establishes the government's intent through circumstantial evidence, namely numerous instances in which the government was informed or advised of problems with the way it was setting up its legal response to racial discrimination, but consistently dismissed or ignored this advice.

4.2. Early ideas and visions

The idea for a national organization dedicated to addressing racial discrimination entered the government agenda in 1978, during a public commission meeting on the position of Surinamese migrants in the Netherlands. In that session, Chel Mertens, a member of parliament for the D'66 party, called on the cabinet to investigate whether it was possible for the Netherlands to start a national, 'anti-discrimination institute that would handle complaints of discriminatory treatment, and function in an independent and objective manner.'[447] Members of parliament rarely act alone in bringing issues to the national table; Mertens was in direct contact with members of the Vereniging Tegen Discriminatie op Grond van Ras en Etnische Afkomst (Association Against Discrimination on the Basis of Race or

[445] Ahmed, "The Nonperformativity of Antiracism."

[446] Ahmed, 105.

[447] Kamerstukken II 1982/1983, 16102, nr. 2, 102.

Ethnicity, VTDR), which formed that same year, and were in communication with him about his motion.[448]

By the time Mertens introduced his motion, the Netherlands Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*, WRR)'s report *Ethnic Minorities* was already in progress. Eventually published in May 1979, the report contained two parts: a 37-page 'report to the government' which contained advice from the WRR, and a 171 page 'comprehensive survey of government policy to date with respect to a number of ethnic minorities in the Netherlands' authored by researcher Rinus Penninx.[449] The recommendation report contained one page addressing 'discrimination'; it recommended creating 'a national body like those in Great Britain or the United States', and 'consistent with the initiatives stemming from the Second Chamber of Parliament in this area.'[450] The organization would be a:

> single channel for complaints about discriminatory treatment… followed up by advice to enterprises and institutions that are closely involved with minority groups and by mediation and guidance in concrete cases of discrimination, leading if necessary to legal proceedings. In addition, it would need to be investigated whether the national body in question should in such cases be able to obtain an injunction or prohibition from an administrative tribunal or civil court, perhaps enforceable by means of a fine.[451]

Between the dissolution of the VTRD in 1982 and publication of formal *Minorities Policy Note*, in September 1983, different societal groups also began to

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[448] Gloudi, "Notulen plenaire vergadering." (Notes of the meeting indicate that some VTDR members were concerned about the independence of an organization vis-à-vis the government; Frank Bovenkerk agreed to call Mertens on the subject.).

[449] WRR, *Ethnic Minorities: Part A: Report to the Government*; Penninx, *Etnische Minderheden. A*.

[450] Ir. Th. Quené, "Ethnic Minorities: A. Report to the Government," Wetenschappelijke Raad voor het Regeringsbeleid (The Hague: Wetenschappelijke Raad voor het Regeringsbeleid, May 9, 1979), xxv.

[451] Quené, xxv–xxvi.

call for a national anti-discrimination institute. In January 1983, the Interdepartmental Coordination Commission on Minorities Policy (ICM) received two different proposals for such an institute. One came from the Dutch Jurists Committee for Human Rights (Nederlands Juristencomité voor de Mensenrechten). The other was submitted by a coalition of 'ethnic minority organizations' including the National Federation of Surinamese Welfare Organizations, the Moluccan Advisory Organization, the Antillean Platform (Plataforma di Organisashonnan Antiano, POA) and the Netherlands Center for Foreigners (Nederlands Centrum Buitenlanders, NCB); its author was NCB staff jurist Arriën Kruyt, who would go on to become director of the LBR for its first seven years.

4.2.1. Congress on Law and Race Relations

That same month, the NCB, the National Federation of Surinamese Welfare Organizations and the Willem Pompe Institute at Utrecht University's law faculty organized the Congress on Law and Race Relations (Congres Recht en Raciale Verhoudingen), described in the opening pages and referenced in the previous chapter of this dissertation. Kruyt timed the submission of his proposal for a national institute to the conference, using it to gain support and attention for the proposal.[452] Approximately 500 people participated, representing 'ethnic groups, police, administrators, social workers, lawyers, [and] a few officers from the Ministry of Justice and the Ministry of the Interior' as well as several members of parliament. The Ministry of Justice provided funding both for the event and an eventual publication of its proceedings.[453] The goal was to identifying concrete ways to mobilize law in the face of racial discrimination.[454]

Despite hosting attendees from a variety of backgrounds and perspectives, the Congress's messaging about the causes of racial discrimination in the

[452] Kruyt, interview.

[453] Ausems-Habes, *Congres Recht En Raciale Verhoudingen*.

[454] Ausems-Habes. Note-takers were present in each session of the congress. After the conference, the ministries of Justice and the Interior jointly provided funding for publication of the notes and summaries in the book cited here, with the goal that it would be useful 'for legal practice, and political and legal discussions about combatting racial discrimination.'

Netherlands engaged in the same type of colonial occlusion as earlier government framing. It defined the problem as rooted in intentional, aberrant and individual prejudice, as opposed to institutional, routine, material and deeply embedded in Dutch society. 'In recent years', the publication began, 'it is becoming more and more clear that discrimination on the basis of race – both open and concealed – *also* frequently occurs in the Netherlands'.[455] If the conference attendees discussed racializing practices and their role in Dutch history, from colonial conquest and slavery through the policies related to migration from former colonies, those discussions were not included in the 300+ page conference publication.

Individual congress sessions did include discussions of racial discrimination within education, housing, and employment, antisemitism, civil rights, affirmative action and the women's movement. By the end of the day, however, two central themes emerged. The first was whether it was feasible or desirable to legally prohibit the existence of 'racist organizations', like the Centrum Partij; the second was the set up and function of a Dutch institute against racial discrimination.[456] Most of those speaking at the conference agreed on the need for such a national organization. The details of what the specific goals, powers, and methods of that organization would be, however, formed points of major debates which centered around five themes:

1. How the organization would respond to individual victims of racial discrimination, and their potential legal claims;
2. Whether the organization would conduct independent research and if so to what end and with what power to compel information;
3. The ability or desirability of filing legal cases or claims under the organization's own name;
4. Whether the organization should engage in general public education around the issue of racial discrimination;
5. Whether the eventual directors of the organizations should be a person racialized as non-white, or a *zaakwaarnemer*, the term used

[455] Ausems-Habes, 5 (emphasis mine).

[456] Ausems-Habes, *Congres Recht En Raciale Verhoudingen*.

> for people racialized as white and Dutch who worked on issues related to 'ethnic minorities'.

As addressed in Chapter Three, when confronted with rising evidence of racial discrimination and the legal obligation to address it in the early 1970s, the Dutch government had chosen criminal law as the primary legal avenue to do so. This choice relied on individuals experiencing discrimination to trigger enforcement of those laws by filing complaints with police or prosecutors. Everyone engaged with the problem of combatting racial discrimination recognized that a problem with the criminal law strategy was that not enough victims of discrimination filed complaints. In his opening address to the Congress, law professor C.A. Groenendijk did not mince words, but proposed as a guiding principle of the discussion that 'when it comes to combatting discrimination with legal measures, a strategy based on the initiative of individual victims will have little to no effect.'[457] One of the hopes pinned on a national institute was that it would increase the number of complaints filed and therefore make the general policy of handling racial discrimination using criminal law more effective.

On the other hand, even a strategy of focusing on a national institute was not a straightforward proposition. For example, would a national institute receive and adjudicate such complaints itself, deciding on whether racial discrimination had in fact occurred and then issuing fines, compelling compliance or awarding financial damages? Would it serve as a legal service provider, accompanying victims to make complaints to local police or prosecutors and then advising them throughout the process? Or would a national institute be more of an information clearing house, providing information to victims on how to file complaints or contact lawyers competent to handle such cases? The Congress on Law and Race Relations debated all these possibilities over the course of several sessions. One session, 'Plan for an institute to combat racial discrimination' presented the proposal drafted by Arriën Kruyt on behalf of the coalition of welfare and advisory organizations. That proposal reiterated the challenges facing individual victims of discrimination, in both the criminal and civil courts and identified two principle tasks for a national institute:

[457] C.A. Groenendijk, "Recht en rassendiscriminatie: een januskop met lege handen?" Introductory speech published in Ausems-Habes, 15.

first to be 'accessible to victims of discrimination', and second ' to combat patterns of discrimination and [conduct] direct research to those areas.' These two tasks would stand in tension with each other, the proposal observed, since there would likely be *'een overvloed'* (an overflow or flood) of complaints from individual victims and addressing them would take resources away from looking for structural patterns. As a third task, the institute should direct itself toward 'education to prevent discrimination,' even though the expertise for this type of task would not necessarily overlap with legal expertise.[458]

To address the tension in the first two goals, Kruyt's proposal recommended that a national institute not handle complaints directly, but instead maintain a list of qualified legal practitioners to which a victim of discrimination could be referred. Such a referral system would keep the institute 'from drowning in the quantity and time' needed to address individual complaints, and free it up to take on more widespread patterns or practices. On the issue of individual assistance, the proposal also recommended producing a folder informing victims 'what to do if you experience discrimination.'[459] According to the proposal, an institute could address patterns or structural problems of racial discrimination in the Netherlands primarily through research. The first research priority would be to identify possible discriminatory patterns; if and when these patterns were identified, an organization could then to use the evidence of them to file discrimination cases, in the name of many clients, or, if necessary, under its own name. Ideally, the proposal stated, the institute would have the power to compel compliance with this research, but not having powers would not be such a hurdle as most relevant information in the Netherlands was publicly available.[460]

Important to note here is that at the Congress on Law and Race Relations, and in fact throughout the life of the LBR, the term 'structural discrimination' was used to describe patterns or practices of discrimination that affected many people within the same institute or organization; it did not indicate historic racializing practices embedded in social structures, as described by sociologist Eduward

[458] Ausems-Habes, 332–35; Arriën Kruyt, "Een instituut tegen rassendiscriminatie," January 12, 1983, LBR Concept/Beleid packet, IDEM Rotterdam Kennisbank.

[459] Ausems-Habes, *Congres Recht En Raciale Verhoudingen*, 333.

[460] Ausems-Habes, 334.

Bonilla-Silva or other critical race scholars referenced in Chapters One and Two. Paradigmatic examples of 'structural discrimination' as defined at the time were the *Nedlloyd* case described above in Section 3.4.2, where a shipping company had a policy of laying off foreign workers before Dutch nationals, or the *Binderen-Kaya* case, also discussed in Chapter Three, where a housing corporation refused to rent apartments any 'foreign' families over a period of years. The idea was that a national organization could gather evidence about such patterns research and use that research to file cases similar to *Binderen-Kaya*.

At the Congress on Law and Race Relations, participants wasted no time identifying problems with Kruyt's proposal. Government researcher A.J. van Duijne Strobosch, at the time finishing a study for the Ministry of Justice about how anti-discrimination institutes worked in countries similar to the Netherlands, observed that such an institute had to have some sort of executive power in order to be effective. It had be able, 'for example, [to] go into a company and require that they provide information…[T]he lack of any powers to sanction (for example, by revoking an operating permit), [could] lead to a situation in which an independent institute ha[d] to limit its task to recording and forwarding complaints.[461] Other attendees agreed with his assessment and worried that without enforcement powers, a national institute would be 'little more than a symbol.'[462] How those powers should be deployed, however, especially in service of individual victims of racial discrimination remained unclear.

[461] Ausems-Habes, 247 ('Het ontbreken van bevoegdheden kan dan ook grote problemen opleveren voor een particulier instituut, zoals het Nederlands centrum Buitenlanders [NCB] voor ogen staat. Het ontbreken van bevoegdheden om bijvoorbeeld bedrijven binnen te gaan, om gegevens op te eisen en het ontbreken van enige "sanctiebevoegdheid" [zoals bijvoorbeeld het intrekken van vergunningen] kan ertoe leiden dat een dergelijk particulier instituut haar taak zal moeten beperken tot het opnemen en verwijzen van klachten. Een van de taken die het NCB nu voor ogen staat, het doen van onderzoek om te komen tot structurele veranderingen, zou wellicht onuitvoerbaar blijken. Ervaringen uit het buitenland leren verder dat discriminatie, eenmaal in de openbaarheid gebracht en onbestraft, steeds meer verhulde vormen aanneemt, zodat steeds verdergaande bevoegdheden door instituten worden gevraagd. Kortom, een particulier instituut zal dan ook niet of nauwelijks in staat zijn discriminatie structureel aan te pakken en te bestrijden.').

[462] Ausems-Habes, 253.

The variety of open questions regarding the powers and possibilities of a future national institute was reflected in the diverse views from the congress's closing plenary session. There, a panel debated who would be in charge of an eventual institute, people racialized as white and Dutch or people racialized as non-white, referred to in the discussion as 'foreigners'. Surinamese Welfare Federation representative Tamara Pos stated that such an institute 'would have to be strongly directed by foreigners,' and that she would most like to see a 'combative institute, carried by foreigners'.[463] Activist Tansingh Partima, representing the Society of Antiracist Organizations in the Netherlands (Samenwerkende Antiracisme Organisaties Nederland, SARON) agreed and went a step further. He:

> identified distrust for such an institute, and not only on his own behalf. He was a proponent of a rigorous tackling of the problem and implied that, in his eyes, such an institute would have to be 'a colored activist group, with occasional support (and no more) from jurists.' A board of directors that was made up of fifty percent white jurists, he would reject completely.[464]

The summary describes an audience that generally held an opinion in line with Partiman's concern that such an institute would not be decisive in times that needed action for people facing racial discrimination; especially representatives of 'ethnic groups' expressed distrust at the idea of a national institute based on the proposed model.[465] Groenendijk, on the other hand, took what the congress scribes described

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[463] Ausems-Habes, 265 ('een strijdbaar instituut, gedragen door buitenlanders.' The term 'foreigners' (*buitenlanders*) here meant people racialized as non-white, who were often referred to at the time as foreigners, another example of the colonial aphasia/occlusion of the fact that many of those same people had been part of the Dutch empire for centuries.).

[464] Ausems-Habes, 266 ('Partiman wees op het wantrouwen, niet alleen van zijn kant, tegen een instituut. Hij is voorstander van een rigoureuze aanpak van de problematiek en dat impliceert dat het instituut in zijn ogen: "Een gekleurde actiegroep zal moeten zijn, met eventuele steun [en niet meer] van juristen." Een bestuur van het instituut dat bestaat uit 50% witte juristen wees hij dan ook volledig af.')

[465] Ausems-Habes, 266 ('Het bleek dat de zaal er in het algemeen een mening op na hield, welke in het verlengde lag van Partiman's visie. Vooral de vertegenwoordigers van etnische groeperingen spraken van hun wantrouwen uit tegenover een dergelijk instituut. Het meest geuite bezwaar was wel dat er van een dergelijk instituut te weinig daadkracht zal uitgaan, terwijl juist nu directe

as 'a view directly opposite that of Pos', stating that if the future institute's leadership were chosen from among the groups representing people racialized as non-white, it would be 'difficult to give the institute a "[unified] face" at the national level… because the diverse organizations differed so much from each other.'[466]

4.2.1.1. The role of whiteness in perspectives on a national institute against racial discrimination

The above discussion illustrates how whiteness functioned, and I would argue still functions, in postcolonial spaces like the Dutch metropole. Groenendijk's comment implied that a person racialized as white, defined in the terms of the time as someone not belonging to an 'ethnic minority group', would be better able to present a universal, or 'unified face' and the interests of diverse groups better than someone racialized as non-white. This comment framed white experiences as universal or neutral in a way that experiences of people racialized as non-white were not and illustrated a core idea of many critical theories of race addressed above in Section 1.2. These theories observe that ideology and practices of white supremacy are both reflected and perpetuated by framing the experiences and perspectives of people racialized as white as objective and neutral, especially in the field of law, while framing the views of people racialized as non-white as biased, or only representative of similarly racialized people.[467] These frames ignore 'historically contingent contemporary entanglements between power and possibility' which have allowed people racialized as white to obtain positions of authority in Europe at the expense of people racialized as non-white.[468] They position whiteness as the 'dominant and normative space against which difference is measured' as opposed

maatregelen [acties, hulpverlening] noodzakelijk zijn. Men meende dat het instituut hier niet in voorziet.').

[466] Ausems-Habes, 266. ('Dat het moeilijk zal zijn het instituut een "gezicht" op landelijk niveau te geven, omdat de diverse organisaties te veel verschillen.')

[467] See e.g. Adébísí, *Decolonisation and Legal Knowledge*; see also Crenshaw, "Mapping the Margins."

[468] Adébísí, *Decolonisation and Legal Knowledge*, 6.

to a racialized construction like any other.[469] This interaction also illustrates how racialization occurs within a 'meso-level' social organization like the LBR; meso-level racialization occurs at an institutional level between state practice and individual action where white experience and expertise are privileged over that of people racialized as non-white.[470] In this case, the racializing practice of framing perspectives of people racialized as white as universal meant that someone racialized as white was seen as more qualified to lead an organization dedicated to combating racial discrimination than someone more likely to have experienced racial discrimination.

Based on conversations with Professor Groenendijk over the course of my research, I have no doubt he made the above comments without any intent to uphold a racialized hierarchy. He had been directly involved in advocating against racial discrimination in the Netherlands since his own student days, and carried that commitment into both his legal advocacy and academic careers.[471] But he was also a product of his own education and upbringing, which privileged perspectives of people racialized like him as objective and universal, while deeming those of people racialized as non-white as biased and limited. Like many of those of his generation, he saw racism as represented by the Nazis and antisemitism, not as a building block of Dutch wealth and society.[472] His comment on the plenary panel is an example of how even those with the best of intentions can engage in practices that perpetuate existing racialized hierarchies. It was also an illustration of one way that particular racializing practice, of privileging the perspectives and experiences of people racialized as white, would play out throughout the set up and implementation of a national institute against racial discrimination.

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[469] Garner, "The Uses of Whiteness," 3 (citing several classic works on race and whiteness, including Richard Dyer's 1997, Peggy McIntosh's 'White Privilege and Male Privilege: a Personal Account of Coming to See Correspondences through Work in Women's Studies'[1988] and Ruth Frankeberg's Displacing Whiteness: essays in social and cultural criticism [1994]).

[470] Meghji, *The Racialized Social System*, 93–101.

[471] Groenendijk, interview.

[472] Groenendijk.

4.2.2. Grassroots organizations

Grassroots organizations and organizations representing people racialized as non-white would continue to make their critiques of a national institute to combat racial discrimination known throughout the two years that elapsed between the Congress on Law and Race Relations and the official start of the LBR. In May of 1983, for example, Arriën Kruyt met with the members of SARON to discuss their concerns. SARON's notes of the meeting identify Kruyt as an 'initiator of the Anti-Discrimination Institute.' That title was apt; he had authored the proposal for such an institute on behalf of the NCB and the other national 'ethnic minority' organizations.[473] Kruyt would also go on to become the LBR's first director, a process described in more detail below. In May of 1983, however, he was still employed the staff jurist of the NCB.

The purpose of the May 1983 meeting was to discuss both sides' views of an institute, since SARON members had made their critiques of existing proposals public. SARON shared four main criticisms of the existing plans: first, that the existence of such an institute would remove the burden that the government should bear to combat racism; second, that SARON's experience with the Dutch legal system led them to believe that the existing legal approach was inadequate to combat racial discrimination; third, they doubted whether individuals experiencing racial discrimination would go through such an institute, if the end result was that they would simply be sent elsewhere for help. Without individual complaints, SARON members argued, an institute would not be able to spot structural patterns. To this end, SARON believed it necessary to reconsider how an institute would handle individual complaints. SARON opined that any anti-discrimination institution had to serve, in the first place, groups actively engaged in fighting racism; these groups should be consulted before the institute chose its research priorities. Finally, the group believed that the staff and directors of any organization had to be 'ethnically profiled', meaning they had to mostly be people racialized as non-white and/or non-Dutch. The notes of the meeting do not indicate any

[473] Kruyt, "Een instituut tegen rassendiscriminatie," January 12, 1983.

response from Kruyt or other representatives of the 'anti-discrimination institute'.[474]

4.2.3. Research and recommendations

As discussed in Chapter Three, the politics of accommodation relied heavily on 'expert, scientific' institutions and the advice they provided the Dutch government in making important policy decisions.[475] Consistent with these observations, after receiving the *Ethnic Minorities* report from its Scientific Council on Government Policy (WRR) in 1979, in which the council recommended creating a national institute against racial discrimination, the Ministry of Justice, the Ministry of Interior, and the Ministry of Culture and Social Work solicited even more expert advice. In 1980, they jointly commissioned a study of similar institutes, policies and programs 'in nations comparable to the Netherlands' and assigned the task to the Ministry of Justice's Research and Documentation Centre, (Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC).[476] The result, *Bestrijding van Discriminatie Naar Ras*, by WODC researcher AJ van Duijne Strobosch, was published in the summer of 1983.[477]

Despite the extensive nature of and clear recommendations contained in the WODC report, however, the government failed to incorporate its most urgent advice into its creation of the LBR. While the transformation from research paper to policy always involves practical and political adjustments, this failure to follow, or in any way visibly consider, some of the more critical aspects of *Bestrijding van Discriminatie Naar Ras* is another relevant piece of circumstantial evidence of

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474 "SARON Notulen," May 9, 1983, personal archive Mr G.J.A.M. Bogaers, SARON.

475 See e.g. Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, 113; R.B. Andeweg and Galen A. Irwin, *Governance and Politics of the Netherlands*, Fourth edition (Basingstoke: Palgrave Macmillan, 2019).

476 The result of this commission was Van Duijne Strobosch, *Bestrijding van Discriminatie Naar Ras* the results of which will be discussed in more detail later in this chapter.

477 Another report, commissioned at the same time, inventoried all Dutch statutes or regulations that could involve a distinction based on race, nationality or ethnicity and made recommendations for where changes should be made. The result, Beune and Hessels, *Minderheid--Minder Recht? Minderheid, minder-recht?* (1983) was over 500 pages long; the follow up appendix containing excerpts from all these laws was nearly five centimeters thick.

intent for the proposition that the cabinet intended the LBR to be nonperformative in addressing racial inequality in the Dutch metropole.

The first major problem the WODC report identified with existing laws prohibiting or addressing racial discrimination in the Netherlands was that they were rarely, if ever, enforced. The problem of enforcement came up again and again throughout the report. A section addressing the proliferation of *gedragscodes* or behavior codes related to non-discrimination, observed that 'enforcement requires special attention: a code of conduct without any form of enforcement mechanism will probably degenerate into a "dead letter"'.[478] A section on research reached similar conclusions; to date, the report detailed, Dutch research had focused more on the existence of racial discrimination than means to combat it.[479] The admission of statistical evidence in the housing discrimination case *Binderen-Kaya* showed that research could be directed toward gathering evidence for litigation, but the question remained whether the targets of such investigations should be forced to cooperate with an institute attempting to gather such evidence.[480] Complicating a lack of cooperation by targets of investigations, the report observed, was the broader lack of good statistics related to 'racial and ethnic minorities' in the labor or housing markets, since the Dutch government did not collect data on race, but instead on place-of-birth. Over the course of a generation or two, the report continued, this problem would become more pronounced as more people racialized as 'ethnic minorities' would be born in the metropole and missed by statistics related to nationality and birthplace.[481] With this last observation, Van Duijne Strobosch observed in real time the occlusion and erasure of race from Dutch public awareness and discourse as it was expressed statistical data.

A second problem the WODC report observed with existing legal approaches to racialized inequality was the government's reliance on individual complaints to enforce anti-discrimination laws which placed unreasonable burdens on victims of discrimination. In criminal cases, for example, individual complainants were 'bound with hands and feet to the police and public prosecutors, as investigative

[478] Van Duijne Strobosch, *Bestrijding van Discriminatie Naar Ras*, 86.

[479] Van Duijne Strobosch, 87.

[480] Van Duijne Strobosch, 88.

[481] Van Duijne Strobosch, 88.

and accusatory organs.'[482] While a handful of criminal cases had been successful against discriminatory entry policies at bars or discos, there had been no groundswell of legal cases related to racial discrimination in employment or housing; at the time of the report, only one case had been brought related to a personnel advertisement, one against an auto insurance company and one against a language institute.[483] The report attributed the lack of cases, first, to the reluctance of victims to report incidents and, second, to the failure of police and prosecutors to follow up on this cases. The two problems were not unrelated, the report elaborated, since in addition to fears of reprisals or being called hypersensitive, language barriers, and lack of information about how to file complaints, victims of racial discrimination also identified a general lack of trust in how the justice systems would handle any complaints they did file.[484] This fear was well founded, the report indicated, as 'police do not take complaints of racial discrimination seriously, the procedures take a long time and the[re are] difficulties in providing proof of discrimination and the general ineffectiveness of criminal proceedings'.[485]

Civil cases that sought court orders to compel change in discriminatory practices or financial damages were useful tools, the report observed, but they were even more rarely filed than criminal ones. One judge in Amsterdam had added symbolic damages of one guilder (a civil law penalty) to a criminal case where the victim was refused entry to a bar; the *Binderen-Kaya* case was widely cited by academics and advocates in the early 1980s as opening the possibility for using statistical evidence as proof of discrimination in the housing and labor markets, but it remained the only case of its kind. Administrative law allowed for local officials to revoke the liquor licenses of bars or restaurants that violated Article 429quater, if the sentence included a fine greater than 1000 guilders, but at the time of the report, no judge had ever imposed so high a penalty. Dutch law did not allow class action suits, where multiple victims could bundle their complaints into one case, and judges frequently refused to allow organizations or associations to file cases on

[482] Van Duijne Strobosch, 89.

[483] Van Duijne Strobosch, 89.

[484] Van Duijne Strobosch, 90.

[485] Van Duijne Strobosch, 90.

behalf of victims, so the private, individual, criminal complaint remained the most available means of legal action against racial discrimination.[486]

The WODC report did not just point out problems with existing laws, it made recommendations for improvement. Most of these recommendations did not focus a national institute. Almost the same number of pages that addressed an institute were dedicated to suggesting that the government engage in 'contract compliance', the practice of requiring parties receiving licenses or subsidies from the government to enforce their anti-discrimination policies, or to engage in affirmative hiring and recruitment of 'ethnic minorities'.[487] As an illustration that contract compliance was a viable strategy, the report highlighted the work of grassroots organization Quater, which had succeeded in pressuring the mayor and town council in Hilversum to rent city-owned space only to organizations with non-discrimination policies.[488] Despite the attention and recommendation of these other solutions, creating a national institute was the one option that ended up in the final *Minorities Policy Note*.

The WODC report ended with discussion of a national institute which would use legal measures to combat racial discrimination. It summarized the two proposals already submitted to the ICM, with some changes to what was described in the Congress on Law and Race Relations bundle. Most significantly, the WODC report attributed to the welfare/advisory coalition proposal the suggestion that a future anti-discrimination institute should be able to initiate legal procedures in its own name, and to compel compliance with research requests/requests.[489] Also contrary to the version presented at the Congress, the report observed that these groups did not envision general education or awareness campaigns as part of the future organization's tasks, as these campaigns involved a different type of expertise and skill than those related to legal knowledge and expertise required for the first two priorities.[490] The discrepancies did not matter much however; the government

[486] Van Duijne Strobosch, 89.

[487] Van Duijne Strobosch, 96–100.

[488] Van Duijne Strobosch, 99.

[489] Van Duijne Strobosch, 77.

[490] Van Duijne Strobosch, 77.

incorporated neither of these recommendations, nor any those related to enforcement or the power to compel information, into the charter of the LBR.

4.3. Cabinet proposal

In September 1983, the cabinet unveiled its vision for a national organization that would use legal means to address racial discrimination in the Netherlands as part of its 1983 *Minorities Policy Note (Minderhedenbeleid Nota)*. As discussed in Chapter Three, the LBR was very much in line with the other policies introduced in that policy note, which shifted away from a 'categorial policy' of channeling social resources through organizations representing specific groups (categories) of people racialized as non-white and towards a 'general policy' of making all public institutions equally accessible. In this context, the goal of the LBR was to improve equal treatment of all people by making anti-discrimination laws more effective.[491]

The *Note* acknowledged Van Duijne Strobosh's WODC report and its conclusion 'based on experience in other countries' that enforcement was the most important factor to realizing the promises of anti-discrimination norms and laws, and that the Ministry of Justice was responsible for this enforcement.[492] In the same paragraph, however, the *Note* shifted the burden to victims of discrimination and reiterated the cabinet's refusal to change existing laws:

> [E]nforcement of the norm in our legal system is also done primarily by those whose interests are directly affected and who - because they do not accept it - stand up for their rights in some way. For those who believe themselves to be victims of discriminatory treatment, in principle, the way is open to them independently, with or without the help of a lawyer or other legal aid agency, to seek their rights before the courts through the normal procedures known to our legal system.[493]

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[491] Kamerstukken II 1982/1983, 16102, nr. 2, 14 ('Onder dit thema worden maatregelen vermeld om de rechtspositie van leden van minderheidsgroepen te verbeteren en om discriminatie te voorkomen en te bestrijden.').

[492] Kamerstukken II 1982/1983, 16102, nr. 2, 96.

[493] Kamerstukken II 1982/1983, 16102, nr. 2, 96 (translation mine).

The *Note* continued to emphasize victims' responsibility for enforcement of anti-discrimination laws in the following pages, stating that if criminal laws were not sufficient, these individuals could file administrative or civil procedures, and if they exhausted all domestic options they could exercise the right to file individual complaints under international treaties.[494] The government also expressed its preference that non-governmental entities, like 'social organizations and in particular businesses' take up the cause of enforcing anti-discriminatory norms in their own internal policies and practices.[495]

The cabinet's insistence that its existing procedures were adequate, given the critique of those procedures from the multiple sources mentioned in the previous pages provides further evidence of its intent to create an organization that gave the appearance of action while failing to change any practice or policy that would materially affect the status quo racialized hierarchy in the Netherlands. The Note itself acknowledged that victims of discrimination were often in 'vulnerable' positions and that there were many barriers to filing individual claims of racial discrimination in civil court cases, including complicated procedures, high costs, and difficult questions of proof.[496] To address these barriers, the cabinet offered the creation of a national institute to combat discrimination.[497] It did not, however, grant that organization any of the powers needed to address problems with enforcement or evidence collection. The cabinet proposed a national organization with the following priorities:

a. advising victims of discrimination and being available to them as much as possible;
b. providing training and expertise for legal advisers and building up a national network of legal advisers;
c. serving as a source of information for local groups active the field of anti-discrimination;

494 Kamerstukken II 1982/1983, 16102, nr. 2, 96. The right to file individual complaints under the ICERD had come into effect in 1982, when Senegal became the 10th country to ratify the treaty, an option mentioned by Minister Rietkerk in his address to the Congress on Law and Race Relations.

495 Kamerstukken II 1982/1983, 16102, nr. 2, 97.

496 Kamerstukken II 1982/1983, 16102, nr. 2, 98–100.

497 Kamerstukken II 1982/1983, 16102, nr. 2," 101.

d. providing information to (potential) victims of discrimination on how to defend themselves against discriminatory behavior; [and]
e. identifying structural forms and patterns of discrimination.[498]

The *Note* acknowledged that listing these priorities did not address many questions raised by the WODC report and other critical voices; it did not specify what an organization would do for individual victims of discrimination, for example, or what would be done after the organization identified structural forms or patterns of discrimination. Instead, it deferred these questions to the Interdepartmental Commission on Minority Affairs (ICM) who would further advise the government on these matters, with the priority being that any outcomes 'lower the threshold for victims of discrimination to turn to the courts in appropriate cases.'[499] The *Note* made clear, however, that whatever the ICM advised, the resulting national institute would not be an agency empowered to resolve individual complaints of discrimination, nor would the government be expanding the legal options to address racial discrimination any time soon. 'Only if it were unambiguously clear that the current legal channels were inadequate,' the *Note* stated, 'and would remain so with the measures outlined above' could such an addition be considered. [500] In the meantime, the cabinet envisioned 'a foundation (*stichting)* with broad societal support (*maatschappelijk draagvlak)*, where societal organizations and organizations of minorities are represented'.[501]

In the *Note*, the cabinet promised to fund the national institute for five years, using funds already allocated to the 'anti-discrimination portion of the minorities policies', after which point the cabinet would evaluate the foundation's mission and functions. In the meantime, the cabinet instructed ICM to prepare advice based on consultation with 'the organizations of minorities and the relevant societal

[498] Kamerstukken II 1982/1983, 16102, nr. 2, 100–101.

[499] Kamerstukken II 1982/1983, 16102, nr. 2, 103.

[500] Kamerstukken II 1982/1983, 16102, nr. 2, 103.

[501] Kamerstukken II 1982/1983, 16102, nr. 2, 102 (leaving open the possibility of a (separate) 'small, decisive agency' to support the work of the foundation, but giving no further explanation of what form or structure this smaller organization would take, or when it would be determined necessary).

organizations'. With that, the cabinet considered its response to the 1978 Tweede Kamer motion to investigate a national institute complete.[502]

4.4. Tweede Kamer critique

While the cabinet may have considered its work on the details of a future anti-discrimination institute to have been sufficiently delegated to the ICM, members of the Tweede Kamer were less convinced. The voiced their concerns in several sessions with cabinet members in early 1984. D'66 MP Elida Wessel-Tuinstra cited 'the government's own report' along with the Prinsenhof Conference on racial discrimination held in Amsterdam in early 1984, for their observations that the government itself was also a cause of racial discrimination, and argued these practices necessitated 'an actually independent office that had real power, also with respect to [policing] the government'; Wessel-Tuinstra went on to argue that such powers were not reflected in the proposed 'national bureau', which was fundamentally different from 'an anti-discrimination institute'.[503]

Pacifist Socialist Party MP Andrée van Es was also highly critical of the government's proposal. First, she criticized the *Minorities Policy Note* more broadly as too quickly abandoning categorical support for 'minority' welfare and advisory organizations. 'Fighting for an equitable position in a dominant majority culture is a long process,' she observed making comparisons to civil rights in the United States, as well as the emancipatory movements of women and Catholic people in the Netherlands. She continued:

> Nowhere in this *Minorities Policy Note* has it been observed that the Dutch culture is not only dominant because it is the majority culture, but because it has been declared superior. Racism has a long colonial past. In our society, 'white' not only outnumbers 'black' in numbers, but it is also considered better than 'black'. While excesses of discrimination can be combated with

[502] Kamerstukken II 1982/1983, 16102, nr. 2, 103.

[503] Handelingen II 1983/1984, 16102, nr. UCV 48, 38, https://zoek.officielebekendmakingen.nl/0000132420.

> anti-discrimination institutions, structural inequality, such as occurs in the labor market or the housing market, cannot.[504]

Along with Communist Party MP Ina Brouwer, Van Es was one of the few members of parliament, or indeed of any of the people racialized as white and involved in issues of racial discrimination in this period, to publicly make the connection between racial inequality in the metropole and the Dutch colonial past.[505] She brought up several times during the parliamentary debate that minority groups were in the best positions to determine what they needed, and had already advised the cabinet what a legal organization should look like; she then asked Minister of Interior Rietkerk if he would abide by their advice.[506] Rietkerk demurred, saying that while the goals of the organization were 'inspired' by these discussions, it was not necessarily the case that they would follow them directly. He added that the details of what he was by now referring to as the Landelijk Bureau Racismebestrijding (LBR) would be handled by the Ministry of Justice and that specific questions should wait for its minister.[507]

When Justice Minister Korthals Altes appeared before the chamber several days later, he focused more on the boundaries the government would place on the coming national institute than on its powers. The future LBR would not pursue legal claims of discrimination on its own, he clarified; if needed, the institute could refer cases to the national ombudsman or the public prosecutor.[508] Because the LBR would receive all its funding from the Ministry of Justice, the ministry would have to approve the organization's articles of incorporation (*oprichtingsakte*), budget

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[504] Handelingen II 1983/1984, 16102, nr. UCV 48, 18.

[505] Handelingen II 1983/1984, 16102, nr. UCV 48, 16; Van Es would also publish a version of her critique of the government's racial discrimination policy with journalist Rudi Boon in Rudi Boon and Andrée van Es, "Racisme en overheidsbeleid," in *Nederlands Racisme*, ed. Peter Schumacher and Anet Bleich (Amsterdam: Van Gennep, 1984), 109–25.

[506] Handelingen II 1983/1984, 16102, nr. UCV 48, 38.

[507] Handelingen II 1983/1984, 16102, UCV 48, 41.

[508] Handelingen II 1983/1984, 16102, UCV 61, 3–5, https://zoek.officielebekendmakingen.nl/0000132433.

and core activities, and board of directors.[509] While this subsidy gave the Ministry of Justice some say over the eventual direction of the LBR, the Minister did not think that right to oversight extended to members of the Tweede Kamer. When liberal party (Volkspartij voor Vrijheid en Democratie, VVD) MP Jan Kees Wiebenga asked when the chamber would have a chance to comment on the articles of incorporation or subsidy for the LBR, Minister Korthals Altes replied that he didn't think that time would come.[510] With this response, the minister seemed to characterize the LBR as public for the purposes of Ministry oversight, but private when the Tweede Kamer requested the same.

This contradictory framing of the LBR continued with respect to discussions about the composition of the first board of directors, which would be listed in the articles of incorporation and therefore also require approval from the Ministry of Justice. When asked why the Ministry should approve the first board, Korthals Altes answered, 'a foundation (*stichting)* is a non-democratic organizational form' and that board members could be 'co-opted' if appointed by particular organizations. It was therefore useful for the Ministry to appoint the first board, 'in consultation with invested parties (*de betrokkenen)* so that in addition to representation of the organizations involved, there will be, to a certain extent, legally skilled and experts on the board.'[511] Korthals Altes's vision for who should sit on such a board included representatives from three areas: people from organizations of 'minorities and minority welfare organizations', people from 'societal organizations' like labor unions and Association of Churches, and finally people from the legal sector, including people from 'university faculties, judges, the Dutch Bar Association (Nederlandse Orde van Advocaten*)*, the union of legal aid providers and the Dutch Jurists Committee for Human Rights.' He added his opinion that it was important

[509] Handelingen II 1983/1984, 16102, UCV 61, 5 ('Zonder aan het private karakter van het bureau afbreuk te willen doen, is het vanuit een oogpunt van beheer noodzakelijk dat aan het verlenen van subsidie een aantal voorwaarden wordt verbonden….').

[510] Handelingen II 1983/1984, 16102, UCV 61, 23 ('Er zal met de subsidiegever wel van gedachten worden gewisseld over hoe het precies in het vat zal worden gegoten. Ik zie echter niet helemaal in hoe de inspraak van de Kamer tot haar recht zou kunnen komen wanneer wij te maken hebben met een privaatrechtelijke stichting die statuten krijgt.').

[511] Handelingen II 1983/1984, 16102, UCV 61, 24.

that people get seats on the board 'based on their expertise.'[512] Korthals Altes identified the government's position that an anti-discrimination bureau should not operate 'only with the consent of [ethnic] minorities' as being 'the most important difference' between the proposals put forth by the NCB and the national 'minority organizations' and the cabinet's own plan. He maintained, however, 'that is our philosophy: the National Bureau is not only a cause of the minorities themselves but must also find support by the majority.'[513]

While on its face, the idea that the whole of society should support the work of combatting racial discrimination does not seem controversial, the idea of 'broad societal support' (*breed maatschappelijk draagvlak)* is a tricky one when it comes to protecting the rights of people in a political minority (in this case people racialized as non-white on the political issue of white supremacy/racial inequality). If, for example, the majority of the Dutch population did not support active measures to reduce racial discrimination, how should the LBR respond?[514] The idea of requiring majority support for anti-discrimination laws also ran counter to the ideas of universal human rights that underscored the International Convention on the Elimination of Racial Discrimination, which the Netherlands had ratified in 1968, as well as Article One of the Dutch constitution, which gave people a right to be free from discrimination based on race, and was also added in 1983. The cabinet ministers did not provide answers to these questions, but they would continue to return throughout the organizational life of the LBR.

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[512] Handelingen II 1983/1984, 16102, UCV 61, 3.

[513] Handelingen II 1983/1984, 16102, UCV 61, 3 ('Dat is onze filosofie: het landelijk bureau is niet alleen een zaak van de minderheden zelf, maar moet juist ook een draagvlak vinden bij de meerderheid.... Voor een echt geïntegreerd, door iedereen gedragen minderhedenbeleid moeten daarin ook voor de meerderheid representatieve organisaties zijn opgenomen. Een samenhangend antidiscriminatiebeleid kan alleen worden gevoerd als het door de gehele maatschappij wordt gedragen. Deze overtuiging ligt hieraan ten grondslag en zij mag ons naar mijn mening niet worden ontnomen.').

[514] For examples of how majoritarian politics can work against the rights of fellow citizens, see Jones, "Citizenship Violence and the Afterlives of Dutch Colonialism," 122 ('Right-wing populists seem to seek restoration of economic and socioeconomic supremacy for the normalized, majoritarian part of the citizenry via restoration of racialized supremacy and hierarchies.').

4.5. Conclusion

Given the context of what the Dutch government knew as it set out the organizational parameters the future LBR, one can conclude that the ultimate inability of the LBR to perform in a way that would materially impact racialization in the Dutch metropole was not accidental, but baked into its design. The government knew from the beginning that the laws and programs they were proposing would not be effective in addressing racialized discrimination or inequality. They knew, for example, that a criminal law approach to racial discrimination was not working; they knew police were not accepting complaints, that prosecutors were not filing charges, and that judges were not issuing penalties. The government had been advised, by their own researchers and experts, that racialized inequalities in hiring and housing could be better tackled by contract compliance, affirmative action or incentive programs than by punitive measures, but they neglected to change their approach. Researchers had also told government ministers that enforcement was key to making non-discrimination norms effective, and that a national antidiscrimination institute had to have the power to compel production of evidence and impose penalties for non-compliance; the ministers created an institution without any of these powers. Finally, the government knew that an independent organization needed access to courts to compel government agencies and officials to comply with their own anti-discrimination laws, but they made themselves immune from such policing, and made LBR funding contingent on the understanding that lawsuits would be undertaken only as a last resort.

Despite the cabinet's clear intentions and the limitations it imposed, the potential still existed for the LBR to make a material impact on the practice of racialization in the Dutch metropole. It had a national platform, funding for a full-time staff and operating budget. It had the ear and support of high profile academics and government-funded 'minority welfare organizations'. Despite initial objections, the cabinet ultimately granted the LBR the power to file lawsuits in its own name. Whether and how it would make use of those powers and possibilities would be up to the board of directors and staff of the future LBR, and is the subject of the remaining chapters.