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Racial stereotyping in the Netherlands: examining
the role of public authorities in the societal debate
on the character of *Zwarte Piet*

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*Wees maar gerust mijn kind
Ik ben een goede vrind
Want al ben ik zwart als roet
'k Meen het toch goed¹*

¹ Verse from a Sinterklaas children's song called '*Daar wordt aan de deur geklopt*', roughly translating to: Rest assured my child, I am a good friend. Because even though I am black as soot, I do mean well.



Sint Nicolaas on his horse Amerigo, accompanied by two Zwarte Pieten and welcomed by children. Drawing made for this thesis by Aafje Horst.

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Summary

This thesis seeks to develop an understanding of racial stereotyping in the Netherlands, through examining the role of public authorities in the societal debate on the character of *Zwarte Piet*. It is the portraying of this character that can contribute to negative racial stereotyping. How did the societal debate come to its current form, and what role do public authorities have, or what role should public authorities have, with regard to the portraying of the character of *Zwarte Piet*? These are some of the issues this thesis seeks to explore.

First, an analysis of the judicial proceedings in the Netherlands involving *Zwarte Piet* has been done, followed by an examination of the Dutch public authorities' stance on *Zwarte Piet*, and the involvement of the United Nations in the matter. The thesis then applies the notion of harmful stereotypes and John Stuart Mill's harm principle. Throughout the analysis, the thesis seeks to discover and discuss possible gaps in Dutch domestic law and international human rights law with regard to racial stereotyping.

The thesis has identified that the portraying of the character of *Zwarte Piet* constitutes negative stereotyping of Africans and people of African descent, as affirmed domestically by the Netherlands Institute for Human Rights and the Children's Ombudsman, as well as internationally by the United Nations. The assessment of negative (racial) stereotyping revealed that 'stereotyping' has emerged as a topic within the scope of international human rights law. Stereotypes reinforce inequality and discrimination, which is why several human rights treaties provide for an obligation on States to combat stereotyping. Human rights courts and treaty bodies have increasingly voiced that States should not enforce harmful stereotypes. This thesis has identified that, in the case of *Zwarte Piet*, it comes down to the issue of where freedom of speech ends and the protection from racial stereotypical imagery begins, and human rights law and national courts have been reluctant to recognise this issue as a violation.

On the one hand, combating *Zwarte Piet*'s discriminatory character seems to be a matter for society, not for the government. And on the other hand, *Zwarte Piet* is certainly a matter of State affairs, as the government often plays an active role in the events surrounding *Sinterklaas*. Unlike private citizens, a liberal State should be neutral. The State represents all citizens, and must therefore refrain from partaking in activities that discriminate on a ground such as race. Government agencies are allowed to participate fully in *Sinterklaas* celebrations, but only on the condition that *Piet* takes on a neutral character. The government must set a good example by excluding negative stereotypes from *Sinterklaas* celebrations in government institutions such as public schools, municipalities, and ministries. Moreover, the government must actively participate in the societal debate by providing adequate information. By providing insight into

the perspective of the discriminated minority groups, the government can promote social awareness among the majority.

Preface

As a child, the weeks leading up to *Sinterklaas* were probably the most fun time of the year. I remember the excitement for the festivities to start at school – when all the *Zwarte Pieten* would suddenly come running into the classrooms, overturning tables and chairs while singing loudly and handing out candy. These are undoubtedly fond memories for many people in the Netherlands. So when the realisation of the complicated background of this treasured tradition comes, it can hit hard.



Photograph of myself in elementary school with Sint Nicolaas and Zwarte Piet.

Though *Sinterklaas* is a feast for children, adults are at the forefront of the heavily polarised *Zwarte Piet* debate. It is one of those no-go conversation topics at birthday parties and Christmas dinner with the family. It seems as though an open dialogue between those opposing *Zwarte Piet* and those in favour of the character is no longer a possibility. While the Dutch government is, mostly, refraining from actively interfering in the societal discussion, some politicians have made their personal stance in the matter loud and clear. With this thesis, my aim is to create an understanding of the *Zwarte Piet* debate – how it came to its current form and what role public authorities have (or should have) with regard to changing the character of *Zwarte Piet*.

I would like to express my sincere gratitude, firstly, to my supervisor, Professor Göran Melander – your continuous support and patience throughout the thesis process have been invaluable. And to the Faculty of Law at Lund University and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law – it has been an incredible learning opportunity, one that I will never take for granted. And last, but definitely not least, to the people I have had the pleasure of meeting along the way.

Abbreviations

APV	<i>Algemene Plaatselijke Verordening</i> (General Local Regulation)
AWGB	<i>Algemene wet gelijke behandeling</i> (General law of equal treatment)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racism
CRC	Convention on the Rights of the Child
CRM	<i>College voor de Rechten van de Mens</i> (the Netherlands Institute for Human Rights)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
KOZP	Kick Out Zwarte Piet
PVV	<i>Partij voor de Vrijheid</i> (Freedom Party)
RvS	<i>Raad van State</i> (Council of State)
The Committee	The Committee on the Elimination of Racial Discrimination
The Court	The Court of Amsterdam
The Working Group	The Working Group of Experts on People of African Descent
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation

UNESCO Convention	2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
VIE	<i>Centrum voor Volkenkunde en Immaterieel Erfgoed</i> (Centre for Intangible Cultural Heritage)
VVD	<i>Volkspartij voor Vrijheid en Democratie</i> (People's Party for Freedom and Democracy)

1. Introduction

1.1 Introduction to the topic

It is mid-November and thousands of Dutch children and their families from across the country have come to watch *Sint Nicolaas* (Saint Nicholas), accompanied by *Zwarte Pieten* (Black Petes), arrive on his steamboat in a Dutch port or city, travelling all the way from Spain. The *Zwarte Pieten* will hand out *pepernoten*² and mandarins or oranges to the children, while *Sint Nicolaas* is welcomed to the country by the mayor. Every year, a different town or city in the Netherlands is nominated to host the national arrival of *Sint Nicolaas*, which is broadcasted live on national television.

Sint Nicolaas is an old mythic bishop with a long white beard, dressed in a red cape, a mitre and a crosier. He rides his white horse, called Amerigo, and is accompanied by his helper, *Zwarte Piet* (though there are almost always multiple *Zwarte Pieten*). *Zwarte Piet* is often portrayed by white males and females wearing black face covering makeup and a curly wig, with red lips and golden hoop earrings.

In the days following the national arrival, *Sint Nicolaas* and *Zwarte Piet* will make appearances across many public spaces throughout the country. Traditionally, children will place their shoe next to the fireplace or chimney at home before they go to sleep, and put some carrots in it for Amerigo, and drawings and a wish list for *Sint Nicolaas* and *Zwarte Piet*. If the children have behaved well during the past year, they will find sweets or a small present in the morning, and if they did not behave well they will find a small bag of salt, placed in their shoe by *Zwarte Piet*, who used the chimney to enter the house. On the evening of 5 December is when the main celebrations take place. Children, surrounded by their families, are anxiously awaiting those famous knocks on the door. Hearing these knocks means that *Sint Nicolaas* and *Zwarte Piet* have come to bring gifts as a reward for the children's good behaviour during the past year.

The discomfort surrounding the portraying of *Zwarte Piet* has started around the 1940's and grew in the year 1975 when the former Dutch colony Suriname became independent and many Surinamese people moved to the Netherlands.³ This is when the first public protests against *Zwarte Piet* started. In the year 2011, the public protests turned into a heated debate on a larger scale. It is the portraying of the character of *Zwarte Piet* that has been called into question: white persons wearing black face covering make up, a black curly wig, red lips and golden hoop

² Small, round gingerbread cookies.

³ Nations Online. *Suriname*. Accessed on 6 March 2020 via <http://www.nationsonline.org/oneworld/suriname.htm>.

earrings, while behaving not very intelligently in a subordinate role next to an influential white male. All these characteristics put together can contribute to negative racial stereotyping. Black face covering make up in itself already has a racist background with regard to blackface traditions; blackface make up was invented for entertainment purposes in American minstrel shows during the nineteenth century based on stereotypes of African American slaves, often at the expense of black people.⁴ Not adding to the innocent image of the *Sinterklaas* tradition are the traditional songs that children sing in schools and with their families. They feature verses like: *'Wees maar gerust mijn kind, ik ben een goede vrind. Want al ben ik zwart als roet, 'k meen het toch goed'*, roughly translating to 'Rest assured my child, I am a good friend. Because even though I am black as soot, I do mean well'.

1.2 Purpose and methodology

It seems to be unclear whether the character of *Zwarte Piet* falls within the scope of racial discrimination under international human rights law, and to what extent the government of the Netherlands is involved in the portraying of *Zwarte Piet*. Many people believe the current portraying of *Zwarte Piet* to be enforcing a racist stereotype, referring back to the Netherlands' colonial past. Others argue that dressing up as *Zwarte Piet* is an innocent and jovial children's pastime, which predates the country's colonial past and involvement in slavery.⁵ They feel that *Zwarte Piet* is an integral part of Dutch culture in its *Sinterklaas* celebrations, and by banning the stereotypical aspects of *Zwarte Piet*, it would infringe upon the right to freedom of expression/cultural heritage.

With a hermeneutic approach and based on the legal dogmatic research method, this thesis seeks to develop an understanding of the role public authorities have in the portraying of the character of *Zwarte Piet*, thereby answering the following overarching research question: *What is the role of Dutch public authorities in the societal debate on the character of Zwarte Piet?*

The thesis is primarily based on Dutch domestic case law and governmental documents, as well as official reports and statements published by international bodies.

⁴ Blackface. Accessed on 6 March 2020 via <http://black-face.com/>.

⁵ Ishaan Tharoor. "4 reasons to reject the racist Dutch tradition of Zwarte Piet" *The Washington Post*. 5 December 2014. Accessed on 6 March 2020 via https://www.washingtonpost.com/news/worldviews/wp/2014/12/05/4-reasons-to-reject-the-racist-dutch-tradition-of-zwarte-piet/?utm_term=.cc3d39ecdb8e.

1.3 Thesis outline

This thesis will attempt to answer the research question in five chapters, starting with an introduction to the topic, followed by an analysis of the *Zwarte Piet* debate in the Netherlands, which will raise topics such as the history of the Dutch *Sinterklaas* tradition and the portraying of *Zwarte Piet*. The third chapter discusses the contesting of the character of *Zwarte Piet*, both in a domestic context as well as in an international context. Chapter four examines the role of public authorities in the *Zwarte Piet* debate in relation to key issues that came forward in the earlier chapters. The thesis ends with concluding remarks.

2. Unfolding the *Zwarte Piet* debate

2.1 History and origins of *Sinterklaas* in the Netherlands

The life of *Sint Nicolaas* has been told through a large variety of stories and legends, and it is not possible to say with certainty that he actually existed. However, there are some legends that can be connected to actual places, people and events. According to various stories about *Sint Nicolaas*, he was born in the year 280 in the city of Patara in the province of Lycia, which nowadays will be southwest of Antalya, Turkey. He lived in the same time as Roman Emperor Constantine, who ruled between AD 306 and 337 and was the first emperor to declare tolerance for Christianity in the Roman empire.

With the spread of Christianity, stories about *Sint Nicolaas* were also spread. *Sint Nicolaas* came from a wealthy, Christian family. His uncle was a Bishop, who helped him become a priest by the age of nineteen. When *Sint Nicolaas*' parents passed away, he inherited all of their belongings, making him a very wealthy man. He shared his wealth with those in need, which led to him becoming Bishop of Myra. He died on 6 December AD 342. *Sint Nicolaas* was canonised in the sixth century, thereby becoming the saint of sailors, merchants, thieves, butchers, prostitutes, and (school)children. In the Catholic tradition it is custom to commemorate saints on the date they passed away, making 6 December a special day to be celebrated by many in the following centuries due to the countless legends describing *Sinterklaas*' good deeds. One of the most famous legends was about a nobleman and his three daughters, who could not provide for himself and his daughters anymore due to some financial setbacks. His only option was for his daughters to become prostitutes. *Sint Nicolaas* decided to throw gold through the window, for the nobleman to use for paying for his daughters' dowry, so as to avoid them having to become prostitutes. The current tradition of handing out pepernoten and sweets might be derived from this legend.

During the early Middle Ages, Christianity spread across Europe, and with the crusades the stories and legends about *Sint Nicolaas* spread from East- to West-Europe. From the eleventh century there were more and more churches dedicated to *Sint Nicolaas*, initially to protect sailors: he would calm the storms, save sailors who fell overboard and lead ships to the harbour of Myra. They were hoping for similar miracles on the North Sea.

Sint Nicolaas' role as friend of children became the most famous one. Celebrations held in French monasteries made its way to Dutch monasteries, where children could appoint a children's Bishop that everyone had to listen to during the celebration. The festivities took place in December, which is why many believe it became entwined with the *Sinterklaas* celebrations.

This seemed to have become a constant: the existing tradition of *Sinterklaas* kept changing due to external influences. Throughout the following centuries, the *Sinterklaas* celebrations kept growing, also outside of the monasteries. There would be special markets and parades, where children would dress up as Bishop, poor children would put up their shoes in churches and the rich would put money or sweets in the shoes.

This all changed after the Reformation, where worshipping Bishops was forbidden and several *Sinterklaas* traditions were banned, though they continued behind closed doors in the domestic spheres, without the physical appearance of *Sint Nicolaas* himself. There are two famous paintings from the year 1665, made by Jan Steen, showing two families in their living room celebrating with gifts and sweets. There is no Bishop in the paintings. Because the *Sinterklaas* celebrations were no longer held in the public space, people started to give their own interpretation to the holiday. The person who would give gifts to the children did not always look like a Catholic saint anymore; sometimes he would look like a creepy figure who would punish children. This threatening element was used by parents to keep children in line.⁶

In the nineteenth century, following the separation of church and State in the year 1796, the *Sinterklaas* celebrations returned to the public space.⁷ The children's holiday as it is currently celebrated in the Netherlands can be traced back to this century, with the appearance of the first published *Sinterklaas* book in the Netherlands called '*Sint Nikolaas en zijn knecht*' (Saint Nicholas and his servant). It was written in the year 1850 by Jan Schenkman, a Dutch writer and schoolteacher. According to this book, *Sint Nicolaas* was a Spanish bishop who travelled to the Netherlands with his black servant. The black servant, who was not given a name in this book, was portrayed wearing a pyjama-like costume, without a beret. In a later edition of the book, in 1851, he was portrayed wearing a costume of a Spanish Moorish servant.⁸

Before the nineteenth century, *Sint Nicolaas* has at times been portrayed with a distinguished white male, and at other times with a creature representing the devil. *Sint Nicolaas*' black servants were first introduced in German paintings in the nineteenth century, and received the name *Zwarte Piet* in the year 1891.⁹

⁶ Jop Euwijk & Frank Rensen, *De identiteitscrisis van Zwarte Piet*, Amsterdam: Atlas Contact 2017, p. 18-23.

⁷ Euwijk & Rensen, p. 23 (supra note 6).

⁸ Frits Booy, *Het verhaal van Zwarte Piet. Geschiedenis en betekenis*, Utrecht: Nederlands Centrum voor Volkscultuur en Immaterieel Erfgoed 2014, p. 2-6.

⁹ Historiën. *Het eerste Sinterklaasboek*. Accessed on 9 May 2020 via <http://www.historien.nl/jan-schenkman-en-het-eerste-sinterklaasboek/>.

2.2 Competing narratives on the history of *Zwarte Piet*

There are various competing narratives on the origins of the portraying of *Zwarte Piet*, and when and how he became a part of the *Sinterklaas* celebrations. Jeroen Rodenberg and Pieter Wagenaar of the Faculty of Social Sciences, Department of Public Administration and Political Sciences, at the Vrije Universiteit Amsterdam, the Netherlands, have thoroughly analysed these narratives and categorised them into pro-*Zwarte Piet* narratives and contra *Zwarte Piet* narratives, some based on a historic interpretation and some focused on the present, based on a hodie-centric interpretation.¹⁰ These narratives are briefly discussed below.

2.2.1 Pro-*Zwarte Piet* narratives

The ‘*Catholic celebration*’ narrative, based on historic interpretation, is used by *Zwarte Piet* defenders claiming that *Sint Nicolaas* himself only existed in stories, and may have been accompanied by helpers representing the devil. Therefore, they are of the opinion that *Zwarte Piet* is not connected to slavery or racism – he was originally a devil. A sentence from an old *Sinterklaas* poem states: ‘*Zwarte piet zo zwart als roet, met een keten aan zijn voet*’ (Black Pete as black as soot, with a chain on his foot).¹¹

The ‘*pan-European and pre-Christian celebration*’ narrative, based on historic interpretation, claims that the roots of *Zwarte Piet* can be found in a pre-Christian, Germanic tradition – or even traced back further to a celebration across Europe and the Middle East, thereby denying a colonial link with the portraying of *Zwarte Piet* as not all countries taking part in the *Sinterklaas* celebrations had a colonial past. According to this narrative, *Zwarte Piet* is a remnant of an ancient fertility rite involving mid-winter traditions, where devilish figures accompanied *Sint Nicolaas* on his yearly visit.

The ‘*nineteenth-Century orientalism and masquerade*’ narrative, based on historic interpretation, places the origins of *Zwarte Piet* in a *Sinterklaas* masquerade during the *Ancien Régime*, thereby finding no connection of *Zwarte Piet* to either religion or colonialism. According to this narrative, *Sint Nicolaas* has not been accompanied by a servant, but instead played a dual role himself: gift giver and punisher. The punisher version of *Sint Nicolaas* was then called *Zwarte Klaas* (Black Nicholas), where his face would be blackened in order to terrify the children and for being unrecognisable in the dark. From the nineteenth century onwards *Zwarte Klaas* changed into a loyal servant who accompanied *Sint Nicolaas*, based on a Moorish servant, who were, at that time, not regarded as slaves.

¹⁰ Jeroen Rodenberg & Pieter Wagenaar, 2016, ‘Essentializing ‘Black Pete’: competing narratives surrounding the *Sinterklaas* tradition in the Netherlands’, *International Journal of Heritage Studies*, 22(9), 716–728.

¹¹ Rita Ghesquiere, *Van Nicolaas van Myra tot Sinterklaas*, Leuven: Davidsfonds 1989, p. 65-71.

The 'feast for children' narrative, based on hodie-centric meaning, is a popular apology for *Zwarte Piet*, articulating that the *Sinterklaas* tradition is first and foremost a celebration for children, and therefore not something to get upset about.¹² This narrative does not refer back to any historical roots other than one's own experience in celebrating *Sinterklaas* (with *Zwarte Piet*) during their childhood. Where the historical origins of the portraying of *Zwarte Piet* come from and why *Zwarte Piet* has certain physical traits is of minor importance in this narrative. *Zwarte Piet* is called '*Zwarte*' *Piet* because this is just how he looks and how he has always looked, therefore it cannot be changed. According to this narrative, *Zwarte Piet* is black because of climbing through chimneys while delivering presents for children.

The 'nativist' narrative, based on hodie-centric meaning, believes the *Sinterklaas* tradition to be a totem of Dutchness¹³, strongly linked to national identity and traditions. Adherents to this narrative feel that with a change in the portraying of *Zwarte Piet*, an essential element of the *Sinterklaas* tradition would be taken away, thereby threatening group identity. According to this narrative, processes of immigration are the cause for the debate. Adherents to this narrative feel that 'outsiders' do not have the right to criticise as they do not really 'belong to the nation' and are only 'guests' in the country.¹⁴

2.2.2 Contra *Zwarte Piet* narratives

The '(post-)colonial slavery' narrative, based on historic meaning, places the portraying of *Zwarte Piet* in the Dutch colonial era, in the mid-nineteenth century. Adherents to this narrative believe *Zwarte Piet* to represent a slave¹⁵, and as such is a racist stereotype of black people. They believe that the *Sinterklaas* tradition, and with it *Zwarte Piet* as well, is an invented tradition and therefore can easily be changed.¹⁶ According to this narrative, the Dutch society has not yet come to terms with the country's involvement in slavery, and *Zwarte Piet* is seen as a symbol for the power relations in the Netherlands and as a tool for social exclusion.

The 'European black face tradition' narrative, based on historic meaning, links *Zwarte Piet* to blackface traditions in the United States of America. According to Hofstede¹⁷, arguing in favour

¹² John I.A. Helsloot, 'De strijd om *Zwarte Piet*' in *Veranderingen van het alledaagse 1950-2000*, edited by Isabel Hoving, Hester Dibbits, and Malou Schrover, Den Haag: SDU 2005, p. 249-271.

¹³ John I.A. Helsloot, 1996, 'Sinterklaas en de komst van de kerstman. Decemberfeesten in postmodern Nederland tussen eigen en vreemd.', *Volkscundig Bulletin* 22(3), p. 262-298; Gerard Rooijackers, 'Sinterklaas en de donkere dagen voor kerstmis. De commercialisering van decemberrituelen.' in *Ons soort mensen. Levensstijlen in Nederland*, edited by Huub de Jonge, Nijmegen: SUN 1997, p. 239-272.

¹⁴ Guno Jones, 'Ons' in 'Ons Sinterklaasfeest' in *Sinterklaasje kom maar binnen zonder knecht*, edited by L. Helder and S. Gravenbergh, Berchem: Epo 1998, p. 107-117.

¹⁵ Diana Fräser, 'Wijsheid in feesten' in *Sinterklaasje kom maar binnen zonder knecht*, edited by L. Helder and S. Gravenbergh, Berchem: Epo 1998, p. 139.

¹⁶ Rihana Hassankhan, *Al is hij zo zwart als roet....: De vele gezichten van Sinterklaas en Zwarte Piet*, Den Haag: Warray 1998, p. 29.

¹⁷ Barend P. Hofstede, 'Persona non grata. The Case of *Zwarte Piet*.' in *Concepts of Person in Religion and Thought*, edited by H.G. Kippenberg, Y.B. Kuiper and A.F. Sanders, Berlin: Mouton de Gruyter 1990, p. 374.

of this narrative, it dates back to the nineteenth century when racist theory was used to legitimise slavery, using the character of *Zwarte Piet* to install racism in children from an early age. Now that slavery is no longer practised, racial stereotypes such as *Zwarte Piet* are still with us.

The ‘racial stereotype’ narrative, based on hodie-centric meaning, believes that the *Zwarte Piet* debate exposed ‘white privilege’ in the Netherlands; only white ‘autochthonous’ Dutch citizens get to have a voice in the debate, determining what counts as racism and what does not. This narrative is closely related to the above European blackface tradition narrative, but differs in the sense that it focuses on the effects *Zwarte Piet* has on people today: children (and adults alike) being addressed as ‘*Zwarte Piet*’¹⁸, as well as the effects the racialised relationship of *Sint Nicolaas* and *Zwarte Piet* as master and servant might have on children in schools.¹⁹ Adherents to this narrative link these type of experiences not only to white privilege, but also to ‘micro aggressions’ and ‘institutionalised racism’.²⁰

2.2.3 The portraying of *Zwarte Piet* in literature

As mentioned above, Jan Schenkman’s book was the first literary publication of *Sinterklaas* celebrations where *Sint Nicolaas* was accompanied by a black servant. In this book, *Sint Nicolaas* would punish children with bad behaviour and put them in a bag. From 1890 onwards, this role of punisher was taken over by the black servant, who, at that time, received the name *Zwarte Piet*. Up until the year 1970, *Zwarte Piet* was therefore a feared persona. The physical appearance of *Zwarte Piet* varied during those years, but he would always have a blackened face. Between 1940 and 1970, *Zwarte Piet* was often portrayed as a foolish and unintelligent character who spoke broken Dutch. From 1970, *Zwarte Piet* changed into the child friendly, helpful assistant of *Sint Nicolaas* as we currently know him, and there would no longer be a punishing element to the *Sinterklaas* tradition. This emancipation of the celebrations was closely related to the changing attitude in Dutch society around authority and the upbringing of children, as well as increasing discrimination from the 1960’s onwards.²¹

¹⁸ Philomena Essed, *Alledaags Racisme*, Amsterdam: Feministische Uitgeverij Sara 1984, p. 57, 157-158.

¹⁹ Hassankhan, p. 52 (supra note 16).

²⁰ Minjon Tholen, “Hoe Nederlands is Zwarte Piet?”, *Opiniestukken*, 4 December 2014. Accessed on 2 April via <http://www.opiniestukken.nl/opiniestukken/artikel/873/Hoe-Nederlands-is-Zwarte-Piet?t=Zwarte%20Piet>.

²¹ Booy, p. 6-10 (supra note 8).

2.3 The road to the current *Zwarte Piet* debate – how did we get here?

2.3.1 *The arrest of Quincy Gario and Jerry Afriyie (Dordrecht, 2011)*

As briefly mentioned in the introduction, the discomfort surrounding the portraying of *Zwarte Piet* is not a new phenomenon. However, the origins of the debate in its current form can be traced back to the year 2011. On 12 November 2011, Quincy Gario and Jerry Afriyie, two artists, joined the crowd welcoming *Sint Nicolaas* at the national arrival in Dordrecht, while wearing a T-shirt with the text '*Zwarte Piet Is Racisme*' (Black Pete Is Racism). Gario and Afriyie are two of the founders of the campaign '*Zwarte Piet Is Racisme*' which was founded a few months prior to the national arrival of *Sinterklaas* in Dordrecht. The campaign is part of the foundation '*Nederland Wordt Beter*' (The Netherlands Will Get Better), which strives for a future without racism and exclusion in the Netherlands.²² The message on the T-shirts of Gario and Afriyie reached thousands of people who were watching the national arrival on live television, as well as the police officers present at the event. Gario and Afriyie were arrested in an unlawful and disproportionately violent manner, as the Dutch National Ombudsman stated in its judgement three years later²³, and were held at the police station for several hours. In a protest against the arrest of Gario and Afriyie, a group of sympathisers went to the *Sinterklaas* parade in Amsterdam the following day, while wearing T-shirts with the text '*Zwarte Piet Is Racisme*'. This group was also harshly arrested, on the grounds of disturbing the public order.²⁴

The violent arrest of Gario and Afriyie was a turning point in the *Zwarte Piet* debate, facilitated by the rise of social media, and was picked up by newspapers, magazines, talk shows and some very lively comment sections on social media and online forums.²⁵ There was a video posted online that showed Quincy Gario being dragged away by police officers in uniform and undercover police, and then kept violently to the ground for several minutes, while he was resisting and saying 'I didn't do anything at all'.²⁶ The groups of activists and sympathisers united themselves in 2015 under the name '*Kick Out Zwarte Piet*' (hereafter: KOZP). The street actions that have been organised have since been announced under this name. The aforementioned foundation *Nederland Wordt Beter* is part of the network of KOZP, and also concerns itself with campaigns to promote the presence of Dutch colonial past, mainly with

²² Nederland Wordt Beter. *Zwarte Piet Is Racisme-Campagne*. Accessed on 9 May 2020 via <http://www.nederlandwordtbeter.nl/projecten/zwarte-piet-is-racisme-campagne/>.

²³ Nationale Ombudsman, *Politie hield onterecht twee mannen aan bij Sinterklaasintocht in 2011*, Report number 2014/138, 15 October 2014. The full report can be accessed via <https://www.nationaleombudsman.nl/nieuws/rapporten/2014138>.

²⁴ Eline Mestdagh, 2018, "Over Zwarte Piet, Erkenning En Historisch Onrecht in 'Postkoloniaal' Nederland." *Brood En Rozen*, 23.4, p. 8-9.

²⁵ Rodenberg & Wagenaar, p. 717 (supra note 10).

²⁶ John I.A. Helsloot, 2012, 'Zwarte Piet and Cultural Aphasia in the Netherlands', *Quotidian: Journal for the Study of Everyday Life*, 3, p. 5.

regard to slavery, in Dutch schools and in Dutch everyday life. The foundation feels that the reason that Dutch people are unable to see the connection between *Zwarte Piet* and slavery is a direct result of the country's unprocessed and insufficiently discussed past with regard to slavery.²⁷

2.3.2 Sinterklaas to be included as Intangible Cultural Heritage

In 2011, the Dutch *Sinterklaas* Association, on the instigation of the Dutch *Centrum voor Volkenkunde en Immaterieel Erfgoed* (Centre for Intangible Cultural Heritage, hereafter: VIE), first reported wanting the *Sinterklaas* tradition to be included on the Representative List of the Intangible Cultural Heritage of Humanity of the United Nations Educational, Scientific and Cultural Organisation (hereafter: UNESCO). This list is an instrument of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter: UNESCO Convention). However, at that time, it was not possible as the Netherlands had not yet signed the UNESCO Convention, and also had not yet included *Sinterklaas* on its national list.²⁸ Both actions are needed in order for intangible heritage to be eligible to be nominated for a place on the Representative List. The Government of the Netherlands mandated the VIE to be responsible for the safeguarding of intangible heritage, the national inventory list, and for the nomination of *Sinterklaas* to be included on the UNESCO's Representative List.

Upon the Netherlands' ratification of the UNESCO Convention in Paris on 5 November 2012, the VIE showcased *Sint Nicolaas*, without *Zwarte Piet*. However, when the *Sinterklaas* Association started the process in 2011, the VIE asked questions about *Zwarte Piet*, leading the society to withdraw from the registration process. In 2014, however, the process was started once again, this time by the 'community' the *Sint & Pietengilde*, and with success.²⁹ The formal signing took place on 15 January 2015.³⁰

The international response to registering *Sinterklaas*, with *Zwarte Piet*, on the UNESCO Representative List, and more so the resistance against it, was enormous. Counter-reactions in Dutch society included a record number of volunteers for playing the character of *Zwarte Piet*, and various shopkeepers made much more use of *Zwarte Piet* advertisements in their shop windows than during previous years.³¹

²⁷ Mestdagh, p. 9-10 (supra note 24).

²⁸ Koen Lemmens, 2017, 'The dark side of 'Zwarte Piet': A misunderstood tradition or racism in disguise? A legal analysis', *The International Journal of Human Rights*, 21(2), p. 125.

²⁹ Rodenberg & Wagenaar p. 717-718 (supra note 10)

³⁰ Jarl van der Ploeg, 'Sinterklaas (en Zwarte Piet) Immaterieel Erfgoed', *de Volkskrant*, 15 January 2015. Accessed on 9 May 2020 via <https://www.volkskrant.nl/nieuws-achtergrond/sinterklaas-en-zwarte-piet-immaterieel-erfgoed~b42822cf/>.

³¹ Booy, p. 21-22 (supra note 8).

2.3.3 The case of the ‘*Blokkeerfriezen*’

In November 2017, KOZP planned on protesting at the national arrival of *Sint Nicolaas* in Dokkum. While on their way to Dokkum, the activists were blocked on the highway by pro-*Zwarte Piet* activists (the so-called ‘*blokkeerfriezen*’, blockage friezen, named after Friesland, the province they are from) who had parked their cars in the middle of the highway, preventing anyone to continue on their way to Dokkum. As a result of speculations of the highway blockage earlier that week, the mayor of the municipality had already decided to forbid demonstrations against *Zwarte Piet* during the national arrival of *Sint Nicolaas*.³² The KOZP activists were therefore deprived of their right to demonstrate under their freedom of expression.³³ In October 2018, 34 of the *blokkeerfriezen* were sentenced to community service sentences, with the highest sentence for Jenny Douwes, the initiator of the blockage, who received the maximum amount of hours of community service, 240 hours, and one month of suspended prison sentence for instigation. The Court of Noord-Nederland stated that the right to demonstrate is a fundamental right enshrined in the Dutch Constitution, and that taking the law in your own hands³⁴ will not be tolerated in a democratic constitutional State.³⁵

The costs for appealing the case were raised by Dutch society through a crowdfunding campaign. The campaign raised over €164.000. The goal of the initiator, Robin van Prattenburg, was to show how many Dutch people stand behind the actions of the *Blokkeerfriezen*.³⁶ In the appeal of October 2019, the sentences were reduced to fewer hours of community service.³⁷

2.3.4 *Zwarte Piet* as a tool for racist treatment

There have been many situations, both public and private, of *Zwarte Piet* being used as a swear word for the racist treatment of others. One of the more recent, public, situations was the situation at the soccer match between FC Den Bosch and Excelsior in November 2019, that was stopped due to racist chants heard in the crowd. The crowd was chanting *Zwarte Piet* songs and racist slurs such as ‘k-negro’ and ‘k-cottonpicker’, in which the ‘k’ stands for the Dutch word

³² Nu.nl. Accessed on 12 May 2020 via <https://www.nu.nl/sinterklaas/5013011/politie-stopt-demonstraties-dokkum-vermoedens-meer-blokkades-.html?redirect=1#sinterklaas-komt-aan-in-dokkum-7>.

³³ Nu.nl. Accessed on 12 May 2020 via <https://www.nu.nl/sinterklaas/5012723/intocht-sint-in-dokkum-rustig-verlopen-demonstranten-gestopt-a7.html>.

³⁴ What the court means here, is that regulating demonstrations and maintaining public order and security are tasks for the government, not for (groups of) individual citizens.

³⁵ Rechtspraak. Accessed on 14 May 2020 via <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Noord-Nederland/Nieuws/Paginas/Werkstraffen-voor-blokkeerders-A7-en-initiatiefneemster-blokkade.aspx>.

³⁶ Floor Bouma, ‘Ruim 164.000 euro opgehaald voor hoger beroep blokkeerfriezen’, *NRC*, 11 November 2018. Accessed on 14 May 2020 via <https://www.nrc.nl/nieuws/2018/11/11/ruim-164-000-euro-opgehaald-voor-hoger-beroep-blokkeerfriezen-a2754812>.

³⁷ Rechtspraak. Accessed on 14 May 2020 via <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Arnhem-Leeuwarden/Nieuws/Paginas/Uitspraak-A7-Blokkadeza.aspx>.

for cancer³⁸, were heard throughout the stadium, aimed at soccer player Ahmad Mendes Moreira. Earlier that day, some of the soccer fans in the group had also participated in pro-*Zwarte Piet* protests.³⁹

³⁸ Translation in Dutch: *kanker*.

³⁹ Arjen Fortuin, 'Onheus bejegend? Moreira werd getroffen door puur racisme', *NRC*, 18 November 2019. Accessed on 22 May 2020 via <https://www.nrc.nl/nieuws/2019/11/18/dit-hoeft-ahmad-niet-te-accepteren-a3980681>.

3. Contesting the character of *Zwarte Piet*

3.1 *Zwarte Piet* as a subject of domestic judicial procedures

Though the *Zwarte Piet* debate has been ongoing in Dutch society for decades, it is only since the year of 2013 that *Zwarte Piet* became the subject of domestic judicial procedures. To date, there are three important (para)legal procedures worth mentioning, taking place at the Court of Amsterdam, the Council of State, and the *College voor de Rechten van de Mens* (the Netherlands Institute for Human Rights, hereafter: CRM).⁴⁰

3.1.1 *The Court of Amsterdam, 3 July 2013*

Firstly, there was the case of the event permit for festivities surrounding the arrival of *Sint Nicolaas* on 17 November 2013 in Amsterdam.⁴¹ On 13 August 2013, the mayor of Amsterdam issued an event permit for the local *Sinterklaas* Association to organise the arrival of *Sint Nicolaas* in Amsterdam. Twenty-one persons filed a complaint against this permit at the administrative law section of the Court of Amsterdam (hereafter: the Court), alleging that the permit should not have been issued as the character of *Zwarte Piet* violates the protection of various fundamental freedoms, including the right not to be discriminated against. The mayor argued that the *Algemene Plaatselijke Verordening* (General Local Regulation, hereafter: APV) provides for an exhaustive list for grounds of refusal of an event permit; these grounds should be in relation to public order and safety, and the prevention of racism and discrimination are outside the scope of the APV. In its judgement of 3 July 2014, the Court annulled the issued event permit and stated that in this case, the APV has to step aside as Article 8 of the European Convention on Human Rights (hereafter: ECHR), the right to respect for private and family life, prevails. In deciding on the permit application, the mayor of Amsterdam should have properly balanced the public interest and the right to private and family life of the plaintiffs.⁴²

The Court based its reasoning on the case of *Aksu v. Turkey* of the Grand Chamber of the European Court of Human Rights (hereafter: ECtHR).⁴³ According to the ECtHR, the notion of personal autonomy is an important principle in the interpretation of the guarantees of the right to private and family life under Article 8 ECHR. It serves to protect an individual's personal

⁴⁰ Aspha Bijnaar & Cees Maris, 2015, 'De Zaak van Sinterklaas', *Caribisch Juristenblad* 4, no. 3, p. 188-190.

⁴¹ Rechtbank Amsterdam, 3 July 2014, ECLI:NL:RBAMS:2014:3888.

⁴² Lemmens, p. 129 (supra note 28).

⁴³ *Aksu v. Turkey*, Application Nos. 4149/04 and 41029/04 (ECtHR GC, 15 March 2012).

identity, which includes the ethnic identity.⁴⁴ The Court, however, did not address this in its judgement as the case was merely about whether the mayor of Amsterdam fulfilled his duties in balancing the interests at stake upon deciding on the application for the event permit. The Court did not mention what these possible positive obligations might be in the portraying of *Zwarte Piet* during *Sinterklaas* celebrations.

Based on email exchanges between some of the plaintiffs and the *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights, hereafter: CRM), in which the CRM stated that *Zwarte Piet* is a phenomenon that is a racist element of the *Sinterklaas* tradition⁴⁵, the Court held that the character of *Zwarte Piet* indeed embodies a negative stereotype of black people. The Court values the CRM's opinion, as it is the independent national institute for human rights as referred to in Resolution A/RES/48/134 of the General Assembly of the United Nations of 20 December 1993 on the national institutions for the promotion and protection of human rights, as well as in Recommendation No. R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national institutions for the promotion and protection of human rights. Next to that, the Court referred to the research conducted by the *Bureau Onderzoek en Statistiek* (Bureau Research and Statistics) of the municipality of Amsterdam in December 2012, in which 7% of all respondents experiences *Zwarte Piet* as discrimination, and of the remaining respondents 37% could imagine that other people experience *Zwarte Piet* as discrimination. The Court sees no reason to doubt the representativeness of the research, as the respondents included a large amount of citizens with various (ethnic) backgrounds.⁴⁶

While the Court acknowledges that for many people *Zwarte Piet* is a fairy-tale figure from their childhood, it is likely that the portraying of *Zwarte Piet* in its current form leads to feelings of inferiority for black people and therefore is a negative stereotyping of black people. Especially the role of servant and *Zwarte Piet*'s appearance and behavior lead to the image of black people being subordinate and unintelligent. The Court noted, however, that not every effect of negative stereotyping leads to a violation of the right to private and family life under Article 8 ECHR. The effect of the negative stereotyping must have a certain degree of severity, in which the Court referred to the ECtHR judgement of 9 April 2009 in the case of *A. v. Norway*.⁴⁷ The Court holds that in this case the effect of the negative stereotyping does reach the necessary degree of severity.

The Court further stated that even though the arrival of *Sint Nicolaas* in Amsterdam is just one element of the *Sinterklaas* tradition, it is an annual event with many spectators, and signifies

⁴⁴ *Aksu v. Turkey*, paragraph 58 (supra note 43).

⁴⁵ These email exchanges took place in the year 2013, which was three years prior to the CRM's official statement regarding the *Zwarte Piet* debate in 2016, as is analysed above.

⁴⁶ *Rechtbank Amsterdam*, paragraphs 15.10.1-15.11.1 (supra note 41).

⁴⁷ *A. v. Norway*, Application No. 28070/06 (ECtHR, 9 April 2009).

the beginning of the *Sinterklaas* celebrations in Amsterdam that will continue to take place over several weeks. *Zwarte Piet* plays an integral role in the entire celebration – not just during the arrival of *Sint Nicolaas* – and is therefore an unmissable element in the everyday life within Dutch society. This is why the mayor of Amsterdam should have taken into account Article 8 ECHR in deciding on the event permit application for the arrival of *Sint Nicolaas*, and in failing to do so, granting the permit infringed upon the right to private and family life of the plaintiffs.⁴⁸ The Court did not hold that the event permit should not have been issued, it merely called for a fair balancing of the interests at stake.⁴⁹

3.1.2 Appeal before the Council of State, 12 November 2014

Following the judgement of the Court in 2014, the mayor of Amsterdam appealed against the judgement before the *Raad van State* (Council of State, hereafter: RvS), the Netherlands' Supreme Administrative Court. In its judgement of 12 November 2014, just days before *Sint Nicolaas* would arrive in the country, the RvS noted that this case transcends the matter at hand and has a societal and legal interest, including the importance of unambiguous laws and regulations by governance and judges. The RvS stated that this interest would be served by the highest general administrative judge providing for a clear answer on the question as to whether the mayor of Amsterdam, in exercising the powers conferred on him in the context of the enforcement of public order and safety, should take into account the content of possible expressions that could be expected, and the violations of fundamental rights these possible expressions might lead to, in the use of the administrative powers such as those at issue here.⁵⁰

The RvS stated that the point of departure of the ECHR is that it must be observed by contracting States Parties, but the ECHR does not prescribe how and by whom within the State this compliance should be realised. The RvS referred to the ECtHR case of *Swedish Engine Driver's Union v. Sweden* of 6 February 1976⁵¹, where the ECtHR considered that 'neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention'.⁵² The RvS acknowledged that from the judgement in *Aksu v. Turkey* can be derived that there are circumstances in which Article 8 ECHR imposes positive obligations on the State to take measures against certain forms of negative stereotyping, but it does not prescribe which body or bodies within that State is/are responsible. Therefore, the RvS notes, answering the aforementioned question cannot be done on the basis of the judgement of *Aksu v. Turkey*, and instead must be done on the basis of the national jurisdictional order.⁵³

⁴⁸ Rechtbank Amsterdam, paragraphs 15.11.2-15.12 (supra note 41).

⁴⁹ Rechtbank Amsterdam, paragraphs 15.1-15.4, 15.13 (supra note 41).

⁵⁰ Raad van State (Afdeling bestuursrechtspraak), 12 November 2014, ECLI:NL:RVS:2014:4117, paragraph 5

⁵¹ *Swedish Engine Driver's Union v. Sweden*, Application No. 5614/72 (ECtHR, 6 February 1976).

⁵² *Swedish Engine Driver's Union v. Sweden*, paragraph 50 (supra note 51).

⁵³ Raad van State, paragraph 6.3 (supra note 50).

The RvS holds that in the matter at hand, the alleged violation of Article 8 ECHR does not directly result from the granting of the event permit by the mayor. The plaintiffs primarily object to the portraying of *Zwarte Piet*, as, according to them, the character infringes upon their right to respect for private and family life under Article 8 ECHR. The event permit relates to the event of the arrival of *Sint Nicolaas* in Amsterdam, which consists of a parade and a boat trip. The granting of the event permit merely contains permission under public law to realise the arrival of *Sint Nicolaas* in the city centre of Amsterdam; it does not include permission to violate the fundamental rights of others. The fact that *Zwarte Pieten* take part in this event, which may result in a discriminatory effect, does not lead to a different judgement. The RvS noted here that the substantive details of the arrival of *Sint Nicolaas*, and thereby the presence of *Zwarte Pieten*, concerns the actions of third parties, and that it is not within the power of the mayor of Amsterdam to forbid events on account of their content, unless there is a threat to public order and peace.⁵⁴

In view of the above circumstances, the RvS holds that the Court wrongly considered that the mayor of Amsterdam should have taken into account Article 8 ECHR in deciding on the application for an event permit for the arrival of *Sint Nicolaas* in Amsterdam. The substantive question as to whether or not *Zwarte Piet* is a racist character, is not relevant for the mayor of Amsterdam. Therefore, the Court wrongly judged *Zwarte Piet* to be a negative stereotype. The RvS further noted that, in the event of an alleged violation of (a principle of) treaty law, the legality of the actions of the third parties can be brought before a civil court. In alleged criminal offenses, criminal proceedings can be initiated against the alleged perpetrator.⁵⁵

3.1.3 CRM decision on an individual complaint, 4 November 2014

While the RvS did not make its own substantive assessment as to whether the portraying of *Zwarte Piet* is of a racist character, the CRM, in its decision of 4 November 2014, did confirm that the character of *Zwarte Piet* is a form of negative stereotyping of black people, and, therefore, is discriminating. In this case, a mother of two children asked the CRM whether a school that permits *Zwarte Piet* to be part of the *Sinterklaas* celebrations, makes a distinction based on race, which is one of the prohibited grounds of discrimination under Article 7 of the *Algemene wet gelijke behandeling* (General law of equal treatment, hereafter: AWGB).⁵⁶

The mother stated that *Zwarte Piet* exposes her two children, who both have a darker skin colour than most other children at the school, to a racist caricature, but she noted that it is also not right

⁵⁴ Raad van State, paragraph 6.4-6.5 (supra note 50).

⁵⁵ Bijnaar & Maris, p. 188 (supra note 40).

⁵⁶ College voor de Rechten van de Mens. Accessed on 22 May 2020 via <https://mensenrechten.nl/nl/gelijkebehandelingswetgeving#AWGB>.

for ‘white children’ to be exposed to the caricature of *Zwarte Piet*. The mother uses the *Sinterklaasjournaal* as a guide for the *Sinterklaas* celebrations, as the creators of the *Sinterklaasjournaal*, the Dutch public broadcaster channel NTR⁵⁷, also create teaching packages for schools, including the school that the mother’s two children attend. *Zwarte Piet* is part of this teaching package. The children have to, for example, make a *Zwarte Piet* in arts and crafts, and there is a *Zwarte Pieten* gymnastics class, which, according to the mother, confirms the negative stereotype that while *Zwarte Piet* is not intelligent, he is physically strong. Next to this, every year, the mother’s two children are confronted with a big mess in the school in the weeks leading up to 5 December, and all the children will have to clean up the mess made by ‘those stupid *Zwarte Pieten*’. The mother therefore argues that in the mind of her children, all these experiences provide for an image that *Zwarte Piet* – read: black people – are unintelligent, weird, messy, and more in general are ‘different’. This makes her children feel uncomfortable and they find it difficult to share this feeling, making them feel lonely and misunderstood at school.⁵⁸

The school board objected to the arguments made by the mother, and stated that they do not fall within the scope of Article 7 of the AWGB. The school board argued that the school does in fact treat its learners equally: the *Sinterklaas* celebrations are, after all, accessible for all children. Moreover, the school board argued, changing a cultural tradition is a matter for the whole of society; it would confuse the learners if the school was ahead of the national debate by deviating from the national *Sinterklaas* celebrations.

The CRM states that in this case, it is about the private relationship between the school and the mother, in which the central question is whether the school has sufficiently ensured a non-discriminatory educational environment at the school, as this is their positive obligation under Article 7 AWGB. Referring to the judgement of the Court of 3 July 2013, the portraying of *Zwarte Piet* infringes upon this. The mother’s two children will be confronted with the figure of *Zwarte Piet* on an annual basis, as the school indeed follows the teaching packages made by the NTR and therefore includes exposure to *Zwarte Piet* in various lessons and subjects at school from the middle of November until 5 December. The CRM stated that with the *Sinterklaas* celebrations at the school, there is an ‘annually recurring negative stereotyping of people with a dark skin colour’ of such severity that one can speak of a phenomenon with discriminatory aspects. Although *Zwarte Piet* is not intended to be discriminatory, the effect is, according to the CRM, discriminatory. Therefore, the CRM noted that in this regard, the school does not ensure a non-discriminatory educational environment.⁵⁹

⁵⁷ It is important to note here that the NTR is a public television channel, as it has ties to the Dutch government.

⁵⁸ College voor de Rechten van de Mens, 4 November 2014, judgement 2014-131, No. 2014-0203, paragraph 3.6.

⁵⁹ College voor de Rechten van de Mens, paragraph 3.9-3.11 (supra note 58).

On the other hand, however, the CRM recognises that the school board must function in a societal environment in which a heated discussion about *Zwarte Piet* takes place. Therefore, the CRM concluded that for the year 2014 the school board has made sufficient attempts to steer the school in a non-discriminatory direction. From 2015 onwards, however, the school board must ensure that *Piet* definitively frees himself from any negative stereotyping. According to the CRM, it is not in line with the school board's duty of care to wait for society to make a move with regard to the portraying of *Zwarte Piet*; the school is part of the society, and especially within the role of school board it should take its responsibilities enshrined in the AWGB seriously. The active tackling of negative stereotypes related to race, is in line with the urgency expressed in the United Nations Convention on the Elimination of All Forms of Racism (hereafter: CERD) and the United Nations Convention on the Rights of the Child (hereafter: CRC). Both of these treaties provide for urgent action in the field of education in order to combat stereotypes leading to racial discrimination, and the best interests of the child must come first.⁶⁰ Important to note here is that the decision of the CRM is authoritative, but not binding.⁶¹

3.2 Public authorities' stance on *Zwarte Piet*

3.2.1 Prime Minister Mark Rutte

At a weekly press conference in October of 2013, Dutch Prime Minister Mark Rutte said, in response to a question about his opinion on the *Sinterklaas* traditions and the role of *Zwarte Piet* in this tradition, that this is not a matter for the government.⁶² During a press conference at the international Nuclear Summit in March of 2014 in The Hague, Mark Rutte was confronted with a critical question about *Zwarte Piet* by Dutch-American journalist Kevin Roberson. Rutte's reply was "*Black Pete is black and I cannot change that, because the name is Black Pete.*" Roberson continued by pointing out the decision of the CRM in which the CRM classifies *Zwarte Piet* as a racist element of the *Sinterklaas* tradition, as the character confirms negative stereotypes. Rutte answered: "*I simply do not agree. This is an old children's tradition, Sinterklaas and Zwarte Piet, Black Pete. It is not 'Green Pete' or 'Brown Pete', it is 'Black Pete', so I cannot change that. This is an old tradition, and I can only say that my friends in the Dutch Antilles, well they are very happy when they have Sinterklaas because they don't have to paint their faces, and when I'm playing Black Pete, for days I'm trying to get off the stuff from my face.*"⁶³

⁶⁰ College voor de Rechten van de Mens, paragraph 3.15-3.17 (supra note 58).

⁶¹ Bijnaar & Maris, p. 190 (supra note 40).

⁶² NOS, 'Rutte: Piet is nou eenmaal zwart', 18 October 2013. Accessed on 22 May 2020 via <https://nos.nl/artikel/564038-rutte-piet-is-nou-eenmaal-zwart.html>.

⁶³ Rutte krijgt vraag over Zwarte Piet. Accessed on 22 May 2020 via <https://www.youtube.com/watch?v=Fk2YkZ2gGDI&t=67s>.

In the run-up to the Dutch municipal elections in 2018, an official promotion video of the conservative-liberal political party the *Volkspartij voor Vrijheid en Democratie* (People's Party for Freedom and Democracy, hereafter: VVD), featured Mark Rutte, the leader of the VVD, and the following text: 'Je schamen voor je tradities?' followed by 'Laat je niets aanpraten. Je bent geen racist als je gezellig Sinterklaas viert' roughly translating to: 'Being ashamed of your traditions?', followed by 'Don't let them get into your head. You are not a racist if you celebrate Sinterklaas in a 'gezellig'⁶⁴ manner'. The video continues with the question: 'Wie houdt zich met de échte problemen bezig?', roughly translating to 'Who engages with the real problems?' followed by two options: 'doener' or 'drammer', roughly translating to the 'doer' or the 'nagger'. The 'doer' is then highlighted in orange, which is the national colour of the Netherlands as well as the colour of the logo of the VVD, followed by a shot of Mark Rutte saying "Gelukkig kun je kiezen. Kies VVD. Kies voor doen.", translating to: "Thankfully, you can choose. Choose VVD. Choose for 'doing'."⁶⁵

3.2.2 Introducing an initiative bill to protect Sinterklaas against changes – the Zwarte Piet-wet (Black Pete Act)

In 2014, members of the *Partij voor de Vrijheid* (Freedom Party, hereafter: PVV), Geert Wilders⁶⁶ and Martin Bosma⁶⁷, initiated a proposal for the *Zwarte Piet-wet* (the Black Pete Act) in order to protect the cultural tradition of *Sinterklaas* from abolishing *Zwarte Piet*. According to the proposal, *Zwarte Piet* forms a prominent and indispensable part of the *Sinterklaas* tradition that has now come under threat. The Dutch *Sinterklaas* tradition is part of the national identity, and an attack on *Zwarte Piet* is much more than a subtle change of a tradition; it is an attack on the Dutch identity. The proposed Act consisted of five Articles, regulating the physical appearance of *Zwarte Piet* under the first Article: 'Zwarte Piet is to have an even black or dark brown face, red painted lips, black curly hair and golden earrings, and is dressed in a velvet suit with 'pofbroek' (knickerbockers) and wears a hat with a coloured feather.' The second Article regulates the cooperation of administrative bodies with *Sinterklaas* celebrations such as the national arrival, to ensure that all the *Zwarte Pieten* fulfil the requirements of Article 1, and, if they do not fulfil that requirement, the administrative body is to reject the application, and withhold itself from cooperating with these *Sinterklaas* celebrations (Article 3).⁶⁸

⁶⁴ No real translation in English, but roughly translates to 'merry' or 'cosy'.

⁶⁵ Je schamen voor je tradities? GR18 tv-commercial VVD. Accessed on 22 May 2020 via <https://www.youtube.com/watch?v=S6uIYXF3oiI>.

⁶⁶ Geert Wilders is a Dutch politician. He is the leader of the PVV, and on behalf of this party he is part of the *Tweede Kamer*, the Dutch House of Representatives. Though there are various interpretations of the PVV's place on the political spectrum, it is mostly considered a right-wing populist party. Wilders is known for his fierce criticism of Islam and his outspoken views on the European Union, immigration and freedom of expression.

⁶⁷ Martin Bosma is a Dutch politician. He is the Spokesperson Culture and Media, as well as Secretary of the PVV, and on behalf of this party he is part of the *Tweede Kamer*, the Dutch House of Representatives.

⁶⁸ Tweede Kamer der Staten-Generaal, vergaderjaar 2014-2015, 34 078, nr. 2, *Voorstel van wet van de leden Bosma en Wilders ter bescherming van de culturele traditie van het sinterklaasfeest (Zwarte Piet-wet)*.

In the explanatory memorandum attached to the proposed Act, Wilders and Bosma stated that by changing *Zwarte Piet* in favour of a very limited group of people, the Dutch identity would be pushed aside; it is a form of capitulation that is unacceptable for many. They explain that *Zwarte Piet* has nothing to do with racism, and that it is very hurtful towards everyone that loves the *Sinterklaas* tradition to state that the tradition is one with racist elements. Especially in a changing world, Wilders and Bosma find it important that certain symbols and customs remain intact, thereby contributing to the community spirit, and from which the Dutch can derive their identity. According to Wilders and Bosma, it is exceptionally distressing to dismantle a unique tradition that creates so much connectedness and joy. The *Sinterklaas* tradition might be the most Dutch tradition that exists, therefore the celebration of this tradition is a strong expression of Dutchness, the connection to the Netherlands and to Dutch cultural traditions.

Wilders and Bosma continue explaining that it is not customary to anchor traditions in law, but that it is also not customary for important and widely supported traditions to be broken down by a small but fierce minority. They state that there is a true war against *Zwarte Piet*. Therefore, they feel that there is a need for codification of *Zwarte Piet*'s appearance. With this Act, the government would not have to play a substantive role in the *Zwarte Piet* debate, court cases would be prevented, and the Act would provide clarity so that entrepreneurs would not have to be in doubt whether to participate in the tradition of *Sinterklaas*.⁶⁹ The Dutch Parliament rejected the proposal.⁷⁰

The advisory section of the RvS gave its opinion on the initiative bill, which was negative, based on two major considerations.⁷¹ In the first place, the RvS stressed that popular culture is an ever-changing phenomenon, and a characteristic of such a tradition is that it adapts to societal developments. It is not a task of the government to prescribe the way in which a certain manifestation of culture should take place. The RvS noted that the initiative bill implies a fundamental change in the relationship between the government and the citizens who organise activities in the public space. Up until now, citizens should be left as much space and freedom as possible in the organisation of cultural activities, manifestations and traditions. The government cooperates where possible, and its task is limited to monitoring public order, public and individual safety and security, and preventing nuisance, leaving no room to intervene with the content of a tradition.

⁶⁹ Tweede Kamer der Staten-Generaal, vergaderjaar 2014-2015, 34 078, nr. 3, *Memorie van Toelichting bij voorstel van wet van de leden Bosma en Wilders ter bescherming van de culturele traditie van het sinterklaasfeest (Zwarte Piet-wet)*.

⁷⁰ NLTimes.nl. Accessed on 26 May 2020 via <https://nltimes.nl/2017/02/16/dutch-parliament-govt-reject-pvvs-keep-zwarte-piet-black-law>.

⁷¹ Raad van State (Afdeling advisering), Advies W04.14.0418/I, Kamerstukken II 2015/2016, 34 078, nr. 5, 5 December 2014. Accessed via <https://www.raadvanstate.nl/@63849/w04-14-0418-0/>.

Secondly, the colour and representation of *Zwarte Piet* is a matter of freedom of expression. Codifying a specific portraying of *Zwarte Piet* would then imply an interference with the right to freedom of expression, as codified under Article 7 of the Dutch Constitution. This is worth mentioning as, from a Dutch perspective, demonstrations generally are not considered to fall within the scope of this Article.⁷² Due to the controversy surrounding the portraying of *Zwarte Piet*, choosing a specific colour for *Piet* has increasingly been interpreted as one's personal position in the debate. Deviating *Sinterklaas* celebrations therefore fall within the scope of freedom of expression.⁷³

3.2.3 De Kinderombudsman (the Children's Ombudsman)

The Dutch Children's Ombudsman is required by law to promote the respect of the rights of youth by the government and private organisations, taking into account the youth's own opinion, in accordance with Article 12 of the CRC, as well as their best interests and the way in which they experience the world. Next to that, the Children's Ombudsman is able to initiate an investigation into whether these rights are in fact being respected.

In the absence of reliable scientific research around the effects of the portraying of *Zwarte Piet* on children, the Children's Ombudsman took it upon herself to speak with both children of colour and white children about *Zwarte Piet*, in September of 2016. She stressed that it was not a representative group of children, but that the stories of these children can be considered indicative and give an impression of what Dutch children have to say about the matter of *Zwarte Piet*. Children of colour told her about their experience with discrimination based on their skin colour throughout the year, which they said intensifies during (the weeks leading up to) the *Sinterklaas* celebrations. Their experiences vary from being yelled at and having *pepernoten* thrown at them, to discriminatory remarks about people of colour by teachers at school, or receiving packages at their home address with red face paint and creole earrings from an anonymous sender, leaving the child to feel scared and unsafe in their own home, afraid to go to school. Some of the children associated *Zwarte Piet* with slavery, mainly due to the costume he wears and the difference in height between *Sint Nicolaas* on his horse and *Zwarte Piet* walking next to him.

Many of the children said that parents and other adults play a big part in the current discussion. Both the children who experience discrimination due to the way *Zwarte Piet* is being portrayed, as well as the children who do not experience any discrimination, are of the opinion that the *Sinterklaas* tradition should continue being celebrated, but they said that the celebrations should be fun for everyone, and no one should feel discriminated against. Therefore, they said, the portraying of *Zwarte Piet* should change. "The holiday should be fun for everyone and it is

⁷² Lemmens, p. 130-131 (supra note 28).

⁷³ Raad van State (supra note 71).

ridiculous to fight about this”, one fifteen year old boy said. They felt that the discussions around the change in the portraying of *Zwarte Piet* and how the tradition can be fun for everyone should include them.

Based on the conversations with children, the Children’s Ombudsman deems it likely that children are being bullied or discriminated against with references to *Zwarte Piet*. She states that the combination of some typical characteristics and the behaviour of *Zwarte Piet* as a negative stereotype of people of colour, is experienced as discriminatory by children.⁷⁴ Based on Article 2 CRC, it is in the best interest of children to grow up in a safe and respectful environment, without discrimination, exclusion or bullying. Adults bear an important responsibility in guaranteeing this safe and respectful environment and with that the right of children to be able to develop themselves, in line with Articles 3 and 6 CRC. The children’s ombudsman stresses the role of parents (Article 5 CRC) and schools (Article 29 CRC) in this. In all the spaces where the *Sinterklaas* tradition is celebrated with children, it is up to adults to make sure that children of all skin colours are enjoying the celebrations, and it is of importance that the experience and the opinion of children is being taken into consideration (Article 12 CRC).

The Children’s Ombudsman concluded that the current portraying of *Zwarte Piet* as a part of the *Sinterklaas* celebrations can contribute to bullying, exclusion or discrimination and is therefore in violation of Articles 2, 3 and 6 CRC. Therefore, she concludes that the portraying of *Zwarte Piet* needs to change in such a way so as to ensure that the holiday will no longer have negative effects on children. By removing the discriminatory and stereotypical features of *Zwarte Piet*, he can be made into the character that does justice to the joy that so many people in the Netherlands experience during the *Sinterklaas* celebrations, and at the same time is in line with the rights of all children in the country.

The Children’s Ombudsman states that there is a primary role for parents in this. The CRC states that parents have the responsibility to help in the development of their child, as well as to protect them (Article 5 CRC). In her opinion, this also means that parents should not include their children in a polarised societal debate, but instead put in active effort, preferably together with schools or youth organisations and the children themselves, to reshape the portraying of *Zwarte Piet*. Next to that, there is an important role for schools to ensure the children’s right to education, which not only entails the transference of knowledge, but also the preparation of children for “responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and

⁷⁴ In line with the CRM.

persons of indigenous origin” (Article 29(d) CRC). There is a chance, especially at schools, to include parents and children in the portraying of *Zwarte Piet* in a constructive manner.⁷⁵

Following the publication of the above recommendations of the Children’s Ombudsman, she has received many hostile and racist responses and threats.⁷⁶

3.2.4 Het College voor de Rechten van de Mens (the Netherlands Institute for Human Rights)

The CRM is independent, impartial, accessible and transparent, and is mandated by law to protect, expose and promote human rights in the Netherlands by way of conducting research, giving advice and providing information. In individual cases, the CRM can also give judgements on whether or not a case involves discrimination.⁷⁷

In 2016, the CRM published its official statement regarding the *Zwarte Piet* debate. The CRM stated that *Sinterklaas* is a wonderful celebration and century-old tradition that should be preserved for future generations. *Zwarte Piet* is part of this celebration. However, there are discriminating aspects to the portraying of *Zwarte Piet*. His behaviour, combined with some typical characteristics such as a blackened face, black curly hair, thickened red lips, golden hoop earring, broken language or accent, athletic, unintelligent, and a submissive attitude in a subordinate role next to a white male, can be interpreted as a negative stereotype of people with a dark skin tone, and confirm this negative stereotype.⁷⁸

The CRM mentions that their own research has shown that discrimination often happens unwittingly. However, even if there is no intent to discriminate and hurt someone, the negative stereotype of *Zwarte Piet* can still have discriminatory effects and be experienced as hurtful. Discrimination does not arise solely from discriminatory or racist intentions; also well-meant, comical or playful expressions can be discriminatory due to their effects. The CRM is not of the opinion that *Zwarte Piet* should be abolished, but the character does have to be stripped of all discriminating aspects. This obligation does not only apply to schools, but also to employers and stores; they have to make sure that their employees and customers will not be exposed to negative stereotypes with discriminatory aspects.

⁷⁵ De Kinderombudsman, 2016, ‘*Kinderombudsman: Zwarte Piet vraagt om aanpassing*’. Accessed on 22 May 2020 via <https://www.dekinderombudsman.nl/70/ouders-professionals/nieuws/kinderombudsman-zwarte-piet-vraagt-om-aanpassing/?id=667>.

⁷⁶ College voor de Rechten van de Mens. Accessed on 22 May 2020 via <https://www.mensenrechten.nl/toegelicht/zwarte-piet>.

⁷⁷ College voor de Rechten van de Mens. Accessed on 22 May 2020 via <https://mensenrechten.nl/nl/wat-doet-het-college>.

⁷⁸ College voor de Rechten van de Mens. Accessed on 22 May 2020 via <https://www.mensenrechten.nl/toegelicht/zwarte-piet>.

According to the CRM, the government is obliged to contest stereotypes and traditions that portray certain groups as inferior, and must do everything possible to prevent and contest discrimination. The government must also take into account the impact the portraying of *Zwarte Piet* has on the sense of identity of people with a dark skin tone; it perpetuates a stereotype that is experienced as hurtful and humiliating.

Throughout the centuries, the character of *Zwarte Piet* has undergone many changes, and he will continue changing. Recognising that stereotypes unwittingly and unknowingly can lead to discrimination, helps. This realisation can promote dialogue in order to remove the discriminatory aspects of *Zwarte Piet* and prevent that the portraying of *Zwarte Piet* leads to discriminatory behaviour or actions.⁷⁹

3.3 *Zwarte Piet* and the United Nations

The first interaction between the United Nations and the Dutch Government concerning *Zwarte Piet* was in January 2013, when a group of United Nations independent human rights experts⁸⁰ (hereafter: the experts) informed the Dutch Government about complaints they have received concerning the portraying of *Zwarte Piet*. The complaints came from individuals and civil society organisations who consider the portraying of *Zwarte Piet* to perpetuate a negative stereotype and derogatory image of Africans and people of African descent. With their letter, the experts sought clarification on the cases brought to their attention – in accordance with their mandates⁸¹ provided by the Human Rights Council – requesting the Dutch Government for cooperation and observations on several matters related to the celebration of *Sinterklaas*.⁸²

The experts stated that “*negative media and other cultural, social or traditional portrayals of persons belonging to minorities may constitute racism and may be degrading to members of those communities, in the present case persons belonging to Black populations and people of African descent, and can perpetuate negative stereotypes within society.*”, appealing on the Dutch government to guarantee the right to equality and non-discrimination of African people and people of African descent, in accordance with Article 1 of the Universal Declaration of

⁷⁹ College voor de Rechten van de Mens, *Stereotypering: wat is dat en hoe werkt het?* Accessed on 22 May 2020 via <https://mensenrechten.nl/nl/publicatie/36061>.

⁸⁰ Verene Shepherd, Chair-Rapporteur of the Working Group on People of African Descent; Farida Shaheed, the Special Rapporteur in the field of cultural rights; Rita Izsák, the Independent Expert on minority issues; and Mutuma Ruteere, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

⁸¹ Pursuant to Human Rights Council Resolutions A/HRC/RES/18/28, A/HRC/RES/19/6, A/HRC/RES/16/6, and A/HRC/RES/16/33.

⁸² Letter of 17 January 2013 to the Dutch government from the Chair-Rapporteur of the Working Group on People of African Descent, Verene Shepherd; the Special Rapporteur in the field of cultural rights, Farida Shaheed; the Independent Expert on minority issues, Rita Izsák; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, AL Af. Descent 2012 Cultural rights (2009) Minorities (2005 -4) G/SO 214 (78-15) NLD 1/2013. Accessed on 22 May 2020 via <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=21183>.

Human Rights (hereafter: UDHR), Article 2 of the International Covenant on Civil and Political Rights (hereafter: ICCPR), and Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR), all of which the Netherlands is a State party to.⁸³

The experts also drew attention to the international standards for the protection and promotion of the rights of minorities. When it comes to human rights, and minority rights in particular, consultation with minority communities on issues that affect these communities is a fundamental principle, which must be respected. The experts referred to the 1992 Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. According to Article 1.1, “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”, and Article 1.2 requires that “States shall adopt appropriate legislative and other measures to achieve those ends.”. Article 5.1 states that “National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.”.

In its response to the experts’ letter, nearly six months later, the Dutch Government clarified that it sees the *Sinterklaas* holiday as a traditional children’s holiday. The Government is aware that there are differing opinions concerning the holiday, and that certain groups find the tradition to be offensive. Furthermore, the Government stated that complaints about *Zwarte Piet* had sharply increased. While pointing out that it is highly committed to combating discrimination, the Government informed the experts of the existing national mechanisms through which people can lodge complaints about discrimination.⁸⁴

From early September 2013, when the letters had been included in a public report, the experts reported they ‘began to receive disturbing reactions, including threats and insults’.⁸⁵

During a visit to the Netherlands in October of 2013, one of the experts, Verene Shepherd, had publicly voiced her thoughts on the matter of *Zwarte Piet* during an interview with a Dutch television show. She said that *Zwarte Piet* is a throwback to slavery, and that she would object the character if she lived in the Netherlands. She also wondered about the need for the Netherlands to have two ‘Santa Clauses’, referring to both *Sinterklaas* and Christmas.⁸⁶

⁸³ Letter of 17 January 2013 to the Dutch government from the experts (supra note 82).

⁸⁴ Letter of 10 July 2013 of the Government of the Kingdom of the Netherlands in response to ‘AL Af. Descent 2012 Cultural rights (2009) Minorities (2005 -4) G/SO 214 (78-15) NLD 1/2013’. Accessed on 22 May 2020 via <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=31496>.

⁸⁵ OHCHR, ‘Black Pete & Sinterklaas: UN experts encourage respectful national debate on Dutch tradition’, 21 November 2013. Accessed on 22 May 2020 via <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14013&LangID=E>.

⁸⁶ NLTimes.nl. Accessed on 22 May 2020 via <https://nltimes.nl/2013/10/23/un-investigator-pleads-abolishing-sinterklaas>.

Following this interview, Verene Shepherd received countless threats and insults, and her ability to be impartial and her independence and expertise were called into question. Human Rights Professor and Belgian attorney Koen Lemmens⁸⁷, for example, found Verene Shepherd's declarations highly problematic, as they illustrated how much she was biased on the matter, in that she already formed a conclusion before carrying out the research she was mandated to do in the following year. He also found her lack of knowledge of *Sinterklaas* to be a problem, as she mixed up *Sint Nicolaas* (Saint Nicholas) with the *Kerstman* (Santa Clause).⁸⁸ Following the interview, Verene Shepherd became the subject of attack in the Dutch media⁸⁹, and two young Dutch men created a Facebook page called *Pietitie*, to defend *Sinterklaas* and *Zwarte Piet* in their traditional forms. The page received over two million likes within 48 hours.⁹⁰ At that time, the Netherlands had around six million active Facebook users, which meant that roughly one in three Facebook users in the Netherlands had liked the page.⁹¹

3.3.1 The Working Group of Experts on People of African Descent on a Mission to the Netherlands

Following the exchange of letters between the experts and the Dutch Government, the Working Group of Experts on People of African Descent⁹² (hereafter: the Working Group), consisting of the Chairperson Ms. Mireille Fanon Mendes-France, and members Ms. Mirjana Najchevska and Ms. Verene Shepherd, received an invitation from the Government of the Netherlands. The Working Group went on a Mission to the Netherlands between 26 June and 4 July 2014, where they met with representatives of both local and national Government, as well as academics, civil society and non-governmental representatives.⁹³

On 20 June 2015, the Working Group published its findings in a report on its sixteenth session. As part of the Working Group's mandate on racism and xenophobia, the report includes *Sinterklaas* under 'Racism in cultural events'. According to the Working Group's findings, there are groups who experience *Zwarte Piet* as an expression of racism and discrimination with

⁸⁷ Professor of Human Rights Law and Press Law (K.U. Leuven and Vrije Universiteit Brussel), as well as attorney at the Brussels bar specialised in proceedings before the European Court of Human Rights and the Belgian Constitutional Court, and member of the scientific committee of several legal journals. See also <https://www.law.kuleuven.be/pub/en/staff/00071951>. Accessed on 22 May 2020.

⁸⁸ Lemmens, p. 120–141 (supra note 28).

⁸⁹ DutchNews.nl. Accessed on 22 May 2020 via https://www.dutchnews.nl/news/2013/11/un_body_calls_for_end_to_virul/.

⁹⁰ Rodenberg & Wagenaar, p. 717 (supra note 10).

⁹¹ Nando Kasteleijn, 'Pietitie' voorbij één miljoen likes – snelstgroeijende pagina in Nederland', *NRC*, 23 October 2013. Accessed on 22 May 2020 via <https://www.nrc.nl/nieuws/2013/10/23/pietitie-heeft-een-miljoen-facebook-likes-snelstgroeijende-pagina-in-nederland-a1430445>.

⁹² Established in 2002 by the Commission on Human Rights, Resolution 2002/68, as a Special Procedure. See also <https://www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx>. Accessed on 22 May 2020.

⁹³ Report of the Working Group of Experts on People of African Descent on its sixteenth session, Addendum, Mission to the Netherlands, paragraphs 1-5, 20 July 2015 (A/HRC/30/56/Add.1).

a strong link to slavery. The Working Group stated that a large amount of the Dutch population still does not understand why the portraying of *Zwarte Piet* is perceived in a negative and hurtful way. The Working Group feels that “this is a symptom of denial of the existence of racism and racist practices and an erroneous understanding of history among its society. It is also a mark of structural racism affecting the society.”⁹⁴ The Working Group “urges the Government to take a more active role in facilitating a public discussion and dialogue with regards to the racial implications of this tradition”⁹⁵, and they feel that there should be more measures in place in order to encourage the media to adopt a respectful tone in the public discussion.

While the Working Group does not call for the banning of the *Sinterklaas* tradition, it does feel that the tradition in its current form is in need of change in order to eliminate the elements that can be linked to slavery, as these elements are offensive to people of African descent. The portraying of *Zwarte Piet* stereotypes Africans and people of African descent in a way that is similar to past era’s blackface tradition and minstrel shows. Before the VIE is to add *Sinterklaas* to the national inventory of intangible heritage, the Working Group encourages the Government to adopt all measures necessary to encourage Dutch society to examine the unequal power relations between the characters of *Zwarte Piet* and *Sint Nicolaas*, and to adopt changes.⁹⁶

3.3.2 Concluding observations by the Committee on the Elimination of Racial Discrimination

In August 2015, *Sinterklaas* and *Zwarte Piet* were once again a concern for the United Nations. This time, it was the Committee on the Elimination of Racial Discrimination (hereafter: the Committee), who mentioned in its concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands their concern about the discriminatory effect of the portraying of *Zwarte Piet*. The Committee stated that “the character of Black Pete is sometimes portrayed in a manner that reflects negative stereotypes of people of African descent and is experienced by many people of African descent as a vestige of slavery, which is injurious to the dignity and self-esteem of children and adults of African descent”⁹⁷. The Committee also noted its concern with regard to the reports from Dutch citizens that they have been denied authorisation to conduct peaceful protests against the portraying of *Zwarte Piet* at a meaningful time and place, and that they have been subjected to violent attacks and other forms of intimidation without an adequate investigation afterwards. These findings may convey a conception that is at odds with the CERD, specifically Articles 2, 5 and 7.⁹⁸

⁹⁴ Report of the Working Group, paragraph 106 (supra note 93).

⁹⁵ Report of the Working Group, paragraph 107 (supra note 93).

⁹⁶ Report of the Working Group, paragraph 104-109, 122 (supra note 93).

⁹⁷ Committee on the Elimination of Racial Discrimination. *Concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands*, paragraph 17, CERD/C/NLD/CO/19-21.

⁹⁸ CERD Committee, paragraph 17 (supra note 97).

The Committee noted that “even a deeply-rooted cultural tradition does not justify discriminatory practices and stereotypes”⁹⁹, and recommends the Dutch Government to “actively promote the elimination of those features of the character of Black Pete which reflect negative stereotypes and are experienced by many people of African descent as a vestige of slavery”¹⁰⁰ and to “find a reasonable balance, such as a different portrayal of Black Pete and ensure the respect of human dignity and human rights of all inhabitants”¹⁰¹ of the Netherlands. Furthermore, the Committee recommends the Dutch Government to “ensure non-discrimination in the enjoyment of freedom of expression and association, and that attacks on protesters be effectively investigated and duly prosecuted”¹⁰².

The response of Mark Rutte was that *Zwarte Piet* is “not a matter of State affairs” and that we should ‘guard against a country where the State determines what a cultural tradition looks like; that is something for the people to decide in a societal debate, and not for politics.’¹⁰³ According to news outlets the Committee’s report can ‘go into the trash’, because the report is a recommendation to the Dutch Government, and the Dutch Government is not enthusiastic to transpose the recommendation into national law.¹⁰⁴

3.3.3 The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on a Mission to the Netherlands

The most recent statement by the United Nations regarding *Zwarte Piet* was made by Ms. Tendayi Achiume, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, at the conclusion of her mission to the Netherlands between 30 September and 7 October 2019. In her End of Mission Statement, she states that “there can be no doubt that the figure of Black Pete embodies degrading and dehumanizing racial stereotypes about black people, reflecting both un confronted colonial legacies and the persisting subordinate status, especially of Dutch people of African descent. A genuine commitment to racial equality, non-discrimination and inclusiveness requires national and municipal authorities to play their part in engaging with racial and ethnic minority communities, especially people of African descent, to ensure that state-sponsored cultural

⁹⁹ CERD Committee, paragraph 18 (supra note 97).

¹⁰⁰ CERD Committee, paragraph 18 (supra note 97).

¹⁰¹ CERD Committee, paragraph 18 (supra note 97).

¹⁰² CERD Committee, paragraph 17-18 (supra note 97).

¹⁰³ NOS, ‘Rutte: Zwarte Piet geen staatsaangelegenheid’, 2015, 28 August 2015. Accessed on 8 May 2020 via <https://nos.nl/artikel/2054617-rutte-zwarte-piet-geen-staatsaangelegenheid.html>.

¹⁰⁴ Tim Engelbart. “Rutte is niet van plan om zwarte piet via de overheid te veranderen.” *De Daghelykse Standaard*. 29 August 2015. Accessed on 8 May 2020 via <http://www.dagelijkestandaard.nl/2015/08/rutte-is-niet-van-plan-om-zwarte-piet-via-de-overheid-te-veranderen/>.

events and narratives are transformed to fully reflect the Kingdom of the Netherlands and its people”¹⁰⁵. The official report will be published in July 2020.¹⁰⁶

¹⁰⁵ End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the Kingdom of the Netherlands, The Hague, paragraph 43, 7 October 2019. Accessed via <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25100&LangID=E>.

¹⁰⁶ NOS, ‘VN-rapporteur: Nederlandse regering moet racisme actiever bestrijden’, 7 October 2019, Accessed on 22 May 2020 via <https://nos.nl/artikel/2305130-vn-rapporteur-nederlandse-regering-moet-racisme-actiever-bestrijden.html>.

4. Moving forward: the role of public authorities in the *Zwarte Piet* debate

4.1 Harmful stereotypes

4.1.1 Racial imagery or depictions not leading to violence

One of the key issues that arose from the previous chapters, is that *Zwarte Piet* is considered to be a form of negative racial stereotyping, both in the Dutch context as well as in the international context. In recent years, ‘stereotyping’ has emerged as a topic within the scope of international human rights law. Stereotypes reinforce inequality and discrimination, which is why several human rights treaties provide for an obligation on States to combat stereotyping, and human rights courts and treaty bodies have increasingly voiced that States should not enforce harmful stereotypes.¹⁰⁷

Mathias Möschel has defined (racial) stereotypes as ‘beliefs about another group in such terms as personality traits, attributions, or behavioural descriptions’, and can include both negative as well as positive (emotional) reactions. Additionally, stereotypes are not limited to intentional negative attitudes; they often extend also to unconscious understandings and orderings of our world, and they not only extend to certain characteristics, but also to the roles that are (or should be) performed by certain groups.¹⁰⁸ According to Möschel, *Zwarte Piet* is placed in the category of ‘racial imagery or depictions not leading to violence’. The question in this category is whether such imagery violates certain human rights norms. If this is the case, it would mean that some of the racial imagery would need to be prohibited by the State, or that States have an obligation to restrict access to such racial imagery. This brings up the issue of where freedom of speech ends and the protection from racist imagery begins, and human rights law and national courts have been reluctant to recognise this issue as a violation.¹⁰⁹

A good example for this matter is the case of *Aksu v. Turkey*, that has been cited in the previous chapters as well. At stake were two publications representing Roma as thieves, containing negative, discriminatory and prejudiced connotations. One was a dictionary that had partly been funded by the Turkish Ministry of Culture, and the other one was a book written by an Associate Professor and published by the Turkish Ministry of Culture. The applicant in this case, Mr.

¹⁰⁷ Eva Brems & Alexandra Timmer, *Introduction*, in *Stereotypes and Human Rights Law*, edited by Eva Brems & Alexandra Timmer, Cambridge: Intersentia Ltd 2016, p. 1.

¹⁰⁸ Mathias Möschel, *Racial Stereotypes and Human Rights*, in *Stereotypes and Human Rights Law*, edited by Eva Brems & Alexandra Timmer, Cambridge: Intersentia Ltd 2016, p. 120.

¹⁰⁹ Möschel, p. 129 (supra note 108).

Aksu, a Turkish Roma, argued that the publications were offensive to him as a member of the Roma community, resulting in a violation of Article 8 in conjunction with Article 14 ECHR. The claim under Article 14 ECHR was immediately rejected by the ECtHR as the applicant failed to produce *prima facie* evidence of a discriminatory intent or effect of the impugned publications.¹¹⁰ With regard to Article 8 ECHR, the ECtHR framed the issue as one of positive obligations of the State, and balanced the applicant's right to private life with the freedom of expression enjoyed by the authors and publishers of the books. The ECtHR concluded that Turkey had offered sufficient protection, thereby also rejecting the claim under Article 8 ECHR.¹¹¹

Despite the fact that the ECtHR rejected the claims of the applicant, the judgement in *Aksu v. Turkey* is an important one with regard to racial stereotyping. In its reasoning, the ECtHR stated the following:

*“any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.”*¹¹²

Next to that, the ECtHR noted that:

*“while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking there may be positive obligations inherent in the effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”*¹¹³

The ECtHR's reasoning in this case creates room for sensitivity to the harms resulting from racial stereotyping – it is just not (yet) sufficient to amount to a human rights violation.¹¹⁴

¹¹⁰ *Aksu v. Turkey*, paragraph 45 (supra note 43).

¹¹¹ *Aksu v. Turkey*, paragraph 57 (supra note 43).

¹¹² *Aksu v. Turkey*, paragraph 58 (supra note 43).

¹¹³ *Aksu v. Turkey*, paragraph 59 (supra note 43).

¹¹⁴ Möschel, p. 130 (supra note 108).

4.1.2 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

The CERD entered into force on 4 January 1969, and a committee of experts was created to supervise the CERD's application and to issue general recommendations and State reports. The Committee also decides on individual complaints of human rights violations under the CERD. With regard to the *Zwarte Piet* debate, one provision is of importance, Article 7, which states:

“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance, and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.”

Article 7 CERD does not mention the word ‘stereotype’, but it does mention ‘prejudices leading to violence’. *Prejudice* can be defined as ‘negative attitudes toward another group that express negative affective or emotional reactions’, and some psychologists have added to this definition that prejudices serve to ‘create and maintain hierarchical status relations between groups’.¹¹⁵ This means that stereotypes are broader than prejudices, and stereotyping is at an earlier stage than *prejudices leading to violence*.¹¹⁶

As already discussed in chapter three, the Committee referred explicitly to the negative stereotype of *Zwarte Piet* in its concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands, and noted that “even a deeply-rooted cultural tradition does not justify discriminatory practices and stereotypes”¹¹⁷, recommending the Dutch Government to “actively promote the elimination of those features of the character of Black Pete which reflect negative stereotypes and are experienced by many people of African descent as a vestige of slavery”¹¹⁸. The Committee stated that its findings may convey a conception that is at odds with the Articles 2, 5 and 7 CERD.¹¹⁹

¹¹⁵ Möschel, p. 119-120 (supra note 108).

¹¹⁶ Möschel, p. 131 (supra note 108).

¹¹⁷ CERD Committee, paragraph 18 (supra note 97).

¹¹⁸ CERD Committee, paragraph 18 (supra note 97).

¹¹⁹ CERD Committee, paragraph 17 (supra note 97).

4.1.3 Combating racial stereotypes through international human rights law in the future

Möschel compares the current relevance of racial stereotypes with the current relevance of gender stereotypes in human rights law, especially with regard to the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (hereafter: CEDAW). Article 5 CEDAW specifically mentions the word stereotype, and helps in the understanding of how the current fight against racial stereotyping is more limited than the fight against gender stereotyping in international human rights law.¹²⁰ In its General Recommendation No 25, the CEDAW Committee has elevated Article 5 CEDAW from a seemingly marginal provision to one of the three main obligations State Parties have in their efforts to eliminate discrimination against women.¹²¹ Möschel calls for a similar approach by the CERD Committee with regard to racial stereotyping, thereby elevating Article 7 CERD to similar heights as Article 5 CEDAW. Despite a General Recommendation being ‘soft international human rights law’, it would explicitly address racial stereotyping and the role it plays for the different rights enshrined in the CERD, and it would provide clarity in stating to what extent racial stereotypes are problematic, what their relation is to freedom of speech, and which international obligations States have as a result of combating and deconstructing racial stereotypes.¹²²

4.2 Zwarte Piet in the liberal State

Even though the judgement by the Court of Amsterdam was annulled in the appeal at the Council of State, the symbolic effect of the judgement remains: it caused an acceleration of the societal and political adjustment process with regard to *Zwarte Piet*. The judgement incited the government to take the feelings of those who felt discriminated against seriously, and left little room for the government to continue stating that *Zwarte Piet* is not a matter of State affairs. In fact, *Zwarte Piet* is a matter of State affairs; his ambiguous character evokes mixed feelings, which is why the government must balance the right not to be discriminated against and the freedom of expression, either in its legislative function, or in its judicial or administrative function.¹²³

¹²⁰ Möschel, p. 137 (supra note 108).

¹²¹ CEDAW Committee, *General Recommendation No 25* (2004), paragraph 6.

¹²² Möschel, p. 137-138 (supra note 108).

¹²³ Aspha Bijnaar & Cees Maris, 2014, ‘Zwart als roet. Zwarte Piet in de liberale rechtsstaat’, *Filosofie & Praktijk*, 35(3), p. 13-14.

4.2.1 The harm principle in the Dutch context

Bijnaar and Maris examined a possible way in which the balancing of freedom and equality could take place in light of the legal-philosophical ideal of the liberal State.¹²⁴ According to John Stuart Mill's harm principle, governments may only interfere in one's individual freedom if that person's actions harm the interests of others, defining 'harm' as violating legitimate interests or rights. Therefore, according to the harm principle, no one is free to discriminate others: one should not systematically treat others as inferior, for example because of their race, religion or gender. It is undisputed that discriminating *actions* are harmful, but discriminating *expressions* can be offensive to others without directly harming them in the technical sense of Mill's principle of harm. Even if *Zwarte Piet* is insulting to Dutch citizens with a dark skin tone, they retain the same rights as their fellow citizens. If the government were to limit the freedom of citizens as soon as someone takes offense or feels insulted, there is very little freedom left. The government must exercise utmost restraint in this matter. In principle, freedom takes precedence in the event of symbolic offense, for example through racist expressions.¹²⁵ You must combat discriminating expressions with counter-arguments, not with a ban.¹²⁶ Therefore RvS has rightly overturned the judgement by the Court of Amsterdam, based on legal grounds that follow from the constitutional freedom of expression and the separation of powers. The Court of Amsterdam based its decision on the judgement of the ECtHR that requires the State to take measures against negative stereotyping, but misinterpreted this judgement by assigning that task to the mayor.¹²⁷

Dutch national law largely corresponds to the harm principle. In line with the aforementioned Article 7 of the Dutch Constitution, government censorship in advance is prohibited; no one requires permission to reveal their feelings or opinions. Article 5 of the *Wet Openbare Manifestaties* (Public Events Law) prohibits a mayor from assessing demonstrations and assemblies in advance based on their content, which also applies to *Sinterklaas* celebrations. These type of manifestations may only be prohibited based on the protection of public health, in the interest of traffic, and to combat or prevent public disorders.

¹²⁴ Bijnaar & Maris, p. 15-19 (supra note 123).

¹²⁵ It only becomes apparent through a public debate which statements are in fact good or bad, or true or false. The government is often unable to determine this in advance; and even if they are able to, citizens will no longer be able to verify the reasonableness of the ban once the expressions have been banned. See also Cees Maris, "Wilders' vrijheid", *Filosofie & Praktijk*, 32 (2011)3, p. 52-73.

¹²⁶ Bijnaar & Maris, p. 15 (supra note 123).

¹²⁷ Aspha Bijnaar & Cees Maris, 2015, 'Minima Philosophica: De zaak van sinterklaas (2)', *Filosofie & Praktijk*, 36(4), p. 54-55.

4.2.2 The harm principle in the European context

Compared to Dutch law, European law is a little less strict. Article 10 ECHR protects the freedom of speech, but limits it in the second paragraph. In the ECtHR case of *Observer and Guardian v. The United Kingdom* of 26 November 1991, the ECtHR stated that prior supervision of expressions must be viewed very critically, but some substantive assessment in advance is permitted.¹²⁸ In referring to the case of *Aksu v. Turkey*, the Court of Amsterdam argues that, in principle, an assessment must take place regarding the right to respect for private and family life, in the broad sense of Article 8 ECHR, including the right not to be confronted with discriminating expressions undermining one's sense of identity. However, it raises the question as to whether the rights enshrined under Article 8 ECHR are intended to circumvent the prohibition of prior government censorship in this way. In the case of *Observer and Guardian v. The United Kingdom*, the ECtHR clearly states:

*“Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph (2) of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”*¹²⁹

In the case of *Aksu v. Turkey*, the ECtHR merely poses the general assertion that the government must guarantee the private life in the relations between citizens. Essentially, the ECtHR adds that the judge may prohibit discriminatory expressions after these expressions have already been made; the ECtHR does not mention an assessment by governing bodies in advance.¹³⁰

4.2.3 The role of public authorities

The harm principle opposes a substantive assessment of expressions in advance, and therefore the mayor of Amsterdam was correct in stating that he was not the appropriate body in the balancing of fundamental rights. This does not mean, however, that the government has no substantive task in the matter of *Zwarte Piet*, or should leave the discussion up to the society. In the first place, after a discriminatory expression has been done, a judge in a domestic criminal proceeding can balance the constitutional freedom of expression and non-discrimination, based on Article 137 or 137d of the *Wetboek van Strafrecht* (Criminal Code). However, the problem here, with regard to *Zwarte Piet*, is that such a discriminatory expression is often not a threat to

¹²⁸ *Observer and Guardian v. The United Kingdom*, Application No. 13585/88 (ECtHR, 26 November 1991).

¹²⁹ *Observer and Guardian v. The United Kingdom*, paragraph 59 (supra note 128).

¹³⁰ Bijnaar & Maris, p. 16 (supra note 123).

the public order (as necessary under Article 137d), and also not an expression of pure hatred (as necessary under Article 137), thereby not resulting in any harm. Therefore, according to the harm principle, there is no ground for a criminal prohibition on *Zwarte Piet*.¹³¹

So far, combating *Zwarte Piet*'s discriminatory character is indeed not a matter for the government, but for society. However, in other aspects, *Zwarte Piet* is certainly a matter of State affairs. The organisation of events in honour of the *Sinterklaas* tradition, in which *Zwarte Piet* plays an integral role, are primarily based on private initiatives, and a mayor merely grants event permits. But the government often plays an active role in these events; the mayor welcomes *Sint Nicolaas* and *Zwarte Piet* to the city, public schools partake in *Sinterklaas* celebrations, perhaps subsidies are granted for financing the events, and so forth. On such occasions a more active government is desirable, not based on the harm principle, but in line with the liberal ideal of State neutrality. Unlike private citizens, a liberal State should be neutral. The State represents all citizens, and must therefore refrain from partaking in activities that discriminate on a ground such as race. The government agencies are allowed to participate fully in *Sinterklaas* celebrations, but only on the condition that *Piet* takes on a neutral character. The government must set a good example by excluding negative stereotypes from *Sinterklaas* celebrations in government institutions such as public schools, municipalities, and ministries. Moreover, the government must actively participate in the societal debate by providing adequate information. By providing insight into the perspective of the discriminated minority groups, the government can promote social awareness among the majority.¹³²

¹³¹ Bijnaar & Maris, p. 16-18 (supra note 123).

¹³² Bijnaar & Maris, p. 18-19 (supra note 123).

5. Concluding remarks

As the previous chapters have shown, it quickly became clear that *Zwarte Piet* can be considered negative racial stereotyping. The Children's Ombudsman concluded that the current portraying of *Zwarte Piet* as a part of the *Sinterklaas* celebrations can contribute to bullying, exclusion or discrimination and is therefore in violation of Articles 2, 3 and 6 CRC. Therefore, she concludes that the portraying of *Zwarte Piet* needs to change in such a way so as to ensure that the holiday will no longer have negative effects on children. By removing the discriminatory and stereotypical features of *Zwarte Piet*, he can be made into the character that does justice to the joy that so many people in the Netherlands experience during the *Sinterklaas* celebrations, and at the same time is in line with the rights of all children in the country.

The CRM also regards *Zwarte Piet* as negative stereotyping, and states that even if there is no intent to discriminate and hurt someone, the negative stereotype of *Zwarte Piet* can still have discriminatory effects and be experienced as hurtful. Discrimination does not arise solely from discriminatory or racist intentions; also well-meant, comical or playful expressions can be discriminatory due to their effects. The character of *Zwarte Piet* does not need to be abolished, but he does have to be stripped of all discriminating aspects. The government is obliged to contest stereotypes and traditions that portray certain groups as inferior, and must do everything possible to prevent and contest discrimination. The government must also take into account the impact the portraying of *Zwarte Piet* has on the sense of identity of people with a dark skin tone; it perpetuates a stereotype that is experienced as hurtful and humiliating.

The United Nations Committee on the Elimination of Racial Discrimination noted in 2015 that “even a deeply-rooted cultural tradition does not justify discriminatory practices and stereotypes”, and recommends the Dutch Government to “actively promote the elimination of those features of the character of Black Pete which reflect negative stereotypes and are experienced by many people of African descent as a vestige of slavery” and to “find a reasonable balance, such as a different portrayal of Black Pete and ensure the respect of human dignity and human rights of all inhabitants” of the Netherlands. Furthermore, the Committee recommends the Dutch Government to “ensure non-discrimination in the enjoyment of freedom of expression and association, and that attacks on protesters be effectively investigated and duly prosecuted”.

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