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Political decolonization and self-determination : the case of the Netherlands Antilles and Aruba

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In this study, I have looked at the international law concerning self-determination in a context of decolonization. I have tried to determine at which point international law considers a process of decolonization completed and whether there are criteria for a legitimate exercise of the right to self-determination, in order to determine whether this area of the law is still relevant to the constitutional relations between the Netherlands, the Netherlands Antilles and Aruba. In this final Chapter, I will briefly summarize the results of my research, and review the implications of the international law of decolonization and self-determination for the Kingdom of the Netherlands.

10.1 THE INTERNATIONAL LAW OF DECOLONIZATION AND SELF-DETERMINATION

In the view of the UN and the legal scholarship, there still exists a separate category of 'colonial peoples' which can claim a right to decolonization and self-determination. This category of 'peoples' is not so much defined by their subordination to a system of colonial government, traditionally defined as a repressive system of exploitation and discrimination, but simply on the basis of the list of overseas territories of the Western states that were known to be 'of the colonial type' in 1945. The UN General Assembly has claimed the authority to classify these territories as 'Non-Self-Governing Territories' under Chapter XI of the UN Charter, as long as they have not yet become independent, and as long as their relation with the mother country is characterised by 'arbitrary subordination', or does not otherwise comply with the Principles laid down in GA Resolution 1541 (XV) of 1960. These Principles provide that territories remain NSGTs until the population makes an informed and democratic choice to become an independent state, a freely associated territory of an independent state, or an integrated part of an independent state.

It has also been established that a choice for one of these status options can be considered as an exercise of the right to self-determination, and has to comply with the standards laid down for the self-determination of colonial peoples, most importantly the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Resolution 1514 (XV) of 1960). The International Court of Justice has confirmed that the dependent peoples have a right to self-determination in the form as developed by the organs of the

UN, which it has defined as the need to pay regard to the freely expressed will of the people.

A problematic situation arises when a population also does not wish to achieve one of the accepted forms of full self-government. Based on the right to self-determination peoples should have freedom of choice. It could be argued that the right to self-determination, defined as the freedom of choice, leaves open the possibility that a dependent people freely chooses a status that is not fully self-governing according to the standards of Resolution 1541, and which creates a subordinate position for that people. The essential criterion for the acceptability of such a status should be whether the population has made that choice in freedom and with due knowledge of the ramifications of its choice. In that case, the remaining elements of subordination should perhaps be seen as an acceptable side effect of continuing a constitutional relation between a European state and a distant island territory that considers itself too small to become independent.

All states have explicitly or implicitly recognised the UN's authority in the area of decolonization, but difference of opinion still exists on the extent of this competence. Opinions also vary on the work of the Decolonization Committee. It seems to be appreciated in most of the remaining territories, and most of the metropolitan states have relinquished some of their opposition to the Committee's involvement with their territories. At present, criticism of the Committee focuses on its supposed lack of effectiveness, and it is argued by the metropolitan states that their remaining NSGTs are no longer colonies and should therefore not be discussed by the Committee.

10.2 STATUS OPTIONS

The UN has formulated two alternatives to independence: free association and integration. The possibility of other options that could qualify as full self-government was recognized in GA Resolution 2625 of 1970, but in practice such options are viewed at the UN with even more suspicion than free association and integration, and are only accepted as temporary solutions at best.

Free association can be a satisfactory form of decolonization for small territories, if the metropolitan state is prepared to relinquish its legislative and administrative control over the territory, and to actively promote the territory's capacity to enter into international relations independently. The population of a territory should be aware that the option of free association often ends up being very close to independent statehood. While the US and New Zealand have provided their associated states with substantial financial aid, they are not obligated to do so under international law, nor does international law compel the principal states to extend their nationality to the inhabitants of associated states.

International law also recognizes the possibility of integrating overseas territories into the mother country as a form of complete decolonization. Most metropolitan governments have not been willing to discuss this option since the 1960s because of the fear that it would entail huge costs and cut off the road to independence for the territories. But the few territories that have been allowed to integrate completely into the metropolis seem to be happy with it.

The UN is generally rather suspicious of integration as a form of decolonization. It has re-listed a number of cases of incomplete integration as NSGTs. It should probably be assumed that a status which does not represent complete integration, but does continue to grant some jurisdiction to the metropolitan state in the internal affairs of the overseas territory may authorize the UN to consider that Chapter XI of the UN Charter and GA Resolutions 1514 and 1541 continue to apply.

The cases of Puerto Rico and New Caledonia, while hugely different in most respects, share at least one common characteristic: their current political status is somewhere in between association and integration. To some extent this 'in-betweenity' of their status causes problems, because it creates a real or imagined responsibility of the metropolis for the internal problems of the territory, which is resented by some, and considered insufficient by others. When there exists internal disagreement both in the territories and in the metropolis on the political future of the overseas relations, a stalemate situation arises, which may hamper the political development of the territory and which can occasionally even lead to violence, as happened in New Caledonia. In this territory, a solution was found by explicitly placing the decision on the future of the territory in the hands of the population. A decisive referendum will be organized between 2013 and 2018 on the political future of the territory.

10.3 SELF-GOVERNMENT UNDER THE CHARTER FOR THE KINGDOM

According to the Charter for the Kingdom, the Netherlands, the Netherlands Antilles and Aruba have voluntarily chosen to create a structure in which a number of affairs are handled jointly on the basis of equivalence. They form three separate Countries which are autonomous in all affairs, except those which are listed in the Charter as affairs of the Kingdom (most importantly: foreign affairs, nationality and defence). The Kingdom has very limited powers to intervene in the autonomous affairs of the Countries.

The Kingdom is a somewhat ambiguous structure, since the Kingdom is often identified with the Country of the Netherlands, while the islands are part of the *Kingdom* of the Netherlands, but not of the *Country* of the Netherlands. The islands have the right to leave the Kingdom, based on the right to self-determination – which has been recognized by all of the Countries of

the Kingdom and the islands – but the Netherlands does not have the right to unilaterally terminate the relations.

During the first decades after 1954, the self-government of the Caribbean Countries remained virtually unchallenged in the expectation that the Countries would achieve independence in the foreseeable future. Surinam became independent in 1975, but the Netherlands Antilles and Aruba chose to stay part of the Kingdom. In 1990, the Netherlands government accepted this, but the realization that the ties with the Caribbean Countries would not be severed anytime soon, caused the Netherlands to become more involved with the internal affairs of the Netherlands Antilles and Aruba, especially in the areas of law enforcement and public spending. Aruba left the Netherlands Antilles in 1986 to form a separate Country within the Kingdom. In 2005, negotiations were started to dismantle the Netherlands Antilles entirely, after referenda on the islands showed that four out of five islands were in favour of obtaining a position outside of the Netherlands Antilles, but within the Kingdom.

10.4 CHARACTERIZATION OF THE KINGDOM IN CONSTITUTIONAL THEORY

The Kingdom is not a nation state in the traditional sense. There have so far been few indications of the development of a trans-Atlantic community of interests that could lead to the birth of a nation. The Charter is an expression of this reality. The federal and unitary traits that the text of the Charter exhibits, have turned out to be no more than constitutional make-up. The Kingdom functions more like a confederation, but it is different in that it is not based on a treaty, the Countries are not independent states, and the organs of the Kingdom do have some – albeit very limited – power over the citizens of the Countries. The structure of the Kingdom does not fit any of the other traditional forms of government. In the Dutch literature on constitutional law, it is usually called a construction *sui generis*, but it has also been described as a ‘constitutional association’ or a ‘cooperative structure governed by constitutional law’.

The constitution of the Kingdom is substantially different from the other overseas forms of government discussed in this study, except perhaps the former British West Indies Associated States, which were considered by some to be freely associated with the UK, but by others – including the UN – to be NSGTs.

Because of the large difference in size between the Netherlands and the Caribbean Countries, combined with the firm desire to change as little as possible to the constitution of the Kingdom as it existed before 1954, the drafting of the Charter resulted in a structure that was not a radical breach with the colonial era, but offered a pragmatic way of realizing some of the most important wishes of the governments of the Netherlands, Surinam and the Netherlands Antilles at the time. Even though the Charter was intended

to create a flexible system that could accommodate the constitutional development of the Caribbean Countries, it has chained the three Countries together in a relation that currently creates considerable dissatisfaction, particularly in The Hague.

10.5 CHARACTERIZATION OF THE KINGDOM ORDER UNDER INTERNATIONAL LAW

The Kingdom Charter was discussed at length in the UN General Assembly, but the representatives could not agree on the characterization of the Kingdom order, nor on the questions whether the Netherlands Antilles and Surinam remained NSGTs, whether they had exercised their right to self-determination, and whether they had achieved a full measure of self-government. A majority of states seemed to think that the answer to these last two questions should be 'no'. A Resolution was adopted by which the GA accepted that the Netherlands would no longer report on the Netherlands Antilles and Surinam, but which left the other issues intentionally undecided.

The international status of the Netherlands Antilles (and Aruba) was thus left somewhat unclear. Based on the debates of 1955 it cannot be excluded that the UN could at some point decide to test the Kingdom Charter against Chapter XI of the UN Charter. The UN has interpreted the provisions of Chapter XI in a number of Resolutions, the most pertinent in this case is Resolution 1541 of 1960. The Principles annexed to this Resolution were defined with the active participation of the Netherlands, and have been generally accepted as a legally binding interpretation of the UN Charter provisions. The UN would probably test the Kingdom order against this Resolution if the need arose, as it has done in the cases of New Caledonia and Puerto Rico.

The Kingdom order does not comply fully with the forms of decolonization as defined by Resolution 1541. The Netherlands Antilles and Aruba are not integrated into the Netherlands, and the fact that they are an integral part of the Kingdom is not very meaningful for the application of Principles VIII and IX of Resolution 1541. The Kingdom relations are more similar to a form of free association, because the Countries are autonomous in most areas and the Charter mainly provides a structure for voluntary cooperation. A number of aspects of the Kingdom order do not, however, comply with the criteria for free association. These concern the powers of the Kingdom to intervene in the internal affairs of the Caribbean Countries without their consent, and the fact that the present status of the Caribbean Countries is not – at least not clearly – based on an act of free choice by the populations of the islands.

Since the majority of the UN member states thought that the status of Country within the Kingdom did not represent 'a full measure of self-government', and since that status also does not comply fully with the Principles of Resolution 1541, it could be argued that Chapter XI of the UN Charter still

applies to the Netherlands Antilles and Aruba, or that the UN might decide that this is the case.

10.6 IMPLICATIONS FOR THE KINGDOM OF THE INTERNATIONAL LAW CONCERNING SELF-DETERMINATION AND DECOLONIZATION

If it is indeed assumed that Chapter XI of the UN Charter still applies to the Netherlands Antilles and Aruba, then there continue to exist a number of international obligations for the Kingdom as a whole. The obligation to respect the wishes of the populations is the central element of self-determination, as defined by the International Court of Justice. A completion of the decolonization process can probably only be achieved when the populations of the Netherlands Antilles and Aruba make a free choice for a status that complies with the international standards for full self-government.

The GA is of the opinion that the UN should supervise these types of self-determination processes. It could be wondered whether the Decolonization Committee could usefully play such a monitoring role, although much depends on the attitude of the Administering state in these cases. It has been suggested that other UN organs could assist the Kingdom and the Caribbean governments in providing information on the status options and monitoring the process of decolonization. This suggestion should receive serious consideration by the authorities of the Kingdom and the islands.

10.7 THE RIGHT TO SELF-DETERMINATION OF THE ISLAND TERRITORIES

The decolonization of the Netherlands Antilles has been complicated from the start due to the fact that the territory consisted of very diverse islands that are located far apart. In 1981, it was decided by the Countries and the six islands that a choice for a different political future would be for each island to decide for itself, based on the right to self-determination. In 1986, Aruba left the Antilles to become a separate Country within the Kingdom. One final attempt by the five remaining islands to make the Antilles work, failed during the 1990s. Referenda were held between 2000 and 2005, which showed that the populations of four of the islands were now in favour of breaking up the Country entirely.

In the legal literature the question has been raised whether the break-up of the Antilles does not violate the *uti possidetis* or non-disruption principle, which provides that states should not cooperate with the secession of parts of dependent territories which are on their way to independence. Leaving aside the question whether the Netherlands Antilles is still – or ever was – on its way to independence, it could be wondered whether this principle is really a part of international law when it concerns small dependent island territories.

The international practice with regard to such territories suggests that it is allowed to cooperate with secessions of islands. As long as there was popular support for it, and as long as the metropolitan government did not actively promote, there has often been no clear international opposition to the secession of one or more islands from a dependent archipelago, even if it occurred shortly before independence. The practice does not reveal, however, what form the popular support should take. A referendum is considered indispensable by some writers, but should such a referendum be held on all of the islands, or only on the seceding island(s)? Absence of strong popular opposition on the other islands has sometimes been considered sufficient, as in the case of the secession of Aruba.

At present, it is uncertain whether the populations of the remaining Antilles still form one 'people' for the purpose of self-determination and the application of the non-disruption principle. Possibly the recognition of the right to self-determination of the separate islands in 1981 should be interpreted to mean that the Antillean people no longer exists, and that the population of each island constitutes a separate people.

The current situation within the Netherlands Antilles is exceptional because separate referenda have been held on all of the five islands based on the right to self-determination, while the outcome on St. Eustatius – the Netherlands Antilles should remain together as a single Country – is not compatible with the outcome on the other four islands, which voted in favour of breaking up the Country. The Round Table Conference of 2005 decided to go ahead with the break-up of the Netherlands Antilles, which seems a reasonable decision as long as the population of St. Eustatius is given the opportunity to approve the new status that will be devised for that island.

10.8 THE RIGHT TO SELF-DETERMINATION IN RELATION TO THE EUROPEAN UNION

An additional question, which currently has some relevance, is whether the law of decolonization and self-determination might also have implications for the European Union in its relations with the Netherlands Antilles and Aruba. I answered this question in the affirmative, because the EEC in 1957 took on part of the 'sacred trust' of Chapter XI of the UN Charter towards the overseas territories of the member states. In so far as the metropolitan states are no longer capable to take measures to realise the goals of Chapter XI for their OCTs because of the European integration, these measures should be taken by the EU.

For EU law to conform to the right to self-determination of the OCTs, and their separate status under international law, the OCTs will have to be given a formal say in the shaping of the association which exists between them and the EU. Also, the EU and the member states should not frustrate a legitimate

exercise of the right to self-determination of an OCT, including the Netherlands Antilles and Aruba. The EU Commission and the OCTs have been working on the modernisation of the association for the last 15 years. The view of the character of the association that is currently taken by all the parties involved should also be reflected by the EC Treaty (or the EU Constitution).

At present, the consent of all member states is required for a status change of an OCT, because the OCTs are listed in Annex II to the EC Treaty. But if such a status change is part of a self-determination process in relation to the mother country, the other member states should not frustrate that process by refusing a territory to enter or exit the EU. The EU and the member states cannot be forced, however, to grant the territory a preferential status as UPT. That would be a matter for negotiations between the Kingdom, the EU, and the other member states.

The application of the right to self-determination and decolonization to the relation EU-overseas territories means that a status change can only be realised in agreement with the overseas people involved. Within the Kingdom of the Netherlands, Article 25 of the Kingdom Charter provides a veto right for the Caribbean Countries with regard to the Treaty amendments needed to change their status from OCT to UPT or another status.

10.9 EPILOGUE

The results of the referenda that were held on all of the Antillean islands between 1993 and 2005 and the results of the general elections in those islands and Aruba indicate that the populations are mainly interested in status options that lie somewhere in between independence and integration with the Netherlands. The ties with the Netherlands are considered important, and for the time being independence is clearly rejected. The Netherlands government has accepted this reality, but at the same time seeks to create more effective tools for the Kingdom to realize its responsibilities in the Caribbean, especially in the new entities that will be created after the dissolution of the Netherlands Antilles, but also in Aruba where the rule of law is sometimes under pressure by the small scale of the society.

The Netherlands set conditions before cooperating with realizing the *status aparte* of Aruba in 1986, and before it agreed to an indefinite continuation of that status after 1996. It has also set conditions to its cooperation with realizing the outcome of the referenda on the other islands of the Netherlands Antilles. This is not unreasonable in itself, since the Kingdom to a large extent revolves around the assistance offered to the Caribbean islands by the Netherlands. In case a conflict arises concerning these conditions, general legal principles such as good faith, equity and proportionality should guide the authorities of the Netherlands, the other Countries and the islands in the fulfilment of

their obligation to realize as well as possible the 'free and genuine expression of the will of the people'.

The Caribbean populations should be aware of the consequences of the options open to them, in order for their choice to be considered as a proper exercise of the right to self-determination. In preparation of the various referendums on the islands, considerable amounts of information were distributed, and debates were held on the issues of self-determination and the political future of the islands. This should be seen as an important step towards exercising the right to self-determination.

The status debate is sometimes denounced as unimportant, and diverting attention away from really important issues such as the economy. If that is true, it provides an additional argument to bring this debate to a speedy and satisfactory conclusion. In view of the remarkable nature of the Kingdom relations – some might call it a freak of history – spanning the Atlantic Ocean and crossing considerable cultural differences, the status debate will not simply disappear, but needs to be resolved in a satisfactory manner.

The principle that the overseas populations should have the final say on their own political future has been recognised to an increasing extent in the practice of the Netherlands and other metropolitan governments during the 20th century. But since the declining international attention for decolonization, especially when it concerns small islands which are unlikely to cause serious international conflicts, has meant that it often takes territories a long time and much persistence to obtain metropolitan agreement to status changes, unless it is independence that the territory wants.

The right to self-determination of small overseas territories has a distinctly do-it-yourself character in the eyes of the metropolitan governments, including the Netherlands. It cannot be denied that the overseas populations should decide for themselves, this is what self-determination means,¹ but especially in the smallest and least developed territories, the metropolitan government should not take lightly its obligations under Chapter XI of the UN Charter to ensure that the population has access to information concerning its rights under international law, and the opportunity to express an informed opinion on its political future. Ultimately, the Kingdom cannot hide behind the autonomy of the Caribbean Countries and the Antillean island governments.

At the time of writing, work is underway to transform the general direction which the referenda have indicated into concrete proposals for a new status of the five islands of the Netherlands Antilles. Bonaire, St. Eustatius and Saba have chose to become part of the Netherlands, and Curaçao and St. Maarten want to become Countries within the Kingdom. Before these proposals are implemented, the authorities concerned should make sure that the proposals

1 A headline in the *Amigoe* newspaper of 6 May 2004 accurately summarized a lecture that I gave at the University of Aruba as '*Zelfbeschikkingsrecht moet je zelf doen*' ('Self-determination means do-it-yourself').

really reflect the wishes of the populations, so that the new situation can be seen as a realization of the right to self-determination.

The position of Aruba is somewhat different from the islands of the Netherlands Antilles, because it – or at least a majority of its politicians – do not want its status changed. Aruba is prepared to cooperate with the Charter amendments that will be required for the break-up of the Antilles, as long as its *status aparte* remains unchanged. This position does justice to the right to self-determination of the Antillean islands.

Aruba's current status was achieved as a result of a long and persistent struggle against the dominant position of Curaçao within the Netherlands Antilles. But while it may be accepted that Aruba's decision to stay a part of the Kingdom as a separate Country did not go against the wishes of the population, it would perhaps go too far to say that the status of Aruba under the Kingdom Charter was the result of a free and informed choice by the Aruban people. The decision to leave the Netherlands Antilles clearly enjoyed the support of many Arubans, but it is not certain how the Aruban people would view alternatives to its current status. Most political parties on Aruba continue to defend the current definition of *status aparte* fervently, but the referenda on the Antillean islands have shown that unanimity among politicians on constitutional status does not necessarily always reflect the wishes of the population. In view of the sometimes difficult political relations between Aruba and the Netherlands, Aruba should perhaps wonder whether further steps could not be taken in its process of decolonization, obviously with due regard for the wishes of the population.