Dutch Overseas Territories

How do you analyze the present situation of the Dutch overseas territories?

As far as the dismantling of the Netherlands Antilles is concerned, a huge number of meetings on both sides of the Atlantic resulted in the following arrangement: the two biggest islands (Curaçao and the Dutch part of Sint Maarten) received the status of Countries within the Kingdom which is virtually identical to that of Aruba. Three smaller islands which used to be components of the Netherlands Antilles – Bonaire, Sint Eustatius and Saba (so-called BES-eilanden) received a status of special municipalities (bijzondere gemeenten) within the Netherlands. The double solution in national law, including the formation of new Countries coupled with the incorporation of some islands into the Netherlands has had profound effects on the shape of the Kingdom of the Netherlands and reflects the reality on the ground much better than before as the fundamental socio-cultural as well as economic and linguistic differences between different Caribbean islands within the Kingdom are recognized.

Recent reform in the structure of the Kingdom of the Netherlands, concluded on 10 October 2010 (the so called 10-10-10 regeling) marked a move towards increasing constitutional complexity of the Kingdom’s constitutional structure with the likely implications for the status of some of the Overseas parts of the Kingdom in EU law (Overseas Countries and Territories Associated with the Union – OCTs- and Outermost Regions - ORs). The recent developments mark a definitive departure from the post-colonial heritage in that it respects the will of the citizens residing overseas and offers a more sensible solution for the successful development of the Kingdom in the future. Once EU law is taken into account, the increasing openness of the leadership of the Dutch Overseas to the serious consideration of a closer relationship with the EU marks an important shift compared with the independentist logic of several decades ago.

At the moment when the European Coal and Steel Community (ECSC) was founded the Kingdom of the Netherlands, just like the majority of other founding states (1), was very different from its current form. Besides the European part and a number of Caribbean Islands which still make part of the Kingdom, it equally included the Netherlands New Guinea (2) in Asia and Suriname (3) in South America. The Charter
of the Kingdom (Statuut voor het Koninkrijk) in force since 1954 established formal equality among the Countries of the Kingdom and also guaranteed virtually full autonomy in their spheres of competence, which include all the key areas of regulation besides defence and the maintenance of independence of the Kingdom, foreign relations and the Netherlands nationality. The agreement of all the component Countries of the Kingdom is necessary for the amendments of the Charter.

Although the Netherlands participated in the European integration project as the Kingdom of the Netherlands, meaning that not only the Netherlands, i.e. the European Country of the Kingdom, but the whole array of lands under the sovereignty of the Dutch monarch became a Member State, the Treaties (both founding and amending) were not ratified for all the Kingdom Countries in the hope to exclude some of them from the effects of EU integration altogether. So the European Economic Community Treaty was only ratified for the Netherlands in Europe and the Netherlands New-Guinea and thus was not applicable in the Netherlands Antilles (then incorporating also Aruba) and Suriname. Given that the Dutch New-Guinea was handed to Indonesia almost immediately following the entry into force of the Treaties, the majority of the Countries of the Kingdom were excluded from the application of European law from the very beginning.

Soon this situation began to change, however. This was due to two developments – one intended, the other not intended by the Kingdom authorities. The intended one consisted in the inclusion of the Federation of the Netherlands Antilles (but not Suriname) into the list of the OCTs, which has been done in 1964. This move made Part IV of the (then) EEC Treaty (among other relevant elements of it (4) ) applicable in the Netherlands Antilles, thus grounding this Country within the Framework of the Treaties. Following this important move the Kingdom authorities were not ratifying amending Treaties for the Netherlands Antilles (or Aruba), but only for the Netherlands in Europe. Given that EU Law of the Overseas is, first of all, the law of exceptions and derogations (5), the inclusion – albeit partial – of the Netherlands Antilles into the scope of the Treaties largely removed the acuteness of such partial ratifications since the OCT status has been established in Primary law of the Union, applying to the Dutch Overseas following the request of the Kingdom approved by all the other Member States. Whether the amending Treaties are ratified specifically for the Antilles, Part IV TFEU applies in its current form anyway, rendering the Dutch constitutional academic debate purely theoretical, in the face of the situation where EU law applied in its current form not limited at all by the partial ratifications.

Agreeing with Ziller, such ‘problem’ can only ‘entertain curiosity of a handful of legal experts’. (6)

The second development, which was clearly not fully envisaged by the drafters of the Treaties consisted in the de facto application of some parts of European law to the
Member States’ territories excluded from the Treaties’ territorial scope via the expansive interpretation of EU law by the ECJ, especially in its case-law on the meaning of the worker.(7) Once every worker of Member State nationality fell within the personal scope of EU law unaffected by her former places of residence, all the Dutch citizens inhabiting the Netherlands Antilles and Suriname got a right to move to other Member States to take up employment there, since Dutch nationality is a Kingdom matter and no differentiation is made between the inhabitants of different Countries of the Kingdom as far as EU law is concerned. All this certainly deduced the effects of the initial desire not to apply European law in the overseas Countries of the Kingdom.

Such developments notwithstanding, this initial period of European integration was marked by profound scepticism vis-à-vis the inclusion of the Dutch Overseas within the scope of European law. Although evidence exists that their limited inclusion was discussed (especially in case of Suriname) with regards to free movement of workers (8), these discussions were always inconclusive – it was feared that French citizens from French Guiana will move in and ‘take all the jobs’(9).

Essential policy of the Netherlands at the time consisted in getting rid of the overseas possessions. It was generally hoped that the Charter arrangement would be merely temporary, awaiting independence of all the former colonies granted the Country status by the Charter. This is clearly illustrated, besides the story of Suriname, which gained full independence in 1975, by the agreements reached during the first serious reform of the Charter which came about in the eighties. In 1986 Aruba received a status of a Country within the Kingdom separate from the Netherlands Antilles and their centre, Curaçao (so called status aparte). The status was granted on a condition, however, that Aruba will eventually become an independent state and leave the Kingdom after 10 years. During this time Aruba was associated with the EC through OCT status identical to that of the Netherlands Antilles it split up from. In the words of the current Prime Minister Mike Eman, ‘it took us a lot of effort to convince the Netherlands that Aruba should remain part of the Kingdom’. (10) Eventually Aruba succeeded, creating an important precedent and also forcing the Kingdom to depart from one of the main principles of decolonization which prohibits splitting up the colonies before granting them independence. (11)

After Aruba’s secession from the Netherlands Antilles within the Kingdom and the amendments in the Charter which made it possible for Aruba to stay within the Kingdom without gaining full independence it started becoming clear that further changes in the structure of the Kingdom of the Netherlands were to be anticipated. In fact, only the condition of becoming independent following the redrawing of the borders of the former colonial entities kept the Netherlands Antilles together.

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This is due to two factors. First of all, it was quite clear to the political elite and the citizens alike that full independence is highly unlikely to improve the quality of life on the islands. In fact, the contrary would be the most likely outcome, to which numerous examples in the region and elsewhere in the world abundantly testify. To turn to Mike Eman once again, ‘Autonomy was necessary to be able to make our own decisions, a fundamental and globally accepted democratic principle. Autonomy would make us stronger. However, we also realized that becoming formally independent could mean that we would in fact risk losing our effective autonomy’.

Secondly, it is equally apparent that very little substantive connections actually existed between the islands making up what used to be the Netherlands Antilles besides the fact that the Low Countries came to exercise sovereignty over them at a certain point. Of the five islands in question, including Curaçao, Bonaire, Sint Maarten, Sint Eustasius and Saba (leaving out Aruba whith its status aparte), different languages were spoken (English in the North, Spanish and Papiamento in the South), different cultures reigned and the levels of socio-economic development were also quite diverse. Moreover, the distance between the northern islands (Sint Maarten, Saba and Sint Eustasius) and the three southern ones is more than a thousand kilometers, which is really substantial given the sizes of the islands themselves. Curaçao, by far the biggest of them, is only 61 km in length. Numerous projects to re-divide the Netherlands Antilles were proposed in the course of the last century, but the new decentralized arrangement only materialized in 2010.

In your opinion, how will the situation likely evolve over the next five years?

The division, partly following the Aruba’s status aparte model – partly representing a new solution in the Netherlands context, was only introduced on 10 October 2010. Following the abandonment of the principle of territorial integrity of the former colonies upon independence which made little sense in the case of the Dutch Caribbean territories given their totally artificial construction by the colonizing power in an atmosphere where local cultures, languages and economies did not play any role in drawing the borders, the fragmentation of the Netherlands Antilles was only to be anticipated; even more so after Aruba managed to convince the Kingdom of the Netherlands of the likely harmful effects of its full independence. The need to avoid full independence in order to guarantee functional independence, democracy, and prosperity for the citizens became clear not only to the elites, however. With the pitiful example of Suriname next door, which failed to perform at the same level after independence, the Dutch citizens of the Netherlands Antilles overwhelmingly voted against full independence in a series of referenda organized in anticipation of the profound reform of the Dutch Overseas which was long overdue. Due to objective factors, independence is not any more on the agenda.

Independence aside, a wide variety of constitutional arrangements could be
considered by the former parts of the Netherlands Antilles to choose from. A combination of national-constitutional and EU-related factors came into play. The new political entities emerging following the dismantlement of the Netherlands Antilles could become Countries within the Kingdom (like Aruba) seek other forms of association trying to renegotiate the Charter in a more profound way (which would lead to the emergence of Countries with more powers than what Aruba got, for instance) or seek full incorporation into one of the existing countries of the Kingdom (either Aruba or the Netherlands). The second option was hardly discussed given the difficulties of amending the Charter, to which all the Countries need to agree unanimously, as well as the generally weak negotiating position of the Netherlands Antilles with almost 3 bn. Euro in debts which had to be repaid by someone. Two viable options for the islands arose: forming new Countries or joining the existing ones. (12)

On the ‘European side’ of the spectrum more choices emerged, since the newly formed entities within the Kingdom had to opt for one of the legal statuses available to the Overseas in EU law, if not ask the Kingdom to negotiate ad hoc arrangements for them. The splitting of the Netherlands Antilles is very fascinating in this regard, since the legal status in EU law never played an important role in the restructuring of the Kingdom before - certainly not when Aruba was negotiating its status aparte. In this context, the government needed to know whether the change in the status of a territory in national law (i.e. the incorporation of an island formerly belonging to the Netherlands Antilles, which was an OCT into the Netherlands) would result in an automatic change in the legal status in EU law. Using French and Danish precedents coupled with systemic analysis of EU law a conclusion was reached that such automatic status changes were not possible – the position the present author defended in his report to the Government of the Kingdom. Consequently, the number of options for the islands of the former Netherlands Antilles to choose from rose dramatically. National law options were not necessarily bound to particular EU law choices.

**What are the structural long-term perspectives?**

It has been decided that all the territories that emerged from the dismantling of the Netherlands Antilles will keep the OCT status at least for five years following the status change, the new municipalities of the Netherlands included. This is not an unreasonable decision. Switching from an OCT to an OR status requires a lot of meticulous preparations, as can be illustrated by the process to this effect ongoing on Mayotte for instance. Consequently, the authorities of the Kingdom need to ensure that the new status, should a decision to change the status be taken, is effectively implemented. A positive development behind the five-year deadline is clearly the possibility itself to consider the possibility for the status change in the near future, which was not in place before. The authorities of the Kingdom – which is the
Member State of the Union and is thus responsible for tabling the proposals for the necessary Treaty changes to ensure that the new status is implemented, are not any more hostile to the idea of better incorporation of the Dutch Overseas into the EU. Moreover, necessary legal framework in Primary EU law has been created with the Treaty of Lisbon in order to simplify the likely status change which is to follow the period of reflection. A simplified procedure included in the last version of the consolidated text of the Treaty on the Functioning of the European Union (TFEU) (13) allows avoiding the formal Treaty change following the ordinary procedure to this effect, including the convening of an Intergovernmental Conference etc. In other words, all is prepared in EU law in order to accommodate the wishes of the newly formed Countries and special municipalities concerning the change of their legal position in EU law. The recent Treaty reform might also be of interest for Aruba where the possibilities of closer integration into the EU are very seriously discussed.

At this point it seems quite feasible that several of the parts of the former Netherlands Antilles are likely to become ORs. Although the possibility of this was certainly not the key factor behind the reform of the Dutch Overseas, the prospect of possible closer ties with the European Union certainly played a role there.

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Notes:


(2) The Netherlands New Guinea was transferred to Indonesia (which itself used to be the Netherlands colony of the Dutch East Indies and only gain independence as a result of the 1945–1949 war) in 1963.

(3) Suriname became an independent republic in 1975.

(4) For the detailed analysis of the academic debate as to which law actually applies in the OCTs see Dimitry Kochenov, “The EU and the Overseas”, in: Dimitry Kochenov (ed.), *EU Law of the Overseas*, Dordrecht: Kluwer 2011.


(6) Jacques Ziller, *ORs, OCTs and Others after the Entry into Force of the Treaty of Lisbon*, in: Dimitry Kochenov (ed.), *op. cit."


(8) Which was possible through granting Suriname an OCT status and concluding an Art. 186 EC (now 202 TFEU) agreement concerning free movement of workers with this territory.


(11) In line with point 6 of the UN Declaration on the Granting of Independence to Colonial...
At this point it seems quite feasible that several of the parts of the former Netherlands allows avoiding the formal Treaty change following the ordinary procedure to lead to the emergence of Countries with more powers than what Aruba got, for example. Switching from an OCT to an OR status requires a lot of meticulous preparations, as can be illustrated by the process to this effect ongoing on Mayotte for instance. Consequently, the authorities of the Kingdom need to ensure unreasonable decision. What are the structural long-term perspectives?

What is the situation in the former Netherlands Antilles? The Netherlands Antilles, which was an OCT into the Netherlands (or Aruba), would result in an explosive situation. Therefore, the whole process of association trying to renegotiate the Charter in a more profound way (which would be possible through granting Suriname an OCT status and concluding an Art. 186

Suriname Charter) was delayed. This is clearly illustrated, besides the story of Suriname, which was quite different from its current form. Besides the European part and a number of regulatory besides defence and the maintenance of independence of the Kingdom of the Netherlands, the fundamental socio-cultural as well as economic and regulation besides defence and the maintenance of independence of the Kingdom of the Netherlands, meaning that not only the Netherlands, i.e. the European municipalities (bijzondere gemeenten) within the Netherlands. The double solution in this situation of the Dutch overseas territories?

Countries and Peoples of 14 December 1960 (Res. 1514 (XV)).

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(11) In line with point 6 of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (Res. 1514 (XV)).

(12) Hoping that the Netherlands will cover the debt, which it eventually did.

(13) Art. 355(6) TFEU.