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Self-Determination or Annexation? The Case of Bonaire

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The recent postponement by the Dutch Government of the 24th March referendum on the political future of the people of Bonaire, coupled with the continued process of annexation of the island in spite of efforts by the elected government to consult its people on their political status choice, violate the inalienable right of self-determination of the people of Bonaire as guaranteed under international law.

Bonaire, one of the five island jurisdictions of the Netherlands Antilles off the coast of South America, voted in 2004 for “direct ties” with the Kingdom of the Netherlands. In referenda conducted in the four other islands held between 2000 and 2005, Saba voted for “direct ties” while St. Eustatius accepted that status after first voting to stay within the present unified five-island country. This was not possible, however, since the country in which they agreed to remain would no longer exist as it would have to be dismantled. The remaining two islands of Curacao and Sint Maarten voted for separate country status, albeit with significantly less autonomy than presently exists.

Minimum Standards for Political Integration Unmet

Since the 2004 Bonaire referenda, however, the meaning of “direct ties” with the Kingdom was increasingly defined by the Dutch political and administrative machinery as a form of “partial integration/annexation,” and apparently not consistent with the understanding of the people of Bonaire. As recent as 2008, there was no elaboration on the meaning of “direct ties” in the Dutch Kingdom’s Report to the *Human Rights Committee* on its compliance with Article 1 (*Right to Self-Determination*) under the *International Covenant on Civil and Political Rights (ICCPR)*. The Report merely stated that “*Bonaire, Saba and St Eustatius will become ‘public bodies’ within the Netherlands*

*(and that) the Kingdom of the Netherlands will then consist of the Netherlands (with Bonaire, Saba and St Eustatius as public bodies), Aruba, Curacao and St Maarten.”*¹

Concern for the failure of signatory countries to provide sufficient detail on Article 1 of the ICCPR dealing with self-determination was expressed by the *United Nations High Commissioner for Human Rights* as early as 1984 in *General Comment 12*.² Indications are that this lack of elaboration persists. Accordingly, the Dutch Kingdom Report was also silent on the nature of the lesser autonomous country status for Curacao and Sint Maarten, respectively without reference to whether this status would meet the minimum standards of autonomous governance according to international norms.

In this connection, there is a temptation to seek to justify such lesser autonomous arrangements by citing UN Resolution 2625 (XXV) which refers to “*the emergence of any other political status freely determined by the people.*” However, the primary intent of that resolution was limited to “*recognis(ing) the emergence of differing and flexible self-governing political models, with the understanding that the minimum level of political equality, and the attainment of a full measure of self-government, remained an essential prerequisite, as consistently reaffirmed in the legislative authority contained in General Assembly resolutions to that point.*”³

In other words, it was never the intention of the General Assembly, by Resolution 2625 (XXV), to legitimise political dependency models which did not provide for a full measure of self government, but rather to acknowledge the evolution of such political and constitutional arrangements as positive developments moving towards a full measure of self-government as clearly defined in Resolution 1541 (XV). There is no formal international process to assess the status of countries which have had their autonomy reversed since the need to address such a development was never anticipated.

Right of the People to be Consulted

Given the democratic deficits emerging in the proposed ‘public body/public entity’ status, a new Bonaire government in 2009 began to enact procedures for a second referendum to consult its people after a more thorough public education programme on their legitimate political options. In this case, the idea was to give the people of Bonaire the opportunity to determine whether the kind of “direct ties” it wished with the Kingdom should be in the form of the emerging partial political integration, or in the form of an association.

It is acknowledged that integration with full political rights, independence, and free association are the three legitimate alternatives which constitute the internationally-recognised options of political equality under United Nations General Assembly Resolution 1541 (XV). Under this international instrument, political integration must be achieved on the basis of “*complete political equality (where) the people should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms...*”⁴

There is the additional requirement, in the context of minimum standards of political equality, that integration must provide for “*equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.*” Direct ties, as envisaged by the Dutch, appears not to conform with these internationally-recognised minimum standards of political integration. A case could be made, therefore, for the listing of Bonaire as a non self-governing territory under the United Nations Charter until integration with full political rights is realised. An independent assessment of this ‘public entity’ status, as well as a review of the lesser autonomous ‘country’ status agreed by Curacao and Sint Maarten, would shed considerable light on whether the relevant minimum standards would be met.

Other requirements in relation to political integration should also be taken into account, most notably, the requirement that integration should “*be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status...*”. Clearly, the insufficiency of information on the details of the “public entity/public body” status did not provide for the “*full knowledge*” of the people before the 2004 referendum. Thus, the reasons articulated by the Bonaire Government to consult the people in referendum are wholly appropriate.

The related matter is the international requirement for the “*freely expressed wishes of the people.*” Thus far, the people of Bonaire have not yet had the opportunity to endorse the proposed status – as it has evolved - through an informed and democratic process. This decision was made by the political leadership in the Final Declaration of 2006, but was not subsequently approved by the people in referendum in Bonaire, Saba nor St. Eustatius.

The Dutch Rationale

It is ironic that the main rationale for the Dutch action to thwart the Bonaire referendum is based on an interpretation that the March 2010 referendum, as planned, “cannot withstand the test of international law.” It is not convincing, however, that the *Bonaire Referendum Ordinance* violated international law. On the contrary, what appears to be in contravention of international law is not the Ordinance, but rather the denial of the right of the people of Bonaire to self-determination as required under the *International Covenant on Civil and Political Rights (ICCPR)*, and other pertinent human rights treaties and international instruments.

Accordingly, it is relevant that General Comment 12 of the *Office of the High Commission for Human Rights* emphasises the requirement of the ICCPR that “*all States parties (to the ICCPR) should take positive action to facilitate realisation of and respect for the right of peoples to self-determination (and that) such action must be consistent with the State’s obligation under the Charter of the United Nations and under international law.*” The Dutch annulment of the Bonaire Referendum Ordinance, and its earlier punitive suspension of aid to that island jurisdiction because of its principled position that the people must be further consulted, are incongruous to the requirement to “*facilitate*” the self-determination process. These actions are also inconsistent with

Article 73 (b) of the United Nations Charter on the requirement of member States to promote self-government.

Within this broader context, the Dutch rationale in blocking the referendum is twofold: firstly, the lack of clarity of the referendum question, and, secondly, voter eligibility.

On the first point, a clear case can be made for greater elaboration of the definitions of the referendum options, and the implications of the proposed choices. One way to accomplish this task is by utilising the definitions of the options of integration and free association, respectively, as clearly defined in United Nations Resolution 1541 (XV), and which conform to the principle of absolute political equality. The United Nations *Needs Assessment Mission* in its report on its visit to Bonaire in December, 2009 did not address the possibility that the partial integration on offer by the Dutch might not have met international standards of full political integration. This may not have been a part of their mandate.

The Voter Eligibility Question

On the second point of voter eligibility, however, the issue is more complex. In this context, a clear distinction must be made between voting in regular elections versus participation in acts of self-determination such as the Bonaire referendum where the people are asked to vote on their political future. Reference to this effect was made in the 2nd February 2010 editorial in the *Daily Herald* that “...in the case of a referendum, it is not unusual to deviate from normal voting rights for elections within the Netherlands Antilles.”⁵

In fact, such a deviation is widely used in self-determination referenda which have historically been governed by different voting eligibility criteria than that utilised for general elections. The rationale for this is clear since it is the people with an historic connection with the country/territory who have the distinct right to determine the future of that country or territory. This is evidenced by a number of examples historically, many of which have been endorsed by the United Nations General Assembly, the Security Council and other relevant bodies. The UN Needs Assessment Mission Report was silent on the differentiation between referenda and regular elections. This, too, may not have been part of their mandate.

Referendum Voter Criteria

The process in New Caledonia, a French overseas territory in the Pacific, is a case in point where the validity of the electoral franchise for the upcoming referendum – agreed by the French Government - was confirmed by the *United Nations Human Rights Committee*. This UN body established that “a differentiation between residents as regards their relationship to the territory, on the basis of length of residence requirement...did not have the purpose or effect of establishing different rights for different ethnic groups or groups distinguished by their national extraction.”⁶ The *European Court of Human Rights* concurred with this assessment in its 2005 decision.⁷

This amounted to a recognition of the legitimacy of a ten-year residency requirement for voting in the self-determination referendum.⁸ The *UN Human Rights Committee* concluded that “*the (ten-year voter eligibility) criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process.*”

The Committee further held that the differentiation in voter eligibility was “*based on objective grounds*” that were “*reasonable*” and “*not discriminatory.*” The *European Court of Human Rights*, in its decision, also concurred with the 15 July 2002 *Views of the United Nations Human Rights Committee* on the New Caledonia residency requirements, which stated, *inter alia*, that:

“*...the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote...and (b) persons permitted to exercise this right owing to their sufficiently strong links with the territory whose institutional development is at issue.*”⁹

Given this legitimisation of a ten-year requirement for a political status referendum by the *United Nations Human Rights Committee*, it is difficult to determine the reasonableness behind the relevant recommendations of the *United Nations Needs Assessment Mission* which termed as “problematic” the five-year requirement originally recommended by the *Bonaire Referendum Committee*. On the contrary, it is the recommended “*reasonable compromise solution*” of a six-month residency period put forth by the UN mission that should be deemed unreasonable, as far as the people of Bonaire are concerned. In any case, the *Bonaire Referendum Ordinance* was later adopted with a three-year residency requirement – still well within the parameters of what was determined reasonable by the *United Nations Human Rights Committee*, and confirmed by the *European Court of Human Rights*, but nevertheless regarded as excessively long by the *UN Needs Assessment Mission*.

If this exercise was designed for the purpose of protecting the political rights of European Dutch citizens, rather than the Antillean Dutch citizens, who constitute the people of Bonaire, then there would be some basis for the short voter residency requirement recommended by the *United Nations Mission*. Of course, the Mission’s equality of rights argument would, then, also be applied to the Antillean Dutch citizens who are hardly equal to their fellow citizens in Europe in terms of political rights within the Kingdom. (*This significant inequality of political rights was even recognised by the Dutch Committee on the Democratic Deficit of the Kingdom Government, but whose recommendation to give voting rights to the people of the present Netherlands Antilles in parliamentary elections was set aside*).

Several other examples of special voter eligibility requirements are worth noting to further illustrate the point, including the 1999 political status referendum in East Timor which limited the franchise to natives and offspring of at least one parent who was born

in the territory. No less than the *United Nations Security Council*, by resolution, “welcome(d) the modalities for the (1999) popular consultation of the East Timorese through a direct ballot.” The United Nations actually conducted the balloting of this restricted franchise.

The situation in Western Sahara is also instructive because it legitimised a further variation on the distinctiveness of the electoral franchise in an act of self-determination, in this case, based on ethnicity. It is the United Nations which is organising this restrictive voter registration for the long-delayed self-determination referendum there.

Even the American – administered territories have instituted unique electoral measures on that basis with the adoption by the Guam Legislature of the *Chamorro Registry* defining voter eligibility in an upcoming referendum on self-determination based on family lineage and descendency. There have been no legal challenges thus far arguing that the rights of “other United States citizens” resident in that territory were being infringed upon – perhaps the quid pro quo is that the people of the US territories have no voting rights in the United States political system. The United Nations has acknowledged these specific eligibility requirements for Guam by General Assembly resolution.

Conclusion

Given established precedent, and taking into account the rulings of the *European Court of Human Rights*, and the *United Nations Human Rights Committee*, respectively, it is difficult to concur with the view that a three-year residency requirement for what amounts to an act of self-determination on the political future of Bonaire violates international law. In fact, the three-year requirement would appear well within the parameters of established international precedent.

It is to be recognised that the voter eligibility requirements contained in the Bonaire Referendum Ordinance might be seen by some as a “conflict with the public interests of the Kingdom” and may even be seen as counter to what some have suggested is a grand strategy to increase European Dutch presence and political power in the Antilles, and by extension, heighten Dutch influence in the Caribbean. Notwithstanding these perceptions, the voter eligibility requirements were properly designed to protect the interests of the people of Bonaire, and have clear international precedent.

As the March 2010 timetable approaches for the vote in the Dutch Second Chamber on the package of draft laws for the three islands to be partially integrated, decisions will have to be taken by the elected government of Bonaire in determining the way forward, even as the Dutch continue to exert inordinate political, economic and other pressures on the situation with the apparent aim of bringing the island in line with what some view as a Dutch plan of annexation. In this regard, the Dutch suspension of financial assistance to development projects in Bonaire until the island “falls in line” is disappointingly heavy-handed, as is the disparaging public comments made about the situation by certain Dutch politicians.

In the final analysis, the rationale used to thwart the Bonaire referendum leans more on the basis of political consideration rather than any convincing interpretation of international law and precedent as far as voter eligibility in referenda is concerned. However, the need for clarification of the referendum question is duly recognised and easily adjusted.

All parties should be in agreement that the overriding principle is the self-determination of the people of Bonaire. This is an inalienable right, and cannot be dismissed so easily for the sake of an external legislative timetable. In this light, there remains considerable scope for a resumption of discussions leading to a satisfactory resolution with the backing of appropriate international support. The alternative may require taking the issue to the relevant international tribunals where the entire spectrum of issues could be put on the table for comprehensive examination by the international community.

Notes

¹ Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights: Addendum Antilles, Human Rights Committee. CCPR/C/NET/4/Add.2. 9 June 2008. Original: English.

² See. General Comment No. 12, The Right to Self-Determination of peoples (Art. 1). 13 April 1984.

³ Carlyle Corbin, “Criteria for the Cessation of Transmission of Information under Article 73(e)” in “Overseas Territories Report, Vol. V, No. 5. August 2006.

⁴ See Principle VIII of Resolution 1541 (XV) of 15 December 1960.

⁵ thedailyherald.com, “Editorial – Wrong Message,” 2nd February 2010.

⁶ See “Views of the United Nations Human Rights Committee, dated 15 July 2002” as cited in *Py v. France* 11 January 2002.

⁷ European Court of Human Rights, “Case of *Py v. France*. pp. 11-12. 11 January 2005.

⁸ New Caledonia Institutional Act (no. 99-209). Article 188 (c). 19 March 1999.

⁹ 7 op. cit., p. 5.

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