

Letter of 4 April 2019 to the President of the House of Representatives from State Secretary for the Interior and Kingdom Relations Raymond Knops, Minister of the Interior and Kingdom Relations Kajsa Ollongren and Minister of Foreign Affairs Stef Blok setting out the government's response to the AIV advisory report 'Fundamental Rights in the Kingdom of the Netherlands: Equivalent Protection in all Parts of the Kingdom'

On 6 July 2018 the chair of the Territorial Limitation Committee of the Advisory Council on International Affairs submitted the advisory report 'Fundamental Rights in the Kingdom of the Netherlands: Equivalent Protection in all Parts of the Kingdom; Theory and Practice of Territorial Limitations on the Application of Human Rights Treaties upon Ratification'. We herewith submit the report and the response of the Council of Ministers for the Kingdom for your consideration.

Essence of the AIV's advisory report

The AIV draws attention to an important theme in its report. Human rights are universal and a core value of democratic states governed by the rule of law. They are an integral part of the constitutional legal order of the Kingdom and its constituent countries. Such rights are intrinsic to the quality of life of the people and of functional importance to society and the state. Safeguarding fundamental rights and freedoms is designated as a Kingdom affair in the Charter for the Kingdom of the Netherlands (article 43, paragraph 2, Charter). More generally, the government of the Kingdom has a constitutional duty to promote the international legal order (article 90, Constitution). As a state, the Kingdom is subject to international law and in that capacity binds the constituent parts of the Kingdom to treaties.

When treaties are concluded on behalf of the Kingdom of the Netherlands, as a matter of legal practice the governments of the autonomous countries of Aruba, Curaçao and St Maarten are asked whether they consider territorial extension to their country to be desirable. Thus far the island authorities of Bonaire, Saba and St Eustatius (the Netherlands in the Caribbean) have been also consulted about whether it is desirable for application to extend to them. The practice of extending application within the Kingdom has varied, in particular with respect to treaties concluded since 2000. As a result, within the Kingdom of the Netherlands different international human rights standards apply to its different constituent parts.

In the AIV's view, this differentiated application of human rights treaties within the Kingdom is difficult to reconcile with the principle of universality of human rights, the objective of safeguarding this principle and the government's constitutional duty to promote the international legal order. In the AIV's view, the absence of territorial extension: (1) undermines the international credibility of the Kingdom of the Netherlands and (2) creates a situation in which human rights do not apply equally to all citizens and other residents of the Kingdom.

These two consequences prompted the AIV to study current practice concerning the territorial extension of human rights treaties in the Kingdom of the Netherlands. The AIV recognises two dimensions to this practice: (a) the harmonisation of international human rights standards within the Kingdom and (b) the implementation and enforcement of these standards by each of the four countries of the Kingdom, including the financial outlay required for this purpose.

The AIV places greater emphasis on the first dimension because the second is conditional on the first.

Against this backdrop (which is elaborated in the introduction and part I of the advisory report) and in light of the eight case studies used to examine current practice concerning the ratification process (part II of the report), in part III of its report the AIV makes six policy recommendations to ensure that these human rights treaties are applied equally and more quickly to all parts of the Kingdom. The Council of Ministers' response to these recommendations is set out below.

Response to the AIV advisory report

Recommendation 1

The Kingdom of the Netherlands must always base its decision to conclude a human rights treaty on the substantive objectives and content of the treaty in question. The basic principle must be that human rights treaties are applicable throughout the entire Kingdom. Convincing reasons must be given if a decision is made to limit territorial application.

In response to the first recommendation the Council of Ministers for the Kingdom joins the AIV in emphasising that it is preferable for human rights treaties to apply throughout the entire Kingdom. The standards set out in human rights instruments are fundamental and usually universal in nature. Therefore, where possible, no differentiation is made in respect of their application within the Kingdom.

Constitutional practice in the Kingdom with regard to human rights treaties shows that this principle is not disregarded. Prominent fundamental rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights have applied throughout the Kingdom for many years and are important sources of rights in the Caribbean parts as well as in the Netherlands in Europe.

As the AIV's report states, with respect to more recent human rights instruments, too, the intent has frequently been to implement them throughout the Kingdom. However, ratification in the Caribbean countries sometimes takes a while because of the difficulties in introducing the implementing measures necessary to enable the treaty to enter into force.

In order to achieve application throughout the Kingdom, it is important for implementing legislation and other implementing measures to be prepared expeditiously. The urgent need for such preparations was recognised at the time of the constitutional reforms of the Kingdom in 2010, when on the basis of a new provision in the Charter the constituent countries concluded a mutual arrangement on cooperation between the countries for implementation of treaties (*Onderlinge regeling inzake de samenwerking tussen de landen bij de implementatie van verdragen*).¹ In our response to recommendations 3, 4 and 5 we discuss options for the government of the Netherlands to take the lead on cooperation under this mutual arrangement. However, in the opinion of the Council of Ministers for the Kingdom there is little constitutional scope for far-reaching changes in current practice. Within the Kingdom's constitutional system, most policy areas are the responsibility of the countries themselves.

While it is the Kingdom that enters into international agreements, the countries themselves bear primary responsibility for implementing them.²

This circumstance prevents the government from following the first recommendation. The recommendation implies that the Kingdom government must be willing to make an independent decision regarding the application of a human rights treaty in the Caribbean countries. Although formally the Charter does not rule out this possibility, this manner of decision-making is undesirable.³ If a human rights treaty is ratified without the consent of a Caribbean country and implementing regulations are subsequently not forthcoming, the Kingdom runs the risk of being called to account by international partners. Given the division of powers in the Charter between the Kingdom and the constituent countries, this risk would be difficult to manage.

The procedure set out in article 27, paragraph 3 of the Charter and referred to in the AIV's account of the Kingdom's treaty relations does not present a solution to the situation described above. On the basis of this provision, the required implementing legislation can be introduced by order in council for the Kingdom if the interests of the Kingdom are affected by the absence of such measures. However, under article 27, paragraph 3 intervention by order in council for the Kingdom is subject to the condition that the treaty in question has not yet been ratified for the country in question by the government of the Kingdom. However, the AIV appears in its recommendation to assume that a treaty can be ratified by the Kingdom government before implementing measures are taken at country level.

Quite apart from this, the legislative history indicates that great restraint should be exercised when deciding whether to apply article 27, paragraph 3 of the Charter. Nevertheless, this provision can play a role in addressing the problematic absence of implementing measures identified by the AIV. This is why the procedure was included in the Charter in 2010.⁴

Another consideration that suggests the need for caution in calling into question existing practice concerning human rights treaties in the Kingdom is the division of powers with respect to human rights laid down in the Charter. Although article 43, paragraph 2 of the Charter stipulates that the safeguarding of fundamental human rights and freedoms is a Kingdom affair, paragraph 1 of that article states that each country of the Kingdom is responsible for promoting the realisation of these rights and freedoms. So apart from the matter of implementation, each of the Caribbean countries bears responsibility for human rights in its territory. The Council of Ministers for the Kingdom considers the legal practice of explicitly submitting the question of territorial extension to the Caribbean countries to be a logical consequence of the countries' individual responsibility for human rights.

Lastly, it bears noting that the Council of Ministers for the Kingdom foresees difficulties in deciding whether a particular international agreement should be characterised as a human rights treaty. As the AIV observed in respect of the Paris Agreement on climate change, treaties do not always fit into neat categories.⁵ In the view of the Council of Ministers for the Kingdom, it would be going too far in such a case to argue on the basis of the universality principle that there is no scope within the Kingdom for differentiation in the application of a treaty.

Recommendation 2

As the BES islands form part of the Dutch constitutional order and a divergent system of human rights cannot be justified by a 'fundamental distinction' within the meaning of article 132a of the Constitution, any such differences between the Caribbean and European parts of the Netherlands must be ended.

Thus far there has been no substantial difference between Bonaire, St Eustatius and Saba on the one hand and Aruba, Curaçao and St Maarten on the other in terms of current practice concerning human rights treaties. This is why it is possible to maintain a divergent system of human rights between the European and Caribbean parts of the Netherlands. The government of the Netherlands shares the AIV's opinion that this is inconsistent with article 132a of the Constitution and would like to change course with respect to human rights treaties for the Caribbean part of the Netherlands.

If the Kingdom enters into a human rights treaty in future, the treaty will have to apply in both the European and the Caribbean parts of the Netherlands.

At the same time, the Dutch government believes it is important to acknowledge that the contexts in which human rights operate are different in the Caribbean and European parts of the Netherlands. Should local circumstances so require, it is important to allow scope for differentiation in the way a human rights treaty is implemented by each part of the Netherlands.

Article 132a of the Constitution does not rule out differentiation of this kind. In following this new course the government of the Netherlands is applying the reasoning in its response to the Spies Committee report evaluating the impact of the new constitutional structure of the Caribbean part of the Netherlands.⁶ In its response, the government stressed the importance of safeguarding the fundamental rights of the population of the Caribbean part of the Netherlands, but also expressed the view that this need not happen in precisely the same way as in the European part of the Netherlands.

Under the new approach, the island authorities of Bonaire, St Eustatius and Saba will no longer be asked whether it would be desirable to extend the application of a particular treaty to them. Instead, they will be consulted about what degree of differentiation is needed in the application of the treaty. In future, the government will strive to synchronise the ratification of human rights treaties for the Netherlands in the Caribbean and in Europe to the greatest possible extent.

Recommendation 3

If the Kingdom government decides on a temporary territorial limitation when ratifying a treaty, it should as a matter of course draw up an implementation plan (including the financial consequences) for all countries of the Kingdom, as referred to in article 2 of the mutual arrangement within the meaning of article 38, paragraph 1 of the Charter for the Kingdom of the Netherlands on cooperation between the countries in the implementation of treaties. The Dutch government should take the initiative in this connection. The implementation plans should be sent with the request for parliamentary approval to the States General and also shared with the parliaments of Aruba, Curaçao and St Maarten.

The aim of the AIV's third recommendation is to expedite and streamline cooperation between the countries for the purpose of drafting implementing legislation, as referred to in article 27, paragraph 2 of the Charter. The Council of Ministers for the Kingdom shares the AIV's opinion that there is much to be gained in this respect, especially since it is unlikely that far-reaching changes will be made to current constitutional practice concerning human rights treaties. On the basis of article 27, paragraph 2 of the Charter, the constituent countries concluded a mutual arrangement in 2010 laying down agreements on drafting and executing implementation plans.⁷ This arrangement was recently evaluated by the Civil Service Meetings on Draft Legislation for Kingdom Relations (*Ambtelijk Wetgevingsoverleg Koninkrijksrelaties*, AWOK).⁸

The AWOK evaluation contains recommendations for enhancing the effectiveness of the mutual arrangement. For example, the countries are advised to draw more attention to the existence of the mutual arrangement among the parties involved in executing treaties. In addition, the countries are urged to make better use of existing resources for sharing implementation plans. Lastly, the AWOK observes that insufficient use is made of the options laid down in the mutual arrangement for requesting and furnishing information and assistance in connection with an implementation plan. In response to the AWOK evaluation, the countries have pledged to make better use in future of the options provided by the mutual arrangement.

The AIV recommends that if the Kingdom government decides on a temporary territorial limitation when ratifying a human rights treaty, an implementation plan should as a matter of course be drawn up for all countries of the Kingdom and the Netherlands should take the lead in this. The Council of Ministers for the Kingdom concurs with this recommendation in so far as an implementation plan drawn up by the Netherlands could in future serve as a model for Aruba, Curaçao and St Maarten. This is particularly the case when a differentiation is made between the European and Caribbean parts of the Netherlands in the implementation of a treaty and a separate implementation plan is drawn up for the Caribbean part of the Netherlands.⁹ As in the Caribbean countries of the Kingdom, a great deal of legislation in the Caribbean part of the Netherlands is still based on Netherlands Antilles legislation and consequently bears more similarities. The Caribbean countries take the view that the idea of using an implementation plan drawn up for the Netherlands in the Caribbean as a template would be in keeping with the intent of the mutual arrangement on cooperation between the countries for implementation of treaties. An agreement has been made to flesh out this idea in the periodic consultations referred to in the response to recommendations 4 and 5.¹⁰

Secondly, the AIV recommends sending implementation plans to the States General along with the request for parliamentary approval and at the same time sharing them with the parliaments of Aruba, Curaçao and St Maarten. The Council of Ministers for the Kingdom does not consider this desirable. The Council agrees that having implementation plans ready when parliament approves a treaty would increase the likelihood of implementation legislation being drawn up in all the countries more expeditiously. However, in the unfortunate event that no implementation plan is adopted, the practice proposed by the AIV could lead to the treaty concerned not being presented to parliament for approval. This could in turn harm the international position of the Kingdom.

Recommendation 4

Within Dutch central government the Ministry of the Interior and Kingdom Relations has primary responsibility for the cooperation between the different parts of the Kingdom, as referred to in recommendation 3. The role of this ministry in coordinating the application of human rights treaties should be strengthened. This should also be the aim of this ministry's coordinating role within the Rijksdienst voor Caribisch Nederland (National Office for the Caribbean Netherlands, RCN).

Recommendation 5

The States General should be informed annually in the Explanatory Memorandum to the Kingdom Relations Budget (chapter IV of the Central Government Budget) about the progress made in executing the implementation plan referred to in recommendation 3.

In the mutual arrangement on cooperation between the countries for implementation of treaties, the Minister of the Interior and Kingdom Relations¹¹ is given a coordinating role in a number of areas.¹² The AIV recommends that this coordinating role be further strengthened.

With regard to the coordination of the countries' individual implementation plans, the Council of Ministers for the Kingdom sees two options. First, on the basis of the AIV's advisory report, the possibility of establishing periodic consultations at civil service level is being examined. This would entail civil servants of the four countries involved in implementation of treaties taking stock of the situation concerning implementation plans and facilitating the preparation of such plans. Second, the Council of Ministers for the Kingdom has agreed that the minister responsible for Kingdom relations within the Ministry of the Interior and Kingdom Relations will, in consultation with the Minister of Foreign Affairs, inform the States General annually about the progress made in executing implementation plans. In accordance with the AIV's recommendation, this information will be included in the Explanatory Memorandum to the Kingdom Relations Budget. The States of Aruba, Curaçao and St Maarten will each receive a copy.

With respect to the coordinating role of the Ministry of the Interior and Kingdom Relations regarding the implementation of treaties in the Caribbean part of the Netherlands, I refer to the government's request of 13 September 2018 to the Advisory Division of the Council of State, asking for information about this role against the backdrop of the existing structure of the relationship between the European and Caribbean parts of the Netherlands.¹³ This information could also include guidance on managing the implementation of human rights treaties.

Recommendation 6

Knowledge within central government in the Netherlands regarding the structure of the Kingdom of the Netherlands should be increased and cooperation between the countries of the Kingdom should be improved.

The Council of Ministers for the Kingdom shares the AIV's opinion that knowledge within central government in the Netherlands regarding the structure of the Kingdom of the Netherlands could be enhanced. Various initiatives are being taken to that end. For example, the Academy for Legislation periodically offers a well-attended course covering the

constitutional structure of the Kingdom, the specific features of Kingdom legislation and the status of the Caribbean part of the Netherlands. There is also a human rights course for central government trainees that provides a more general survey of this topic. Lastly, a new category was recently added to the central government registration system for recording the progress made on legislation. The system now indicates whether the draft legislation is relevant to the Netherlands in the Caribbean. This, too, is helping to enhance awareness that the Kingdom is not just the Netherlands in Europe.

In connection with the above, the Council of Ministers for the Kingdom would note that it is also important for the Caribbean parts of the Kingdom to have sufficient knowledge of the structure of the Kingdom. The Council appreciates the various initiatives that are being taken in order to increase this knowledge. Worthy of note in this respect is the e-learning course on Kingdom affairs offered by the Ministry of Foreign Affairs' Academy for International Relations, which is open to all central government staff, including employees in the Caribbean countries.

Concluding remarks

The Kingdom of the Netherlands has a unique constitutional structure in which four countries and, within one of these countries, a European and Caribbean part share a common legal order. Within the Kingdom's territories, there is broad scope to choose varying legal norms. There is a good explanation for this. Though bound together by history, each of the territories has its own culture and some are separated geographically by large distances. In a joint legal order, however, it is important for certain fundamental legal norms to be applied consistently as guiding principles. This is certainly the case when it comes to human rights. The AIV was therefore right to draw attention in its report to the fact that some human rights treaties apply in only certain parts of the Kingdom.

At the same time, the Council of Ministers for the Kingdom believes it is important to emphasise that this problem concerns a limited number of treaties. As observed above, the majority of human rights treaties to which the Kingdom has acceded over the past decades apply to all parts of the Kingdom. In most cases, all Dutch nationals and other residents of the Kingdom can invoke, on an equal basis, the protection of the human rights treaties to which the Kingdom is a party. Compliance with these treaties poses challenges for each part of the Kingdom. As the contracting party, the Kingdom has an interest in ensuring these challenges are tackled effectively. The way in which this is done, however, is in part governed and delimited by the constitutional relationships laid down in the Charter and the Constitution.

1 Government Gazette 2010, no. 19006, 10 December 2010.

2 This is not the case for the Netherlands in the Caribbean. See the response to recommendation 2.

3 The Charter only prohibits the government from binding Aruba, Curaçao and/or St Maarten to economic or financial treaties without their consent. See article 25, paragraph 1 of the Charter.

4 Parliamentary Papers, House of Representatives, 2009/10, 32213 (R 1903), no. 3, pp. 7-8.

5 See p. 17 of the AIV advisory report.

6 Government's response to Spies evaluation report, 12 May 2016.

7 Government Gazette 2010, no. 19006, 10 December 2010.

8 Report on the effectiveness and impact of the mutual arrangement, within the meaning of article 38, paragraph 1 of the Charter for the Kingdom of the Netherlands, regarding cooperation between the countries for implementation of treaties. This report is appended to this response.

9 It is not currently standard practice for implementation plans to be drawn up for the Netherlands in the Caribbean.

10 Expedient and, wherever possible, uniform implementation of human rights treaties is in the interests not only of the people of the Caribbean countries in the Kingdom but also of the people of the Netherlands in the Caribbean.

11 Currently the State Secretary for the Interior and Kingdom Relations.

12 This is the case in articles 4 and 6 of the mutual arrangement.

13 Parliamentary Papers, House of Representatives, 2017/18, 34 775 IV, no. 53.