

STATEN VAN SINT MAARTEN		
Ingek. 30 MAR 2022		
Volgnr. 18/72412-22		
Par.	A	CR

The Charter for the Kingdom: a child of its time

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It is with great pleasure that I accept the invitation to take part in this round table meeting with the esteemed members of the St. Maarten Parliament and members of the general public here in St. Maarten (also very esteemed, of course) on the very interesting and relevant topic of self-determination. In my position paper, I will focus on the constitutional developments and the political process that have led to the introduction of that peculiar document known as the Charter for the Kingdom. I will place its developments and structural framework in the broader setting of the decolonization of the Dutch Kingdom after 1945, both in the East and West Indies. In doing that, I will try to give an analysis of the fundamental character of the Charter as it has come to be. I will finish with a short evaluation of the question whether the Charter has brought what it was intended to do in 1954, and whether it still can be seen as an adequate form of self-determination in 2022. For the sake of readability, I will refrain from using footnotes in this short document. Those interested in sources can always contact me for further information on that subject.

The Charter for the Kingdom of the Netherlands came into force on December 29, 1954. On the 15th of December of that year, Queen Juliana of the Netherlands had formally ‘acknowledged’ (*bevestigd*) the Act on the Charter of 28 October 1954 as was prescribed in both the Charter itself as in the Constitution of the Kingdom of the Netherlands as a prerequisite for its coming into force. It is often described as a legal document of a peculiar nature: it introduced a ‘new legal order’ for an existing Kingdom, in which the remaining overseas territories were to be given far-reaching autonomy and a say in the few remaining common matters of regulation and governance. As such, its fundamental make-up is quasi-federal, but the Charter does not use the term ‘federal’ and there is a lot in the chosen structure that looks strange from a normal ‘federal’ perspective, such as the fact that there is no structural representation of the four countries making up the Kingdom. There are Kingdom authorities, but it is unclear if they are really separate Kingdom organs or Dutch organs acting in a different role. There is a Kingdom constitution, but it is only partly laid down on the Charter itself, and partly still in the Constitution of the Netherlands itself, originally introduced in 1814. The Kingdom enjoys international legal personality, but no legal personality under internal law. It has no budget and collects no taxes.

But how did this come to be? For that, we need to dive into Dutch constitutional history. During the early decades of the constitution, there was very little interest in the legal nature of the relationship between the Kingdom in Europe and its overseas possessions and colonies. It was only in 1887 that article 1 of the constitution was amended to read that “The Kingdom comprises of the territory in Europe and furthermore that of the colonies and possessions in other continents”. Although this article clearly showed that the overseas territories were subjected to the Netherlands proper, it was also made clear that those overseas territories were not simply legal possessions of the Kingdom of the Netherlands, but formed an integral part of that Kingdom itself. The constitution was amended again in 1922, after the horrors of the first world war. The Charter of the League of Nations was one of the very first internationally binding documents that stated that colonial peoples had a right to be guided towards self-determination, albeit that this was limited to the former colonies of Germany. But the Dutch government realised that this was still an important development and wanted to react in kind. Thus, in 1922 article 1 of the constitution was amended in the following manner: “The territory of the Kingdom comprises of that of the Netherlands, the Netherlands Indies, Suriname and Curaçao”. The 1922 constitution for the first time acknowledged the four constituent parts of the Kingdom and at least suggested some form of equal status among them. In the framework of the constitution as a whole, this was far less the case: the Netherlands proper were entitled to regulate the affairs of the Kingdom as a whole without any formal influence from the other three and the Dutch authorities could through ordinary act regulate the internal affairs of the Netherlands Indies, Suriname and Curaçao as well. Nevertheless, there were a number of new articles in the Constitution that stipulated that the

Dutch legislator had to allow the overseas territories a form of internal autonomy, that was to be enacted through local authorities, the framework of these and their powers to be laid down by act of parliament. In that sense, the 1922 constitution tried to create a system of overseas government that was somewhat similar to the position of the provinces and communities in the Netherlands itself. In 1925, the new Act on the constitutional status of the Netherlands Indies (*Wet op de Indische Staatsregeling*) introduced a limited form of elections for the representative assembly of the Netherlands Indies, the popular council (*Volksraad*) and gave the popular assembly the right to create statutory instruments (*ordonnanties*) for the territory of the colony, including the budget. Suriname and Curaçao were given new constitutional acts (*Staatsregeling*) in 1936. For Curaçao this meant the introduction of a limited form of suffrage for the first time: for Suriname, that had existed already. Both Suriname and Curaçao were placed in a constitutional position that was similar to the one that the Netherlands Indies got under the 1925 Act.

When the Netherlands were attacked by Germany on May 10 1940 and Queen Wilhelmina and the government were evacuated to London, the government of the Netherlands Indies in Batavia requested it to set up domicile in Batavia. This was considered, but it was decided that it would be better to stay in London. In the spring of 1941, the government in London decided to install a new official state commission for the Netherlands Indies whose task it was to gain insight in the feelings of the population of the Netherlands Indies on the future of the colony and to give advice on how to give shape to those insights. This commission, the Visman Commission, published its report in the early spring of 1942. Unfortunately, by then Japan had already invaded the Netherlands Indies and on March 7 1942 the Dutch army and the colonial government capitulated. Since then, both the Netherlands itself and the most important overseas territory of the Kingdom were under foreign occupation. Only Suriname and Curaçao remained 'free'. For the occupied territories in Europe and Asia it was utterly clear that the Netherlands would never be able to liberate them independently: we would need the military power of the allies, first and foremost the Americans, to be able to do that. It was also clear for the government in London that the USA would not be willing to sacrifice its soldiers for the liberation of the Netherlands Indies, simply to restore colonial rule.

For that reason, Queen Wilhelmina gave an important speech on the official radio of the Dutch government in exile, Radio Orange, on the first anniversary of the Japanese attack on Pearl Harbor, on December 7 1942. In that speech, the Queen sketched the contours of a new framework for the Kingdom after the war would be over. She stated that representatives of all four parts of the Kingdom should convene to discuss the future together. She said that she envisioned a future in which all four parts of the Kingdom would have a broad measure of self-government, and in which all four parts of the Kingdom would also take part in the decision-making process on common Kingdom matters. Thus, the two cardinal points were on the one hand, autonomy and on the other hand, influence on common decision-making. It is not hard to see a sort of 'foreshadowing' of the Charter in these words from 1942. The message was mostly unheard in the Netherlands itself and in the Netherlands Indies because of the occupation – but it was very seriously studied in both Suriname and Curaçao, and both would demand its realisation almost directly after the war.

The war ended in Europe in May and in the far east in August when Germany and Japan capitulated respectively. The power vacuum left behind by the Japanese capitulation on August 15 of 1945 was filled by a small group of nationalists led by Sukarno and Hatta that had grown to prominence under the Japanese occupation. They seized the opportunity brought by the fact that Japan had laid down its arms but there was no a Dutch soldier or government official in sight and declared the independence of what they had been calling since the 1920s "Indonesia". The reaction in the Hague on the arrival of this news was one of disbelief and fury. The Dutch government was willing, according to the blueprint provided for by Queen Wilhelmina in 1942, to enter into serious negotiations on the future of the colonies, but not in a situation of a unilateral declaration of independence and not with people the Hague considered traitors who had cooperated with Japan. But it soon became clear that developments went so quickly that the clock could not fully be turned back. Over time, a considerable military force was sent to the far east in order to restore 'peace and order' and create the conditions for serious negotiations with those the Netherlands deemed suited to negotiate with, but the government in the Hague was never capable of fully regaining the political or military initiative and freedom of action.

Although limited military successes could be gained, the *Republik Indonesia* that was proclaimed in 1945 turned out to be too strong to be defeated and in the spring of 1946 the Netherlands first started negotiating with the Indonesian nationalists. These negotiations led to an agreement in the summer that was ratified by both parties in the autumn.

The agreement gained notoriety as the Linggadjati-agreement, after the small village in western Java where it was concluded, and it laid the groundwork for a very dramatic restructuring of the entire framework of the Dutch empire. The fundamental principles of the 1942 speech by Queen Wilhelmina, autonomy of the overseas territories within a restructured Kingdom, were abandoned for the Netherlands Indies. Instead, the Netherlands and the Republic of Indonesia would together set up a new federal Indonesian Republic, the Republic of the United States of Indonesia. This federal state would comprise several autonomous states, of which the Indonesian Republic declared in 1945 would be one. Together with the Kingdom of the Netherlands, the United States of Indonesia would form a Dutch-Indonesian Union in which the two states would be co-equal partners. The Union would have its own constitution in the form of the Dutch-Indonesian Charter, on the basis of which it would have its own organs, including a High Court (*Hof van Arbitrage*) that would be entitled to review the legality of all norms of both partners on their validity under the Union Charter. The Dutch King would be the Head of the Union. As one of the partners of the Dutch-Indonesian Union, the Kingdom of the Netherlands itself would be drastically reformed in the sense of the 1942 speech: Suriname and Curaçao would gain a full measure of self-autonomy within the framework of the Kingdom. Thus, the Kingdom of the Netherlands would be federalised and would comprise of three partners, the Netherlands proper, Suriname and Curaçao, under a new constitution that was to be elaborated based on consensus of the three partners. Indonesia would also be a federal state, but a republic, under a new constitution to be negotiated internally and with the Netherlands. Together, these two federations would be co-equal partners in the Dutch-Indonesian Union, itself also a quasi-federal framework with its own constitution and organs. In this whole enormous framework, the existing constitution of the Netherlands would be downsized to a far lesser status: namely, the constitution of just one of the three partners within the Kingdom of the Netherlands.

It was not to be. Or rather, it was tried, but failed. The Netherlands and Indonesia could not agree on the implementation of the Linggadjati-agreement. In the summer of 1947, war broke out anew between the two sides and would continue, off and on, until the late summer of 1949. Eventually, an agreement was reached and Indonesia gained her full independence on December 27, 1949. That independence was structured along the lines of what had already been agreed in 1946: Indonesia became independent as the Republic of the United States of Indonesia. On the same day, the Charter of the Dutch-Indonesian Union came into force. To allow for all this, the constitution of the Kingdom had been amended in 1948 to make way for legislation that would create a new legal order for the four constituent parts of the Kingdom mentioned in article one: since then, these were called “the Netherlands, Indonesia, Suriname and the Netherlands Antilles”. The constitution created a special procedure for enacting this legislation in deviation from the constitution. This procedure was used to create the legislation necessary to regulate the independence of Indonesia and the foundation of the Dutch-Indonesian Union and its Charter. All this happened. But the three-year war had led to much bad blood between the Netherlands and Indonesia. The latter had only accepted the whole framework to gain independence. As soon as that had happened, Indonesia started dismantling its own federal framework and frustrating the functioning of the Dutch-Indonesian Union, that was mostly seen as a last colonial relic from the Dutch. In the autumn of 1950, the Republic of Indonesia had taken over the federal republic and the original 1945 constitution was re-instated as the constitution for all of Indonesia. The Dutch-Indonesian Union was stillborn and was formally abolished in 1956.

The procedure laid down in 1948 in the constitution was also envisioned for the internal restructuring of the Kingdom proper. Suriname and the now officially called “Netherlands Antilles” wanted no independence, but they did want a measure of internal autonomy and the restructuring of the Kingdom to guarantee that, along the lines of what had been promised in 1942. In the first years after the war, they were often frustrated by the lack of progress made, because of the sharp focus that the Netherlands had on solving the ‘Indonesian question’ first. This was even more so due to the fact that

the Netherlands had negotiated with Indonesia what the new Kingdom would look like internally before it had negotiated with Suriname and the Antilles! It took to 1948 before a Round Table Conference was called between the three remaining partners within the Kingdom of the Netherlands to lay the groundworks for what the Kingdom would look like internally, as one of the partners of the future Dutch-Indonesian Union.

The resolutions of this conference were then worked out by a commission led by the former professor of Dutch Indian constitutional law Logemann into a concept of a “Constitution for the United Kingdom of the Netherlands”. This constitution envisioned a fully-fledged federal Kingdom of the Netherlands. It would have its own federal authorities, that would create separate and hierarchically higher “Acts of the Realm” on those subjects on which the Kingdom would have the power to do so. It would have a fully-fledged Kingdom parliament (the “Estates of the Realm”, *Rijksstaten*) and a Government of the Realm. There would be a High Court of the Realm, empowered to review the conformity of lower legislation (including the constitutions of the three partners) with the Constitution of the Kingdom. This Court would of course itself be subject to the reviewing powers of the Union High Court. The concept was presented to the Dutch government in late 1948 and rejected out of hand. The new government that came into power after the 1948 elections dismissed the proposal as overweight, too complicated and not in line with the overall target: autonomy for Suriname and the Netherlands Antilles. The government therefore made public that its top priorities were Indonesian independence and autonomy for Suriname and the Netherlands Antilles. As soon as this was achieved, the Netherlands would negotiate further with Suriname and the Netherlands Antilles how the Kingdom would look like in the future. Both these targets were achieved in 1949 and 1950 respectively: Suriname and the Netherlands Antilles were given self-government through two temporary acts of 1949 and 1950 and we already saw that Indonesia became independent in 1949. Between 1950 and 1953, the now-autonomous Suriname and Netherlands Antilles negotiated with the Netherlands on the future status of the Kingdom. This eventually led to a second Charter: the Charter for the Kingdom. It, too, was enacted under the special provisions laid down in the 1948 constitutional amendment.

But the Charter as it finally came into force in 1954 was a far cry from the very ambitious plans that were blueprinted in Linggadjati. It had by then already become clear that the Dutch-Indonesian Union was not to be. It was also clear that the ambitious new Kingdom Constitution of 1948 was a bridge too far. The restructuring of the Kingdom was to take place in a far less ambitious way. Surprisingly, perhaps, it would have been even less ambitious if the Dutch government would have had its way. Following Indonesian independence it had suggested in 1950 and 1951 to restructure the Kingdom through a negotiated settlement between the Netherlands, Suriname and the Netherlands Antilles in which the existing constitution would remain the constitution for the entire Kingdom and the organs and authorities of the Netherlands would continue to act on behalf of the entire Kingdom. The influence of Suriname and the Netherlands Antilles would then be guaranteed by an agreement between the three governments that would regulate how representatives of Suriname and the Netherlands Antilles could partake in the decision-making process when the Dutch organs were to deal with a common matter for the Kingdom as a whole. This agreement would have the same legal status as the constitution and would function as a *lex specialis* vis-à-vis the constitution. This idea was rejected by Suriname. The Surinamese government considered this to be far less than the new legal order promised by Queen Wilhelmina in 1942. Suriname also rejected the idea that the constitution as such would remain in force for Suriname and the Antilles and demanded some form of a new Kingdom constitution that would be hierarchically superior to the constitution of the Netherlands.

The compromise reached in 1954 was the Charter. On the one hand, it did create a new legal order in the form of a Kingdom constitution, that creates Kingdom organs and Kingdom regulations superior to those of the Netherlands. The Charter puts the constitution in its place: it declares it to be the constitution for the Netherlands, in the same way that the constitutions of Aruba, Curaçao and St. Maarten are the constitutions of these countries respectively. It also solemnly declares that the Charter is hierarchically superior to the Dutch constitution. But on the other hand, it does not in itself provide for a fully-fledged constitution for the Kingdom as a whole, as did the proposed constitution of 1948. Instead, the Charter declares important parts of the Dutch Constitution to still be in force for the

Kingdom as a whole. The constitutional authorities of the Netherlands are still also the constitutional authorities acting for the Kingdom as a whole. The Charter only regulates what needs to be done in order to guarantee influence of the other three countries on decision making of the Kingdom as a whole. In that sense, materially speaking the Charter is mostly the agreement envisioned by the Dutch government in 1950/51. The Charter also lays down the serious limits on the powers of the Kingdom as a whole: it stipulates in art. 3 the powers of the Kingdom. These are few, apart from the obvious ones of defense and foreign affairs. And even in those two areas the Charter regulates important rights for the three Caribbean countries, so as to guarantee that they cannot be easily overruled or bound against their will. The Kingdom does have the power to interfere in the internal matters of the Caribbean countries in order to guarantee democracy and the rule of law, but those powers have been used very sparingly so far.

From an international perspective, the Charter regulates a very far-reaching form of autonomy. There is scarcely any other arrangement in the world that maintains constitutional ties between four entities and gives these entities that much constitutional autonomy. Although it is not written down in the Charter, it is an unwritten rule of Kingdom constitutional law that the three Caribbean countries have the right to secede from the Kingdom and thus gain a full measure of independence under international law. Compared to many other constitutional arrangements it is also quite striking that there is only a rather limited influence for the Caribbean countries on common decision making on the Kingdom level. Here, there is a very clear dominance of the Netherlands proper, so much so, in fact, that from the perspective of the Netherlands, the difference between itself and the Kingdom has always been rather artificial. It has something of a bargain: on the one hand, the three Caribbean countries have very little influence on what the Kingdom as a whole decides. On the other hand, the Kingdom has very little influence on the affairs of the Caribbean countries, because the powers of the Kingdom are so limited.

This balance has functioned well for the first decades of the Charter. That is no longer the case, mainly because the Caribbean countries perceive themselves to be sometimes severely limited in their autonomy. This is not because the Charter has been amended or the Kingdom has gotten more powers somehow, but because the Netherlands itself (the country) has intensified its cooperation with the Caribbean countries on subjects not reserved for the Kingdom. Often, this cooperation is in the form of the Netherlands donating money and demanding influence on decision-making in return. These developments are formally speaking completely outside the power-division that the Charter provides for: but precisely because the difference between the Kingdom and the Netherlands is rather artificial, this conclusion also becomes somewhat artificial. In the political and legal reality of the Kingdom in 2022, the powers of the Netherlands to interfere in the domestic affairs of Aruba, Curaçao and St. Maarten are far greater than they were thirty years ago. One can ask however, if this would have been different in any other constitutional arrangement. Socio-economic developments and differences being what they are, this is doubtful. The Charter therefore, has as such more or less delivered what the Queen had promised in 1942: not perfectly perhaps, but as a guarantor of constitutional autonomy it has almost no equal in the world. The democratic deficit in decision-making on the Kingdom level is to be corrected by the present Dutch government, if its government agreement is to be believed. And of course, when the people of St. Maarten would one day decide to no longer be bound by a constitutional link to the Netherlands, they can opt for full independence. If such a decision however would improve socio-economic conditions and therefore would enhance true autonomy (as opposed to just a formal one) is debatable, I would argue.