

## POSITION PAPER

**The Charter of the Kingdom of the Netherlands****I. Introduction:**

The Charter was enacted by law on October 28<sup>th</sup> 1954 and forms the highest Constitutional arrangement in the constellation of the Kingdom. The Kingdom of the Netherlands consists of 4 autonomous countries, namely the Netherlands, Aruba, Curacao and Sint Maarten, each with its own Constitution. The constitutions of the countries are subjected to the Charter, the regulations of the Charter are of a higher order.

In this paper I will not review the discussion on the establishment of the Charter and the meetings of the UN on its acceptance in determining whether or not in 1954 Surinam and the former Netherlands Antilles were formerly declared decolonized or not. I will focus on the following Question: a) the Constitutional Status of the Kingdom arrangement, b) the Question of Country within the Kingdom, c) the process of Decolonization, d) the Democratic Deficit and e) Recommendations. I will give a historic perspective on the Question of Decolonization, review the Democratic Deficit within the Kingdom and finalize by offering several Recommendations that I believe will strengthen and improve our Kingdom relationship.

**II. The Constitutional Structure of the Kingdom.**

The Charter regulates the Constitutional structure of the Kingdom of the Netherlands and how this structure functions. For many years the Question exists: What is the Constitutional Form of the Kingdom? Is it a Unitary State, a Federal State or is it a state Juris Sui Generis. The Charter is often referred to as a juris sui generis, meaning a special legal arrangement between parties. In Constitutional Law however such a structure is not common. Common are the state form of a Unitary State and a Federal State.

In a Unitary State all Governmental Power and Authority is attributed to the highest Government body, certain powers are then delegated downward to lower levels of Government. These lower levels of Government are subject to the powers and instructions from the higher levels of Government and are supervised in their decision making and the execution of their tasks. There is a vertical arrangement of Governmental authority and decision making.

In a Federal structure there is a delimitation of the Powers between the Federal Government and the Governments of the Constituent States that form part of the Federation. In other words a number of States choses to form a Federation and distribute the Governmental powers and authority among them. There is an enumeration of the powers attributed to the Federal Government and the powers that are not listed are attributed to the Government of the States.

**III. A review of our Kingdom Charter reveals the following:**

There is a Federal Government and a Federal Constitution being the Kingdom Government and the Charter. Each State has its own Constitution arranging the structure of its Government, Parliament and Judiciary. The Powers of the Federal Government are enumerated in article 3 of the Charter, consequently the remaining Governmental powers are attributed to the Governments

of the 4 countries, the Netherlands, Aruba, Curacao and Sint Maarten, as is also confirmed in article 41 section 1, of the Charter. The Countries have a measure of Full Internal Self Government as it pertains to those Governmental matters that are not attributed to the Kingdom Government in article 3 of the Charter. In the Charter there is little or no indication that the Kingdom structure is that of a Unitary State with the exception of a few articles regulating the Higher Supervision. This matter is a major source of contention between the Kingdom Government, the “Rijksminister Raad” (RMR) and the States. The composition of the Kingdom Government is also a source of contention. This will be further reviewed in the section on the Democratic Deficit.

### **Conclusions:**

I am of the opinion that our Kingdom structure is that of a Federal State and consequently it should function as such and not as a Unitary State as it does now. I further believe that if this matter is properly addressed it will enhance the proper functioning of our Kingdom and thus avoid many political and constitutional crises that we currently experience within the Kingdom.

#### **IV. The Question of Sint Maarten as a Country within the Kingdom.**

In the Pre-amble of the Kingdom Charter is stated that Aruba, Curacao and Sint Maarten voluntarily accept the legal status as a Country within the Kingdom. Article 1 states The Kingdom consists of the countries the Netherlands, Aruba, Curacao and Sint Maarten. By virtue of the afore-mentioned Sint Maarten has acquired the status as a Country within the legal order of the Kingdom Charter.

The Convention of Montevideo provides a number of criteria that a Country or State should possess: a) permanent population, b) defined territory, c) government, d) the capacity to enter into relations with other states. Taking the afore-mentioned criteria into consideration it must be concluded that Sint Maarten qualifies in meeting the 4 listed criteria. One may argue that Sint Maarten does not meet the criterion d) as foreign affairs is listed as a competence of the Kingdom Government. I beg to differ and refer to article 26 of the Charter and the practice of the Countries establishing international treaties between themselves and foreign countries.

It should be clear that my position is not that Sint Maarten is a Sovereign entity. Sint Maarten has chosen voluntarily not to declare itself Independent but to accept the position of a Country within the Kingdom of the Netherlands. This is in accordance with Principle VI sub b of the UN Resolution 1541. The Kingdom is the Sovereign entity and not any of the 4 countries separately. The afore-mentioned, further substantiates the position that the Kingdom is a Federal Structure consisting of 4 States similar to the United States of America. Finally it must be stated that in accordance with the UN Resolutions 1514 and 1541 on Decolonization, Sint Maarten still possesses its Right to Self Determination and can still opt to become an Independent State.

#### **V. The Question of Decolonization:**

Our colonial period goes back to 1629 under the West Indian Company. During the years that follow our islands were colonized at times by the English, the French and then again by the Dutch. During the colonial period the islands were governed by a director appointed by the West

Indian Company. During the period starting from 1815 the island were governed by the Government of the Netherlands, initially by the King until the change in the Constitution of the Netherlands in 1848 in which the political powers of the King were limited. The Colonies were then placed under the rule of a Minister of Colonies and the Department of Colonies.

The Governor was appointed by the King and played a very important role during this period. The Governor was in fact the “Government” of the Colonies in the West Surinam, Curacao, Aruba, Bonaire, Sint Maarten Saba and Sint Eustatius. The Governor would receive his instructions via an Ordinance called “Regerings Reglement” Government Regulation, the first of these were issued in 1815.

## **VI. The “Regerings Reglement” of 1865.**

For the purpose of analyzing the topic I wish to review in more detail the “Reglement” of 1865. This document is considered by many constitutional experts to be our first Constitution. In the Final document recording the deliberations on the implementation of this Regulation, the discussion entailed amongst others the introduction of a system of Self-Government, and Autonomy as well as a Constitutional system of Government.

The Executive Council consisted of the Governor as the President, the Prosecutor as vice-president and 3 members, all 5 were appointed by the King. The Colonial Council which was the legislative branch consisted of the members of the Executive Council and 8 other members appointed by the King, with the Governor as the President. The powers and authority of the Governor is listed in 57 articles. Article 29 states the Governor governs taking into consideration the law in the name and as representative of the King and is endowed with Executive powers. The Ordinance further regulates matters such as: the Territory, Fundamental Rights, Finances, Delimitation of Powers, Quorum and of course Supervision, Right of Amendment, Right of Initiative, which are typical matters that are regulated in any modern Constitution.

In 1936 our first “Staatsregeling” was established, in this Constitution the process of transferring Executive Powers from the Governor to a locally appointed Government and the election of a Legislature was started. At first only person who met certain criteria such as the level of education and payment of taxes were qualified to vote. In 1948 the “Staatsregeling” this process was continued in the Interim Regeling” of 1950. In 1951, the Island Regulation was introduced creating the Netherlands Antilles with a two level structure of Government, followed by the Kingdom Charter in 1954 and the Staatsregeling of the Netherlands Antilles of 1955. In 1962 the first Antillean born Governor, N. Debrot was appointed as Governor of the Netherlands Antilles.

It is my opinion that since 1865 we had a modern constitution although at time we were still a Colony. The Decolonization process for us started actually in 1865 and continued up and until the enactment of the “Statuut” the Kingdom Charter. By this process of Constitutional change and development of Self Government we must conclude that in 1954 and thereafter we cannot still be considered a Colony. I do not believe that the process of the acceptance of the “Statuut” by the UN in 1954 and the UN Resolutions taken, should be the only determining factors in providing an answer to this Question. In accordance with the articles of the “Reglement” of 1865, we already met the criteria for Statehood that were established much later in the

Montevideo Convention. In 1865 the Governor already had the authority to enter into agreements with foreign countries. These were of course subject to final approval by the King.

We must conclude however that it is legally not correct to state that we are still a Colony of the Netherlands and the Decolonization process has not been completed. From a historical and constitutional perspective there are no valid arguments to substantiate such a view.

On the question if we have attained a full measure of Self-Internal Government I will hasten to state: Yes we have, but there are still some restrictions that find their origin in the Kingdom Charter. Should measures be undertaken to correct this? Absolutely yes, and this Conference is a perfect attempt to initiate such action. The cause and reason for us having the feeling that we have not attained a Full measure of Self Government is directly related to the status we attribute to the Kingdom Government and the interpretation we give to the Constitutional Structure of the Kingdom, along with certain outdated structures, undemocratic organs and particular articles that are still part of the Charter. These impediments are referred to as the Democratic Deficit.

#### **VII. The Question of the Democratic Deficit.**

In handling matters within the Kingdom whether related to Kingdom competencies or internal matters of the Countries, the Netherlands has an undue advantage in comparison with the other partners in the Kingdom. It cannot be disputed that the Netherlands is the biggest, best economically developed, most experienced of the 4 constituent states with the largest population and the largest GDP compared to the others. These advantages are however not legitimate reasons for the Netherlands to command the democratic control of the entire Kingdom.

#### **VIII. The Kingdom Council of Ministers:**

The interpretation of the Kingdom structure as that of a Unitary state assists in perpetuating the Democratic Deficit. In a Unitary state theory the Kingdom is the State and the Countries are the Decentralized Governmental Units. The state possess all Governmental Powers and can delegate such powers to the Lower Level Governments. The Dutch Council of Ministers form the Kingdom Government according to article 7 of the Charter together with the Ministers Plenipotentiary who do not have any voting rights on matters being deliberated and decided upon. In other words the Dutch Council of Ministers who have no political affiliation with the voters of the Constituent States are given powers to rule and overrule the Governments and Parliaments of the Constituent States.

The composition of the Kingdom Council of Ministers is undemocratic to say the least. This Council can give instructions to the Governor on matters pertaining to the internal affairs of the country such as establishing the budget, elections matters and conducting investigations. Needless to say that such actions are undemocratic. In a Unitary State there is a vertical division of Governmental Powers from the top down, consequently Higher Supervision on the Lower Levels of Government is the norm. The Higher Supervision articles regulated in articles: 43 section2, 49,50,51,52 and 53 are remnants of the Colonial past and a result of the incorrect interpretation of the Kingdom structure as a Unitary State.

## **IX. A Kingdom Parliament**

The lack of a democratically elected Kingdom Parliament is another example of an undemocratic structure within the Kingdom constellation giving way for the Dutch Parliament and Senate to have a determining say in all matters related to the Kingdom and the Constituent States. It must be noted however that the Parliaments of the Constituent States are more involved in matters and have a larger measure of participation compared to matters that are handled by the Kingdom Council of Ministers. If the Kingdom of the Netherlands is viewed and governed as a Federal State the above mentioned impediment will be changed and or eliminated.

## **X. A Dispute Regulation**

During the negotiations for the dismantling of the Netherlands Antilles article 12 a. was added to the Charter. The lack of an adequate independent institution to handle disputes among the Kingdom partners resulting in the organs of the Country of the Netherlands determining how a conflict will be settled is another disadvantage for the Constituent States and further add to the existing Democratic Deficit.

Because of the smaller size in population and the inadequate financial and economic development of the Constituent States, it will take democratic processes, procedures and institutions to eliminate this Democratic Deficit and create a proper balance between the State of the Netherlands and the other partners.

## **XI. Recommendations:**

- a. We should define the Kingdom Charter as the Constitution of a Federal State and further develop and introduce the organs, procedures and structures to function as such.
- b. The issue of the Democratic Deficit should be resolved along these lines.
- c. A Democratically elected or appointed Kingdom Government and Parliament should be established in which the organs of all 4 countries are equally represented and involved.
- d. The delimitation of powers should be adhered to, the Kingdom Government should only handle and deal with Kingdom matters in accordance with article 3 of the Charter.
- e. The articles relating to Higher Supervision should be removed from the Charter.
- f. A Kingdom Constitutional Court should be established to settle administrative disputes between the Kingdom and the Constituent States and between the partners of the Kingdom.
- g. The Supreme Court should be granted the full competence to perform Judicial Review on all Ordinances and Decisions of Parliament, enacted and or taken by the Kingdom Parliament and the Parliaments of the Constituent States.
- h. Cooperation and collaboration should be promoted amongst the Constituent States and their agencies and in the private sectors in all areas.

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