

5 | Characterization of the Kingdom of the Netherlands in Constitutional Theory

The structure of the Kingdom under municipal law determines, to some extent, how international law looks at the Kingdom. In the context of the law of decolonization, the standards determining whether 'a full measure of self-government' has been achieved differ depending on whether the state presents itself as an integrated whole, or as an association of states, or as something else. It is therefore important to determine how the form of government of the Kingdom could be characterized, although it should of course be remembered 'that the various classifications of territories are primarily a matter of convenience and (...) the designation given to a territory as a matter of internal or constitutional law may not reflect its proper characterisation in international law'.¹

The official explanation to the Charter of 1954 states the Charter is a legal document with its own special character. Most Dutch authors agree that the constitutional order of the Kingdom does not fit any of the traditional forms of government. The Kingdom order is often described as a composite state with a unique, or *sui generis* character.²

It may not be possible to categorize the Kingdom with more precision, but I will discuss some of the attempts and see if the structure really does not resemble any of the established forms of government.

5.1 FEDERATION

Many authors have noted that the Charter has some federal traits,³ most importantly the division of power between the Kingdom and the Countries, based on the exhaustive list of subjects in the Charter, which is one of the basic characteristics of federations according to *Bernier*.⁴ It could be questioned,

1 Oppenheim/Jennings & Watts 1992, p. 277.

2 See for instance Kranenburg 1955, p. 23-33, Jonkers 1960, p. 1323, Van Aller 1994, p. 306, Van Rijn 1999, p. 72, and Hoogers & De Vries 2002, p. 36 and 41.

3 Logemann 1955, p. 439, Munneke 1993, and Van Aller 1993, p. 305. Some authors even simply consider it as a federation, see Belinfante & De Reede 1997, p. 301 et seq., and Bongenaar 1987, p. 242. Hirsch Ballin 1989, p. 464 describes it as 'a curious, somewhat limping federal structure'.

4 Bernier 1973, p. 5.

however, to what extent this division of power really exists, and whether it should not be considered as mere constitutional make-up.

The federal elements in the Charter were part of a compromise reached between the Netherlands and Surinam during the negotiations on the Charter. At first, a structure had been designed in which the Kingdom would become a fully functioning federation with its own legislature, executive and judiciary. This 'strong' Kingdom would guarantee that the interests of the overseas Countries were properly represented, but it was also feared there would not be enough work for full-time institutions, and that a federal structure would make too large a demand on the limited resources of the overseas Countries. After Indonesia had become independent, the draft for a federal 'Constitution for the Realm' (*Rijkgrondwet*) of 1948 was considered too burdensome by the Netherlands, also because a large part of the constitutional law of the Country of the Netherlands would have to be incorporated into it.⁵

In 1950, the Netherlands presented a 'Draft for a Charter' (*Schets van een Statuut*) was made, followed in 1952 by a Working Paper (*Werkstuk*), both of which abandoned the idea for a real federation and replaced it with a structure in which there would be no separate federal level, but merely co-operation between the Countries. No new institutions would be created, and it was proposed that the common affairs of the Countries would be handled largely by the organs of the Netherlands.

At the request of Surinam, the final text of the Charter represents a return in some respects to the federal language of the original Constitution for the Realm. The Charter seems to create a number of federal institutions, such as a Council of Ministers of the Kingdom, a *Raad van State* of the Kingdom, and a Kingdom legislator. But *Van der Hoeven* has argued convincingly that the Charter, despite its federal language, remained true to the concepts of the Draft and the Working Paper.⁶ The structure of the Kingdom remained the same. The new organs that the Charter creates, should not be considered new institutions, *Van der Hoeven* argues. There are no institutions of the Kingdom, except perhaps for the Kingdom government. The existing institutions of the Netherlands are merely attributed new functions by the Charter, and the existing institutions of the Netherlands Antilles and Surinam are given the right to influence the fulfilment of these functions by the Netherlands. When a Dutch institution acts as a Kingdom organ, it has the duty to follow the procedures of the Charter, but it does not change its character because of this, in *Van der Hoeven's* view, which I think is correct. This means that the Kingdom cannot really be considered as a federation. There is no true division of power between the Kingdom organs and the organs of the Country of the Netherlands.

5 Van Helsdingen 1957, p. 154 and 156, and Jonkers 1955, p. 54.

6 Van der Hoeven 1959. In a similar sense, see Borman 2005, p. 22-24.

Most writers on Dutch constitutional law agree that the Kingdom is fundamentally different from federations.⁷ This opinion is based especially on the fact that there is no real equality or equivalence of the constituent parts of the Kingdom, and that the Kingdom government hardly not function as a separate level of government. In 2005, the minister for Administrative Reform and Kingdom Relations responded to questions from the Lower House, that in his view the Kingdom was not a federation.⁸

5.2 CONFEDERATION

The Kingdom has occasionally been compared to a confederation. *Gastmann* detected a number of confederal elements in the structure of the Kingdom.⁹ *Bijkerk* in one of his pleas for a federal interpretation of the Charter, complains that ‘the worthy politicians on both sides of the [Atlantic] ocean have considered it opportune to interpret and apply the constitution of our Kingdom confederally.’¹⁰ Government statements have occasionally confirmed *Bijkerk’s* claim.¹¹

Oppenheim described confederations as ‘several fully sovereign states linked together for the maintenance of their external and internal independence by a treaty into a union with organs of its own, which are vested with a certain power over the member states, but not over the citizens of these states’.¹²

Some elements of *Oppenheim’s* definition more or less apply to the Kingdom. It is a union of three entities that operate rather independently, and which have some international personality.¹³ The union established by the

7 See for instance Luiten 1983, p. 69, Janus 1993, p. 36, Borman 2005, p. 23, Hoogers & De Vries 2002, p. 38, and Nap 2003a, p. 17. Bergamin & Van Maarseveen 1978, p. 432, and Matos 2002 call it a ‘pseudo-federation’.

8 *Aanhangsel Handelingen II*, 2005/06, nr. 396.

9 Gastmann 1968, p. 115.

10 Bijkerk 2003, p. 1862. *Bijkerk* considers that it would not be allowed to radically change this interpretation without first consulting the populations of the Netherlands Antilles and Aruba in a referendum.

11 See for instance the explanation of the Kingdom order by the Dutch representative during the discussion of the report of the Netherlands on the ICESCR in 1998, E/C.12/1998/SR.15.

12 Oppenheim/Jennings & Watts 1992, p. 246-7.

13 It is usually assumed by writers on Dutch constitutional law that only the Kingdom has international legal personality, whereas only the Countries have legal standing under municipal law (see for instance Borman 2005, p. 25, and Hoogers & De Vries 2002, p. 192). But if the Netherlands Antilles and Aruba do not possess a full measure of self-government, they can still exercise at least one right under international law, namely the right to self-determination, as part of their process of decolonization. This suggests that the Countries, or their ‘peoples’, have a form of international personality. GA Resolution 2625 (XXV) of 1970 declares that territories such as the Netherlands Antilles and Aruba have ‘a separate status’ under international law. If it is assumed that the Charter creates an imperfect form of free association between the Countries, than they should also be viewed as having

Charter has very little direct control over the citizens of the Countries.¹⁴ *Oppenheim* furthermore notes that the chief organ of a confederation 'is one where the member states are represented by diplomatic envoys; its power (...) is essentially nothing else than the right of the body of the members to use various forms of coercion against such a member as will not comply with the requirements of the Treaty of Confederation.' This description somewhat resembles the practice of the Council of Ministers of the Kingdom, which more or less functions as a procedure for conferring with the ministers plenipotentiary as ambassadors of their Countries. Decisions of the Kingdom are almost always based on consensus between the Countries.

The powers of the Kingdom government to intervene in the administration and legislation of the Caribbean Countries do not conform to this description of confederations, but these powers have so far been left unused. Other Kingdom powers are usually only employed with the consent, or even at the request of the Countries.

The comments of the representative of India (and some other states) during the UN debates of 1955 suggest that the Kingdom was viewed in some quarters as a confederal structure linking an independent state with two colonies. India also claimed that the Kingdom as a whole should not be considered as a state under international law, but this conclusion is not shared by any writer, as far as I am aware, and it is also not supported by the international practice, which accepts that the Kingdom is authorized to conclude treaties and to perform other functions of independent states.

An important difference with confederations is that the Kingdom Charter is not an international treaty and that the Countries are not sovereign states. The Charter does bear some resemblance to a treaty (it is based on voluntariness and can only be amended with the approval of the 'state parties'), and the Countries are proto-states in the sense that they can perform most of the functions of states and they can choose to become independent (except the Netherlands).

It could therefore be argued that the Kingdom is somewhat similar to a confederation.¹⁵ But the fact remains that the Kingdom relations are not based

international personality. Only when the Netherlands Antilles and Aruba are considered as integrated with the Netherlands – an interpretation of the Charter which I will reject in the next Chapter – could it be argued that only the Kingdom has legal standing under international law.

14 The authority of the Kingdom legislator is mainly limited to subjects which usually have no direct impact on the life of its citizens. A few exceptions are the laws and regulations concerning Dutch nationality, extradition, and royal decorations. But on these subjects, the Kingdom legislator may sometimes choose to apply different standards in different Countries, for instance with regard to extradition.

15 This would spell doom for its present constitution, because confederal systems tend to be regarded as unsatisfactory and are usually not long-lived. In time, they always seem to be dissolved or transformed into real states, *see* *Oppenheim/Jennings & Watts* 1992, p. 246-8.

on a treaty concluded by independent states.¹⁶ It would also be hard to deny that the Kingdom is considered a state under international law. For those reasons, *Oppenheim* does not discuss the Kingdom under the heading of 'Confederated states' (but under 'Colonies', *see below*).¹⁷

5.3 CONSTITUTIONAL ASSOCIATION

The term 'constitutional association' was used by *Janus* to describe the Kingdom, to make clear that the relations are determined (mainly) by the municipal law of the Kingdom, and not by international law (as is probably the case with free association).¹⁸

The term 'association' in this context refers to the voluntary and cooperative structure that the Kingdom intended to create. It is often used to describe the constitutional structure of the Kingdom, also by the Kingdom government.¹⁹

Van der Hoeven, in his insightful article on the relation between Kingdom law and the constitutional law of the Netherlands, coined the phrase 'the cooperative Kingdom', in which the Netherlands performs certain tasks for the Caribbean Countries after consulting with them.²⁰ This interpretation, which *Van der Hoeven* defends on dogmatic grounds, rejects the idea of the Kingdom as a separate, superimposed layer of government, and is more in line with the idea that there exists a 'constitutional association' between the three Countries. This interpretation is also confirmed by the practice of the Kingdom, at least before 1990, in which the Kingdom has functioned as a procedure for Dutch organs to consult with the Netherlands Antilles and Aruba before acting on their behalf. *Borman* therefore considers the Kingdom could be described as cooperative structure governed by constitutional law.²¹ I think that terms such as 'cooperative structure' or 'constitutional association' reflect the essential characteristics of the Kingdom – as it has operated in practice – quite well. But this is perhaps not a very meaningful conclusion since these terms are not defined in the general doctrine concerning constitutional law. Also, they do not reflect the fact that the relation between the Kingdom and

16 *Similarly, see* Meel 1999, p. 62.

17 *Oppenheim/Jennings & Watts* 1992, p. 280-1.

18 *Janus* 1993, p. 36. *Janus* does think the relations have an international aspect, because the Netherlands Antilles and Aruba can claim a right to self-determination as long as they are not independent. *Van Rijn* 1999, p. 57-8 considers the relations with the Netherlands as a form of association, and on p. 72 he writes that these constitutional relations are also determined by the international right to self-determination.

19 *See for instance* the Core Document which serves as the basis for the Kingdom's reports on its compliance with the UN human rights treaties to which the Kingdom is a party (UN Doc. HRI/CORE/1/Add.66, par. 32).

20 *Van der Hoeven* 1959, p. 388.

21 *Borman* 2005, p. 24.

the Caribbean Countries is still hierarchical, as evidenced by Articles 43 through 51 of the Charter (*see* Chapter 4).

5.4 OTHER FORMS OF OVERSEAS RELATIONS

5.4.1 Dominions

The status of the Caribbean Countries has also been compared to that of the dominions within the British Commonwealth between 1926 and WW II, a status that also ‘defies classification’.²² The dominions (Australia, Canada, South Africa, New Zealand, Newfoundland and Ireland) were ‘autonomous communities within the British empire, equal in status (...) and freely associated as members of the British Commonwealth of Nations’.²³ As determined by the Statute of Westminster of 1931, the dominion parliaments became equal in status to the UK parliament, and the dominions themselves decided to what extent they wished to cooperate with the UK. The UK could only legislate for the dominions if they so desired. This status was therefore (broadly speaking) similar to that of the Cook Islands and Niue.

According to *Kranenburg*, the Kingdom is tied together more strongly than the pre-War Commonwealth was, by the acceptance of a common area of legislation and administration, and by a certain right of supervision by the Kingdom government, which did not exist for the dominions.²⁴ *Logemann* considered that these differences were necessitated by the fact that Surinam and the Netherlands Antilles considered themselves ‘not yet well enough equipped’ to exercise all of the functions of a state, whereas the dominions were already developed enough ‘to stand by themselves under the strenuous conditions of the modern world’ in 1926.²⁵

Baker considered the dominions as separate persons under international law because they were ‘capable of practically every international relationship of which “sovereign states” are capable’.²⁶ The Netherlands Antilles and Aruba have not reached this point. The Kingdom Charter does not explicitly prohibit the Countries to develop their ‘proto-dominion status’²⁷ into something more akin to independence. The Charter in fact requires the Kingdom

22 According to the Commission on Inter-Imperial Relations (1926), cited in *Kranenburg* 1955, p. 23. *Klinkers* 1999, p. 427 gives an historical overview of the use of the term ‘dominion’ in the debates on the status of Surinam and the Netherlands Antilles.

23 The Balfour Declaration adopted at the Imperial Conference of 1926.

24 *Kranenburg* 1955, p. 33. *See also* Van der Pot 1946, p. 110.

25 *Logemann* 1955, p. 55-6.

26 *Baker* 1929, p. 353.

27 This description was used by a Surinam politician (*Pengel*) during the negotiations on the Charter (cited in *Klinkers* 1999, p. 427) and during the debates on the approval of the Charter in the *Staten* of Surinam by representative *Karamat Ali*, cited in *Meel* 1999, p. 77.

to involve the organs of the Countries as much as possible with Kingdom affairs, including foreign affairs and defence.²⁸ The only limit that the Charter places on the independent operation of the Countries is the conclusion, approval and ratification of treaties, which the Charter attributes to the King and the *Staten-Generaal*.

The potential for a more independent role of the Caribbean Countries on the international scene has not been developed fully (*see also* in the next Chapter the paragraph on free association), and the status of the Netherlands Antilles (and Aruba) has largely stayed the same since 1954, for which reason the Kingdom is essentially different from the pre-War Commonwealth.

5.4.2 Puerto Rico

The Commonwealth status of Puerto Rico has also been compared to the status of the Netherlands Antilles and Aruba.²⁹ The constitution of Puerto Rico may also be considered as a constitutional appendix to the US Constitution, and the island also has a slightly ambiguous and uncertain status in relation to the US that dates from the same time as the Kingdom Charter.

But Commonwealth status seems to mean more metropolitan involvement and interference. The US Congress has retained its authority to legislate for Puerto Rico, and considers this authority as principally unlimited. The legislative and executive powers of the Kingdom in the Caribbean Countries are more restricted than those of the US in Puerto Rico. The Caribbean Countries also have more formal ways of influencing metropolitan decisions than Puerto Rico, and the Kingdom is not allowed to revoke the autonomy of the Countries, except temporarily and as a last resort. The nationality of the Caribbean Dutch is guaranteed by the Kingdom Charter. All this indicates that the Kingdom Charter has created more equivalent relations than the US relation with Puerto Rico.

5.4.3 New Caledonia

The new status of *pays d'outre-mer* of New Caledonia is comparable to the status of the Netherlands Antilles and Aruba in the sense that New Caledonia also has a separate identity within the Republic – tied to France, but not entirely a part of France in every respect. But French metropolitan control over various aspects of the government of the islands still appears to be considerably stronger. French citizens in New Caledonia also still possess several rights that they can claim from the French government directly, which means that

28 Article 6, para. 2 of the Charter.

29 Hintjens 1997, p. 538, and Van Aller 1996.

New Caledonia is probably more integrated into the mother country than the Dutch Caribbean Countries. Another important difference is that France seems never to have contemplated refusing their overseas citizens access to the metropolis, as the Dutch government has done.³⁰

The participation of New Caledonia in the exercise of the reserved powers of France is different from that of the Netherlands Antilles and Aruba. New Caledonia votes for the president and the parliament of France, but it does not have a representative comparable to the Ministers Plenipotentiary of the Dutch Caribbean Countries. The French government is obligated to request the advice of the local institutions in a number of situations, but for the most part it is constitutionally allowed to proceed on its own in the affairs that are not part of the autonomy of New Caledonia. Again, this points more to a form of integration into the mother country than the status of the Netherlands Antilles and Aruba.

5.4.4 Cook Islands and Niue

The Cook Islands and Niue are part of the Realm of New Zealand, but they are not part of New Zealand, which makes their status similar to that of the Netherlands Antilles and Aruba. But the New Zealand government has no authority whatsoever to legislate for the Cook Islands, and for Niue only when that island requests it and consents to it. New Zealand also lacks any other authority to intervene in their affairs. These territories also have full control over their constitutions, which are the highest laws in the territories. The autonomy of these territories therefore exceeds that of the Netherlands Antilles and Aruba considerably. Curiously, a considerable part of the law in force in the Cook Islands, and even more so in Niue, consists of English common law and New Zealand laws that date from before the period of free association. The territorial parliaments are allowed to replace these foreign sources of law by indigenous legislation, but have not done so in many areas.³¹ In this respect, they seem to be more closely connected with the metropolis than the Netherlands Antilles and Aruba, even though their legislative powers are formally larger than those of the Dutch territories.

For the same reason, the Netherlands Antilles and Aruba are essentially different from other associated territories such as the Federated States of Micronesia. The debate on the relations between the US and the associated

30 In 2006, the Dutch government presented a bill to enable the expulsion of unemployed Antillean and Aruban youngsters with insufficient education. At the time of writing, it was still uncertain whether the bill would become a law. Klinkers 1999, p. 327 et seq. describes the migration policies of France and the US, as compared to those of the UK and the Netherlands.

31 See Ntunmy 1994, p. 3 et seq. for the Cook Islands, and p. 158 et seq. for Niue.

states of Micronesia and the Marshall Islands, and between New Zealand and the Cook Islands and Niue is nonetheless somewhat reminiscent of the status debate in the Kingdom, especially regarding the relation between the Netherlands Antilles and the Netherlands. The fact that all of these islands depend to a considerable extent on support from the metropolis probably has a strong influence on the character of the relations, at least in the public debate.

5.4.5 West Indies Associated States

The closest parallel to the Kingdom relations is probably the British West Indies Associated States (WIAS), which no longer exist. Similar to the Kingdom Charter, the system of the WIAS was characterized by a limitative list of affairs that were attributed to the UK government, which was largely identical to the list of Kingdom affairs in the Charter. All other subjects were exclusively attributed to the governments of the associated states. The UK only had a right of intervention in case the foreign affairs or the defence of the associated state were at stake. The way in which the associated states were allowed to play a limited role in international affairs is also mirrored rather closely in the situation of the Netherlands Antilles and Aruba.

The West Indies Act did not create a superstructure similar to the Kingdom, and the associated states did not have representatives that took part in the deliberations of the government in London. Another difference was the absence of a right of abode in the UK for the citizens of the associated states. But this does not really change the basic constitutional structure, as well as the practice based on it, which appears to have been very similar.³²

5.4.6 Colonies

Some of the five elements of colonial status identified in the international literature (*see* Chapter 2) apply to the Netherlands Antilles and Aruba. They are clearly separated from the Netherlands by an ocean, and different in cultural and many other aspects from the Netherlands. If the Kingdom government is seen as the metropolitan government, then the Caribbean Countries are subordinated to the metropolis, which still has some powers in these territories. The Netherlands Antilles and Aruba depend on the Netherlands

32 In a similar sense, *see* Oostindie & Klinkers 2003, p. 237, note 18. *See also* Broderick 1968, p. 400, who considers the only major distinction between the UK association and the Kingdom relations (a 'satisfactory solution by a Country with a similar problem to the United Kingdom') to be the absence of a right of secession for the Dutch Caribbean Countries. As was explained in Chapter 4, the Countries have obtained this right. *See further* Chapter 3 for a description of the WIAS and the reasons why these territories all became independent during the 1970s and 1980s.

in the sense that they do not handle their own foreign affairs, defence and a few other affairs, and in the sense that they rely to some extent on financial contributions from the Netherlands. Whether the relations with the Netherlands are not voluntary, which is probably the most important characteristic of colonial status, will be discussed in Chapter 6.

The term 'colonies' was never clearly defined in Dutch constitutional law. The overseas territories were originally considered to be possessions of the colonial trading companies, and from 1813 possessions of the Dutch state, which were administrated by the King without any constitutional restrictions. During the course of the 19th century, parliament extended its authority to the colonies and at the start of the 20th century, the colonies were no longer considered possessions, but part of the territory of the Dutch state. The precise nature of the legal relation between the metropolis and the overseas territories remained somewhat murky.³³

The End of the Colonial Era

The end of the colonial era was celebrated more than once in the Netherlands. In 1922, the term 'colonies' was deleted from the Dutch Constitution to enable the development of the constitutional status of the Dutch East Indies.³⁴ Doubts persisted in the legal scholarship whether Curaçao was still a colony. The criterion used in this discussion was whether the overseas territories were subordinated to the Netherlands. Some writers claimed the territories were 'coordinated' on an equal footing with the other parts of the Kingdom. These writers claimed that the Kingdom consisted of four separate parts which were all equally subordinated to the state, and which each had their own legislator.

Others rejected this interpretation as unrealistic, because the legislator for the overseas territories was ultimately still the Dutch *Staten-Generaal* and government, even though the Constitution of 1922 introduced the principle that the internal affairs of the overseas territories should be handled by the organs of those territories. This principle meant a decentralization of authorities from the metropolitan to the overseas organs, but it did not affect the subordination of the overseas territories to the metropolis. Also, the Netherlands could still unilaterally decide to change the Constitution. Some authors therefore continued to describe the position of the overseas territories as subordinated to the Netherlands.³⁵ *Van der Pot* and others saw the relation as developing from subordination into something else (perhaps 'sub-coordination'

33 See Van Vollenhoven 1934.

34 Kranenburg 1930, p. 132-3. In 1936 the word 'colony' was dropped in the name of 'Curaçao and dependencies', see De Gaay Fortman 1947, p. 37.

35 Oud 1967, p. 14-5.

as *Eigeman* called it), because of which the relation could not yet be categorized.³⁶

One of the aims of the Kingdom Charter of 1954 was to end all remaining doubts regarding the status of the Dutch Caribbean territories.³⁷ In The Hague, it was expected that the Charter would easily succeed in obtaining this goal, and the Charter was therefore hailed as the end of the colonial era in the Dutch West Indies. Dutch premier Drees stated during the final conference that: 'The colonial relation is ended; the intensive consultations alone are proof of that; those would have been out of the question during colonial times'.³⁸ In the Dutch Lower House, it was stated that a colonial relation was terminated by independence, but also when the 'unlimited supremacy of the mother Country' ended. In the opinion of many members of parliament, the Charter had transformed the colonial relation of subordination into a relation based on equivalence.³⁹ Only the communist members maintained that the colonial status of the Netherlands Antilles and Surinam would be continued under the Charter.⁴⁰

Kranenburg described the Charter as a radical breach with the colonial situation,⁴¹ and *Oud* wrote that the Charter ended the subordination of the Netherlands Antilles and Surinam.⁴² But some writers on constitutional law were less certain. *Ooft*, while accepting that the Charter had created equivalent Countries, found Articles 41 through 51 colonial, as well as the regulations for the Governor.⁴³ *Van Haersolte* compared the Charter to the draft Constitution for the Realm of 1948, and concluded that it represented less of a radical breach with the old structure of the colonial era.⁴⁴ Much of the international literature also continued to consider the Netherlands Antilles and Surinam as colonial or dependent territories (*see* Chapter 6).

The continued doubts may be explained partly from the fact that the Charter was born from the desire to make as few changes to the constitutional order of the colonial era as were necessary to realise a substantial amount of autonomy for the overseas Countries at relatively low costs, both in man power and financially. Surinam and the Netherlands Antilles were mainly interested in economic autonomy. The Netherlands was not prepared to create a really federal structure that would give the Caribbean Countries a say in Dutch

36 Van der Pot 1946, p. 110.

37 Kranenburg 1955, p. 9.

38 Cited in Klinkers 1999, p. 131. *See also* Van Helsdingen 1957, p. 586 for the opinion of the government of the Netherlands as expressed in parliament.

39 *See* Van Helsdingen 1957, p. 584 and Klinkers 1999, p. 209-10.

40 Klinkers 1999, p. 130.

41 Kranenburg 1955, p. 92. Kranenburg 1958, p. 48-9 placed the breach with the colonial era in 1950-1 when the Interim Measures went into force.

42 Oud 1967, p. 22. *In a similar sense, see* Van der Pot/Donner/Prakke et al. 2001, p. 822.

43 Ooft 1972, p. 197-9.

44 Van Haersolte 1988, p. 158.

affairs, and also not prepared to relinquish all constitutional control over the territories. Because of this, the new order still exhibited elements of subordination, in spite of the Charter's claim that the Countries were equivalent.

Comparison of the Kingdom Order with Colonial Forms of Government

A number of aspects of the constitution of the Kingdom are still similar to forms of colonial government.

1. The constitutional institutions of the European part of the Kingdom continue to handle the Kingdom affairs for the overseas Countries, although the influence of the Caribbean Countries increased in these areas after 1954. The Council of Ministers of the Netherlands and the Dutch *Staten-Generaal* can still take unilateral actions (in the form of Kingdom legislation, or other decisions) that can be made binding on the Caribbean Countries against their will, when it concerns Kingdom affairs, or when the Netherlands considers that the interests of the Kingdom as a whole are at stake. This does not mean that the Netherlands Antilles and Aruba still fall under the unrestricted legislative and administrative powers of the Netherlands, as in truly colonial systems of government. The Charter lists the Kingdom affairs exhaustively, and since the Charter cannot be amended without the consent of the Netherlands Antilles and Aruba, the powers of the Netherlands in the Caribbean are constitutionally limited.
2. The power of interpretation of the Charter ultimately lies with the Netherlands, without – in many cases – the possibility of constitutional review by the courts, which are not allowed to test Kingdom acts against the Charter or the Constitution of the Netherlands.⁴⁵ This means that any interpretation of the Charter laid down in such forms of legislation is final.⁴⁶
3. The Crown still appoints the Governors and some other officials for the Netherlands Antilles and Aruba. In the first edition of *Oppenheim*, it was considered to be the determining factor for colonial status 'that their Governor, who has a veto, is appointed by the mother Country'.⁴⁷ The Governors are always native Antilleans or Arubans, and they are proposed for appointment by the government of the Country concerned. The Governors nowadays function mainly as organs of their Countries, and

45 HR 14 April 1989, AB 1989, 207 (*Harmonisatiewet*).

46 Except when it violates self-executing provisions of international treaties, see Article 94 of the Netherlands Constitution. Besselink et al. 2002, p. 46 and Hoogers & Nap 2005, p. 81-4 think that this provision does not apply to Kingdom acts. Other writers think it does, see for instance Van Rijn 2005a, p. 106.

47 Oppenheim 1905, p. 103.

not so much as representatives of the Kingdom government.⁴⁸ But the Governor does still have the duty to report decisions of the local government to the Kingdom government if he considers them to be in violation of international treaties, the Charter, other Kingdom legislation or if he thinks they conflict with the interests that the Kingdom has to observe or safeguard.

4. The Netherlands Antilles and Aruba cannot change certain parts of their constitutions without the consent of the Kingdom government.
5. There are also a few other, less fundamental aspects of the Kingdom relations that essentially date from the colonial era.⁴⁹

There are also a number of fundamental *differences* compared to colonial forms of government.

1. The Charter can only be changed with the consent of the parliaments of the overseas Countries. This points to a relation of equivalence.
2. The legal order of the Charter is based on consultation, cooperation and consensus, at least in practice. It does leave some room for unilateral actions by the Netherlands which can be made binding on the Netherlands Antilles and Aruba, but as a rule, the Kingdom only acts as with the consent of all three Countries. The Caribbean Countries can always claim the right to be informed and consulted on Kingdom affairs.
3. The Kingdom relations are voluntary for the Netherlands Antilles and Aruba. There has been little to no evidence in the 20th century that the

48 *Borman* has proposed that the Governor should become entirely an organ of the Countries (Borman 2005, p. 18).

49 For instance: the 'colonial clause' of the European Convention on Human Rights of 1950 (Article 56, para. 3) is considered to apply to the Netherlands Antilles and Aruba. This clause, which is also a part of each protocol to the Convention, intended to allow a 'different' level of human rights protection in 'certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention' (*Tyrer v. the UK*, judgement of 25 April 1978). It provides that 'The provisions of this Convention shall be applied in such territories with due regard (...) to local requirements.' The Court of Human Rights has interpreted the phrase 'local requirements' very restrictively. In 2005, it accepted that the pacification of the conflict in New Caledonia as well as the exercise of the right to self-determination of the local population required far-reaching restrictions on the right to vote, which were not in violation of Article 3 of the first protocol, read in conjunction with Article 56, para. 3 (*Py v. France*, judgement of 11 January 2005 (application no. 66289/01)). Another colonial relic can be found in the decision of the Supreme Court of the Netherlands to accept that the principle of legality does not apply to the Kingdom order, as far as extradition is concerned. The decision concerned a regulation (similar to an order in council) dealing with extradition, which was not based on delegation by the Kingdom legislator, and which only applied to the Netherlands Antilles and Aruba. This situation dated from before the Kingdom Charter. See HR 7 November 2003, NJ 2004/99, m.n. Koopmans, who called this a 'colonial remnant' for which the Kingdom legislator 'ought to be ashamed'.

population of the islands would wish to sever the ties with the Netherlands. As *Ermacora* states, colonial status ends when the population freely chooses its political status.⁵⁰ It could, however, be doubted to what extent the current status of the islands is really 'freely chosen' by the population.

These three differences should probably lead to the conclusion that the legal order of the Kingdom is essentially different from traditional colonial forms of government, even if it was not achieved in a way that could be considered an expression of the right to self-determination.

The Kingdom Charter does however still put the Netherlands Antilles and Aruba in a formally somewhat subordinate position. An essential factor here could be that the Kingdom legislator has the power to interpret the Charter, and the Netherlands can control the Kingdom legislator. The Netherlands usually chooses not to force the issue because it often does not have a stake in Antillean or Aruban problems, and if it does, it will seek to negotiate and compromise. But the Netherlands Antilles and Aruba cannot but be aware of the possibilities that the Charter offers to the Netherlands in case of a conflict. This sometimes leads to accusations of colonial behaviour.

Anti-Colonial Discourse Concerning the Kingdom

The colonial history of the Kingdom relations still clearly plays a role in the public debate on the political relations between the Countries, and on the situation of the Caribbean Countries. There still exists a general perception in the Netherlands, the Netherlands Antilles and Aruba that the process of decolonization is somehow incomplete.⁵¹

The word 'colony' and its derivatives are often simply fighting words, used out of anger over incidents in which the Netherlands was perceived to act dominantly or showed a lack of respect for the Netherlands Antilles and Aruba. They are sometimes used to convey more profound dissatisfaction with the Kingdom order.

Social scientists still tend to recognize various influences of the colonial system in the societies of the Netherlands Antilles (and to a lesser extent Aruba), and often see the decolonization of the Netherlands Antilles and Aruba as incomplete. *Verton* considers that the Charter was the starting point for a process of decolonization that would meet with considerable resistance from the colonial system in the colonies itself. In his view, the introduction of general suffrage and autonomy for the Netherlands Antilles hailed the be-

50 *Ermacora* 1992, p. 662.

51 See for instance the title of John Jansen van Galen's review of the Kingdom relations (2004): *De toekomst van het Koninkrijk. Over de dekolonisatie van de Nederlandse Antillen* ('*The Future of the Kingdom. On the Decolonization of the Netherlands Antilles*').

ginning of the 'late colonial phase', which has not been completed yet.⁵² The effects of the Dutch policies of decolonization unintentionally led to 'political disintegration, an unproductive political system, and a stagnant socio-economic development process', *Verton* wrote in 1990. He rejected the Dutch insistence on independence as 'pseudo-decolonization', because it would lead to more dependence and fewer opportunities for development, which is the opposite of what decolonization should aim to achieve.⁵³

Broek & Wijenberg consider the present relations between the Netherlands and the islands cultivate a significant 'colonial' element, because of the dominant role of gifts. The financial support of the islands by the Netherlands is still considered as a gift and not as a legal obligation. According to *Broek & Wijenberg*, the acquirement of gifts by the islands from the Netherlands fits the social and psychological relations between master and slave. An unequal relation based on gifts and the absence of legal certainty creates mutual distrust and makes cooperation difficult.⁵⁴

Historians such as *Oostindie* describe the decolonisation of the Dutch Caribbean as 'incomplete' or 'unfinished'. *Oostindie* has also written about a 'stagnant' decolonization process. In this case, he explains that this description derives from others, and that it suggests that decolonization should always lead to independence, which suggestion *Oostindie* rejects.⁵⁵

In the Netherlands Antilles and Aruba, the relations with the Netherlands are still described in terms of decolonization. *Gorsira* considers the Kingdom as an intermediate phase in the process of decolonization.⁵⁶ Other Antillean and Aruban writers simply describe the relations as a form of colonial subordination. *Duzanson*, in his introduction to the public law of St. Maarten, states that the constitution of the Kingdom and of the Netherlands Antilles makes it possible for St. Maarten to be brought into a subordinate or colonial position, and that this possibility is occasionally used.⁵⁷ *Lake* describes St. Maarten as 'one of the last colonies of the Caribbean'.⁵⁸ *Croes* thinks the relation of Aruba with the Netherlands is one of subordination.⁵⁹ *Brison* thinks his fellow-Antilleans are suffering from a colonial complex which prohibits them from taking charge of their own destiny.⁶⁰

52 *Verton* 1977, p. 234. *Verton* stresses that colonialism is not merely a relation between a mother Country and an overseas territory, but also consists of relations within the colony itself, namely between the 'colonial elites' and the 'colonized'.

53 *Verton* 1990, p. 215.

54 *Broek & Wijenberg* 2005.

55 *Oostindie* 1994, p. 13.

56 *Gorsira* 1988, p. 60.

57 *Duzanson* 2000, p. 55-6.

58 *Lake* 2000, p. 35.

59 *Croes* 2005, p. 66.

60 *Brison* 2005, 35 et seq.

There are also a few foreign authors who seem to have little doubt that the Netherlands Antilles and Aruba are still colonies. *Connell*, for instance, considers that only Great Britain and the Netherlands 'formally retain colonies'.⁶¹ *Novak*, in his authoritative commentary on the ICCPR, places the Arubans in the category of 'peoples living under colonial rule or comparable alien subjugation'.⁶² *Oppenheim* discusses the Kingdom in his paragraph on colonies, although he considers the Kingdom relations as not 'fully colonial'.⁶³ Occasionally, the Kingdom is faced with the fact that foreign states view the Caribbean Countries as colonies, but these views are rarely expressed in public.

The word 'colonial' is still used in the Netherlands, the Netherlands Antilles and Aruba by politicians, activists and writers as a way of generating outrage and decrying the Kingdom relations as a form of repression of the Netherlands Antilles and Aruba. Sometimes the anti-colonial doctrine that overseas territories should always become independent is used as a hidden argument, in which case it is easy to reach the conclusion that the Kingdom relations are colonial. But the anti-colonial discourse is also used by people who think the autonomy of the Netherlands Antilles and Aruba is absolute and should always be respected by the Netherlands, in which case 'colonialism' refers to Dutch interference or domineering behaviour. A recent example occurred when Antillean minister of economic affairs Cova visited Venezuela, where he explained that the Dutch colonizers had forced a colonial complex on the Antilleans which was 'clever and very thorough' because 'it makes you feel that you are worthless because you can do nothing'.⁶⁴ Anti-colonial discourse can also be used in situations where the Netherlands refuses to grant the wishes of a Caribbean Country, as in the case of the sugar and rice conflict with the EU.⁶⁵

These accusations of colonialism have been called 'colonitis', and they are sometimes used very effectively as a way of influencing the behaviour of politicians or entrepreneurs from Holland who are perceived as a threat to the autonomy of the Netherlands Antilles or Aruba.⁶⁶ Occasionally it is also used by the Dutch to criticize their own government's policies with regard

61 Connell 1987, p. 411.

62 Novak 1993, p. 21, note 87.

63 Oppenheim/Jennings & Watts 1992, p. 280.

64 Reported in the *Amigoe* of 9 May 2005 and the *NRC Handelsblad* of 13 May 2005. The minister was soon after forced to resign by the *Staten* because of this statement, among other things. Premier Ys considered Cova's statements damaging to the Kingdom and a snub to the Queen. A similar statement was made soon afterwards by Eduardo Cova (a nephew of minister Errol Cova and one of the Commissioners of Curaçao) during a memorial of 30 May 1969, see the *Amigoe* of 31 May 2005. Errol Cova later stated that Curaçao had started 'a process of decolonization' that no-one should hinder (*NRC Handelsblad* 8 August 2005).

65 See Chapter 9.

66 De Jong 2002, p. 59 et seq. describes several outbreaks of 'colonitis' as deliberate attempts to scare off the Dutch, or to force them to comply with Antillean demands.

to the Netherlands Antilles and Aruba, in which context it often seems to mean simply 'wrong'.⁶⁷

The debate on constitutional reforms has inspired Antillean and Aruban politicians to address pleas to the Decolonization Committee, to visit New York (with the hope of being received by the Committee), or to threaten such actions, or to consider asking an independent neighbouring island to ask the GA to revise its decision of 1955.⁶⁸ The idea that the Decolonization Committee could discuss the Netherlands Antilles is based on the assumption that the UN should not have accepted the cessation of transmission of information on the Netherlands Antilles in 1955,⁶⁹ or on the idea that Resolution 1514 (XV) of 1960 (the Declaration on the Granting of Independence to Colonial Countries and Peoples) applies to all overseas territories that have not become independent yet.

The colonial history of the Kingdom relations continues to cast a dark shadow over the present relations. If this will ever change, is hard to predict, and not really a subject of legal research anyway. But constitutional law could

67 See for instance the remarks by member of the Lower House Van Bommel in reaction to the announcement that the Netherlands would start restricting the access to the Netherlands of unemployed and uneducated youngsters from the Antilles and Aruba (reported in *De Telegraaf*, 11 May 2005).

68 Aruba sent a delegation to the Decolonization Committee in 1977. Aruban leader Croes claimed that the vice-president of the Decolonization Committee and several members received the Aruban delegation, and were very curious to know why the Netherlands would not grant Aruba independence (see Paula 1989, and Croes & Moenir Alam 1990, p. 84). The governing party *MEP* of Aruba addressed a letter to the UN in 2003, in which it claimed that the Netherlands intended to stop Aruba from becoming independent (*Amigoe* of 18 November 2003).

Minister Cova of the Netherlands Antilles shortly thereafter contacted the Decolonization Committee for advice on the meaning of the right to self-determination and the possibility of holding UN-supervised referendums (*Amigoe* of 20 November 2003). This news was discussed with some concern in the Senate of the Netherlands, but Dutch minister for Kingdom Affairs De Graaf stated that Cova had asked legitimate questions to the Committee, and that the Netherlands had not minded it when representatives of Saba had visited the UN headquarters in 2001 (*Kamerstukken I* 2003–04, 29 200 IV, B, p. 6).

A delegation from the Island Council of Saba again visited New York in August of 2005 to inform the Committee of the ongoing talks on the constitutional restructuring of the Netherlands Antilles, and to complain about Dutch minister for Kingdom Affairs (Pechtold) who allegedly delayed this process by laying down new demands (*NRC Handelsblad* (internet edition) of 10 August 2005). *The Daily Herald* reported on 12 August 2005 that Saba would ask a UN member state (probably St. Kitts and Nevis) to ask the GA to place the Netherlands Antilles on the list of NSGTs.

Curaçaoan Novelist Frank Martinus Arion in 2004 wrote that he supported those people who campaigned to have the UN referee between the Netherlands and Curaçao (*Amigoe* of 4 November 2004). *Munneke* proposed that the decolonization committee should send observers to the referendum of 2005 on Curaçao (*Amigoe* of 16 August 2003).

69 *Bijkerk*, an adviser of the *UPB* of Bonaire, claims the Netherlands provided false information to the UN in 1955 in order to convince the member states that Surinam and the Netherlands Antilles were no longer colonies (*Bijkerk* 2003, p. 1862).

make a contribution by making sure that the constitution of the Kingdom is no longer vulnerable to accusations of colonialism. This could only be achieved by reforming the Kingdom in a way that would make clear that the relation of the Dutch Caribbean Countries has taken a shape that is desired and freely chosen by their populations on the basis of their right to self-determination, as I will discuss in the next Chapters.

5.5 CONCLUSION

The Dutch literature on constitutional law has not succeeded in categorizing the Kingdom order into one of the existing forms of government. It is usually called a construction *sui generis*, but it could also be called a 'constitutional association' or a 'cooperative structure governed by constitutional law'. The Charter has created a legal order that leaves the three Countries free to pursue their own policies in most areas, while establishing common organs for cooperation and some supervision over the Caribbean Countries. The Netherlands took on most of the common tasks of the Kingdom, with a right of consultation for the Caribbean Countries on subjects that concerned them, and a right of veto on the application of economic and financial treaties to their territories, and on amendments to the Charter. The Kingdom is substantially different from the other overseas forms of government discussed in this study, except perhaps the former British West Indies Associated States, which were considered by some to be freely associated with the UK, but by others – including the UN – to be Non-Self-Governing Territories (*see* Chapter 3).

The Kingdom is not a nation state in the traditional sense. There have so far been few indications of the development of a trans-Atlantic community of interests that could lead to the birth of a nation.⁷⁰ The federal and unitary traits that the text of the Charter exhibits, are at present no more than constitutional make-up. The Kingdom functions more like a confederation, although it cannot be called that either, because it is not based on a treaty, the Countries are not independent states, and the organs of the Kingdom do have some – albeit very limited – power over the citizens of the Countries. The structure of the Kingdom also does not fit any of the other traditional forms of government.

Because of the large difference in size between the Netherlands and its Caribbean territories, combined with the firm desire to change as little as possible to the constitution of the Kingdom as it existed before 1954, the drafting of the Charter resulted in a structure that was not a radical breach

70 Hirsch Ballin's plea for the creation of such a community is probably evidence that it does not yet exist, *see* Hirsch Ballin 2003. Logemann 1952, p. 311-15 already noted that the Netherlands, Surinam and the Netherlands Antilles shared no common interests and that its citizens did not form a community. *See also* Croes 2005.

with the colonial era, but offered a practical way of realizing most of the basic wishes of the governments of the Netherlands, Surinam and the Netherlands Antilles at the time. But even though the Charter was intended to create a flexible system that could accommodate the constitutional development of the Caribbean Countries, it rather seems to have chained the three Countries together in a relation that hardly no-one appears to be happy with at present.

It could be argued that some of the characteristics of colonial government, as they were defined before World War II, still exist (at least potentially) in the Kingdom order. The question whether the changes to the colonial order were substantial enough to warrant the title of a complete form of decolonization, has not really been a subject in the Dutch literature on constitutional law. But it has been the subject of some discussion in the literature on international law, which I will discuss in the next Chapter.

