

# Summary

## Introduction

The Charter for the Kingdom of the Netherlands regulates the basic structure of the Kingdom and of the formal relations between its constituent countries. The Charter was signed in 1954 by the then representatives of the Netherlands, the Netherlands Antilles and Suriname. This signing is particularly memorable because it was an official farewell to the colonial system that consisted of the 'motherland' Netherlands and the overseas colonies.

A lot has changed in 70 years. Suriname became independent in 1975 and Aruba became an autonomous country within the Kingdom in 1986, separate from the Netherlands Antilles. In 2010, the Netherlands Antilles was dismantled. Since then, three Caribbean islands have had the status of autonomous 'country': Aruba, Curaçao and Sint Maarten. The remaining three islands - Bonaire, Sint Eustatius and Saba - are incorporated as 'special municipalities' into the Netherlands, the fourth country of the Kingdom.

## Appreciation and distrust

Progress has been considerable since the adoption of the Charter seventy years ago. Living standards in Caribbean countries are higher than in most surrounding states. And residents appreciate the benefits of being part of the Kingdom. Consequently, there is hardly any support for leaving the Kingdom, although the Caribbean countries also strongly value their autonomy. At the same time, it is clear that Kingdom relations are largely dominated by distrust. Caribbean countries regularly regard the attitude of the Kingdom (or the Netherlands) as (too) harsh and authoritarian, with too little consideration for local conditions and insufficient respect for

their autonomy. The Kingdom (or the Netherlands) regularly reminds the Caribbean countries that they are not succeeding enough in solving the problems faced by their citizens, such as poverty, school dropout and crime. These problems can be traced in part to administrative impotence and administrative unwillingness.

In short, there is friction in the Kingdom. The Advisory Division of the Council of State of the Kingdom starts this advisory opinion with a general consideration, addressing the various causes of this. The structure of the Kingdom, in which the Netherlands is undeniably dominant, makes tension inevitable to some extent. On top of this, the Caribbean countries' dependence on the Netherlands has increased significantly in recent decades. Public responsibilities have increased since 1954, partly due to international developments. However, due to their small size, the Caribbean countries cannot fulfil these tasks entirely on their own.

The Advisory Division recognises that the tense relations in the Kingdom are not only caused by the imbalance between the countries. There are also root causes that are not eliminated by just a few measures. Particular mention should be made of colonial history and the legacy of slavery, which also affect current generations. In this regard, hope may be drawn from the route taken with the apologies from both the King and the Prime Minister of the Netherlands. Since then, there seems to be a changing zeitgeist, causing people to deal with the past in a different way. This offers opportunities to enter the future together in a more constructive way, which is precisely the theme of this opinion. Therefore now is a good time to implement step-by-step

measures to improve cooperation between the countries.

### **Charter still relevant**

While the world has changed dramatically since 1954 the Charter has remained virtually intact. This raises the question of its relevance. The Advisory Division certainly believes the Charter is still relevant. The core concepts in the Charter- local autonomy, good governance, human rights, collective defence, cooperation and mutual assistance- are still very important. In addition, the Charter provides good principles and tools to shape cooperation. This means that improvements are possible without amending the Charter. In doing so, however, it is necessary to read the 1954 Charter and its official explanatory memorandum through 2024 eyes: they are not static documents but must be given meaning in today's context.

### **This advisory opinion**

In this opinion, the Advisory Division of the Council of State of the Kingdom formulates two guiding principles for the future of our Kingdom, namely 'constructive cooperation and mutual assistance' and 'contributing to more balanced relations and mutual understanding'. It advises Kingdom partners to use these guiding principles in their actions.

In the following chapters, these two principles will be developed into an analysis and specific recommendations on several issues facing the Kingdom: safeguarding human rights and good governance (chapter 2), and consensus Kingdom Acts and other mutual arrangements as a basis for cooperation (chapter 3). To bring more balance to the relations, the Advisory Division makes proposals to reduce the democratic deficit (chapter 4) and, as a conclusion, suggests a

regulation to settle disputes between Kingdom and countries by an independent institution (chapter 5).

In doing so, the Advisory Division sees no need to amend the Charter or the Constitution. Time and energy that would be put into amending the Charter could be better used by making more effective use of the ample opportunities that the Charter already provides for cooperation to improve the handling of social problems.

### **Human rights and good governance: from unilateral intervention to constructive cooperation**

#### **Social problems**

Whether it is poverty, school dropout and low literacy or environmental pollution, geopolitical tensions, international crime and refugee work, the problems in the countries of the Kingdom are large and diverse. The Caribbean countries of the Kingdom are unable to resolve many of these issues on their own. This is due to their small size, which makes their administrative capacity and implementation power very limited. They often lack adequate resources in terms of knowledge, personnel and money. It should also be borne in mind that they are relatively young countries that are still in the early stages of development. Besides impotence, unfortunately, there is also unwillingness: due to corruption, clientelism and other integrity issues, it is far from clear that social problems are also at the top of everyone's agenda. It is therefore very important that Caribbean countries take their own responsibility seriously by getting and keeping public administration in order. It is also necessary to cooperate constructively, among themselves and with the Netherlands.

Good governance and respect for human rights are abstract concepts, but this is not an academic discussion. The social issues mentioned above are directly related to human rights, such as the right to education or the right to a healthy living environment. And the quality and effectiveness of public administration directly affects public services and the well-being of citizens. Whether it concerns healthcare, education and poverty reduction or maintaining law and order and security.

### **Shared responsibility**

The Charter contains a separate provision on respect for human rights, legal certainty and good governance, which indicates that ensuring these are autonomous responsibilities: the countries are therefore primarily responsible for this. If a country cannot or will not fulfil this responsibility, the Kingdom has an additional responsibility to safeguard. In this way, the Charter regulates shared responsibility for respect for human rights, legal certainty and good governance.

When the Charter was created, the concept of good governance was not yet sharply defined. That concept has become clearer and its scope has become broader with the development of the general principles of good governance, the development of the international policy concept of good governance and the growing number of international (human rights) treaties.

### **From intervention by the Kingdom...**

Application of Kingdom obligation to safeguard human rights, legal certainty and good governance may involve unilateral and coercive intervention by the Kingdom. However, such intervention is only an issue when the country in question has failed to live up to its responsibility and is also unable or unwilling to remedy it. In addition, intervention by the Kingdom is not without its problems, as it may disrupt relations between the countries. Countries may perceive

intervention as an undue violation of their autonomy.

### **... to intensified cooperation**

The Kingdom government must remain prepared to intervene when really necessary. But it is especially important to prevent having to intervene in the first place. Both the Kingdom and the four countries have a responsibility in this respect. The Kingdom's obligation to safeguard can also be fulfilled better through close and effective cooperation within the Kingdom and among the three Caribbean countries. There is every reason for this, considering the heavy burden of governance on the individual Caribbean countries and their limited governing capacity.

Meanwhile, valuable experience is being gained with cooperation under the so-called Country Packages. Since early 2021, this has involved working together on reforms with financial support from the Netherlands and by setting up a Temporary Work Organisation to support implementation by the countries. These include reforms in key areas such as strengthening local economies, sound public finances, social security, healthcare and education, and strengthening the rule of law. It is advisable to thoroughly evaluate these 'packages' - which are now temporary in nature - and consider whether an organisation analogous to the Temporary Work Organisation could be set up at kingdom level or whether the Temporary Work Organisation could be extended for this purpose. Indeed, in key areas such as education, the economy and poverty reduction, long-term efforts are needed to achieve structural improvements. That seems the way to structurally embed respect for human rights, legal certainty and good governance. Social problems in the Caribbean countries are large and diverse. The Advisory Division therefore recommends prioritising cooperation in education and poverty reduction. This will strengthen the social foundation for an active civil society and a stronger economy.

### **Mutual arrangements and consensus kingdom acts as basis for cooperation**

To collaborate on a structural basis between the (governments of the) countries, it is important to work on the basis of formal agreements. These agreements may include the goals to be achieved, the way cooperation will take shape, and funding and accountability. In practice, countries collaborate on the basis of two instruments: non-formal mutual arrangements, which have the character of an agreement, and consensus Kingdom Acts, which have to be approved by the Dutch parliament according to the procedure for Kingdom Acts.

#### **Consensus Kingdom Acts**

There is reluctance among the Caribbean countries to use the instrument of consensus Kingdom Acts. In the decision-making process concerning these acts, the Dutch institutions were said to be too dominant, preventing real consensus. Also, not all consensus Kingdom Acts in the past have stipulated whether they can be terminated unilaterally.

Given the reluctance of the Caribbean countries to voluntarily enter into new Kingdom Acts, it is desirable that arrangements are made for decision-making on consensus Kingdom Acts: arrangements that ensure the involvement and consensus of the Caribbean countries during the legislative process. This does justice to the principle of equivalence and mutual understanding.

This advisory opinion includes a number of specific procedural suggestions to ensure that no Kingdom Acts can be created on autonomous matters to which the country's government and Parliament have not explicitly agreed. This contributes to the creation of consensus Kingdom Acts based on genuine consensus. In addition, the Advisory Division recommends that consensus Kingdom Acts

explicitly regulate whether they can be unilaterally terminated and- if so- under what conditions this is possible.

The advantage of the consensus Kingdom Act is that it can contain generally binding provisions and has an established structure with a procedure that safeguards input from the Caribbean countries. The consensus Kingdom Act provides the most solid basis for constructive cooperation which, when applying the recommendations to ensure continuous consensus in its formation, is also democratically legitimised by the agreement of parliaments.

#### **Mutual arrangements without specific formalities**

Besides the possibility of cooperation based on consensus Kingdom Acts, it can also be done through mutual arrangements without specific formalities ('vormvrije onderlinge regeling'). The Charter does not regulate anything about its form or content, which means it is without specific formalities. This makes it a flexible tool that offers many possibilities. However, rules which may be binding on all persons belong in a law; a mutual agreement without specific formalities is not authorised to do so, unless it is accepted for adoption in legislation by the parliaments of the countries involved.

When deciding on a consensus Kingdom Act, the centre of gravity lies with the Dutch bodies. In contrast, when entering into and terminating mutual arrangements without specific formalities, the relations are more equivalent. In addition, arrangements schemes without specific formalities are ideally suited for establishing cooperation agreements between the Caribbean countries.

Both instruments thus provide a basis for cooperation, each with advantages and disadvantages. However, the use of consensus Kingdom Acts can be increased if countries agree on procedural agreements on

the use of this tool. If the consensus requirement is adequately tested in its creation and if the conditions for denunciation are deliberately and balanced, there will be less reluctance among the Caribbean countries to enter into a consensus Kingdom Act.

### **Towards more balanced relationships**

#### **Equivalent – but not the same**

Equivalence is a key concept in the Charter and a major recurring theme in the debate on the Kingdom relations. This stems from the very unequal proportions between the four countries. The Netherlands has the upper hand in almost every aspect (population, economy, finance, governing powers), which numerically leads to unequal proportions. This cannot be resolved entirely. Nevertheless, a few measures can help the Caribbean countries and their people experience more a greater sense of equivalence. This can also increase the legitimacy of the Kingdom. The following is recommended to bring more balance to the proportions.

#### **Right to vote**

Most Dutch nationals living in the Caribbean countries of the Kingdom are excluded from the right to vote for the House of Representatives and also have no influence on the composition of the Senate. This while the Dutch parliament does adopt Kingdom Laws and controls the Kingdom Government, in the absence of a formal Kingdom Parliament. This has been the subject of debate for many years. The Advisory Division believes that after weighing all the arguments for and against, it is desirable to grant Dutch residents of the Caribbean countries the right to vote. For example, the situation arises that Dutch nationals in the French part of Sint Maarten (Saint Martin) can vote for the House of Representatives, but Dutch nationals in the Caribbean country of Sint Maarten cannot.

Only residents of the Caribbean countries who have lived in the Netherlands for at least 10 years have the right to vote for the House of Representatives when returning to their country. It is further inconsistent that Dutch nationals in the Caribbean countries are allowed to run for a seat in the House of Representatives or Senate and are also allowed to vote for the European Parliament. Granting the right to vote for the Dutch parliament to all Dutch nationals, including those living in the Caribbean countries, is of more than just practical significance and therefore cannot be reduced to a cost-benefit consideration. The symbolism it carries should not be underestimated: it recognises the equivalent position of all Dutch citizens in the Kingdom. Over time, the right to vote could lead to greater mutual understanding between the countries and a better basis for cooperation between them and the Kingdom.

#### **Position of Ministers Plenipotentiary**

The Council of Ministers of the Kingdom consists of the Dutch Council of Ministers supplemented by the Ministers Plenipotentiary of Aruba, Curaçao and Sint Maarten. These officials are not directly accountable to any of the four parliaments. The Kingdom Government as a whole is, but only to the parliament of the country of the Netherlands. As a result, the parliaments of Aruba, Curaçao and Sint Maarten do not have the opportunities that the House of Representatives and the Senate have to hold the Kingdom Government accountable.

It is ultimately up to the Ministers Plenipotentiary to represent Caribbean interests in the Council of Ministers of the Kingdom. This is no easy task, given the relationships within the Council of Ministers of the Kingdom. The Advisory Division therefore suggests that the position of the Ministers Plenipotentiary in the Council of Ministers of the Kingdom be strengthened. This can be done, for example, by making procedural arrangements under which they

are given more opportunity to put forward their views. The guiding principle here is that Caribbean countries appoint individuals with qualities that match the weight of the position. It is important that once appointed Ministers Plenipotentiary are given time to build a network.

### **Regulation to settle disputes**

The ratio of Dutch vs Caribbean members of the Kingdom Council of Ministers means that the representatives of the Caribbean countries can easily be outvoted by their Dutch colleagues. This is, of course, especially important in case of disagreement. Since 2010, the Charter therefore includes the obligation to adopt a system of dispute settlement between the countries and the Kingdom. Fourteen years later, however, there are still no regulations and the design of this mechanism itself is the subject of dispute. The Advisory Division advocates putting new energy into the design of a dispute settlement mechanism and makes specific suggestions to this end in the advisory opinion.

The Advisory Division stresses in advance the importance of good dialogue to avoid escalation. From this point of view, it is important to engage in constructive dialogue at an early stage in an attempt to resolve matters together, for instance through mediation.

The Advisory Division recommends that the scope of a dispute settlement mechanism cover specific decision-making by which the Kingdom Government intervenes in the governance of the countries, and ensure that the legal aspects of a dispute can be settled in a binding manner. A dispute may additionally involve non-legal aspects, which are more in the realm of policy and governance. For those aspects, it could be stipulated that the position of the dispute settlement body on such policy questions will have to count as an opinion that can only be deviated from on (very) compelling grounds.

Indeed, in this way, the preponderance of the Netherlands within the Council of Ministers of the Kingdom can be balanced to some extent.

Several answers are conceivable to the question of which body should be designated as the dispute settlement body, ranging from a judicial body to the Advisory Division of the Council of State of the Kingdom. But if policy considerations are also to be judged, a judicial body is less obvious. In any case, the Advisory Division recommends linking the mechanism to an existing body rather than creating a separate college or division as proposed earlier. This will allow the handling of a dispute to be smoother and more efficient.

### **Recommendations**

Based on the above, the Advisory Division of the Council of State makes the following recommendations to the countries of the Kingdom.

#### **Intensify cooperation**

1. Base cooperation on local needs and wishes, do not use autonomy as an excuse to reject cooperation.
2. Strengthen the soundness of governance in the Caribbean countries according to the criteria agreed on in 2006 ahead of the dissolution of the Netherlands Antilles, and in line with the general principles of good governance and the international concept of good governance.
3. Intensify administrative cooperation between the countries so the Kingdom only needs to intervene unilaterally in exceptional cases. Prioritise education and poverty reduction.
4. Explore opportunities for administrative cooperation among the Caribbean

countries of the Kingdom to enhance their governance and implementation capacity.

5. Consensus Kingdom Acts are a good basis for cooperation. To remove obstacles perceived in the use of this tool, the Division recommends making arrangements for the creation and termination of consensus Kingdom Acts.

**Greater equivalence between countries and citizens of the Kingdom**

6. Promote the application of human rights and fundamental freedoms as much as possible in all parts of the Kingdom and to all citizens.
7. Grant Dutch nationals living in Caribbean countries of the Kingdom the same influence on the composition of the Senate and House of Representatives available to other Dutch nationals.
8. Assuming that persons with qualities appropriate for this demanding function are appointed, strengthen the role and position of the Ministers Plenipotentiary in the Council of Ministers of the Kingdom. Consider whether they can stay on after a change of government so they have time to settle in and build a network.
9. Provide a mechanism for settling disputes between the Kingdom and the countries of the Kingdom. Designate an existing body as a dispute settlement body and ensure that it can render a binding judgment on the legal aspects of a dispute in the exercise of supervisory powers of the Kingdom and on the interpretation of the Charter. In addition, consider having this body give a weighty opinion on policy issues submitted in that context.