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The Constitutions of the Dutch Caribbean: A Study of the Countries of Aruba, Curaçao and Sint Maarten and the Public Entities of Bonaire, Sint Eustatius and Saba

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Abstract and Keywords

This chapter provides an overview of the key constitutional provisions and the political structure of the Dutch Caribbean as well as of some of the most important constitutional issues regarding these islands. While the Caribbean countries and public entities have a different constitutional status, they are all part of the Kingdom of the Netherlands. With respect to its European part, the Kingdom of the Netherlands has always been a Member State of the European Communities and nowadays the European Union, which affects the Caribbean parts of the Kingdom. Therefore, the chapter also addresses the narrowly shaped and specific relationship between these islands and the European Union.

Keywords: Dutch Caribbean, constitution, political structure, Kingdom of the Netherlands, European Union

8.1 Introduction

THE Dutch Caribbean currently consists of three countries and three public entities: Aruba, Curaçao and Sint Maarten are countries with an autonomous constitutional status; while Bonaire, Sint Eustatius and Saba (hereinafter 'BES islands') are 'special municipalities' (public entities) which integrate the country of the Netherlands.¹ The three Caribbean countries function as pluralist democracies with a high degree of autonomy in most matters. Their constitutions reflect a multi-faceted and pluralistic colonisation culture as well as the complex decolonisation process which included the complex constitutional arrangements made in 1954 with the end of Dutch colonialism, the independence of Suriname in 1975, and the dismemberment of the Netherlands Antilles in 2010.² In addition, the complex constitutional status of the Dutch Caribbean (p. 217) countries reflects the fact that these islands are inhabited by highly diverse populations with respect to cultural backgrounds, languages, and religions. The term 'Dutch Caribbean' itself is moreover imperfect as it appears to unite two constitutionally distinct types of entities.³

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This chapter provides an overview of the key constitutional provisions and the political structure of the Dutch Caribbean as well as of some of the most important constitutional issues regarding these islands. While the Caribbean countries and public entities have a different constitutional status, they are all part of the Kingdom of the Netherlands. With respect to its European part, the Kingdom of the Netherlands has always been a Member State of the European Communities and nowadays the European Union, which certainly also had consequences for the Caribbean parts of the Kingdom. Therefore, this chapter also addresses the narrowly shaped and specific relationship between these islands and the European Union.⁴

This chapter starts with a historical overview of the Dutch Caribbean and Dutch colonialism. The first section also explains the place of the Dutch Caribbean in Dutch constitutionalism following the revision of the relations between these islands and the Kingdom in 2010. Considering the distinct features of the two groups of Dutch Caribbean islands (countries and ‘public entities’), this chapter is then divided in two symmetrical parts: the first one delves into the constitutional order of the Dutch Caribbean countries (Aruba, Curaçao and Sint Maarten), and the second one into the BES islands. As mentioned, the three countries enjoy a far-reaching autonomy, whereas the BES islands are part of the Dutch constitutional order. For this reason, more attention will be devoted to the constitutional system of these countries. This chapter analyses in both parts the political organisation of the Dutch Caribbean following the 2010 constitutional amendment. This chapter aims to provide an (p. 218) introduction to the Dutch Caribbean constitutional orders and explain some of their past and future challenges. The structure and the organisation of the Kingdom of the Netherlands will not be discussed extensively, but only insofar it directly relates to the constitutional orders of the respective countries.

8.2 Historical background

The Dutch Caribbean islands are geographically divided into two groups: the Leeward islands, located north and northwest of Venezuela, comprise Aruba, Curacao, and Bonaire (also known as the ‘ABC islands’); and the Windward islands, located east of Puerto Rico and the Virgin Islands, which consist of Sint Maarten, Sint Eustatius, and Saba.⁵ Both groups of islands are currently characterized by multiculturalism and multilingualism. This cultural diversity results from the historical administration of these islands during the Dutch colonial period which, with Dutch as the official language, allowed for the coexistence of different languages and customs.⁶

The Kingdom of the Netherlands, as a whole, still mirrors its long and multifaceted colonial history. Besides the Dutch Caribbean, the Dutch also set foot in numerous other parts of the world, including present-day New York, New Jersey and Delaware, Brazil, Ghana, South Africa, Indonesia, and Sri Lanka.⁷ Dutch colonial history in the Atlantic is intimately connected to the Dutch West India Company (‘WIC’) and is tainted by its participation in the horrors of colonial warfare, slave trade and slavery.⁸ This chartered company, originally created to protect trade and eliminate foreign competition between different trad-

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ing posts, became instrumental in the colonization of the so-called West Indies. The WIC established the first relationship between the Netherlands and the Caribbean islands in 1634, upon the occupation of Curaçao on behalf of the then Republic of the United Netherlands.⁹ In the fourteen years that followed, the WIC took furthermore possession of Sint Eustatius (1636), Bonaire (1636), Aruba (1636), Saba (1640) and the Southern part of the island of Sint Maarten (1648), along with other Caribbean islands for relatively short periods. Until the nineteenth century, the constant wars between European colonial powers in the continent as well as (p. 219) overseas meant that the authority over the two groups of islands changed multiple times before they finally fell under the definite rule of the Dutch state in 1816.

In the eighteenth century, Sint Eustatius served as the main hub for the WIC. However, with the restoration of Dutch colonial power in 1816, Curaçao started being regarded as the main island of the Dutch Caribbean group. The election of Curacao as the ‘capital’ of the Dutch Caribbean was nonetheless problematic for several reasons. The vernacular was—and still is—Papiamentu (or ‘Papiamento’), a Portuguese-based creole language spoken in Aruba, Bonaire and Curacao, but not in the more geographically distant islands of Sint Maarten, Sint Eustatius, and Saba where English was spoken. While Dutch was the official language in the six islands, it was slowly supplemented or partially replaced by Papiamentu and English. Contrary to other colonised islands in the region (for example, the French Caribbean), the Dutch Caribbean never shared a common language in daily use. Moreover, due to the lack of infrastructure and the geographical separation of the islands, it was difficult for the government in Curaçao to stay well informed about the latest situation in the other islands and their needs. In addition, the colonial administration in Curaçao never promoted common interests among the islands. As Isaïc Fransen van de Putte, the then Dutch minister of colonies explained, ‘[these islands] had nothing in common, save for their colonial administration’.¹⁰ Due to the linguistic, religious, and cultural diversity of the Dutch Caribbean islands, interisland communications remained limited and their relationship with Curaçao tended to be conflictual.¹¹

When the Dutch colonial period came to an end in the 1950s, the Dutch Caribbean emerged as the Netherlands Antilles, a constituent country within the Kingdom of the Netherlands. Due to the longstanding conflicts and diversity of the Dutch Caribbean, its inhabitants were everything but a nation. The idealistic efforts made for some time to create an ‘Antillean’ nationhood had not been enough to bring together the islands. In fact, Aruba consistently objected to being part of the Netherlands Antilles. Indeed, after at times violent confrontations, in 1986 Aruba was conferred the so-called ‘*Status aparte*’ within the Kingdom of the Netherlands. This differentiated status allowed the island to be an autonomous country along with the Netherlands Antilles (then consisting of five islands) and keep its relationship with the Netherlands.

The ill-fated inception of the Netherlands Antilles would ultimately cause its downfall, notwithstanding efforts to create a higher level of internal self-government. The idea behind the establishment of the Netherlands Antilles was to allow it to operate as a federation. The parliament of the Netherlands Antilles was composed of members elected sepa-

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lately in each of the islands, with a manifest overrepresentation of the smaller islands. A similar attempt was also made between 1958 and 1962 with the West Indies Federation that aimed to generate political unity within the British Caribbean. This attempt also (p. 220) failed due to numerous political conflicts and this federation was short-lived. Political controversies about possible alternatives and concerns about their viability postponed the inevitable dissolution of the Netherlands Antilles until 2010. The islands acknowledged the advantages of their autonomy, the centralization of judicial powers and politically sensitive affairs, as well as the existence of a support structure for the smaller islands which did not have the financial capacity to fulfil all governmental responsibilities. The need to guarantee the reliability of law enforcement and the public administration was one of the main reasons why the Netherlands was opposed to an unconditional dissolution of the Netherlands Antilles, but finally supported the 2010 constitutional arrangements with strict guarantees for the rule of law and financial viability.

The constitutional changes enacted in 2010 aimed to initiate a new and improved constitutional era in the relationship between the Netherlands and the Dutch Caribbean in particular with regard to the BES islands. Whether this constitutional era will indeed be successful, is yet to be seen. The recent changes gave rise to new challenges that can only be solved through a continuous process. However, the change met—with the exception of Sint Eustatius—the objections that the respective islands had towards the functioning of the Netherlands Antilles. The BES islands were until then dissatisfied about the limited provision and redistribution of public services, and had higher expectations regarding the direct ties with the Netherlands. The islands with a relatively large population (Curaçao and Sint Maarten) strived for an autonomous legal order, similar to the status that Aruba had acquired in 1986 and that of the Netherlands Antilles in its entirety. In this period, the population on all six islands had consistently rejected in referenda the possibility of independence and preferred to continue the longstanding constitutional bonds with the Netherlands. This constitutional relationship had meant for decades that some affairs could only be promoted at the central level of the Kingdom (see below). The 2010 constitutional amendment left untouched the listing of these affairs originally made in the 1954 Charter. It added nevertheless some subjects related to law enforcement and fiscal policy, contingent upon the enactment of consensual Kingdom Acts (see section 8.3.2 below *in fine*) valid in the Kingdom as a whole.¹²

The Kingdom of the Netherlands is currently governed by two primary constitutional documents: the Charter of the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*, adopted in 1954) ('the Charter') and the Dutch Constitution (*Grondwet voor het Koninkrijk der Nederlanden*, adopted in its original form in 1815). The Charter is regarded as the primary constitutional document of the Kingdom and it is applicable to all the countries that are part of the Kingdom. The Charter currently defines the constitutional relationship between the Dutch Caribbean countries and the Netherlands.¹³ The applicability of the Dutch Constitution to the Dutch Caribbean depends on the Charter's referral dispositions. An important disposition in (p. 221) this context is Article 5, paragraph 1, of the Charter which stipulates that inter alia 'the exercise of royal [i.e. governmental] and legislative power in Kingdom *affairs* shall be governed, if not provided for by

the Charter, by the Constitution of the Kingdom.’ This document refers in the new setting primarily to the constitution of the country of The Netherlands. The Kingdom affairs include foreign relations, defense and the single nationality of the Kingdom. In any case, ‘[t]he Constitution [should] have regard for the provisions of the Charter’.¹⁴ Both constitutional documents are interconnected and determine thus the constitutional landscape of the Kingdom of the Netherlands.

8.3 The Dutch Caribbean countries: Aruba, Curaçao, and Sint Maarten

8.3.1 Introduction

Aruba, Curaçao and Sint Maarten are ‘autonomous’ countries within the Kingdom of the Netherlands. They each have their local, subnational constitution and they promote most of their interests in accordance with the needs and convictions of the local society. This section considers these three countries jointly, as the provisions of the Charter apply without exception to these countries. In addition, their subnational constitutions share multiple similarities. Therefore, separate references are only made to identify relevant differences between the Dutch Caribbean countries (*e.g.*, the existence of a Constitutional Court in Sint Maarten).

In this section of the chapter we discuss the scope of the autonomy of the Caribbean countries, we elaborate on the division of authority between the Kingdom and the countries, and we also explore the protection of human rights in the Dutch Caribbean.

8.3.2 Autonomy

The Charter establishes a high level of autonomy for Aruba, Curaçao and Sint Maarten. This autonomy aimed to reflect the right to self-determination that became particularly important following the decolonization process.¹⁵ Indeed, decolonization was, legally speaking, the recognition that the population of these colonized countries in the (p. 222) Caribbean were *peoples* or *nations* in their own rights. ‘Nation’ and ‘people’ should be understood here in a constitutional sense, that is, not as an ethnic category. The renunciation of racial supremacy ideologies was and is a key factor in effective decolonization. In constitutional terms, the population of the colonized countries was no longer defined as mere ‘subjects’ (for example, Dutch or British subjects), but as *citizens* with the political entitlements equal to the entitlements of citizens of the mother country.

In 1954, the elites in the Netherlands Antilles considered that the country belonged to the ‘people of the Netherlands Antilles’. However, the movement towards a separate constitutional status for each of the major islands, described above in the introduction, expressed the feeling that Aruba as well as Curaçao and Sint Maarten belonged to its own people (*‘pueblo’* in Papiamentu). The fact that the Kingdom comprises several peoples has also been recognized since 1992 in the Kingdom Act on the oath of fidelity to ‘the peoples of

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the Kingdom that has to be sworn by a new King (*Wet beëdiging en inhuldiging van de Koning*).

The autonomy aspect of the Dutch Caribbean is visible, on the one hand, in the recognition that each of these three countries has an identifiable people (not defined by ethnicity), despite being citizens of the Kingdom of the Netherlands. Indeed, the entitlement to equal Dutch citizenship in the Kingdom of the Netherlands was and is one of the most important features of the Kingdom Charter.¹⁶

On the other hand, the autonomy of these countries is present in the power to conduct their internal affairs autonomously.¹⁷ An interest may only be promoted by Kingdom authorities when the Charter explicitly vests these powers in them. These Kingdom affairs are mentioned primarily, but not exclusively in Article 3, paragraph 1 of the Charter and they include the maintenance of the independence and the defence of the Kingdom, foreign relations, the Dutch nationality, general rules governing the admission and expulsion of Dutch nationals as well as aliens.

As part of the 2010 constitutional revision, essential public tasks were also regulated by additional 'Kingdom Acts' based on consensus between three or four of the countries.¹⁸ These matters include financial supervision, the Council for Law Enforcement, the Prosecution Office, and the Police (all relevant for Curaçao, Sint Maarten and, as far as the BES islands are concerned, the Netherlands), and the Common Court of Justice (also relevant for Aruba).¹⁹

The autonomy of the three countries is particularly limited in the context of the celebration of international treaties and in some legislative areas where the requirement of 'legislative coherence' requires greater uniformity between the Caribbean countries and the Kingdom. The following subsections devote further attention to both legal areas. (p. 223)

8.3.2.1 International Treaties

The Kingdom of the Netherlands defines itself as a single subject in international law. In contrast to federal states like Germany and Belgium, its constituent parts have no limited treaty-making power. Treaties that take effect for Aruba, Curaçao and/or Sint Maarten, must be concluded by the Kingdom government, which will usually be signed by the Kingdom Minister of Foreign Affairs or another representative at Kingdom level. With special authorization, also a Minister from Aruba, Curaçao and Sint Maarten may sign such a treaty.²⁰ The only situation of limited international legal personhood of a country is the possibility that Aruba, Curaçao or Sint Maarten may become a member of an international organization on the basis of a treaty concluded by the Kingdom (Art. 28 of the Kingdom Charter). Parliamentary approval, insofar Article 7 of the Kingdom Act Approval and Publication of Treaties is concerned, does not exclude the need for parliamentary approval.²¹ This approval must be given at Kingdom level, that is, by Kingdom Act with the required consultation of the governments and parliaments of Aruba, Curaçao and Sint Maarten, unless the treaty does not affect them, in which case an ordinary Dutch law is sufficient. Approval by law can be replaced by a so-called tacit parliamentary approval. Pursuant to

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Article 5 of the Kingdom Act Approval and Publication of Treaties, tacit approval has been given if one-fifth of one of the Chambers in Parliament has not stated within thirty days after the government has informed Parliament about the treaty, that the treaty should be approved explicitly, by voting. Should the treaty affect one or more Caribbean country, Article 24 of the Charter grants the relevant Minister Plenipotentiary a similar authority to state within these thirty days that the treaty should be approved explicitly. The binding character of the treaty—for all or only some of the countries of the Kingdom—must be expressed at the conclusion and/or the ratification of the treaty, in accordance with Article 29 of the Vienna Convention on the law of treaties.²²

The most important treaties concluded by the Kingdom with a territorial limitation are the Treaties on the European Union and on the Functioning of the European Union. Only specific parts of these treaties apply to the Kingdom as a whole or to Aruba, Curaçao and Sint Maarten. Economic and financial treaties which affect Aruba, Curaçao or Sint Maarten can only be concluded with the consent of the country concerned and must be concluded on their demand.²³ Article 27 regulates the involvement of Aruba, Curaçao and Sint Maarten in the preparation of treaties that affect them. These countries are responsible for the implementation of the treaties through their own autonomous legislation, but in the absence thereof, Kingdom legislation can temporarily fill the gap. (p. 224)

8.3.2.2 Legislative coherence or ‘concordance’

Besides the existence of Kingdom affairs, the legal differences between the four countries of the Kingdom are also mitigated by the requirement of ‘concordance’ or legislative coherence. The four countries are required to have similar legislative provisions in the areas of civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, and intellectual property and to consult each other about substantive changes in the legislation.²⁴ This requirement is, nonetheless, a source of great ambiguity. On the one hand, it implies the acknowledgment that the countries of the Kingdom of the Netherlands each have their own legal order. This is different from what typically happens even in federal states, which have one legal system, albeit layered and subdivided depending on the subject. This requirement is also distinct from the direct applicability of norms that belong to European Union law in the legal orders of the Member States. On the other hand, the distinct legal orders of the Kingdom are required to be compatible, to the extent that (a) legal norms established by Kingdom Acts and treaty norms can have legal effect within each of the different legal orders, (b) judicial decisions are directly enforceable in each country (Art. 40 of the Kingdom Charter), and (c) the codes and some other core parts of the legislation must be similar.

The requirement of legal coherence does not mean that there are not any differences between the Netherlands and the Dutch Caribbean. Legislative differences based on moral or politically sensitive matters to the Caribbean countries have been deemed acceptable. Recent examples of deviations in the respective Criminal Codes and Civil Codes concern the conditional legalization of abortion and euthanasia and same-sex marriage.

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Nowadays, this principle of concordance is particularly helpful for the Common Court of Justice, which functions as a court for all islands in the Dutch Caribbean, and for the Supreme Court of the Netherlands (*Hoge Raad*, the court of cassation for civil and criminal affairs for the Kingdom as a whole).

8.3.3 Fundamental rights

The constitutions of Aruba, Curaçao and Sint Maarten start with a chapter on fundamental rights.²⁵ The rights that are entrenched in all constitutions are, among others, the right to equality, the right to life, the right to bodily integrity, the right to freedom of religion and the freedom of speech respectively, and the right to assembly.

The wording of the fundamental rights adopted in the Constitution of Curaçao is very similar to that of the Constitution of the Netherlands. The text of several provisions (p. 225) coincides totally.²⁶ The Constitution of Curaçao is drafted in rather abstract terms, arguably assuming that the ‘spirit’ of the respective constitutional rights is of equal importance, whilst the drafters of the Constitutions of Aruba and Sint Maarten tended to be more elaborate in describing details of the fundamental rights. An example of provisions that are more detailed are Article I.17, paragraph 2, of the Aruban Constitution and Article 7, paragraph 3 of the Sint Maarten Constitution. In these provisions it is determined that in the event the authorities enter a home against the will of the occupant, a written report of the entry must be issued to the occupant within forty-eight hours. By contrast, the Constitution of Curaçao, pursuant to the Dutch Constitution does not specify this time frame, but ‘merely’ states ‘as soon as possible’.

Besides the promotion of ‘classical’ human rights, all three countries acknowledge the need to pursue socio-economic rights. These ‘social’ rights are again similar to those acknowledged in the Dutch Constitution, and involve for instance rights with respect to work, housing and access to healthcare. A particular feature of Aruba’s constitution is that these social, economic and cultural rights (with the exception of the right to education) are not mentioned in the first chapter of the constitution, but in the fifth which refers to legislation and administration. In that sense they seem to qualify less as rights for the people, but rather obligations for the government which is essentially the case following the wording of the respective provisions as well as the character of social rights.

Following Article 43 of the Charter, the Caribbean countries are in principle responsible to protect and promote fundamental rights in their territories. The Kingdom government merely safeguards the overall protection of these rights and values. The Charter does not specify which fundamental rights are to be protected. The selection of fundamental rights is mainly left to the discretion of the respective countries. This margin of discretion is nonetheless limited by the fact that the Kingdom government must be consulted before these countries try to alter any provisions affecting the protection of fundamental rights.²⁷ Local constitutions play thus a pivotal role in the protection of human rights.

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Additionally, various self-executing norms that are laid down in treaties to which the Kingdom of the Netherlands is a part of, are applicable in the national legal orders, provided that no territorial reservations had been made for the Caribbean territories.²⁸ The Charter does not stipulate the grounds on which such reservations can be made. The practice gave rise to criticism by the Advisory Council on International Affairs. (p. 226) In a 2018 report, this council criticized the extent to which such territorial reservations are made. The report recommended the Kingdom Government to align the protection of human rights for the Kingdom as a whole unless convincing arguments could be provided.²⁹

The treaties which are actually in force for the Kingdom to as a whole include the European Convention of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. For these and several other treaties no territorial exceptions have been made concerning the Caribbean countries. This has important practical consequences. For example, complaints can be brought before the European Court of Human Rights, which may provide extra safeguards for the protection of fundamental rights; especially when the countries of the Kingdom fail to collaborate effectively. A recent example is the supervision by the European Court of Human Rights³⁰ and other bodies of the Council of Europe on detention conditions for suspects, convicts and illegal aliens in Dutch Caribbean countries, which repeatedly revealed serious shortcomings, whilst the combination of encouragement, pressure, and assistance on behalf of the Dutch government has so far not yet yielded sufficient tangible results.

As the Dutch Caribbean countries are ‘Overseas Countries and Territories’, rather than Ultra-peripheral regions, EU law and the Charter of Fundamental rights of the European Union are not applicable. An important exception is the right to vote for the European Parliament, which is granted to all Dutch citizens, including ‘Caribbean Dutch citizens’, since they are as such considered European citizens, and also have thus other rights related to the European citizenship.

8.3.4 Tasks and composition of constitutional bodies

In this section we discuss the composition of the legislative, executive, and judiciary branches. We conclude this section of the chapter by discussing the tasks and composition of the High Institutions of State.

8.3.4.1 Parliament

The Parliaments of the three countries, with the traditional Dutch name ‘*Staten*’, differ first in the amounts of members. In Aruba and Curaçao, the Parliament comprises twenty-one members, while that of Sint Maarten comprises only fifteen representatives.³¹ Members of the respective Parliaments are elected through general (p. 227) elections, by secret ballot and by proportional representation. The general elections must be held every four years. Although the countries’ constitutions determine that people vote for in-

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individual candidates rather than for political parties, political parties play an important role as all candidates are connected to a list.

Besides their task to legislate on local matters, national Parliaments also participate in the legislative procedure at the Kingdom level whenever Kingdom affairs are involved. Their role in these procedures is to assess Bills for an Kingdom Act of Parliament and in case the Bill gives rise to further questions or remarks, to issue a written report on the matter. Furthermore, the Minister Plenipotentiary who represents the country in the Kingdom Council of Ministers or representatives from respective Parliaments are empowered to take part in the subsequent parliamentary debates on these Bills but not to vote. They are merely entitled to declare opposition to the Bill. If such opposition has been expressed, then the House of Parliament in The Hague in which the Bill is being debated, must adopt the proposal by a three-fifths majority. In the event that the Bill is adopted by a majority, less than the required three-fifths majority, the proposal is sent back to the Kingdom government for further consideration. In addition to meetings for these 'ad hoc' legislative procedures, delegates from the respective parliaments, including the Dutch Parliament (both the Upper and the Lower House) meet several times a year in order to discuss and promote their common interests.

8.3.4.2 Government

The governments of Aruba, Curaçao and Sint Maarten are composed of the King, represented by the respective Governors,³² and the ministers. The political party who wins the elections typically takes the initiative to form a governing coalition. Because of the large number of parties that take part in the elections, combined with the system of proportional representation, the governments tend to be coalitions between parties that form a majority in Parliament. Aruba forms an exception to this pattern as often one of the two main political parties tends to win a majority in Parliament. The Governor plays a significant procedural role in the formation of the Cabinet, as he or she appoints a politician, mostly someone who is supported by an emerging majority in Parliament, to investigate whether a proposed cabinet formation could be successful. This '*informateur*' assesses whether parties are willing and able to cooperate in a government or whether their interests are too far apart. If the parties involved come to an agreement, the '*informateur*' informs the Governor, who may then appoint the '*formateur*'. The '*formateur*' is the proposed Prime Minister, who will subsequently make proposals for (p. 228) ministers to form the Cabinet. This process was similar to that in the Netherlands, where, until 2012, the King coordinated the formation. Since then, the Dutch Parliament has assumed the role of coordinating the formation of the cabinet itself.

The Governor is appointed by the Kingdom Government, usually in close consultation with the Government of the country concerned. The Governor is appointed for six years, and may be appointed for a second term of another six years. It is the custom that he or she is a member of the local society.

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All the Dutch Caribbean islands participate in the Dutch Caribbean court system. This system is divided into three divisions: civil law, criminal law and administrative law. This system is furthermore divided into different courts: a court of first instance (one for each country) and the Common Court of Justice, which is involved with hearing appeals. There are furthermore three specialized judicial bodies: one is concerned with affairs regarding civil servants; another body is specialized in taxes and the last one, albeit only in Aruba, is concerned with social security matters.³³ Lastly, the Caribbean countries are connected to the Supreme Court of the Netherlands in The Hague, that deals as a court of cassation in the French tradition with cases in tax law, civil law and criminal law.

The courts of first instance hold sessions on each of the respective islands. The Common Court of Justice also holds sessions as well as hearings in each of the countries. The judges must be legally qualified and are appointed for life by 'Royal decree'. A deputy-judge, on the contrary, is not required to have a law degree. This can be explained by the fact that it may not be possible to have a judge permanently available on the smaller islands. Because of the small scale of the islands there are two final interesting facts to be mentioned here. The first one is that, contrary to the continental Dutch court system, the judges are both members of a court of first instance and the Common Court of Justice (they are nonetheless not involved in the appeal of cases they have previously decided). The judges are usually not specialized and might be required to judge cases in different fields of law.

8.3.4.4 High Institutions of State

Aruba, Curaçao and Sint Maarten each have High Institutions of State that are similar to those of the Netherlands. These councils are the Council of Advice, the General Audit Chamber and the Ombudsman (at the time of writing the exception is Aruba) which aim to assist the government or Parliament—or both—in strengthening the rule of law and the democracy.

The Council of Advice specifically advises the respective government on legislative proposals. The Council scrutinizes the legality of the proposal, its suitability or efficiency and whether the proposal is sound from a legal-technical perspective. The (p. 229) Members of this council are appointed by their government, for a period of five years in Curaçao and for seven years in Aruba and Sint Maarten.

The General Audit Chamber examines the legality and efficiency of the country's reception and spending of public wealth. Furthermore, they may advise their governments and Parliament on the public expenditure. Every year the respective General Audit Chamber submits a report to the Governor and Parliament about its activities of the past year.³⁴ In Sint Maarten the General Audit Chamber may also be asked by the Electoral Council to 'conduct an examination of a political party's financial statements submitted on the basis of Article 37'.³⁵ The chair and members of the general audit chamber of Aruba are ap-

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pointed for life by the Aruban government; in Curaçao they are appointed for five years and in Sint Maarten for seven years, with the possibility to be reappointed.³⁶

Like in the Netherlands, the Ombudsman also plays an important role in Sint Maarten and Curacao. Either following a complaint or on his or her own motion, the Ombudsman examines the conduct of governmental bodies or bodies with public authorities. In Sint Maarten, the Ombudsman has the extra task of initiating proceedings before the Constitutional Court if it deems a Bill to be unconstitutional.³⁷ A bill concerning the establishment of an Ombudsman for Aruba is pending before the Aruban parliament.³⁸

Although the Social Economic Councils are not officially a High Institution of State, they are important to include in the discussion, as these Councils are a permanent advisory body to the Government.³⁹ Their task is to provide the government with solicited or unsolicited advice on social-economic matters, for example when the government or parliament initiates legislation and they want to have an idea of the expected effect on, for example the economy.

In Aruba and Sint Maarten the Social and Economic Councils consist of nine members: three independent members, three representatives of the employee's organization and three representatives of the employer's organization. In Curaçao the council consists of eight members: two independent members, two representatives of the overarching organization of NGO's, two representatives of the employee's organization and two representatives of the employer's organization. The members are appointed by the Government.

(p. 230)

8.3.5 Checks and balances

The Dutch Caribbean countries have recognized and facilitated checks and balances between parliament and the government, the government and the judiciary and the legislature and the judiciary in a number of different ways.

8.3.5.1 Parliamentary Democracy

All Dutch Caribbean countries are parliamentary democracies. This is both reflected in the principle of ministerial responsibility combined with the negative rule of confidence and in the prescribed collaboration between the government and Parliament to enact legislation.

Ministerial responsibility is explicitly founded in constitutional norms.⁴⁰ The rule of confidence states that the minister shall make his position available in the event that he no longer enjoys the confidence of Parliament.⁴¹

Although Parliament may compel ministers to resign, the government is in its turn authorized to dissolve Parliament. This authority of the government mirrors the historical right of the King (nowadays to be understood as 'the government') to dissolve the parliament of the Netherlands. Although this provision has nowadays lost its relevance in the Netherlands, it is still of importance in the Caribbean countries. In case of conflict between the

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government and Parliament, the government is still inclined to dissolve parliament. Such a situation arises more specifically when a Member of Parliament leaves a coalition party, and joins the opposition in an attempt to let the government collapse and form a new government. In these cases, the government seeks to counterbalance the power of Parliament, a practice that is generally held to be constitutionally accepted in the Dutch Caribbean under the condition that every member of the government is required to step down when confronted with a motion of confidence directed against him or her.

8.3.5.2 Judicial review of Acts of Parliaments

Judicial review is one of the very few matters where the constitutions of the Caribbean countries differ from the Dutch Constitution. While Article 120 of the Dutch Constitution prohibits the judicial review of Acts of Parliament (*'wetten in formele zin'*), the constitutions of Aruba, Curaçao and Sint Maarten authorize the judiciary to scrutinize the constitutionality of Acts of Parliaments (*'landsverordeningen'*) that have come into force, although under strict conditions.

(p. 231) Articles I.22 and VI.4 of the Constitution of Aruba, for example, state that constitutional review is limited to the scrutiny of the compatibility of Acts of Parliament with the first chapter of the constitution, which refers to constitutional rights. The Constitution of Curaçao has a similar disposition in Article 101, whereas Article 119 of the Constitution of Sint Maarten requires that the subject of the constitutional provision is suitable for constitutional review and there is a sufficiently relevant interest in performing this review.

It is noteworthy that constitutional review in Sint Maarten is more elaborate. Contrary to the other two Dutch Caribbean countries, Sint Maarten has a constitutional court which scrutinizes the constitutionality of Acts of Parliament before these Acts have come into force. The Ombudsman is authorized, or arguably obliged, depending on the reading of Article 127 of the Constitution, to initiate proceedings in the event of suspicion that an Act of Parliament is incompatible with the Constitution, unless 'the provision of the Constitution does not lend itself for assessment.' These proceedings must be initiated within six weeks after the ratification of the Act of Parliament at stake. If this occurs, the Act of Parliament will not come into force. An exception to this rule is that in case of an urgent interest, the Ombudsman's request will be deemed inadmissible and the Act may come into force after Parliament adopted it. However, in that case, the Constitution stipulates that Parliament will be required to approve the legislative proposal by a two-thirds majority.

8.3.5.3 Judicial review of government decisions

The judiciary is authorized to scrutinize the legality of governmental decisions that are directed at individuals. In order for the case to be admitted, the individual must have standing, which is strictly regulated in a similar manner to continental Dutch law. Judges are limited to the scrutiny of the legality of a government decision and are bound to respect the margin of appreciation of the government in taking these decisions. In other words, judges will have to defer to public bodies whenever they enjoy broad discretionary pow-

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ers. In an administrative case, citizens can require judicial review of individual decisions to two instances: first (appeal: in Dutch, '*beroep*') at the court of first instance, and subsequently (appeal: in Dutch, '*appel*' or '*hoger beroep*') to the Common Court of Justice of Aruba, Curaçao, *Sint Maarten* and Bonaire, Sint Eustatius and Saba.⁴² Besides both appeals, the claimant can also bring the case to the European Court of Human Rights or the Court of Justice of the European Union, provided all the formal requirements (*e.g.*, preliminary ruling) are met.

In an administrative case, a preliminary administrative objections procedure will precede in most cases judicial review: the appellant must state her objections to an (p. 232) individual decision made by a public body and request this body to reconsider its decision ('*bezwaarprocedure*'). In Aruba this procedure is, in principle, mandatory. Interestingly, there are no rules regarding the language in which a case must be filed. That means that any of the three official languages (Dutch, English or Papiamentu/o) may be chosen. The judges are therefore expected to understand all three languages in which arguments are presented.⁴³ This can be particularly challenging for Dutch judges who are often hired to assist the administrative law division of Caribbean courts. It is furthermore noteworthy that Aruba, Curaçao, Sint Maarten and the BES islands each have their own Administrative Law Act. The Administrative Law Acts of Curaçao and Sint Maarten are nonetheless very similar. This means that the Common Court does not only operate in three different languages but also faces the challenge of applying legislation of four jurisdictions.

8.3.5.4 The Kingdom's supervision

In addition to the various checks and balances within the respective legal orders, the Charter still provides for supervision by the central government (Kingdom) in order to safeguard the earlier mentioned fundamental rights and freedoms, good governance and legal certainty (Article 43, paragraph 2, of the Charter). This so-called 'higher supervision' is also based on Article 51, paragraph 1, of the Charter, which states that '[i]f any organ in Aruba, Curaçao or Sint Maarten does not or does not adequately perform its duties as required by this present Charter, an international instrument, a Kingdom Act or an order in council for the Kingdom, the measures to be taken may be determined by Kingdom Act, setting forth the legal grounds and the reasons on which it is based'.

Whereas in regular circumstances the Governors represent the King as the head of their local government on the basis of Article 2 paragraph 2 of the Charter, there may also be circumstances in which the Governor is required to act as a representative of the Kingdom government. Such a situation arises when a local Act of Parliament, the budget, or a local order is believed to conflict with, for example, the Charter, an international instrument or an interest of the Kingdom. Before the Kingdom government decides whether the proposal is found indeed in conflict, the Council of State of the Kingdom will express its views and advise on the matter.⁴⁴ This advice is in principle not binding,⁴⁵ but the government tends to take it into account.

(p. 233) Higher supervision may take place retrospectively. This is regulated in Article 22 of the Regulation of the Governor.⁴⁶ In the event that the Governor has decided that there is no conflict with the Charter or an international instrument, and consented to the proposal, the Kingdom government may still hold a different opinion than the Governor and annul local legislation on these grounds.

8.3.5.5 Disputes

The relationships between the countries of the Kingdom and the Kingdom itself and in particular the need to guarantee the mentioned 'higher supervision' may give rise to disputes between the countries of the Kingdom. Constitutional disputes between the countries of the Kingdom and the Kingdom government are—contrary to common practices in many other states with a federal or quasi-federal constitutional structure—not subject to constitutional adjudication. The Kingdom government itself has, in a procedure of extended consultations, the final say in such disputes (Article 12 of the Charter). In 2010, a new provision (Article 12a) was included in the Charter, which requires a procedure for dispute settlement. The Caribbean countries insist that this procedure must give an independent court the last word in questions of constitutional interpretation, but the Dutch government so far insisted on a procedure that would merely solidify the Council of State's advisory role.⁴⁷

8.4 Constitutional foundation of the public entities Bonaire, Sint Eustatius, and Saba

8.4.1 The qualification as public entities

Bonaire, Sint Eustatius and Saba are commonly referred to as special municipalities, which are part of the Netherlands as one of the four countries of the Kingdom of the Netherlands. The constitutionally correct qualification is 'public entity' (*'openbare lichamen'*, Art. 134 of the Dutch Constitution). The qualification of these three islands as such is closely connected to the Dutch decentralization system. According to the Dutch Constitution, decentralization consists in the establishment of so-called public entities: in the first place, entities which are defined by their territory (provinces and municipalities), in the second place by their function, partly in combination with territorial limitations, and finally other public entities.⁴⁸

(p. 234) The constitutional power to establish 'other public entities' has been historically applied to territories that were not yet suitable to function as a fully-fledged municipality, such as the land reclaimed from the sea and two German villages that were temporarily annexed to the Netherlands after the Second World War. The same rationale was applied at the time of the dissolution of the Netherlands Antilles. Given that the three Caribbean islands were too small to function as an autonomous country within the Kingdom of the Netherlands, another solution had to be identified. The representatives of the various islands rejected the possibility of a bond between the smallest islands and one of the new

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countries. The only viable solution was a constitutional attachment to the European mainland, comparable to the position of the French overseas departments (*départements d'outre-mer*).⁴⁹ However, since specific complementary arrangements were needed to overcome issues such as the distance from Europe and the island's specific socio-economic condition, the BES islands were established as 'other public entities' in the sense of Article 134 of the Dutch Constitution, rather than as ordinary municipalities.

The BES islands are thus not fully comparable to Dutch municipalities, even though they are commonly referred to as 'special municipalities'. The status of municipality would suppose that the islands were situated in a province, which is impossible, and would not allow for the required legal deviation between the islands and ordinary municipalities.⁵⁰ The new second paragraph of Article 1 of the Kingdom Charter, in November 2017 replaced by a similar provision in the Dutch Constitution (Art. 132a) provides for the constitutional pedigree of the differentiated inclusion of the BES islands in the structures of the state. Many people on the islands expected in 2010 that the Netherlands would gradually reduce the legal and socio-economic differences between the BES islands and the mainland but internal political unrest, administrative problems and reluctance on the Dutch side have left these expectations still unfulfilled. A fuller inclusion in the structures of the mainland will also require a change in the relation with the European Union from Overseas Countries and Territories to Outermost Regions. This transition is possible at the request of the Member State concerned, by unanimous decision of the European Council.⁵¹

The islands' administration is regulated by the Law on the Public Entities BES (*Wet openbare lichamen Bonaire, Sint Eustatius en Saba*), which covers the subjects that are otherwise dealt with in the Dutch Municipality Act ('*Gemeentewet*'). The differences between this Act and the Municipality Act may vary from legal terminology (e.g., lieutenant governor, '*gezaghebber*') rather than mayor (*burgemeester*) to different provisions on supervision on the one hand and a higher level of autonomy on the other. The BES islands are for example supervised more closely with regards their financial administration than regular Dutch municipalities.⁵² The supervision is also organized differently, as there is no province to perform the task of supervision over the islands. The Kingdom Representative ('*Rijkswetvoerder*'), who is not the representative of the government of the encompassing Kingdom but of the Dutch government, is the one who supervises the islands on behalf of the government. Such was the case when a rather controversial report by an independent commission on ongoing maladministration in Sint Eustatius was followed by a special national Dutch law which temporarily replaced the institutions of the island territory by the appointment of a Government Commissioner with full powers ('*Tijdelijke wet taakverwaarlozing Sint Eustatius*', 7 February 2018).

As the BES islands are constitutionally integrated in the Netherlands, the Dutch Constitution applies 'in principle' without reservation. It is necessary to underline 'in principle', because contrary to the French Constitution, the Dutch Constitution has given a different meaning to the idea of '*égalité*'. Although the Netherlands is a decentralized unitary state, the Charter of the Kingdom of the Netherlands has specified how the principle of equality, ex Article 1 of the Dutch Constitution must be applied in these islands. Whereas

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Article 1 of the Constitution stipulates that '[a]ll persons in the Netherlands shall be treated equally in equal circumstances[,] [d]iscrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted', the provision in the Constitution (Art. 132a, Par. 4) specifies in which cases the Caribbean islands are different: 'rules may be laid down and other specific measures may be introduced for these islands, in view of their specific circumstances, that substantially distinguish them from the European part of the Netherlands'.

In practice, this disposition has opened the door to numerous, sometimes questionable differences in the applicability of treaties, social and tax laws as well legislation regarding (financial) supervision, and organic laws. The most important or remarkable differences are discussed in the remainder of this chapter.

8.4.2 Fundamental Rights

Citizens living in the BES islands enjoy the same constitutional rights as the citizens in the European part of the Netherlands. Nevertheless, as explained in the introduction of this paragraph, the application of these rights may differ. The differentiation seems to be made predominantly when social rights are to be promoted.⁵³ It is not just that the standard could be lower than the standard in the Netherlands, but that it is (p. 236) disproportionately lower. For example, in the BES islands, governmental child benefits for children up to 18 years amount to \$63 per child per month. At the time of writing, governmental child benefits in the Netherlands are approximately double this amount, depending on the age of the child. Although the cost of living is lower in the Dutch Caribbean, it is still difficult to maintain that the child support should be in some cases half the amount awarded in the continent. Overall, the population living in the Dutch Caribbean may be poorer but the prices in supermarkets are very high,⁵⁴ which means that the needs of the children are quite similar.

Contrary to what was agreed in the negotiations between the government and the governments of the respective islands, same-sex marriage, euthanasia and abortion were legalized within a much shorter timeframe after the BES islands became constitutionally part of the Netherlands. The change was made after Parliament adopted an amendment, because Parliament felt that the principle of equality demanded equal treatment throughout the whole country of the Netherlands, notwithstanding the sensitivity of the issue. From a legal perspective it is therefore unclear when a differentiation should be made and when equality is demanded or at least expected. In fact, the inconsistency in the application of the differentiation principle has thus far led to disappointment in the BES islands.⁵⁵ Those who voted in favor of becoming constitutionally part of the Netherlands expected a higher social provision as well as a higher regard to the sensitivity of moral issues. This disappointment is of legal relevance, given that the constitutional status of the islands is the result of their exercise of the right to self-determination and international law commands that the Netherlands fulfils its agreement with its Caribbean islands.⁵⁶ Besides the differentiation in the application of constitutional rights, differentiation also occurs when treaties are ratified; on various occasions territorial reservations have been

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made for the Caribbean part of Kingdom including the BES islands. This situation was also criticized by the Advisory Council on International Affairs in its report on inequality in the protection of fundamental rights, issued in 2018.⁵⁷ The criterion upon which these decisions are based remains equally unclear. An example is the territorial reservation for the Caribbean part of the Kingdom, with regard to the Convention on the rights of persons with disabilities.⁵⁸ On the other hand, the International Covenant on Economic, Social and Cultural Rights, which already applied to the then Netherlands Antilles, continues to apply after (p. 237) the acquisition of their new status. Other human right treaties that apply for the BES islands are the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.⁵⁹

8.4.3 Tasks and composition of local bodies

In this section, we discuss the tasks and the composition of the island councils, the executive councils, the Ombudsman (or Ombudsman committee) and joint audit chamber. Bonaire, Sint Eustatius and Saba have their own representative bodies. These island legislative councils were created to enact most local ordinances and control the executive council.

The island councils are very small in terms of numbers of members. Bonaire's island council consists of nine members while the island council of Sint Eustatius and Saba only have 5. The lieutenant governor presides over the island council, although he is not a member (Art. 10 and 14 (1) (h). His task is *inter alia* to invite the members to meetings, if he or she deems the meeting necessary.⁶⁰ Members are elected on the basis of proportionate representation, by secret ballot and for four years. Like in the European part of the Netherlands, longtime resident non-nationals are included in the electorate. In separate elections from which longtime residents without Dutch citizenship are excluded, the population of the island territories elects an 'electoral college'. The members of these colleges elect, alongside the members of the Dutch provincial parliaments, the members of the First Chamber (Senate) of the Dutch Parliament (Art 132a, para 3, of the Dutch Constitution). Numerically, their influence is marginal (Bonaire 0.09 seat, Saba 0.01 seat, and Sint Eustatius 0.01 seat), but the principle that all citizens have a right to vote for their national Parliament is in this way observed.

The main tasks of the executive councils are to administrate and, if prescribed by law, to legislate. The executive council of Bonaire consists of four members, the executive council of Sint Eustatius and Saba of three including the lieutenant governor. The other members of the executive council are appointed by the island council. Due to the small size of the islands, corruption and partiality concerns such as family or business ties, the appointment of executive councils is subject to strict requirements.

The position of lieutenant governor is comparable to the position of a mayor. He presides over the island council and the executive council, acts as a separate authority when he exercises power that the law attributes or delegates to his office. Such tasks are *inter alia* to maintain the public order and represent the public entity in legal procedures. The lieu-

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tenant governor is appointed for six years, by royal decree proposed by the Minister of the Interior and Kingdom Relations, and can also be suspended and dismissed by royal decree.

(p. 238) At the resemblance of Dutch municipalities, the BES islands also attach great importance to the existence of an Ombudsman. The island councils of the respective BES islands can opt to establish either a joint Ombudsman or a joint Ombudsman committee. In the event that they omit or select not to do so, the National Ombudsman is authorized to receive and investigate complaints about the conduct of the mentioned island public bodies.

The Ombudsman or members of this committee are appointed for six years. The requirements for appointment are considerably less demanding than that of members of the island council or executive council. Essentially, appointees may not have a criminal record or have faced bankruptcy.

Whereas the island council, the executive council and the lieutenant governor might have some leeway regarding the choice to appoint a joint Ombudsman, the establishment of the joint audit chamber is mandatory. The chamber consists of three members; each island council appoints one member for a period of six years.

8.4.4 Checks and balances

Dutch constitutional law applies to any matters where constitutional review is relevant for the BES islands. As mentioned earlier, Article 120 of the Dutch Constitution prohibits the judicial review of Acts of Parliaments (*'wetten in formele zin'*). The only exception to this prohibition refers to international treaties insofar as they contain self-executing norms. When a court seeks to scrutinize if an Act of Parliament is compatible with a human rights or other international treaty, the court will have to decide if the Act of Parliament is compatible with a self-executing international law provision.⁶¹ Article 94 of the Dutch Constitution then determines that in case of incompatibility, this national legal disposition will not be applied to that specific case.

With respect to the local form of government, it is remarked that the BES islands maintain a dualist system, similar to the Dutch municipalities; that is to say that the members of the island council are not members of the executive council. The checks and balances are only found in the responsibility and the negative rule of confidence;⁶² with respect to the 'legislative function', the powers are strictly separated. In principle the respective island councils enact the local legislation, and the executive councils exercise the executive power, unless this power is attributed to the lieutenant governor.⁶³

The BES islands are subject to the strictest system of higher supervision in the Kingdom of the Netherlands; the temporary suspension of the governing bodies of Sint Eustatius was mentioned above. The Kingdom Representative for the three island territories acts solely on behalf of the government of the Netherlands.⁶⁴ The Kingdom (p. 239) Representative is conferred many and intrusive powers, such as that of approving or disapproving

the appointment, promotion, or suspension of civil servants of the islands. This authority can also propose to the relevant minister in the Netherlands to annul decisions made by the island government if he deems it necessary.⁶⁵

Also, the financial supervision of BES islands is stricter than the financial supervision of Dutch municipalities and that of the Dutch Caribbean countries.⁶⁶ While the financial supervision of Aruba, Curaçao and Sint Maarten is merely temporary, the financial supervision of the BES islands is permanent.

8.5 Perspectives for the future of the Dutch Caribbean

For a long time, the autonomy of the Caribbean countries of the Kingdom of the Netherlands was viewed as an intermediary stage or a step towards their independence. Indeed, Surinam, one of these countries, became a sovereign state in 1975. The Dutch government had strongly encouraged it to accept independence. As this chapter has described, the opinions in the Netherlands Antilles differed, taking the Dutch Caribbean countries and public entities in a different direction: a growing self-confidence that they could take care of their own affairs relying on the stabilizing force of the Kingdom's legal and constitutional system. The constitutional system of the Dutch Caribbean countries and public entities reflects, at the time of writing, this image. The appreciation for the judiciary, the international security, and the Dutch—and thus European—citizenship played a significant role in maintaining the relationship between the six islands and the Kingdom.

(p. 240) Tensions continue to arise in the Dutch Caribbean stemming from situations of maladministration and corruption, which may require action from the Kingdom government. An example was the imposition of intensified higher supervision on Sint Maarten in 1992, but which inevitably encroached to some extent on the principle of internal autonomy.⁶⁷ These tensions raise growing questions about the autonomy of the Dutch Caribbean countries. Between 1954 and until the riots on Curaçao in 1969, autonomy was mainly interpreted as a degree of constitutional freedom within the subsistent unitary state of the Netherlands. After 1969, more or less federalist interpretations gradually made their way,⁶⁸ although scholars are still divided as the constitutional framework is also explained as a decentralized unitary state *sui generis*.⁶⁹ According to the scholars who defend the opinion that the constitutional framework should be explained as a decentralized unitary state, attention should be paid to the fact that the Caribbean countries were decolonized after they had been part of a decentralized unitary state. Only after the Charter came into force, these islands were granted a high level of autonomy which ended the Dutch domination (hence, the addition of *sui generis*) and the Kingdom institutions are factually predominantly Dutch. Saleh furthermore maintained that it could not be considered a 'federal' framework, since the Kingdom of the Netherlands lacks a constitutional court, which is essential for a federation. However, this argument might also be turned

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around: as a quasi-federal state, the Kingdom should finally accept that it ought to establish such a court.

International law and European constitutional law have for a long time been conceived as hierarchical structures. We would argue that the subtleties and complexities of the constitutional arrangements in the Kingdom of the Netherlands require a different approach. In a densely connected world, nations and states find each other in a wide variety of partnerships which do not fit in hierarchical worldviews. An alternative vision defends a re-interpretation of the autonomy of these countries, suggesting that the Charter amounts to a freely accepted constitutional relationship in which Aruba, Curaçao and Sint Maarten are part of an 'association' with The Netherlands.⁷⁰ The association involves certain terms and conditions, such as the attribution of authority in international relations to—undeniably—Dutch institutions. The main advantage of this approach is that it takes out some of the duplicity of the current system: qualifying the Kingdom as a 'federation' would suggest an unattainable similarity between the position of the countries. In that (p. 241) sense, the reinterpretation of the Kingdom as an associative structure conveys a message of constitutional respect. Furthermore, it departs from the idea of a decentralized unitary state, which—even when called *sui generis*—is a framework that supports the mindset that politically justifies a dominant Dutch influence. In that sense, the idea of an 'association' might open minds and consequently, new perspectives for the Dutch Caribbean.

Notes:

(1) The BES islands are not legally qualified as special municipalities but as public entities ('openbare lichamen'). However, we adopt this terminology because this widely used term offers a clearer description of how the Dutch Caribbean function in practice and because several jurisdictions might be unfamiliar with the term 'public entity' in the sense of Dutch constitutional and administrative law ('openbaar lichaam'). See also the respective statute, *Wet openbare lichamen Bonaire, Sint Eustatius en Saba* (WolBES), 17 May 2010, Stb. 2010, 345.

(2) For a thorough analysis of the decolonization process and the constitutional relationship between the Netherlands and the Caribbean territories, see G. Oostindie and I. Klinkers, *Knellende Koninkrijksbanden: Het Nederlandse dekolonisatiebeleid in de Caraïben*, Vol. I-III (Amsterdam University Press 2001); G. Oostindie and I. Klinkers, *Decolonising the Caribbean: Dutch Policies in a Comparative Perspective* (Amsterdam University Press 2003); G. Oostindie and I. Klinkers, *Gedeeld Koninkrijk. De ontmanteling van de Nederlandse Antillen en de vernieuwing van de trans-Atlantische relaties* (Amsterdam University Press 2012); Ryçond dos Santos Nascimento, *Het Koninkrijk ontsluiert* (PhD dissertation Rijksuniversiteit Groningen and University of Aruba 2016, Maklu 2016), A. G. Croes, *De herdefiniëring van het Koninkrijk* (PhD dissertation Tilburg University, Wolf Legal Publishers 2006); S. Hillebrink, *Political Decolonization and Self-Determination: The Case of The Netherlands Antilles and Aruba* (PhD dissertation Leiden University 2007); I. L. A. Broekhuijse, *De gelijkwaardigheid van de landen van het Koninkrijk der Nederlanden: realiteit of perceptie?* (PhD dissertation Utrecht University/

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Wolf Legal Publishers 2012); L. J. J. Rogier, *Beginnelsen van Caribisch Staatsrecht* (Boom Juridische uitgevers 2012), C. Borman, *Het Statuut voor het Koninkrijk* (Kluwer 2012); see also for a broader perspective on Dutch colonialism Frances Gouda, *Dutch Culture Overseas: Colonial Practice in the Netherlands Indies 1900–1942* (Amsterdam University Press 1995).

(3) The term ‘Dutch Caribbean’ is only used for the sake of simplification and it is not used in current Dutch literature, legislation or policy to encompass the six islands. Rather, the Dutch term ‘Caribisch Nederland’ has a more limited meaning as it is only employed to refer to the three Caribbean public entities that integrate the country of the Netherlands (Bonaire, Sint Eustatius and Saba).

(4) H. E. Bröring, D. Kochenov, H. G. Hoogers, J. H. Jans (eds), *Schurende rechtsordes: over de Europese Unie, het Koninkrijk en zijn Caribische gebieden* (Europa Law Publishing 2008).

(5) The expressions ‘leeward’ and ‘windward’ are not consistently used in various languages. Depending on the viewpoint, the three latter islands are in English usage also called ‘leeward’.

(6) M. Alberts-Luidjens, ‘Historical Development of Libraries in the Netherlands Antilles and Aruba’ in C. Peltier-Davis and S. Renwick (eds), *Caribbean Libraries in the 21st Century: Changes, Challenges, and Choices* (Information Today 2007) 31–32.

(7) For an overview of the complex Dutch colonial history, see, for example, M. van Groesel, *Amsterdam’s Atlantic: Printing Culture and the Making of Dutch Brazil* (University of Pennsylvania Press 2017).

(8) See J. Israel, *Dutch Primacy in the World Trade, 1585–1740* (Oxford University Press 1989).

(9) Upon the decline of the Second West India Company at the end of the eighteenth century, all territories formerly occupied and administered by the company were reverted to the power of the Dutch state. C. M. A. M. Duijf and A. H. A. Soons, *The Right to Self-determination and the Dissolution of the Netherlands Antilles* (Wolf Legal Publishers 2011) 5.

(10) H. W. C. Bordewijk, *Ontstaan en ontwikkeling van het staatsrecht van Curaçao* (Martinus Nijhof 1911) 92.

(11) This conflictual relationship was evident for example in the protests against Curaçao’s central administration that took place in the 1910s and 1920s in the Windward Islands.

(12) These affairs are mainly, but not exclusively listed in Article 3, para 1 of the Charter.

(13) Since 1954, Suriname was also a constituent country of the Kingdom of the Netherlands until its independence on 25 November 1975.

(14) Article 3, para 2, of the Charter.

(15) The identical Article 1 para 1 of the of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognize this collective human right to self-determination. Each of the Dutch Caribbean countries has its own 'people' or 'nation', with a right to one of the forms of self-determination recognized under international law. Self-determination can result in independence, but also in a merger with another independent state (including possibly the former colonial power), or a freely chosen association.

(16) Article 3, para 1 (c) of the Charter.

(17) Article 41 of the Charter, para 1.

(18) Article 38 of the Charter requires 'common consent' for the regulation of these matters.

(19) Although there is debate whether the consensus only relates on the fact that a Kingdom Act will be enacted, or that the consensus must last throughout the complete legislative procedure.

(20) According to Article 2, para 1 (b) of the Charter, foreign relations are qualified as a Kingdom affair.

(21) According to this article, approval may not be necessary if the treaty is, for instance, secret or confidential and its provisions are not in conflict with the Constitution.

(22) Article 29 of the Charter states 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'

(23) Article 25 of the Charter.

(24) Article 39 para 1 of the Charter.

(25) Albeit in Sint Maarten and Curaçao after one, respectively two articles on the territory of the country (and the sources of law).

(26) Save for a legal term that is necessarily different; e.g. an Act of Parliament is referred to as 'landsverordening' in the Constitution of Curaçao, *whereas* in the Dutch Constitution this would be called 'wet' (statute). Also, although the Constitution of Curaçao was adopted in 2010, it even recognizes the right of privacy for telegraphing. This right was adopted in the Dutch Constitution in 1983 and was also protected under the Aruban Constitution, which was adopted in 1986.

(27) Article 45 of the Charter.

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(28) Article 93 and 94 of the Constitution of the Kingdom of the Netherlands are, through Article 5 of the Charter, also applicable on Kingdom level and hence for all territories of the Kingdom. See about its effect section 8.4.4 of this chapter.

(29) *Fundamental Rights in the Kingdom of the Netherlands: Equivalent Protection in All Parts of the Kingdom. Theory and Practice of Territorial Limitations on the Application of Human Rights Treaties Upon Ratification*, Report No. 107, June 2018 <<https://aiv-advies.nl/download/06d8f6fe-f4db-460b-9fd2-62a87956f178.pdf>>.

(30) See *Corallo v the Netherlands* (App. 29,593/17) ECHR 9 October 2018.

(31) In Sint Maarten, the number of members of Parliament varies according to the size of the population. Parliament shall consist of fifteen members if the population of Sint Maarten is 60,000 or less, seventeen members if the population amounts to more than 60,000 and no more than 70,000, nineteen members if the population amounts to more than 70,000 and no more than 80,000 and twenty-one members if the population amounts to more than 80,000 (Art 45, para 1 of the Sint Maarten Constitution).

(32) Article II.1, para 1 of the Constitution of Aruba, Article 28 para 1 of the Constitution of Curaçao, Article 32 para 1 of the Constitution of Sint Maarten. The King is represented by the Governor (see para 2 of each of these articles, as well as Article 2, para 2 of the Charter).

(33) L.J.J. Rogier, *Beginnelsen van Caribisch bestuursrecht*, (Boom Juridische Uitgevers 2012) 101.

(34) L.J.J. Rogier, *Beginnelsen van Caribisch bestuursrecht*, (Boom Juridische Uitgevers 2012) 177-80.

(35) Article 38, *National ordinance registration and finances of political parties* (explanatory memorandum).

(36) L.J.J. Rogier, *Beginnelsen van Caribisch staatsrecht*, (Boom Juridische Uitgevers 2012) 178.

(37) See section 8.3.4.2 in this chapter.

(38) In 2017 Aruba was still debating a Bill on the appointment of an Ombudsman and a Children's Ombudsman. The country has been debating the need to appoint an Ombudsman for two decades.

(39) See Article IV.9 of the Aruban Constitution, Article 72 of the Curaçao Constitution and Article 79 of the Sint Maarten Constitution.

(40) Article II.1, para 3, of the constitution of Aruba; Article 28, para 3 of the constitution of Curaçao; and Article 32, para 3, of the Constitution of Sint Maarten.

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(41) Only in Sint Maarten there is an additional constitutional provision on the rule of confidence. Article 33, para 3 states that specific rules on the rule of no confidence shall be laid down by Act of Parliament.

(42) The Dutch legal terminology distinguishes two words for appeal in this context: the original appeal in which the claimant brings a case against the Government to the courts, is called '*beroep*' and when one of the parties seeks to challenge this judicial ruling, and takes it to the higher court, it is called '*appel*' or '*hoger beroep*'.

(43) Translations may be used. This is also often necessary, because—especially on the Windward Islands—many people do not speak Dutch.

(44) The Dutch Council of State (Raad van State) is a body with two divisions which functions both as an advisory body to the Dutch *legislature* (Advisory Division) and as the Dutch Supreme Court in a number of administrative matters (Judiciary Division). The advisory opinions of the Dutch Council of State are also not binding but they are supposed to be seriously taken into consideration. The Dutch Council of State analyses the legality of the Bill and makes a policy evaluation of the legislative solution.

(45) An exception may be found in Article 26 (10) Kingdom Act on the Financial Supervision Curaçao and Sint Maarten.

(46) Same provision in all three countries.

(47) Pending legislative proposal 35 099 (R2114), '*Voorzieningen voor de behandeling van geschillen tussen het Koninkrijk en de landen (Rijkswet Koninkrijksgeschillen)*'.

(48) Chapter 7 of the Dutch Constitution.

(49) See in this volume, David Marrani and Sacha Sydoryk, 'The Constitutional Framework of the French Caribbean: Guadeloupe, Martinique, Saint Martin and Saint Barthélemy', Chapter 10.

(50) Which is interesting, because Article 109 of the Dutch Municipality Act states that by or pursuant to the law differentiation between municipalities can be made if necessary; Article 115 of the Municipality Act, on concordance between municipalities, when cooperation is required, offers a similar ground to deviate.

(51) Article 355, para 6 of the Treaty on the Functioning of the European Union.

(52) This financial supervision is described in Act Finances BES (*Wet financiën Bonaire, Sint Eustatius en Saba*).

(53) Irene Broekhuijse, 'Naar een BES-Doctrine?' in Paul Bovend'Eert e.a., *De verhoudingen in het Koninkrijk der Nederlanden, een perspectief op de toekomst* (Wolf Legal Publishers 2016) 169–87 (preadvies voor Staatsrechtconferentie in 2015).

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(54) Evaluation report: Rapport *Vijf jaar verbonden: Bonaire, Sint Eustatius, Saba en Europees Nederland* 2015, 81.

(55) Evaluation report: Rapport *Vijf jaar verbonden: Bonaire, Sint Eustatius, Saba en Europees Nederland* 2015, 57.

(56) Broekhuijse therefore proposed in return a set of doctrines, one doctrine to establish when and if so, how to differ in the event that social rights are at stake and one doctrine to establish when to differ in the event that ‘classical’ human rights are at stake (Broekhuijse, ‘Naar een BES-Doctrine?’ (n 53)).

(57) See *Fundamental Rights in the Kingdom of the Netherlands* (n 29).

(58) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en#4>. As Hirsch Ballin once noted, it makes no difference whether a citizen is on a wheelchair in the Caribbean or in the Netherlands; the central government should look at the factual situation rather than at the environmental circumstances. See Broekhuijse, ‘Naar een BES-Doctrine?’ (n 53).

(59) See section 8.3.2 of this chapter.

(60) In principle, the island council decides how often it meets.

(61) Article 93 of the Dutch Constitution.

(62) Articles 171 and 60 of the Law on the Public Entities BES.

(63) Article 149 of the Law on the Public Entities BES.

(64) Article 205 Law on the Public Entities BES. On the contrary, the Governor of a Caribbean country is in the first place a member of the local government; and in the event that he acts on behalf of the Kingdom, at least there are procedures that the Caribbean country will be heard regarding the measure that the Kingdom takes.

(65) Article 204, para 1 sub b and g, Law on the Public Entities BES. In a municipality it would be the task of mayor to propose to the central government (via the provincial government) to annul a decision, rather than for instance of the Kings Commissioner (on provincial level); Article 273 of the Municipality Act. Article 273a offers ground for the Kings Commissioner to propose to annul a decision, but 1) the definition of decision is narrower than in the BES islands and 2) the Kings Commissioner can only propose to annul a decision taken by the mayor and the Provincial government of the local government or city council. Also, the authorities granted to the Kingdom Representative is necessarily more intrusive, as the checks and balances on provincial level—who exercise higher supervision over the municipalities—offer better safeguards against improper actions than the ‘one-headed’ Kingdom Representative. When the provincial government decides to ‘send the proposal to the Crown’ for annulment, there is at least a necessary debate be-

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tween the members of the provincial government, and the provincial representative body may control the provincial government when they exercise this power.

(66) There is also financial supervision of Aruba based on a special agreement between the governments and Aruban legislation enacting this supervision.

(67) Article 43 of the Charter.

(68) A. van Rijn, *Handboek Caribisch Staatsrecht* (Boom Juridisch 2019) 132.

(69) See, for example, A. G. Croes, *De herdefiniëring van het Koninkrijk* (Wolf Legal Publishers 2006) and J. M. Saleh, *Constitutionele- en rechtsstatelijke verhoudingen in de landen van het Koninkrijk, in het bijzonder de Caribische delen van het Koninkrijk. Twee redevoeringen van prof. mr. J.M. Saleh* (Wolf Legal Publishers 2011). See also the historical research in the PhD Dissertation *Het Koninkrijk ontsluit* by Ryçond Santos do Nascimento, Groningen/Aruba 2016, https://www.rug.nl/research/portal/files/37551866/Complete_thesis.pdf

(70) E. Hirsch Ballin, 'Autonomie met perspectief. Een terreinverkenning voor toekomstige relaties van Caribische landen met Nederland en Europa' (2017) 6 Caribisch Juristenblad 291.

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