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## A Case Study: Law and Emotions Within the Kingdom of the Netherlands

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## **A Case Study: Law and Emotions Within the Kingdom of the Netherlands**

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## Introduction

Whether you are a Christian or not, you cannot deny the truth of the proverb “[a] brother offended is more unyielding than a strong city, and quarrelling is like the bars of a castle,”<sup>1</sup> especially when you study the constitutional relationship between the Netherlands and its former colonies Aruba, Curacao, and St. Maarten.

The Netherlands, Aruba, Curacao and St. Maarten are four countries that together constitute the Kingdom of the Netherlands.<sup>2</sup> These countries feel so wronged by one another that emotions often take over. In July 2014, for instance, the Prime Minister of Aruba desperately went on a hunger strike because he felt that the autonomy of Aruba had been illegally infringed upon as the Kingdom Government ordered the Governor of Aruba not to sign the country’s budget. The reasoning behind this order was in response to an opinion of the Kingdom Government that the debt had grown explosively and that this budget aggravated the problem. Subsequently, the Prime Minister of Aruba believed that the dispute settlement procedure between the Kingdom, ‘central’ (predominantly Dutch) government, and ‘local’ government was useless.<sup>3</sup> He felt that the Dutch government would be overrepresented in this procedure, and he was afraid that the Dutch government would maintain its stance.<sup>4</sup> The Dutch government urged for reasonableness.<sup>5</sup>

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1. *Proverbs* 18:19 (ESV).
  2. The Kingdom of the Netherlands is not just a country in North-West Europe headed by a King; part of the Kingdom is situated in the Caribbean. In fact, it extends to three more Caribbean islands, Bonaire, St. Eustatius and Saba; these three islands are constitutionally part of the Netherlands (in North-West Europe). STATUUT NED [CHARTER] art. 1.
  3. *Premier Eman from Aruba Hunger Strike*, DE TELEGRAAF, (July 11, 2014), [http://www.telegraaf.nl/binnenland/22846081/\\_\\_\\_Premier\\_Aruba\\_in\\_hongerstaking\\_\\_\\_html](http://www.telegraaf.nl/binnenland/22846081/___Premier_Aruba_in_hongerstaking___html).

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Although the ‘Aruban matter’ has now been resolved, this case demonstrates the seriousness of the debates on the interpretation of the Charter,<sup>6</sup> especially with regard to the division of competencies and power between the Kingdom government and the governments of the respective countries.<sup>7</sup> These conflicts have, of course, a history and the underlying emotions go deep.

Today, the deadlock in the Kingdom’s relationships is marked by the absence of an independent dispute settlement procedure, notwithstanding the agreement between the four countries to establish such procedure on the Kingdom’s level.<sup>8</sup> For a long time, the Netherlands

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4. Although not the Council of Ministers of the Kingdom, which consists of the Dutch Council of Ministers plus one minister plenipotentiary of each Caribbean country, but a delegation of the Council of Ministers of the Kingdom would decide. For completeness, the dispute settlement procedure is laid down in Art. 12 of the Charter; the key ‘passages’ of the Article for this purpose read: If the Minister Plenipotentiary of either the Netherlands Antilles or Aruba has serious objections to the initial opinion of the Council of Ministers on the binding nature of the provision referred to in paragraph 1, or on any other matter in the consideration of which he has participated, deliberations thereon shall continue at his request, if necessary having regard to a time-limit to be determined by the Council of Ministers. The deliberations referred to above shall be conducted by the Prime Minister, two Ministers, the Minister Plenipotentiary and a Minister or special representative to be designated by the Government concerned. If both Ministers Plenipotentiary desire to participate in the continued deliberations, these deliberations shall be conducted by the Prime Minister, two Ministers and the two Ministers Plenipotentiary. Article 10, paragraph 2 shall apply *mutatis mutandis*. STATUUT NED [CHARTER] art. 12, paras. 2-4.
  5. *Plasterk Calling Hunger Strike of Eman Undesirable*, NEDERLANDSDAGBLAD (July 14, 2014), <http://www.nd.nl/artikelen/2014/juli/14/plasterk-noemt-hongerstaking-eman-onwenselijk>.
  6. The Charter is the highest constitutional document of the Kingdom of the Netherlands. STATUUT NED [Charter] pmb1. For completeness, this example of the hunger strike is only one out of numerous cases of serious conflict. Some other recent cases are: Aruba’s (initially forced) participation in the Common Court of Justice of Aruba, Curaçao and St. Maarten and Bonaire, St. Eustatius and Saba.; *see*, higher (financial) supervision over Curaçao (although this particular conflict is based on a Kingdom Act, Financial Supervision Act Curaçao and Sint Maarten, Kingdom Act of July 7, 2010 rather than on the Charter and the integrity test on St. Maarten, *Integrity test/screening of government of St. Maarten*, DAILY HERALD (Oct. 20, 2014), <http://www.dutchcaribbeanlegalportal.com/news/latest-news/4357-second-chamber-backs-st-maarten-instruction>.
  7. The relevant articles are – at least – 3 and 43, STATUUT NED [CHARTER] art. 3, sub. 1, 43.

defended the stance that they should be able to ultimately overrule the Caribbean countries; the Netherlands feels that given that it is the largest partner (ca. 17,000,000 inhabitants), its policies must not be overridden by the interest of a Caribbean country which represents either ca. 35,000 people (St. Maarten), ca. 100,000 (Aruba), or ca. 140,000 (Curacao).<sup>9</sup> The Caribbean countries argue their right to self-determination, which means they cannot be overruled in the event that the law is applied incorrectly at the expense of their autonomy.<sup>10</sup> Of course, we do not argue that the Netherlands insists on being able to breach the law when it wants to enforce its policy. However, even if all parties would agree that only disputes about the interpretation of the law could be litigated, one must note that the line between law and policy is thin. Is interference with national budgets based on constitutional norms a matter of law or policy? Consequently one might wonder if litigation would be the answer to resolve this highly emotional issue and whether it could solve the underlying conflict.

In this paper, we propose a different approach to resolve this problem inspired by the South African Constitution, which focuses on cooperation.<sup>11</sup> Section 41, subsection 3 and 4 of the South African Constitution reads:

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute;

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8. STATUUT NED [Charter] art. 12A. In May the inter-parliamentarian meeting reopened the discussion, by giving their respective governments a clear task to establish a dispute settlement procedure. However, despite this effort, in June the Governments still did not reach an agreement on the matter. *Kingdom Conference Fails to Agree on Dispute Regulation*, DUTCH CARIBBEAN LEGAL PORTAL (June 17, 2015, 8:58 AM), <http://www.dutchcaribbeanlegalportal.com/news/latest-news/5408-kingdom-conference-fails-to-agree-on-dispute-regulation>. Today, the discussion still prolongs.
  9. CORNELIS BORMAN, *HET STATUUT VOOR HET KONINKRIJK 22* (Kluwer 2005).
  10. Irene Broekhuijse, *The constitutional equality of the countries of the Kingdom of the Netherlands: reality or perception?*, 271-73 (thesis, Utrecht University 2012). <http://dspace.library.uu.nl/bitstream/handle/1874/254907/broekhuijse.pdf>
  11. S. AFR. CONST. 1996 § 41.
  13. *Id.*

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(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.<sup>12</sup>

Likewise, rather than focusing on litigation, we focus on cooperation. We believe that the law, specifically the dispute settlement procedure, must be framed in such a way that cooperation is promoted.<sup>13</sup> Presently, the overarching legal framework seems to be designed in a way that the different interests of the respective countries are acknowledged, underpinned, and highlighted. Given the present legal framework, which allowed this conflict to arise, and the legacy of colonialism, it can be challenging to establish a new paradigm. With reference to the communication theory “the Rose of Leary,”<sup>14</sup> we will illustrate why we believe such a paradigm shift may be necessary despite these difficulties.

In order to develop our argument, we successively provide an insight into the colonial history of the “Dutch West Indies,” discuss how the present legal framework stimulates disassociation, and briefly mention the main idea of the Rose of Leary and how this model can be used to marginalize the emotional, but particularly conflictual situation. We conclude with a brief summary reinforcing our argument.

### **A Historical Background**

Let us begin by providing some insight into the history of the Kingdom of the Netherlands. After all, if we are to understand the difficulties of today, we have to understand its causes. As it goes too far to give an extensive overview of a history of more than three centuries, which is how long the connection between the Netherlands and the Caribbean parts of the Kingdom exists, let us highlight one

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12. *Id.*

13. Although of course we acknowledge that – like in the South-African Constitution – a provision must be made to allow for litigation as an *ultimum remedium*. *Id.*

14. TIMOTHY LEARY, MULTILEVEL MEASUREMENT OF INTERPERSONAL BEHAVIOR: A MANUAL FOR THE USE OF THE INTERPERSONAL SYSTEM OF PERSONALITY 1 (1956). For a brief and an accessible explanation of this theory, please view: Sjoerd Wapperom, *Modeling Interpersonal Stance in Affective Conversations in Police Interrogations*, U. OF TWENTE, ¶ 2.2., <http://hmi.ewi.utwente.nl/verslagen/capita-selecta/RT-Wapperom-Sjoerd.pdf> (last visited June 15, 2015).

particular and recurring cause that created emotionally deep wounds within the Kingdom relationships: colonialism and unfruitful decisions regarding the colonial and later post-colonial administration.<sup>15</sup> Two particular related and recurring causes that have created emotionally deep relationship wounds within the Kingdom are colonialism and unfruitful decisions regarding the colonial and post-colonial administration.

The problem is thus twofold. On the one hand there is this tension between the metropolis and the (former) colonies, and on the other hand, there is great tension between the respective islands.<sup>16</sup> Below we limit our discussion of the former observation, as we believe that the tension between the metropolis and the (former) colonies speaks for itself. We will provide further explanation on the latter observation below.

In sum, these islands have been united seemingly against their will and without essential common interests.<sup>17</sup> Moreover, even after the decolonization in 1954, the smaller islands still felt dominated, although this time by Curacao, the largest and historically main island.<sup>18</sup> The prevailing view was that Curacao took better care of itself as an independent unit than the Netherlands Antilles as a whole; consequently the islands developed not only a hostile attitude towards their former colonizer, the Netherlands, but also towards each other.<sup>19</sup>

Disregarding the autonomy granted by the Netherlands, the autonomy was thus not necessarily experienced. It was not until October 10, 2010 that the five islands<sup>20</sup> ceased to be united as a country.<sup>21</sup>

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15. BORMAN, *supra* note 9, at 1.

16. A.B. VAN RIJN, *STAATSRECHT VAN DE NEDERLANDSE ANTILLEN*, DEVENTER: W.E.J. TJEENK WILLINK 33 (1999).

17. H.W.C. BORDEWIJK, *ONTSTAAN EN ONTWIKKELING VAN HET STAATSRECHT VAN CURAÇAO*, 84, 92 (Den Haag: Martinus Nijhoff 1911).

18. VAN RIJN, *supra* note 16, at 33.

19. GERT OOSTINDIE & INGE KLINKERS, *GEDEELD KONINKRIJK, DE ONTMANTELING VAN DE NEDERLANDSE ANTILLEN EN DE VERNIEUWING VAN DE TRANS-ATLANTISCHE RELATIES* 21-36 (Amsterdam University Press 2012).

20. OOSTINDIE & KLINKERS, *supra* note 19, at 7; CHARLOTTE M.A.M. DUIJF & ALFRED H.A. SOONS, *THE RIGHT TO SELF-DETERMINATION AND THE DISSOLUTION OF THE NETHERLANDS ANTILLES I* (Wolf Legal 2011), Aruba left the constitutional framework of the Netherlands Antilles already on the 1<sup>st</sup> of January 1986 and acquired the status of country within the Kingdom of the Netherlands.

21. *Id.*

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On this date, the country ‘Netherlands Antilles’ was finally dissolved.<sup>22</sup> Curacao and St. Maarten became countries within the Kingdom of the Netherlands; constitutionally Bonaire, St. Eustatius and Saba, the smallest islands became part of the Netherlands.<sup>23</sup> Although the dissolution of the country happened peacefully, it left a big emotional impact on the islands, which would prove to have far-reaching consequences. Autonomy was considered a national trophy, especially for St. Maarten and previously for Aruba. At last they are not dominated by other powers on a day-to-day level, and they have decided to defend it forcefully. The battle for autonomy also had an impact on a different level: the legal framework has proven to be able to adapt to changes as the result of a conflict.<sup>24</sup> Against the original will of the Netherlands, the Caribbean countries managed at last to renegotiate their constitutional position, thus the conflict proved effective.<sup>25</sup>

During colonial times, there does not seem to be a clear point in which the islands cooperated effectively, nor were their common interests detected and promoted. The Netherlands Antilles therefore inherited a legacy, which hardly contained any social, economic, cultural infrastructures, or shared interests between the respective islands. In essence, six islands that had hardly anything in common, were united administratively for centuries. The only theme of the colonial history that unites the islands is the disregard of their distinct nature. In 1815, the Kingdom of the Netherlands adopted its first Constitution, which divided the islands into two colonies: St. Maarten, St. Eustatius and Saba, on which inhabitants spoke English and Curacao (and subordinations, *i.e.* Aruba and Bonaire), on which the local language was Papiamentu/Papiamento.<sup>26</sup>

This situation lasted for thirteen years. In 1828, Surinam, Curacao (and subordinations, *i.e.* Aruba and Bonaire), St. Maarten, St. Eustatius, and Saba were administratively united.<sup>27</sup> Although each of

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22. *Id.*

23. CHARLOTTE M.A.M. DUIJF & ALFRED H.A. SOONS, THE RIGHT TO SELF-DETERMINATION AND THE DISSOLUTION OF THE NETHERLANDS ANTILLES 1 (Wolf Legal 2011).

24. *See infra* Section 3.

25. DUIJF & SOONS, *supra* note 23, at 15.

26. *Id.* at 3.

27. GERT OOSTINDIE & INGE KLINKERS, DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE 58 (AMSTERDAM UNIVERSITY PRESS 2003).

these colonies kept their local administration, they were all responsible to “Paramaribo,” the capital of Surinam, where the head office of the colonial administration was situated.<sup>28</sup> Fransen Van de Putte, the then Dutch Minister of colonies, admitted that they had nothing in common, except for their administration.<sup>29</sup> Centuries later, Oostindie, a contemporary Dutch historian, commented that the structure was indeed unfruitful.<sup>30</sup>

In 1845, the administration changed again: Surinam became a separate colony from Curacao (and subordinations), St. Maarten, St. Eustatius and Saba.<sup>31</sup> The administration of the islands was established on Curacao, the largest and main island.<sup>32</sup> This change was not necessarily beneficial for the islands, since, the difference was not merely between the islands and Surinam. As mentioned above, the language of the local people in Curacao, Aruba, and Bonaire is Papiamentu/Papiamento, while in St. Maarten, St. Eustatius, and Saba the primary language is English.<sup>33</sup> Also, the distance between the Windward Islands (St. Maarten St. Eustatius and Saba) and the Leeward Islands (Curacao, Aruba and Bonaire) is about 900 kilometers,<sup>34</sup> thus escalating cultural differences. It is unthinkable that the Windward Islands and Leeward Island would influence each other culturally, particularly since the possibilities of communication were still limited in the mid-nineteenth century. In fact, even the islands that are relatively close to each other could have tremendous differences. For example, Curacao and Bonaire have a history of slavery until July 1st, 1863, whereas Aruba has not;<sup>35</sup> St. Maarten also has a history of slavery, whereas Saba was famous for piracy.<sup>36</sup> Given the circum-

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28. BORDEWIJK, *supra* note 17, at 63.

29. Broekhuijse, *supra* note 10, at 24.

30. *Id.* at 25.

31. VAN RIJN, *supra* note 16.

32. *Id.* at 28.

33. DUIJF & SOONS, *supra* note 23, at 3.

34. *Id.*

35. ENCYCLOPEDIA OF EMANCIPATION & ABOLITION IN THE TRANSATLANTIC WORLD 189 (Junius Rodriguez, Ed. 2007).

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stances (large distance and limited means of communication), one might wonder if all local interests could be sufficiently taken into consideration; for example, one might ask whether the administration on Curacao was sufficiently aware of the state of affairs on the other islands.

This question is perhaps the *key* question in history, for even after the colonial administration gained more influence on the colonial affairs, and ultimately after the decolonization in 1954, Curacao was always regarded as the ‘main island’ that particularly took care of its own affairs; even at (according to emotional experiences) the expense of other islands. Without incentives and good infrastructure to cooperate,<sup>37</sup> the islands ultimately persisted in the dissolution of the Netherlands Antilles.<sup>38</sup>

One might wonder why it was considered necessary for the six islands to remain together after the decolonization in 1954, if it was clear that the islands had not much in common and were not attired with a good infrastructure and communication abilities. Was the union of the six islands merely unfruitful, or were there also good causes? Whether there was good cause falls outside the scope of the present discussion. However, one cause which was considered important was the ability to maintain a sufficient level of good governance. Because the islands are small and fragile, people are prone to favor those they know. How then, could they, for instance, establish an independent court and maintain a complete judicial system? The issue would be marginalized when representatives of the islands cooperated in such affairs as, maintaining a judicial system, deciding on the spending of public money, etc.<sup>39</sup>

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36. For some more informal information on the historical background of these two islands, please view: *History and Culture*, SABA DUTCH CARIBBEAN, <http://www.sabatourism.com/history.html> (last visited Nov. 27, 2015); *Slavery and Emancipation*, ST. MAARTEN NAT'L HERITAGE FOUND., [http://www.museumsintmaarten.org/index.php?option=com\\_content&view=article&id=83&Itemid=117](http://www.museumsintmaarten.org/index.php?option=com_content&view=article&id=83&Itemid=117) (last visited Dec. 17, 2015).

37. Etienne Ys, former Prime Minister of the Netherlands Antilles, Presentation at the National Constitutional Law Conference of the Netherlands (Dec. 19, 2015).

38. DUIJF & SOONS, *supra* note 23, at 14-15. Except for St. Eustatius, the only island which voted in favor of the Netherlands Antilles.

The dissolution of the Netherlands Antilles did not, consequently, establish full autonomy for the Caribbean countries. The Netherlands demanded that the islands prolonged their cooperation in certain affairs, such as maintaining the judicial system.<sup>40</sup> The autonomy was still greater than the event in which they remained an island territory of the Netherlands Antilles. They also faced another novelty that potentially affected this newly gained autonomy, which could actually diminish their level of autonomy. The newly established Caribbean countries noticed that the Charter was now directly applicable to them, including the provision on supervision.<sup>41</sup> Since October 10, 2010, the Netherlands has been willing to make use of their power to supervise, whether it was because of disagreement on spending public money or because of the appointment of government ministers and the alleged malfunctioning of local ‘national’ authorities.<sup>42</sup> This resulted from the call for recolonization and the increased accusations of ill-government and thievery. The fact that all Caribbean countries ‘fight for their autonomy’ against the Netherlands, they may, at last, cooperate in order to implement a independent dispute settlement procedure.

For nearly the past five years, governments have sought a solution to resolve this severe problem.<sup>43</sup> Needless to say, that due to the economic crisis, which also hit the Netherlands and affected the islands, the solution must be affordable. Given the tremulous history,

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39. The reasons to unite the islands are different from the motives to unite the islands administratively in the colonial era. During colonial times the organisation of the administration of the ‘West-Indies’ changed numerous times. The outcome of a change seems usually the result of financial considerations. In any case it did not always seem to the benefits of the colony, whilst the administrative structure appears to be most economical.

40. Aruba continued to participate in the Court of Justice of the Netherlands Antilles when it acquired the status of country within the Kingdom. The Court was later renamed: The Common Court of Justice of the Netherlands Antilles and Aruba. Luc Verhey, *Slotakkoord of nieuw begin, enkele algemene beschouwingen over het nieuwe koninkrijk*, in WETTEN VOOR DE WEST, 27, 29 (Alfred Roos & Luc Verhey ed. 2010).

41. Irene Broekhuijse & Roxan Venter, *Constitutional Law from an Emotional Point of View: Considering Regional and Local Interests in National Decision-Making*, XXVII WORLD CONGRESS OF THE INT’L ASS’N FOR THE PHIL. OF L. AND SOC. PHIL. (IVR) 15 (2006), [https://drive.google.com/file/d/0B7v1\\_whu0-coRXFpTFJuYVI3LTg/view](https://drive.google.com/file/d/0B7v1_whu0-coRXFpTFJuYVI3LTg/view).

42. *Id.* at 12.

43. Verhey, *supra* note 40.

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it could be difficult to reach an agreement that will satisfy all countries.

### **The Present Legal Framework**

So far, we established that the conflicts within the Kingdom of the Netherlands are of a serious nature and that these negative feelings are fed by historical events. Besides these, there are other causes of disassociation that need to be taken into account: the structure of legal framework; the maximization of the autonomy of the respective countries; and the structure of the Kingdom institutions.<sup>44</sup> The structure of the institutions encourages and fosters the respective countries to plea for their own cause, rather than promoting a focus on *common* interests. The aforementioned legal framework will be spelled out below in the interest of completeness.<sup>45</sup>

#### **A. Autonomy**

Concretely, after the decolonization of the Dutch West Indian colonies, emphasis was laid on the autonomy of the Caribbean countries of the Kingdom.<sup>46</sup> In short, three legal orders (then: the Netherlands, Surinam and the Netherlands Antilles, at present four: the Netherlands, Aruba, Curaçao and St. Maarten were created within the international legal subject ‘the Kingdom of the Netherlands.’<sup>47</sup>

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44. *Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean*, MINISTRY OF FOREIGN AFF., <https://www.government.nl/documents/leaflets/2015/06/05/kingdom-of-the-netherlands-one-kingdom-four-countries-european-and-caribbean>.

45. Paragraphs 3.1 and 3.2 are adapted from the paper written by Broekhuijse for the World Congress on Constitutional Law, June 16-20, 2014 in Oslo. Given it is not part of an argument but the basic explanation of the constitutional framework, it has not been rewritten for the present purposes. Also, for illustration we have additionally incorporated numerous articles of the Charter. For more information on the legal framework please see, Broekhuijse & Venter, *supra* note 41 (the legal framework is briefly spelled out in the joint paper of Venter and Broekhuijse, which has also been submitted for the XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy).

46. *Caribbean Parts of the Kingdom, New Constitutional Order*, GOV. OF THE NETHERLANDS (Dec. 15, 2008), <https://www.government.nl/topics/caribbean-parts-of-the-kingdom/contents/new-constitutional-order>.

47. *Id.*

The Caribbean countries of the Kingdom conduct all affairs independently,<sup>48</sup> unless the Charter indicates that the Kingdom has jurisdiction.<sup>49</sup> As it states, the number of Kingdom affairs is limited; these can be found mainly, but not exclusively<sup>50</sup> in the Articles 3 paragraph 1 and Article 43 paragraph 2 of the Charter, as well as in Article 5. These articles state:

### ***Article 3 Paragraph 1***

Without prejudice to provisions elsewhere in the Charter, Kingdom affairs shall include:

- a. Maintenance of the independence and the defence of the Kingdom;
- b. Foreign relations;
- c. Dutch nationality;
- d. Regulation of the orders of chivalry, the flag and the coat of arms of the Kingdom;
- e. Regulation of the nationality of vessels and the standards required for the safety and navigation of seagoing vessels flying the flag of the Kingdom, with the exception of sailing ships;
- f. Supervision of the general rules governing the admission and expulsion of Dutch nationals;
- g. General conditions for the admission and expulsion of aliens;
- h. Extradition.<sup>51</sup>

### ***Article 43***

1. Each of the Countries shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance.

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48. Albeit not entirely, as mentioned above the Caribbean countries still have to cooperate with each other in certain affairs for purposes of good governance. However, in principle they are autonomous.

49. OOSTINDIE & KLINKERS, *supra* note 27, at 94.

50. *See, e.g.* STATUUT NED [Charter] arts. 44 & 45.

51. Translation of this and other articles by the Ministry of Foreign Affairs, Department of Translation (*Ministerie van Buitenlandse Zaken, Directie Vertalingen (AVT)*). Bulletin of Acts and Decrees of the Kingdom of the Netherlands, Nov. 1, 2010, 4. *See* STATUUT NED [Charter] art. 3.

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2. The safeguarding of such rights and freedoms, legal certainty and good governance shall be a Kingdom affair.<sup>52</sup>

#### *Article 5*

1. The Monarchy and the succession to the Throne, the Organs of the Kingdom referred to in the Charter, and the exercise of royal and legislative power in Kingdom affairs shall be governed, if not provided for by the Charter, by the Constitution of the Kingdom.
2. The Constitution shall have regard to the provisions of the Charter.
3. Articles 15 to 20 inclusive shall apply to any proposal for amendment of the Constitution containing provisions concerning Kingdom affairs, as well as to the Bill stating the grounds for considering such a proposal.<sup>53</sup>

It may be added, that Article 5 relates to the ‘autonomy’ of the Netherlands. Article 5 provides that the Caribbean countries are to be involved in the amendment of the Constitution to the extent that the amendment relates to the organization and competences of, for example, the legislative and the administrative powers.<sup>54</sup> This is on account of the agreement with Kingdom authorities. Also, it must be stated that Article 43 section 2 of the Charter is no more than a *safe-guard*.<sup>55</sup> In principle, the countries are autonomous. According to the memorandum, the Kingdom authorities are only permitted to interfere in the event that the authorities of the country cannot restore the situation by themselves.<sup>56</sup> However, the measures taken by the Kingdom government have to be proportional.<sup>57</sup>

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52. Bulletin of Acts and Decrees of the Kingdom of the Netherlands, Nov. 1, 2010, 14-15. See STATUUT NED [Charter] art. 43.

53. Bulletin of Acts and Decrees of the Kingdom of the Netherlands, Nov. 1, 2010, 4-5. See STATUUT NED [Charter] art. 5.

54. STATUUT NED [Charter] art. 5.

55. STATUUT NED [Charter] art. 43, sec. 2 (emphasis added).

56. *Id.*; Irene Broekhuijse, *The Challenges of the Constitutional Structure of the Kingdom of the Netherlands: A ‘Quasi-Federal’ State in Post-Colonial Context*, 7 (2014), <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws2/w2-broekhuijse.pdf>.

57. STATUUT NED [Charter] art. 51; *The Challenges of the Constitutional Structure*, *supra* note 57.

Furthermore, in Article 39, the Charter stipulates the principle of legal concordance with regard to several areas. Article 39 states:

**Article 39**

Civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, industrial property, the office of notary, and provisions concerning weights and measures shall be regulated as far as possible in a similar manner in the Netherlands, Aruba, Curacao and St Maarten (section 1). Any proposal for drastic amendment of the existing legislation in regard to these matters shall not be submitted to or considered by a representative assembly until the Governments in the other Countries have had the opportunity to express their views on the matter (section 2).<sup>58</sup>

Arguably, neither country is entirely autonomous in these affairs.

**B. Autonomy Guaranteed when Cooperating**

Under Article 38 of the Charter, the countries can cooperate in autonomous affairs, should they desire to do so.<sup>59</sup> It is even possible that the respective governments will negotiate on agreements that will later become legislative proposals. During the entire legislative procedure, in the event the proposal has been amended by parliament in a way that is deemed unacceptable, the respective governments can declare on behalf of their country that the consensus ceases to exist.<sup>60</sup>

**C. Influence in Kingdom Affairs**

A large degree of autonomy was awarded to the Caribbean countries of the Kingdom as well, insofar as matters dealt with by the Kingdom. However, the decisive power in Kingdom affairs remains ultimately in the hands of the Netherlands, making the Caribbean countries' power marginal.<sup>61</sup>

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58. STATUUT NED [Charter] art. 39.

59. STATUUT NED [Charter] art. 38.

60. Cf. Van Dijk, *Consensuswetgeving: Een Bijzonder Concept*, 25 REGELMAAT 6, 321-335 (2010).

61. BORMAN, *supra* note 9, at 26.

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Due to the scarcity of manpower in Kingdom affairs available to Surinam and the Netherlands Antilles, one sought to participate in Dutch institutions, such as: the Council of Ministers,<sup>62</sup> the Council of State,<sup>63</sup> the Court of Cassation,<sup>64</sup> and the States General (*i.e.* Parliament). In sum, the key authorities of the Caribbean countries with regard to their say in Kingdom affairs include: Articles 10, 12, 15, 16, 17, 18, and 23.<sup>65</sup>

Despite the connection with the Dutch institutions, these Kingdom institutions are constitutionally distinct. Remarkably, the one exception is that there is no Kingdom parliament; nor can Dutch Caribbean people vote for the Dutch parliament.<sup>66</sup> As Steven Hillebrink, a Dutch scholar, argues: “[t]here is no Kingdom parliament, *although it could be argued that the Dutch parliament, the Staten-Generaal, functions as such*, because it approves Kingdom acts and international treaties, and applies to the Netherlands Antilles and Aruba.”<sup>67</sup>

The Caribbean representation in these institutions is minimal, and apart from the Council of Ministers of the Kingdom of the Netherlands, optional.<sup>68</sup> By way of compensation for this minimal representation a number of provisions were included in order to counteract possible unilateral dominance by the Netherlands.<sup>69</sup> Examples of such provisions, other than the aforementioned Articles 12 (the ‘conflict procedure’) and 18 of the Charter, include Articles 12a<sup>70</sup> and 38a,<sup>71</sup> as of the last 2010 Amendment. Apart from those sections, the spirit of

62. *Id.* at 93.

63. Art. 17 Council of State Act (addressing the task to advise the Government). Art. 18 Council of State Act (addressing the task to advise the Parliament).

64. In private law, criminal law and in tax law.

65. STATUUT NED [Charter] art. 10, 12, 15-18, 23.

66. Steven Hillebrink, *Political Decolonization and Self-Determination; The Case of the Netherlands Antilles and Aruba 176* (Dissertation Leiden University 2007), <https://openaccess.leidenuniv.nl/bitstream/handle/1887/11003/000-proefschrift-hillebrink-10-01-2007.pdf?sequence=1>.

67. *Id.* at 147 (remarked in BORMAN, *supra* note 9, at ¶ 5.9) (emphasis added).

68. Hillebrink, *supra* note 66, at 147.

69. Broekhuijse, *supra* note 10, at 24.

70. *Id.* at 9. Article 12a: Provisions shall be made by Kingdom Act for settling disputes between the Kingdom and the Countries which are designated by Kingdom Act. It is this procedure that we are presently still awaiting.

71. *Id.* Article 38a: The Countries may enter into mutual arrangements for settling disputes between them. Article 38, paragraph 2 applies. *See* STATUUT NED [Charter] art. 38, sub. a.

the Charter, constitutional equality, would occupy a central position in Kingdom relationships. However, rather than being the conflict procedure for resolving the issue, it is far more often a source of irritation: the countries essentially plea for their own cause and this makes it a competition with ‘winners’ and ‘losers’.

### **The Rose of Leary**

So far we have mainly focused on the problems and some of there causes within the Kingdom. In this paragraph we work towards a proposed solution: from conflict to cooperation. Although in the introduction of this paper we acknowledge our inspiration from the South-African Constitution, which focuses on cooperation, we take it one step further and pay attention to the communicative theory ‘the Rose of Leary’ (for matrix view, see appendix II). We argue that this theory is useful for the present purpose despite the fact that it has been written based on the behavior and personalities of human beings and not on that of states. In our view, it can be used to explain the actions and reactions between states, and in general behavior. Both people and states/governments (groups of people) can be, for instance, dominant, rebellious, distrustful, or cooperative. In addition to the South-African Constitution, this model could assist to establish more specifically which kind of behaviour parties should show in order to create the most beneficial outcome: whether one should take the lead and others should follow, and if so to what degree. The law could then be framed to promote this behaviour.

#### **A. The Theory in a Nutshell**

In the 1950s, a scientist named Timothy Leary co-developed a theory on personalities and behaviour.<sup>72</sup> His most famous work in this regard perhaps, is *The Interpersonal Diagnosis of Personality*, published in 1957.<sup>73</sup> The original work is highly technical and mathematical,<sup>74</sup> but other authors have simplified it over time.<sup>75</sup>

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72. TIMOTHY LEARY, INTERPERSONAL DIAGNOSES OF PERSONALITY: A FUNCTIONAL THEORY AND METHODOLOGY FOR PERSONALITY EVALUATION 15-16 (1957).

73. *Id.*

74. LEARY, *supra* note 14.

75. LEARY, *supra* note 72. For the sake of completeness, the simplified model is the one we studied.

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The model that Leary presents is a circular matrix, which contains two main axes.<sup>76</sup> The vertical axis relates to dominance (the top part of the axis) and submission (the bottom part of the axis); the horizontal axis relates to hostility (the left part of the axis) and the 'love'/cooperation (the right part of the axis).<sup>77</sup> Within this diagram, one finds different ways of interaction, of which eight are, according to Arthur L. Kobler, distinguished as "generic ways of interaction for the use as the overall variable system."<sup>78</sup> These are, in counterclockwise order:

- (1) Managerial-Autocratic,
- (2) Competitive-Narcissistic,
- (3) Aggressive-Sadistic,
- (4) Rebellious-Distrustful,
- (5) Self-Effacing-Masochistic,
- (6) Docile-Dependent,
- (7) Cooperative-Overconventional, and
- (8) Responsible-Hypernormal.<sup>79</sup>

To make it simpler, as described by Sjoerd Wapperom as: "(1) leading, (2) helping, (3) cooperative, (4) dependent, (5) withdrawn, (6) defiant, (7) aggressive, and (8) competitive."<sup>80</sup>

In sum, these types of behavior are not 'merely' classified in the matrix, but the model can also be used as a prediction for reactions. For instance, as Wapperom explains, dominant behavior invites submissive behavior and vice versa, and aggressive behavior invites aggressive behavior, just as cooperative behavior, invites cooperative behavior.<sup>81</sup> Kingdom partners could use this knowledge, not only to be become aware of the issue, but also to influence others positively, to see if the deadlock could be overcome.

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76. *Id.* at 2.

77. *Id.*

78. Arthur L. Kobler, Book Review, 29 *HUM. BIOLOGY* 378, 379-80 (1957).

79. *Id.*

80. Sjoerd Wapperom, *Modeling Interpersonal Stance in Affective Conversations in Police Interrogations*, U. OF TWENTE, ¶ 2.2., <http://hmi.ewi.utwente.nl/verslagen/capita-selecta/RT-Wapperom-Sjoerd.pdf> (last visited June 15, 2015).

81. *Id.*

## Conclusion

In this present paper, we provided basic insight into the historical background and current legal structure of the Kingdom of the Netherlands in order to illustrate how these causes contribute to and foster present conflictual situations. Historically, the islands were administratively united for centuries: first in colonial times, and then after the decolonization in 1954—notwithstanding the fact that they had hardly anything, if anything at all, in common.<sup>82</sup> Although in spite of this required unnatural collaboration, there were also reasons to keep the islands united after the decolonization. It was held that, given their small scale, it would be in the interest of the quality of the government and judicial system in which the islands continued to cooperate. This forced collaboration resulted in a situation in which the islands did not wish to cooperate with each other at all and, finally in 2010, it led to the dissolution of the Netherlands Antilles.<sup>83</sup> Although the islands that became countries gained a high level of autonomy in respect to each other, the dissolution of the Netherlands Antilles potentially diminished their autonomy at the core. Whereas, in the event that the Netherlands, being the largest and ultimately responsible partner within the Kingdom, interferes, the Netherlands Antilles could function as a shock-absorber for the islands Aruba, Curacao and St. Maarten that are now directly exposed to the influence of the Netherlands.<sup>84</sup>

In the introduction of this paper, we established that the Netherlands has not been shy to use this power. Consequently, new issues arose because the Caribbean countries, who fiercely defend their autonomy, accuse the Netherlands of “recolonization.”<sup>85</sup> The Netherlands, on their turn, defend and justify the interference, claiming that their actions are constitutional and, moreover, necessary to maintain the public order. It seems that in 2010, when the Charter was revised in order to realize the dissolution of the Netherlands Antilles, all par-

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82. Broekhuijse, *supra* note 10, at 45.

83. *Id.* at 19.

84. *Id.* View for instance the case of St. Maarten and the issue of good governance. In the early/mid nineteen-nineties, the supervision went via the Governor of the Netherlands Antilles; he could instruct the local authorities. Today, the Governor of St. Maarten is instructed directly by the Kingdom government.

85. *Premier Eman*, *supra* note 3.

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ties anticipated a conflict. In a new Article 12a, it was arranged that they would find a way to establish a suitable dispute settlement procedure.<sup>86</sup> For a long time, we kept searching for a solution within the existing paradigm, the existing legal framework. However, this paradigm fosters conflictual situations, so it is doubtful if a “solution” within this paradigm would ever resolve the matter. After all, as established, the present legal framework focuses particularly on the maximization of the autonomy and political disassociation in the Kingdom institutions.

Indeed, there are (predominantly private) initiatives that focus on cooperation, but we need the law in order to cure this situation of non-collaborative behaviour, because some core issues, such as good governance are at stake. It becomes clear that today, the historical background, combined with the present legal framework, pushed the Kingdom relationships in the left “hostile” part of the circle of “the Rose of Leary,” which we discussed.<sup>87</sup> We argue that if we are to marginalize the conflicts within the Kingdom relationships, we should not focus on the resolution of the legal conflicts, e.g., through litigation; instead, we need to position ourselves in the right “cooperative” part of the circular matrix.<sup>88</sup> It is this side of the matrix that serves the better purposes for the Kingdom relationships. Consequently, when the governments design the required and promised dispute settlement procedure, they need to take into account that its nature would be collaborative rather than competitive, such as litigation or constitutional review. Of course, it is understandable that given the legacy this might be difficult. However, as long as the governments of the countries within the Kingdom of the Netherlands do not change in attitude, it is possible that the real, underlying conflicts can be resolved.

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86. This article states: Provisions shall be made by Kingdom Act for settling disputes between the Kingdom and the Countries which are designated by Kingdom Act. It is this procedure that we are presently still awaiting. Broekhuijse, *supra* note 11, at 69.

87. Wapperom, *supra* note 80, at 2.

88. *Id.* It falls outside the scope of this paper to establish in which concrete corner(s).

**APPENDIX I: A Selection of Articles from the Charter*****Article 10***

1. The Minister Plenipotentiary shall participate in the deliberations of the Council of Ministers and of the permanent boards and special committees of the Council whenever Kingdom affairs are discussed which affect the Country in question.
2. The Governments of Aruba, Curacao and St Maarten shall be entitled to appoint – if they see reason to do so in relation to a particular matter – a Minister, in addition to the Minister Plenipotentiary, to participate with an advisory vote in the deliberations referred to in the preceding paragraph.

***Article 12***

1. If the Minister Plenipotentiary of Aruba, Curacao or St Maarten, indicating his reasons for expecting that a proposed instrument containing generally binding rules would be seriously detrimental to his Country, has declared that his Country could not be bound by such an instrument, the instrument may not be adopted in such a way as to apply to the Country concerned, unless such a course would be inconsistent with the Country's ties with the Kingdom.
2. If the Minister Plenipotentiary of Aruba, Curacao or St Maarten has serious objections to the initial opinion of the Council of Ministers on the binding nature of the provision referred to in paragraph 1, or on any other matter in the consideration of which he has participated, deliberations thereon shall continue at his request, if necessary having regard to a time-limit to be determined by the Council of Ministers.
3. The deliberations referred to above shall be conducted by the Prime Minister, two Ministers, the Minister Plenipotentiary and a Minister or special representative to be designated by the Government concerned.
4. If several Ministers Plenipotentiary desire to participate in the continued deliberations, these deliberations shall be conducted by these Ministers Plenipotentiary, the same

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number of Ministers and the Prime Minister. Article 10, paragraph 2 shall apply *mutatis mutandis*.

5. The Council of Ministers shall take a decision in accordance with the result of the continued deliberations. If the opportunity for continued deliberations has not been utilised within the time-limit specified, the Council of Ministers shall decide.

#### ***Article 15***

1. The King shall forward Bills for Kingdom Acts, at the same time as they are introduced in the States General, to the representative assemblies of Aruba, Curacao and St Maarten.
2. If a Bill for a Kingdom Act was initiated by the States General, the Bill shall be forwarded by the House of Representatives immediately following its introduction in the House of Representatives.
3. The Minister Plenipotentiary of Aruba, Curacao or St Maarten shall have the power to propose that the House of Representatives initiate a Kingdom Bill.

#### ***Article 16***

The representative assembly of the Country in which the legislation is to apply shall be empowered, before the Bill is publicly debated in the House of Representatives, to examine the Bill and to issue a written report thereon, if necessary within a fixed time-limit.

#### ***Article 17***

1. The Minister Plenipotentiary of the Country in which the legislation is to apply shall be afforded the opportunity to attend the debates on the Bill in the States General and to furnish such information to the Senate and House of Representatives as he considers desirable.
2. The representative assembly of the Country in which the legislation is to apply may decide to designate, for the purposes of the debate on a particular Bill in the States General, one or more special delegates who shall like-

wise be empowered to attend the debates and furnish information.

3. The Ministers Plenipotentiary and the special delegates shall be immune from any legal proceedings in respect of anything they say in or submit in writing to the meetings of the Senate or House of Representatives.
4. The Ministers Plenipotentiary and the special delegates shall be empowered to propose amendments to a Bill during the proceedings in the House of Representatives.

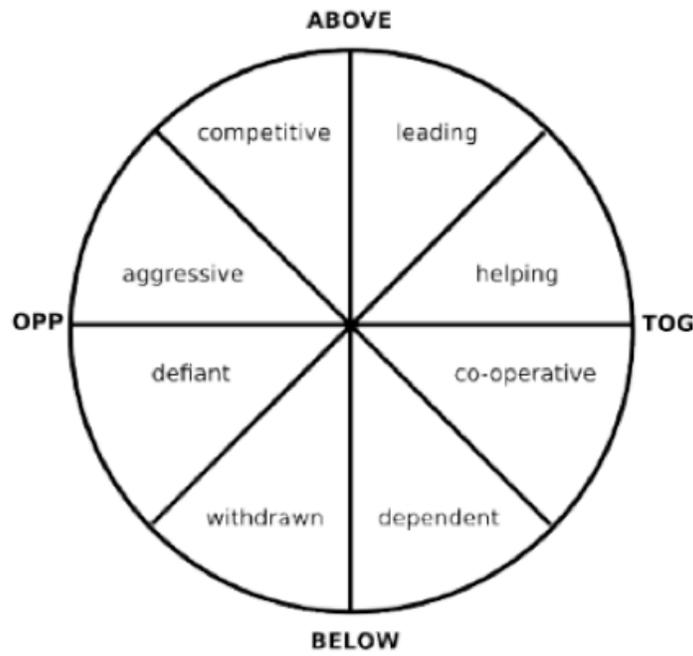
#### ***Article 18***

1. Before a final vote is taken on any Kingdom Bill in the Senate and House of Representatives, the Minister Plenipotentiary of the Country in which the legislation is to apply shall have the opportunity to express his opinion on the Bill. If the Minister Plenipotentiary states his opposition to the proposal, he may request the House at the same time to postpone the vote till the following meeting. If, after the Minister Plenipotentiary has stated his opposition to the Bill, the House of Representatives adopts it with a majority of less than three-fifths of the number of votes cast, the proceedings shall be suspended and the Council of Ministers shall consider the Bill further.
2. If the meetings of the Senate or House of Representatives are being attended by special delegates, the power referred to in paragraph 1 shall devolve upon the delegate designated for the purpose by the representative assembly.

#### ***Article 23***

1. The jurisdiction of the Supreme Court of the Netherlands in respect of legal cases in Aruba, Curacao and St Maarten, and also in Bonaire, Sint Eustatius and Saba, shall be regulated by Kingdom Act.
2. If the Government of Aruba, Curacao or St Maarten so requests, the said Kingdom Act shall provide for the addition of a member, an extraordinary member or an advisory member to the Court.
- 3.





The model used by Wapperom<sup>90</sup>

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90. Wapperom, *supra* note 80, at 2.

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