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1 SEPARATE BUT EQUAL IN THE PROTECTION AGAINST CLIMATE CHANGE? THE LEGAL FRAMEWORK OF CLIMATE JUSTICE FOR THE CARIBBEAN PART OF THE KINGDOM OF THE NETHERLANDS

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Abstract: The experiences of overseas territories and how their varying degrees of self-governance influence climate (in)action are overlooked topics. Even though these places are often highly impacted by climate change. Analyzing the situation of the Dutch Kingdom demonstrates some of these challenges. The Kingdom consists of European Netherlands and the Caribbean islands of Aruba, Curacao, St. Maarten, Bonaire, St. Eustatius and Saba. Out of these, the Caribbean islands are the most vulnerable to climate change while the European Netherlands has contributed the most to it. This can be seen as climate injustice. Access to mitigation and adaptation mechanisms mentioned in international agreements could be beneficial to these Caribbean islands. However, the international climate change agreements have only entered into force for the European part of the Kingdom and not the Caribbean part due to a territorial limitation. This has several consequences, and this article highlights two. Firstly, the requirement that greenhouse gas emissions should be reduced does not apply to the islands. Which leaves room for unsustainable activities, but it also overlooks their need for adaptation and compensation for loss and damage. Secondly, access to climate finance instruments is limited as the Dutch Caribbean islands are seen as part of the Kingdom and therefore do not qualify for international assistance. Within the European Union, funds are available but access to these is not guaranteed as the experience with recovery after hurricane Irma demonstrates. These examples show that the issues around climate justice have been insufficiently resolved. There is a need for a long-term climate strategy within the Kingdom

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along with complementary funding. Until then climate litigation could assist in enforcing a duty of care by local governments and the Kingdom to protect inhabitants by using the human rights framework. This would also create a roadmap for other territories in similar circumstances.

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2 INTRODUCTION

When discussing the situation of countries or territories which are highly affected by climate change it is often overlooked that a significant number of them depend in varying degrees on states which they have a historical connection with. They experience different levels of self-governance which influence whether and how interventions and solutions from climate change agreements meet the needs of these places and their communities. Examples are the fourteen overseas territories of the United Kingdom (e.g. Anguilla, Bermuda, St. Helena) and the five territories of the United States of America (e.g. American Samoa, Puerto Rico). But also, the Kingdom of the Netherlands which often remains unnoticed due to geopolitical marginalization and linguistic barriers (Groenewoud, 2021) reveals a complex set of relationships between its Caribbean and European parts, affecting climate action. Its different parts are spread across 8000 kilometers, with the islands of Curacao, St. Maarten, Aruba, Bonaire, St. Eustatius and Saba in the Caribbean Region and European Netherlands in Europe. The experiences on the Caribbean part of the Kingdom differ from those of European Netherlands, especially in relation to climate change.¹ European Netherlands has historically contributed considerably to causing climate change. And still in 2021, the carbon dioxide (CO₂) emissions from fossil fuels and industry per capita was 8.06 tons (Ritchie et al., 2020).

Most Dutch Caribbean islands on the other hand do not reach similar numbers.² Curacao and St. Maarten do have relatively high CO₂ emissions per capita. However, these numbers can be

considered negligible in the historical and global sense (Government of the Kingdom of the Netherlands, 2022).³ These islands have difficulty coping and adapting to climate change. This is partly due to their small geographical size, regular exposure to natural disasters, limited natural resources and limited infrastructure (Baptiste & Rhiney, 2016). One of the effects of climate change is that it leads to an increase in extreme weather. For example, hurricanes are increasing in intensity, as was seen when Hurricane Irma hit Saba, St. Eustatius and St. Maarten in 2017 (Rhiney, 2018). This was the first Category 5 hurricane ever to hit the northern Windward Islands. Climate change also causes sea level rise which, if the climate goals are not met, will cause one-fifth of Bonaire to disappear before the turn of the century (van Beukering et al., 2022). So, it could be said that the Kingdom of the Netherlands houses both a contributor to, as well as victims of climate change. Therefore, a climate justice perspective assists in analyzing the current situation as well as identifying possible solutions and interventions.

Climate justice is concerned with the uneven distribution of the impact of climate change amongst people and countries as those who have contributed the least to bringing about climate change are affected the most. And climate justice consequently is concerned with addressing this injustice in a fair and equitable way. It therefore requires thorough analysis of who is impacted and left out of interventions for adaptation and mitigation (Sultana, 2022). And in the case of the Kingdom of the Netherlands, climate justice also demands examination at the subnational level differentiating between European Netherlands and the Caribbean islands and finding ways to fill in possible gaps in protection (Ferdinand, 2018). It is important that the Dutch Caribbean islands have access to instruments which support them in meeting the challenges they face. International climate change agreements such as the 1992 United Nations Framework Convention on Climate Change and the other agreements which followed such as the 1997 Kyoto Protocol and the 2016 Paris Agreement are meant to assist in stabilizing the Earth's climate. The Agreements do so by establishing obligations for states to reduce greenhouse gas emissions and by providing assistance to vulnerable states in the form of financial mechanisms and facilitating access to technology. None of these agreements have however entered into force for the Caribbean part of the Kingdom as they are only applicable to the European Netherlands.⁴

This article dives into how this came to be and critically reflects on the consequences. It first gives a short introduction to the Kingdom of the Netherlands. The structures of the Kingdom are unique and unlike those of for instance France or the United Kingdom (Hendry & Dickson,

2018). After explaining the Kingdom structure, a discussion follows around the international climate change agreements and their lack of applicability to the Caribbean part of the Kingdom. The consequences of this will be explained and examples will be used to demonstrate two challenges. Firstly, this article looks at the requirement of emission reduction and how it is not required on the Caribbean islands. This disparity could be resolved internally. Secondly, the lack of access to climate finance for the Caribbean islands is looked at. The example of the recovery after hurricane Irma hit St. Maarten in 2017 is used to show how the gap is insufficiently filled by financial mechanisms of the European Union (EU).⁵ After, discussing these two consequences the article dives into what the groundbreaking Urgenda case could mean for the Caribbean islands.⁶ In it the Dutch government was ordered to reduce greenhouse gas emissions in 2020 by 25% compared to 1990. It also recognized human rights for Dutch citizens in relation to climate change protection. Therefore, it could provide a necessary step towards climate justice for the Dutch Caribbean islands.

3 FROM COLONIES TO AUTONOMOUS COUNTRIES AND MUNICIPALITIES WITHIN THE KINGDOM

As explained, climate change poses an urgent problem for the Dutch Caribbean islands. The international climate change agreements could provide opportunities to protect them against the effects of climate change and help them adapt to it. In order to understand why these international agreements are not applicable to the Dutch Caribbean islands it is necessary to look briefly at the internal constitutional relationships within the Kingdom.

The relationships within the Kingdom of the Netherlands flow from a past of struggle, empire, and colonization.⁷ To sufficiently summarize the colonial history of the Kingdom of the Netherlands in this section would be challenging. Therefore, a pivotal legal development for the contemporary structure of the Kingdom namely the 1954 establishment of the Charter of the Netherlands is taken as a starting point. After the independence struggles of the Netherlands East Indies and the global developments of decolonization, a new structure was developed for the Dutch territories (Hoefte, 1996). European Netherlands, Suriname, and the Netherlands Antilles (consisting of Curacao, Aruba, Bonaire, St. Maarten, St. Eustatius, and Saba) would become equal partners in what would be known as the Kingdom of the Netherlands. The structure has been readjusted several times since the independence of Suriname in 1975 and the increasing autonomy of several Caribbean islands (van Rijn, 2019). The most recent restructuring in the constitutional sense took place on 10 October 2010. Since

then, the Kingdom of the Netherlands consists of four countries: Aruba, Curaçao, the Netherlands and St. Maarten. From a constitutional point of view, the islands of Bonaire, St. Eustatius and Saba are part of the Netherlands as public bodies or special municipalities.⁸ Therefore, the Netherlands consists of a European part and a Caribbean part. The countries within the Kingdom are equal in status and look after their own interests which are classified as those topics which are not mentioned in the Charter's exhaustive list on Kingdom affairs in article 3. This list includes Dutch citizenship, foreign affairs and defense. Therefore, topics such as the realization of human rights fall under the primary responsibility of the countries themselves and there is a secondary obligation for the Kingdom to safeguard. (Misiedjan & Palm, 2012; Santos do Nascimento, 2016).

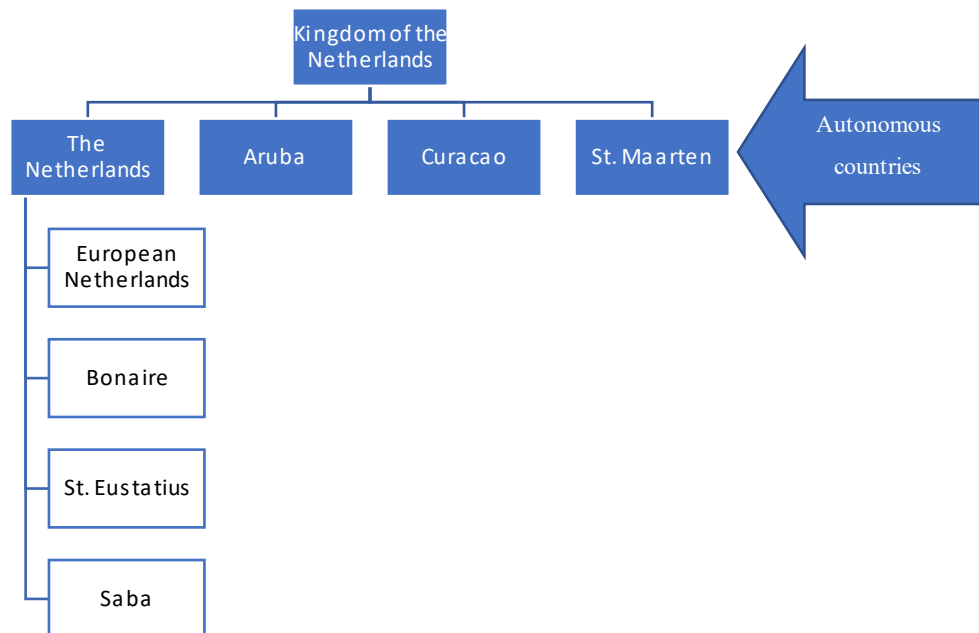


Figure 1 Political structure of the Kingdom

As mentioned, the BES-islands consisting of Bonaire, St. Eustatius and Saba are constitutionally part of the autonomous country, the Netherlands as public bodies or special municipalities. They are governed through two tiers of government. The first tier is formed by the Dutch national government seated in the Hague and is responsible for the execution of governmental tasks on these islands. The second tier is the local island council (representing the people), the executive council (consisting of deputies) and the lieutenant governor. The BES-islands have no direct representation in the Hague, the political capital of the Netherlands, making their ability to influence decision-making challenging (Bakhuis, 2019).

The autonomous Dutch Caribbean countries have their own governments. These consists each of a governor, as a representative of the King, and the Ministers (van Rijn, 2019). In addition,

Aruba, Curaçao and St. Maarten have Ministers Plenipotentiary in the Hague and, in the case of Aruba and Curaçao, also in Washington. These have been appointed by their respective governments and represent the interests of their countries in the European Netherlands, at the European Union and the United Nations. The Ministers Plenipotentiary together with the Dutch Ministers form the Kingdom Council of Ministers. The highest binding law for the countries within the Kingdom is the Kingdom Law. These are formulated through a process which include the Kingdom government and the Dutch parliament. The parliaments of the autonomous countries are unable to execute direct influence on this process. As a result some argue that Kingdom Law lacks democratic legitimacy. (*Ongevraagd advies over het Koninkrijk, verdragen en het Unierecht*, 2021; Santos do Nascimento, 2016; van Rijn, 2019)

Although there are different relationships internally, these fade away when looking in from the international perspective. The Kingdom of the Netherlands is seen as a unified whole. Only the Kingdom has legal personality under international law and can therefore be party to treaties (Duijf, 2020). The countries and special municipalities do not have the power to ratify treaties on their own. Treaties are therefore always signed by the Kingdom of the Netherlands (Adviesraad Internationale Vraagstukken, 2018). However, there is also a practice of territorial limitation which is allowed under international law but is nevertheless controversial as it opens the possibility of different levels of obligations and rights within the Kingdom (Duijf, 2020). A territorial clause or statement can be included to only have the treaty apply to part of the territory (Doehring, 1967). In the case of the climate change agreements this option has been used to only have the agreements apply to European Netherlands.

4 THE INTERNATIONAL CLIMATE CHANGE AGREEMENTS AND THE CARIBBEAN PART OF THE KINGDOM OF THE NETHERLANDS

In relation to climate change, the Kingdom is a party to several agreements that formulate climate change goals. A few are highlighted here due to their importance and relevancy. First, it ratified the United Nations Framework Convention on Climate Change (1992) and the subsequent Kyoto Protocol (1997) and the Paris Agreement (2015). However, these agreements are not applicable to all parts of the Kingdom because of the territorial limitation through unilateral declaration.

The Paris Agreement entered into force in 2016. It is the first more or less universally, legally binding global climate agreement. It stipulates that the contracting countries themselves take

measures to ensure that the earth does not warm by more than 1.5 or 2 degrees.⁹ Greenhouse gas emissions must therefore be drastically reduced. The Paris Agreement builds on previous climate negotiations and agreements as stated in the Framework Convention and the Kyoto Protocol. The Framework Convention, the Kyoto Protocol and the Paris Agreement have not entered into force for the Caribbean part of the Kingdom, not for the autonomous countries, nor for the BES islands. For the time being, they have only been accepted for the European part of the Netherlands.¹⁰ The Explanatory Memorandum to the Law Approval of the Paris Agreement¹¹ explains that the reluctance to find the climate change agreements applicable to the entire Dutch Kingdom has to do with the implementation legislation that must be prepared for the treaty to enter into force. Drawing up implementing legislation is primarily a matter of the countries of the Kingdom themselves and the Dutch Caribbean islands so far lack the capacity to take this on. And even though the municipalities are seen as part of European Netherlands, which would make implementation legislation the responsibility of the Netherlands, practice shows that for them also it is considered to be their own task.¹² In addition, representatives of the Caribbean part in general feel left out of the international (climate change) negotiations.¹³ On paper, when the treaties are concluded, consideration is given to the desirability of applicability to the Caribbean part of the Kingdom. And this is explicitly mentioned in the Explanatory Memorandum (MvT). Both the individual countries and the BES islands can indicate that they want complicity, but the final decision rests with the Kingdom government (Adviesraad Internationale Vraagstukken, 2018). After all, it is the Kingdom that ultimately becomes a contracting party.¹⁴ And in this case it was decided not to include the Caribbean islands in the application. Which is a different approach from France, which did ratify the agreements on behalf of its overseas territories (Ferdinand, 2018). All in all, the lack of capacity in relation to implementation legislation and the overall limited (political) influence of the Dutch Caribbean islands concerning the topic of climate change have led to the non-applicability of the climate change agreements to that part of the Kingdom. Because of this there is a risk of creating two different levels of obligations and rights in relation to climate change within the same Kingdom.

An extension of application is still possible concerning the climate change agreements. It would, however, confirm that the Caribbean part of the Kingdom must meet the same standards as the European Netherlands. This could give the Caribbean part disproportionate obligations while historically they have hardly contributed to climate change. Without the constitutional relations with the European Netherlands, these islands would be seen as developing countries

with a different level of obligations. This practice of territorial limitation and its consequences has been criticized before. Especially when it is used in the context of human rights treaties. When this practice was similarly applied to the UN Convention on the Rights of Persons with Disabilities (Adviesraad Internationale Vraagstukken, 2018; Duijf, 2020) the Dutch Advisory Council on International Affairs stated that:

within the Kingdom of the Netherlands, different international human rights standards apply to the different parts. These differences are difficult to reconcile with the universal application of human rights, nor with the designation of safeguarding fundamental human rights and freedoms as a Kingdom affair (Article 43, second paragraph, of the Charter for the Kingdom of the Netherlands). In light of this principle, human rights treaties signed by the Kingdom should apply in all countries and territories of the Kingdom ('extention of application').(Adviesraad Internationale Vraagstukken, 2018)

Even though this comment refers to human rights treaties, this line of reasoning is relevant for two reasons. Firstly, it shows that the distinction made between European Netherlands and the Caribbean islands is frowned upon and the legitimacy of the practice is questioned. Secondly, the statement emphasizes that safeguarding fundamental human rights and freedoms is a Kingdom affair. As climate change is increasingly considered to be a human rights issue and not merely an environmental issue it could be argued that it also requires safeguarding as a Kingdom affair. A consequence would be that if the Council of Ministers, would find that one of the countries does not live up to its responsibility, the Kingdom would have to step in. However, this development has not materialized yet. The conclusion so far, is that the practice of territorial limitation could be considered problematic, creating two different levels of not only human rights but also climate change protection within the same Kingdom.

5 THE CONSEQUENCES OF NON-APPLICABILITY OF CLIMATE AGREEMENTS TO THE DUTCH CARIBBEAN ISLANDS

There are consequences to the agreements not being applicable to the Caribbean part of the Kingdom. The following paragraphs look into two aspects namely: the obligations to reduce emissions and the access to climate finance. For each consequence, a reflection is made on a possible resolution.

5.1 Emissions

As mentioned, global warming is to be kept well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels. To achieve this, states are obligated to limit greenhouse gas emissions. The Paris Agreement requires state parties to prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve.¹⁵ In order to reach these NDCs states pursue domestic mitigation measures. Because the international climate change agreements do not apply to the Caribbean part of the Kingdom, it can be assumed that the requirement to limit emissions does not either. The former Dutch climate minister Wiebes also confirmed, in his letter to the House of Representatives¹⁶, that the relevant climate agreements are only applicable to the European part of the Netherlands. And that the obligations regarding data collection and reporting to the UNFCCC also only apply to the European part of the Kingdom.¹⁷ This means that on paper the Kingdom of the Netherlands can meet its international climate change obligations while not addressing the emissions on the islands.

This creates a few complexities from the perspective of the Caribbean islands. The assumption that the emissions in the Caribbean part of the Kingdom are not counted could be justified from the viewpoint of common but differentiated responsibilities, which relates to climate justice. Meaning that as the Caribbean islands historically have contributed little to bringing about climate change, they have more room to move towards emission reduction over time. However, it could create inequality in relation to climate change efforts within the Kingdom. An example of this can be found in relation to the special municipality, Bonaire. The Dutch government announced in November 2021, it will discontinue financing fossil fuel projects abroad to meet its NDCs.¹⁸ However, seven months prior the government approved the construction of new infrastructure for oil reserves on Bonaire affecting vulnerable coral reefs.¹⁹ This was made possible as there is no requirement for the Dutch government to consider the climate change goals for the Caribbean Netherlands. However, after public protest the plans were changed, and now more sustainable energy sources are sought after.²⁰

Even though, this plan for fossil fuel infrastructure was halted it should be noted that, unlike for European Netherlands, structural long-term plans to limit emissions on the Caribbean islands are lacking. The European part has its Climate Act and the Climate Plan 2021-2030. The Dutch cabinet also presented its Climate Agreement in 2020 in which 600 agreements between the government, companies and social organizations have been included to combat

greenhouse gas emissions. The Caribbean islands are not mentioned in any of these policies. Not even the BES-islands that are constitutionally part of the Netherlands (Misiedjan, 2022). However, these policies could guide the formulation of plans for the autonomous countries and municipalities. The opportunity should be taken to create specific arrangements for the different islands as well as a complementary Kingdom wide climate strategy.

5.2 Access to Climate Funding

The international treaties not only set out the obligations of states concerning CO₂ emissions and other greenhouse gasses, but also create financial instruments that can support the climate mitigation and adaptation of states. In doing so, special attention is often given to the most vulnerable states due to the principle of common but differentiated responsibilities (Misiedjan, 2019). In the 1992 UNFCCC, the particularly vulnerable position of Small Island Developing States (SIDS) was recognized for the first time. Specific measures were created for these island states. The SIDS list currently includes 38 countries, including: the Bahamas, Jamaica, St. Lucia and Suriname. Only UN member states can be included on this list. There is also a list of affiliated non-UN member states to which non-sovereign countries and territories belong, such as French Polynesia, but also Aruba, Curaçao and St. Maarten. Because of their position as special municipalities, the BES-islands fall outside of both groups. The autonomous countries are authorized to participate in the meetings but do not have the same rights as the other SIDS such as access to the following climate funds (Petzold & Magnan, 2019).

The Green Climate Fund is a fund of the United Nations that has been set up to financially support countries in development with the adjustments that they must make and the measures that must be introduced to further combat climate change.²¹ The UNFCCC laid down the foundations for the Fund in Article 11, and it was effectively set up in 2010 during the climate negotiations in Cancun. Articles 95 to 112 of the Cancun Agreement explain that developed states parties to the Convention are to make financial resources available to the Fund on a voluntary basis so that developing state parties to the Convention can use these resources, when they follow the necessary procedures and meet the requirements.²² Since donating to the Fund is on a voluntary basis, it remained fairly insufficient until 2014. However, during the negotiations for the Paris Agreement, the Netherlands, among others, promised to make 100 million euro available to the Fund.

The condition that only treaty parties can make use of this Green Climate Fund is the biggest obstacle for the Caribbean part of the Kingdom. This requirement also applies to other climate funds such as the Adaptation Fund (Kyoto protocol). The Dutch Caribbean islands are not contracting parties to the treaties that established these funds. As explained earlier, the Kingdom has signed the agreements, but they have only been declared applicable to the European part of the Kingdom. And even if the agreements were to apply to the entire Kingdom, the Caribbean islands would still count as a developed country and on that basis still not have access to these funds. After all, the Kingdom of the Netherlands is a donating developed state. The situation of the Dutch Caribbean islands is therefore different from that of their neighboring countries, which are sovereign. But similar to the situation of French overseas territories such as: Guadeloupe and French Guyana. The Caribbean part of the Kingdom therefore has no access to funding for mitigation and adaptation from the UN. This stumbling block was also a point of discussion during the last few Interparliamentary Kingdom Consultations (IKC, 2021), where the representatives of all the countries within the Kingdom gather.²³

5.3 Filling in the Gap of Climate Finance

This gap within climate finance for Dutch Caribbean islands could be filled in different ways. Financing can also come from another source namely the European Union. Within the context of the EU, the Netherlands together with other EU countries, continued their relationships with their former colonies. As a result, several instruments were developed for those overseas territories which are constitutionally a part of EU member states. At present, Denmark, Spain, France, Portugal and the Netherlands have overseas territories that are linked to the EU through different arrangements. For example, the Canary Islands and French Saint Martin are outermost regions (ORs) within the meaning of Article 349 Treaty on the Functioning of the European Union (TFEU). As a result, EU law and all rights and obligations associated with EU membership, insofar as no deviating or specific measures are in effect, apply here. However, the overseas territories that belong to the Kingdom of the Netherlands all fall under the special association arrangement for Overseas Countries and Territories (OCTs) as referred to in Article 355 paragraph 2 TFEU. The precise content of the regulations for OCTs is further elaborated in part four of the TFEU and in the 2021 OCT decision which applies to the relationship between the European Netherlands and the Caribbean part of the Kingdom. No distinction is made between the BES-islands and the countries (Aruba, Curaçao, St. Maarten).

Through the latest OCT Decision funds are available for the OCTs of the Netherlands and France (Rekwest, 2019). This funding can be used for adaptation and mitigation efforts on the Dutch Caribbean islands but also for recovery efforts after natural disasters such as hurricanes. However, these funds may not be easily accessible as was demonstrated after hurricane Irma hit St. Maarten. Even though, Dutch St. Maarten and French Saint Martin are both overseas territories of European Union Member States they differ in status. Saint Martin is an Outermost Region (OR) while Sint Maarten is part of the Overseas Countries and Territories (OCTs). These statuses influence access to financial mechanisms for providing emergency disaster relief and post-disaster recovery. Only the French part was entitled to receive assistance via the European Union Solidarity Fund (EUSF). In addition, as an Outermost Region, Saint Martin also had access to the European Regional Development Fund (ERDF) and the European Social Fund (ESF). In the case of St. Maarten, it was decided to not make use of European Union funds. Instead, the Dutch government on its own accord provided emergency disaster relief. And to cover the post-disaster recovery process a Trust Fund was set up by the Dutch government but managed by the World Bank.²⁴ Providing access to the EU funds is only optional as EU Member States are not obligated to do so which make disaster relief part of the political process of the Hague (Ferdinand, 2018). The Dutch government needs to approve access for the Caribbean islands and thereby decided how and under which circumstances they can adapt, rebuild, and develop. This road can be politically challenging as the influence of the islands is limited in The Hague.

Instead of having to depend on the uncertainty of the European instruments, it would be an appropriate development if in anticipation of future climate challenges, similar to the plans formulated for the European part plans would be made for the Caribbean part. As mentioned the European part has its Climate Act, Climate Plan 2021-2030 and Climate Agreement which also draws out the contours for climate financing. A financial strategy covering not only mitigation and adaptation efforts, but also loss and damage would be fitting and timely (Lai et al., 2022).

6 CLIMATE CHANGE LITIGATION: THE URGENDA EFFECT

Besides the beforementioned political road to climate finance and policy, another road which could be taken to tackle the climate change challenges from a human rights perspective is the road of litigation. Due to the 2019 Urgenda ruling in which the Netherlands was required to reduce greenhouse gas emissions by 25% in 2020 compared to 1990, the rights of Dutch

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residents and citizens in relation to the climate are taking shape. The Urgenda ruling has been groundbreaking for a number of reasons. Among other things because for the first time a State was held responsible for (its contribution to) climate change. And human rights obligations formed part of the legal basis for that claim. The Dutch Supreme Court connected a duty of care of the state to the human rights obligations mentioned in articles 2 (right to life) and 8 (right to family life) of the European Convention on Human Rights (ECHR). Based on this the state is required to take appropriate measures to prevent climate change extremes by limiting greenhouse gas emissions as environmental sciences have concluded. The Dutch Supreme Court therefore made use not only of climate research and the climate agreements as formulated in, for example, the Paris Agreement, but also human rights. Thereby, recognizing the reduction of greenhouse gas emissions as a human rights issue and making the ECHR a source of protection. Even though the climate agreements are not legally binding in the case of the Caribbean islands, the ECHR can in itself provide a foundation for climate obligations for the Caribbean islands. As the ECHR is applicable to the whole Kingdom including the Caribbean islands. These rights therefore also apply to citizens (and residents) within the Caribbean part of the Kingdom. But they would have to be enforced through the judicial system. And this has some hurdles and particularities.

In the case of a special municipalities as well as the autonomous countries, a possible climate case would come before the Joint Court of Justice of Aruba, Curaçao, St. Maarten and Bonaire, St. Eustatius and Saba (hereinafter: JCJ) and not before the Dutch court. This is because the legal orders are separate, but the aim is to maintain uniformity within the Kingdom (Seinen, 2014). Meaning that the JCJ and Dutch Courts generally follow the same line of reasoning in cases with similar circumstances. Through the JCJ only the island governments can be held accountable for greenhouse gas emissions. The JCJ has not yet commented on climate change issues. But taking into account the aim of uniformity, the applicability of the ECHR, and the Urgenda ruling, it is to be expected that the JCJ would follow the Dutch Supreme Court and hold the local government accountable for greenhouse gas emissions. However, the JCJ could allow for more leeway to recognize a possible disproportionate economic burden the emission reduction could have on the governments of the Caribbean islands.²⁵ In addition, the JCJ could emphasize the need for adaptation. Thereby holding the island governments to a different standard than the Dutch government.

Through the JCJ the Caribbean governments can be held responsible for greenhouse gas emissions but not the Kingdom. However, even with the territorial limitation basing the obligations only on the ECHR the Kingdom could be held responsible if a case would reach the European Court of Human Rights (ECtHR). Because from the point of view of the ECtHR, the Kingdom as a whole is responsible for compliance with human rights standards and not the individual countries within the Kingdom. This was demonstrated in a case before the ECtHR where the Court held the Kingdom responsible for the conditions in the detention centers in St. Maarten, which led to a violation of Article 3 ECHR on the prohibition of torture.²⁶ Even though the Dutch government stated that this was a policy area in which the country Sint Maarten is autonomous (Duijf, 2020). Therefore, the internal structure does not always have the last say especially when it concerns human rights obligations. As the relevance of human rights in relation to climate change is increasingly recognized taking into account this aspect of responsibility should not be overlooked. The litigation could therefore provide a solution to holding both local governments as well as the Kingdom as a whole responsible for greenhouse gas emissions in its Caribbean parts.²⁷ Making it clear that those on the islands as well as in Europe have a right to be protected.²⁸

7 CONCLUSION

The climate change agreements have only been declared applicable to the European Netherlands and so far, there is no extension of application to the Caribbean part of the Kingdom. This has several consequences. In this article two are highlighted. Firstly, the greenhouse gas emissions from the islands are not considered in relation to meeting the Dutch and international climate change goals. This means that the emissions on the islands are in principle, not legally required to be reduced. Which has led to the Dutch government for instance approving activities which are carbon intensive. As a result, it could be said that there is a discrepancy in relation to the climate change measures taking in European Netherlands versus the Dutch Caribbean islands. All while the Dutch Caribbean islands are more vulnerable to climate change than European Netherlands.

Secondly, the Dutch Caribbean islands have less access to climate finance than their similarly vulnerable neighbors. This is because they are seen as part of the Kingdom, which is classified as a developed country and can thereby not depend on international assistance. In addition, the islands do not have separate international legal personality which prevents them from becoming party to agreements which could provide them access to climate finance. This gap

in access can be filled by EU instruments. The most recent OCT Decision does give access to funds to be shared with the French OCTs which can be used for sustainable development and combating climate change. But this access is not guaranteed and subject to political considerations as the Caribbean islands can only gain access through The Hague. The experience with hurricane Irma in 2017 shows that access to finance can be a challenge. However, the EU funds are the few funds available to the Caribbean part of the Kingdom. Besides these funds, it would be advised to develop similar plans and legislation for the Caribbean islands as has been done for the European Netherlands, through the Climate Act, Plan and Agreement. As it stands now, the Dutch Caribbean islands are caught between a rock and a hard place. On the one hand the non-applicability of the climate change agreements for them creates two different levels of obligations and rights concerning climate change within the same Kingdom. On the other hand, if they would join the European Netherlands in the applicability, they would have to meet the requirements of emission reduction and their needs in relation to adaptation and loss and damage could be overlooked. A strategy developed for them within the context of the Kingdom could provide a solution.

The groundbreaking Urgenda case, could provide a foundation for realizing climate for the Dutch Caribbean islands as it has done for the European Netherlands. This case established a duty of care of governments concerning the protection against the effects of climate change. Reducing greenhouse gas emissions has thereby become a human rights issue. And through the rights to life and family life, the ECHR could provide an appropriate foundation for a court case holding local island governments as well as the Kingdom responsible for not reducing emissions on the Dutch Caribbean islands. And possibly for lacking adaptation efforts. This could provide a significant step towards climate justice for these islands who are (made) vulnerable to the impacts of climate change even though they have contributed little to bringing it about. And it would establish that not only those citizens within European Netherlands should be protected against climate change but also those within the Caribbean. So that even though an ocean separates the two regions they still enjoy equal protection within one Kingdom. This kind of climate litigation would provide a roadmap for other vulnerable communities in territories and regions who are confronted with similar subnational obstacles for climate justice.

From the beforementioned, it can be concluded that realizing climate justice for the Caribbean part of the Dutch Kingdom is not easily done. Especially if climate justice is expected to be

reached through international agreements and policies. Because within this context the vulnerable position of the Dutch Caribbean islands is obscured by the overarching Kingdom of the Netherlands. Its status as a developed state, its international legal personality and its practice of territorial limitation create obstacles for the islands to being protected from the effects from climate change and receiving support. For them, and territories in similar positions, it is not enough to formulate international climate change agreements. They need internal solutions to provide the protection and support that other similarly vulnerable sovereign nations receive through the agreements.

ENDNOTES

¹ What should be kept in mind, is that the specific impact of climate change for the Dutch Caribbean islands is largely unknown due to the lack of studies by the government in this area. As of 2022, Bonaire is the only island for which a comprehensive study, commissioned by Greenpeace, has been conducted regarding the consequences of climate change. In this study, various scenarios were mapped out and the potential impact was examined on the economy, health, infrastructure and cultural heritage of Bonaire.

² The annual share of global CO₂ emissions (2021) of Aruba was 0.002%. See: Hannah Ritchie, Max Roser and Pablo Rosado (2020) - "CO₂ and Greenhouse Gas Emissions". Published online at OurWorldInData.org. Retrieved from: '<https://ourworldindata.org/co2-and-other-greenhouse-gas-emissions>'

³ Not all data concerning CO₂ from the Dutch territories is consistently available.

⁴ In the field of environmental protection and conservation some measures are in place through the BES Foundation of Nature Management and Protection Act (Ministry of Economic Affairs, 2013). This law divides the responsibilities between the local authorities on the BES islands and the Dutch government. (Ministry of Agriculture Nature and Food Quality Infrastructure and Water Management & Ministry of Interior and Kingdom Relations of the Netherlands, 2020) Every five years, the Dutch Ministry of Economic Affairs must approve a policy plan for environmental management in collaboration with the local authorities. However, the other islands: Aruba, Curaçao and St. Maarten, are largely responsible for their own environmental management policies, which follow from international agreements such as the Convention on Biological Diversity (CBD), the Ramsar Convention (on Wetlands of International Importance) and the Cartagena Convention. For example, Curaçao has 4 Ramsar

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areas. At the time, Curaçao itself designated and nominated this area (on behalf of the Kingdom). And Sint Maarten published its first 'Nature Policy Plan 2021 -2025' in 2021. So, the emphasis lies on nature conservation, but the issue of climate change seems to fall outside of the scope. However, these two topics could be aligned to fit the context of the Caribbean islands.

⁵ The method used for this research is mostly desk-based legal research using legislation, academic literature, and other relevant sources such as reports. In addition, information from other sources was used in a limited fashion by for instance attending conferences and gathering information from news outlets.

⁶ State of the Netherlands v. Urgenda Foundation, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.).

⁷ Suggestion on these topics: Basu D., Miroshnik V. (2020) Dutch Empire and Consequence. In: Imperialism and Capitalism, Volume I. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-030-47368-6_6;

Silvia W. de Groot, *Agents of their own emancipation* (Silvia W. de Groot 2009);

Anton de Kom, *We Slaves of Suriname*. English / transl. from Dutch by David McKay. Cambridge: Polity, since november 2020, expected voorjaar 2022; Gloria Wekker, *White Innocence* (Duke University Press 2016)

⁸ See: Public Bodies Act Bonaire, St. Eustatius and Saba

⁹ Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015 U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015)

¹⁰ The obligations arising from international agreements must be transposed into national measure and legislation. States must formulate legislation and plans themselves to combat climate change. For the European part of the Kingdom, to which the Paris Agreement does apply, there is the national Climate Act and the Climate Plan 2021 – 2030. In addition, the Dutch cabinet presented the Climate Agreement in 2020 in which 600 agreements between the government, companies and civil society are included to combat greenhouse gas emissions. The Dutch Caribbean islands are not mentioned in any of these documents.

¹¹ Kamerstukken II, 2016–2017, 34 589 (R2077), nr. 3, p. 8 Translation to English by Author.

¹² *“Extension of the application of the Paris Agreement for the Caribbean part of the Netherlands (Bonaire, St. Eustatius and Saba) also requires the extension for the Framework Convention for the Caribbean part of the Netherlands; this is not yet the case. In the context of possible ratification of the Paris Agreement consultations had been held with Bonaire, St. Eustatius and Saba about the way in which they can make an (additional) contribution to achieving the general goal and the long-term term temperature target of the Agreement. This includes looking at increasing the adaptive capacity of the islands, strengthening their resilience against (the effects of) climate change, their mitigation plans, the necessary legislation and regulations and the financing of the entire package. As soon as the preparation of the necessary implementing legislation has been completed, the Agreement can also apply to Bonaire, St. Eustatius and Saba. In this context, the necessary extension of application for the Framework Convention for Bonaire, St. Eustatius and Saba will therefore be included.*

¹³ This point was made during the congress and trade mission: ten years after the dismantling of the Netherlands Antilles in The Hague held on 8 and 9 December 2021

¹⁴ The Kingdom government could even make a decision of “compulsory complicity” on its own. However, this has not yet taken place since the constitutional changes (Duijf, 2020). Rather, it would be more obvious to design the implementing legislation necessary for co-approval through cooperation.

¹⁵ Art. 4(2) Paris Agreement

¹⁶ Kabinetsaanpak klimaatbeleid 32 813 nr. 247 vergaderjaar 2018-2019

¹⁷ Another state with overseas territories, France, opted for a different path. It takes the perspective that in principle international agreements are signed on behalf of France and its overseas territories. Therefore, the international climate change agreements have also entered into force for its overseas territories. The emissions from the areas also count towards the French national targets. See: (Ferdinand, 2018).

¹⁸ <https://nos.nl/collectie/13871/artikel/2404834-nederland-stopt-toch-met-financiering-fossiele-brandstofprojecten-in-buitenland>

¹⁹ <https://www.oneworld.nl/lezen/column/den-haag-berooft-bonaire-van-schone-energie/>

20 <https://www.bnnvara.nl/zembla/artikelen/energiebedrijf-bbt-ziet-af-van-pier-in-kwetsbaar-koraal-van-bonaire>. In response to public protest and critique the government has formulated the following plan in September 2022 to invest 33.6 million euro's in sustainable energy on the BES-Islands. See: <https://www.rijksoverheid.nl/actueel/nieuws/2022/09/28/ruim-33-miljoen-euro-voor-duurzame-elektriciteit-caribisch-nederland>

21 Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention,' in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011)

22 Art. 97 Cancun Agreement

23 *The Kingdom of the Netherlands is a party to the Charter of the United Nations. The countries of the Kingdom are not individually. As a result, the Caribbean countries are limited in their access to climate finance from the UN. The Kingdom government is asked to draw extra attention to the political structure within the Kingdom at the UN*

Afsprakenlijst Interparlementair Koninkrijksoverleg 2021 (translation by author)

24 <https://www.sintmaartenrecovery.org/>

25 Urgenda Decision paragraph 5.3.4 art. 2 and 8 ECHR must not lead to an impossible or, in the given circumstances, a disproportionate burden on States. If a State has taken reasonable and appropriate measures, the mere fact that those measures have failed to avert the danger does not mean that it has failed in its obligation. The obligations arising from art. 2 and 8 ECHR relate to the measures to be taken by a state, not to (guaranteeing) the achievement of the result to be achieved with them.

26 EHRM 9 oktober 2018, ECLI:CE:ECHR:2018:1009JUD002959317 (Corallo/Koninkrijk der Nederlanden).

27 Greenpeace and residents of Dutch Caribbean island Bonaire are in preparation of a lawsuit against the Dutch state for its climate inaction. See: <https://www.greenpeace.org/nl/klimaatverandering/54574/bonaire-climare-research-lawsuit/>

28 But the emphasis for the Caribbean islands should lie on support in adaptation and covering loss and damage. (Lai et al., 2022)

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