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**Federal Disputes in the German Reich under the Weimar Constitution: Lessons in Dispute Settlement for the Kingdom of the Netherlands**

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**Abstract:** Although the German Bundesverfassungsgericht has become one of the most famous constitutional courts in the world, there is an older, less ambitious but nonetheless interesting tradition of constitutional review in Germany. In this article an analysis will be undertaken of the functioning and case law of the *Staatsgerichtshof für das deutsche Reich* (RStGH), especially its case law on federal disputes, to see whether this half-forgotten court of the Weimar years could be an interesting role model for the Kingdom of the Netherlands, where the discussion on a new constitutional arrangement for the resolution of federal disputes has been paralysed for years.

**Keywords:** constitutional review, federal disputes, Weimar Republic, Kingdom of the Netherlands

1 Introduction

In the late summer of 2016, the German Federal Constitutional Court, the *Bundesverfassungsgericht* (*BVerfG*) celebrated without much ado its 65th birthday: the first decision was given on September 28, 1951 by the then-freshly minted court. However, reaching this respectable age is no cause for celebration by the court itself (it did celebrate its 50th birthday in 2001) nor for lying back: on the contrary, the court is faced with over 6000 complaints yearly – and the tendency is up. In those 65 years, the *BVerfG* has become one of the most important German state organs, according to some perhaps the single most important feature of the post-war constitutional make up laid down in the

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Basic Law.\textsuperscript{1} It has also become one of the most influential constitutional courts in Europe, and has been an example for many countries introducing a new constitutional order after a period of authoritarian leadership.\textsuperscript{2}

The success and importance of the BVerfG for Germany and Europe can easily lead to a form of myopia, where it is overlooked that the Constitutional Court did not spring up \textit{ex nihilo}. Germany did have a far earlier tradition of constitutional review, both by ordinary courts and by specialised constitutional courts. The 1849 Paulskirche constitution already envisioned a rather far-reaching form of judicial review by the proposed Reichsgericht, but that constitution never came into force. Its legacy was not completely lost, however: especially after the fall of the monarchy and the introduction of the first democratic constitution in Germany, the new federal constitution of August 1919, constitutional review became a rather important feature of the constitutional system.

This was not the very far-reaching system introduced by the Basic Law and concentrated in the hands of the Bundesverfassungsgericht, to be sure. The system of constitutional review that existed under the 1919 constitution lacked three of the most distinctive and important features of the post-war framework: the possibility of a \textit{Verfassungsklage} or constitutional complaint by citizens because of an alleged violation of a fundamental right, the (federal) \textit{Organstreitigkeit}, the power to settle disputes among organs of the German federal tier and finally the power to review the constitutionality of federal acts, although this latter power was assumed to flow from the constitution itself by the Reichsgericht in some of its case law of the 1920s.\textsuperscript{3}

\textsuperscript{1} The BVerfG is often seen as the guardian of the German constitution and has portrayed itself as having that status from very early on: eg BVerfGE 1, 184; 1, 396; 6, 300.

\textsuperscript{2} Greece and Portugal after 1974, Spain after 1975, the new democracies of central and Eastern Europe after 1991: they are all examples of countries introducing constitutional courts whose make up and powers reflect those of the BVerfG.

\textsuperscript{3} The Reichsgericht accepted, at least theoretically, the idea that ordinary courts could review the constitutionality of federal acts. Quite well-known in this respect is the decision of November 4, 1925, RGZ 111, 320, a verdict that is often presented as the principal decision by Germany’s highest court to allow the judicial power of review: see e.g. Carl Schmitt, ‘Das Reichsgericht als Hüter der Verfassung’ in Carl Schmitt (ed), \textit{Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre} (3rd edn, Berlin 1985) 89–96. However, as Honauer convincingly shows in her 2008 Frankfurt dissertation, this 1925 decision was neither the first in which a Reichsgericht-senate accepted its power to do so, nor the last; and following the 1925 decision, the power of review was often rejected by several Reichsgericht-senates as well. There is simply no common doctrine of the Reichsgericht as such concerning constitutional review in the Weimar years. And since there were hardly any practical consequences from the few cases in which a form of review did take place, we will not look into this.
The constitution did provide (in Article 13 RV) for a judicial power to review the federal constitutionality of state acts, however, placed in the hands of the Reichsgericht; and it did provide (in Article 19 RV) for a specific court, the Staatsgerichtshof für das deutsche Reich (RStGH) to decide public law-disputes between two or more states, between a state and the Reich and between the organs of a state (the state-level Organstreitigkeit) insofar as no other court was given competence. The RStGH never developed into a completely autonomous court, however, and always remained an ad hoc annex of the Reichsgericht itself. At least some of the powers now granted to the BVerfG were therefore in place under the 1919 Constitution; and as may be clear from the above, the system concentrated on the judicial settlement of conflicts of a federal nature.

In this article, we want to take a perhaps unusual approach. Rather than taking the BVerfG as an example for others, we want to see whether the system of constitutional review in place in the Weimar Republic, precisely because it was less ambitious and less far-reaching than the system put in place by the post-war Basic Law, could perhaps be an example in itself for constitutional systems that lack proper mechanisms for settling federal disputes, but do not feel the need for a fully-fledged system of constitutional review. We will argue that such might be the case for the Kingdom of the Netherlands. Since 2010, the Kingdom comprises of four Countries (Landen): the Netherlands (in Europe) and Aruba, Curacao and Sint Maarten (in the Caribbean Sea). This is the result of the planned and executed dissolution of the Country of the Netherlands Antilles, between 2006 and 2010. One of the main points in which the Charter of the Kingdom, the highest constitutional document in the Kingdom, governing and structuring the relations between the Netherlands proper and the three Caribbean Countries, was amended in 2010 was through the introduction of a new form of dispute settlement between the Kingdom and one or more Countries or between two or more Countries. The Kingdom legislator has to provide for regulations (through one or more Kingdom acts) organising these new forms of dispute settlement. As will be seen later in this article, the discussion between the Netherlands and the other three Countries concerning dispute settlement between the Kingdom and one or more Countries has become completely bogged-down, whereas the discussion concerning dispute settlement between two or more Countries hasn’t even properly started yet.

We will analyse the question whether or not the review system of the Weimar Republic, which was not as far-reaching and ambitious as the post-war German system, but which specifically focused on the topics that concern

the Kingdom of the Netherlands as well, might actually be an example worth looking at for the present-day Kingdom. In the following paragraph, we will take a closer look at the development of the doctrine of constitutional review in the German Reich under the 1919 constitution. In the third paragraph, the focus will be on the case-law of the RStGH from 1919 to 1933, to see what kind of disputes were settled by the court and how it settled them. We will not try to "weigh" the Staatsgerichtshof or to go into an in-depth discussion on its relative merits and the role it played in the demise of the Weimar Republic: instead, we will simply analyse its case law. The fourth paragraph will focus on the development of (federal) dispute settlement in the Kingdom of the Netherlands and the reasons for the difficulties surrounding this topic, while the fifth paragraph will discuss the problem if and how the Weimar system (and in particular the RStGH) could be a working model for the Kingdom of the twenty-first century. We will finish with concluding remarks and recommendations.

2 The Sonderweg of German constitutional review

As we stated in the introduction, there is a German tradition of constitutional review that dates from long before the BVerfG. The venerable Reichskammergericht of the Holy Roman Empire had no powers of constitutional review in the modern sense of the word, of course: the old Reich did not have a written constitution in the modern sense. But with its competence to decide on disputes that arose from a breach of the pax instituta between the imperial estates and other estates it did possess a judicial power that can be seen as a forerunner of modern-day federal disputes. The Paulskirchenverfassung of March 1849, the all-German constitution that was the product of the 1848 revolution, introduced in the form of the Reichsgericht a fully-fledged constitutional court. Among its powers were the settling of disputes between the Reich and one or more states, including disputes on the constitutionality of federal acts (par 126a); conflicts between the federal houses of parliament or between one of the houses and the federal government (par 126b); public- and private-law disputes between two or more states (par 126c); disputes on the interpretation of a state constitution (par 126e); and finally three different forerunners of the Verfassungsbeschwerde of Art 93.1 under 4a GG: the right of a citizen to complain

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4 See for a detailed analysis of the powers granted to the Reichsgericht under the 1849 constitution Claus Bönnemann, Die Beilegung von Verfassungskonflikten vor der Zeit des Grundgesetzes. Die Entwicklung verfassungsgerichtlicher Strukturen in Deutschland, ausgehend vom Frühkonstitutionalismus bis zum Ende der Weimarer Republik (Berlin 2007) 56–66.
before the Reichsgericht about a violation of the state constitution (paragraph 126 f),
but only in absence of sufficient remedies in the state constitution; the right of a
citizen to complain about the denial of legal remedies provided for by law
(paragraph 126 h), but only after the exhaustion of state remedies; and finally the
right every citizen to complain about a violation of a fundamental right provided for
in the Reich constitution itself (paragraph 126 g), to be determined by federal act. The
Reichsgericht would have possessed almost all of the powers of the present-day BVerfG, a framework virtually unheard of in nineteenth century Europe. As is well
known, of course, nothing came of it. The Reich constitution was published, but
never came into force because it was rejected by the monarchs of the most important
German states, including the proposed Emperor Friedrich Wilhelm IV of Prussia.
Thus, the Reichsgericht remained a chimera as well. And so it stayed for a long time:
in the unified Empire that came about through the 1871 constitution the question of
the powers of courts to review the constitutionality of acts (especially, after 1871,
federal acts) remained largely theoretical and the Reichsgericht, when it was eventual-
tually founded in 1878, became a rather traditional high court in civil and penal law
cases instead of the constitutional court proposed in 1849.

This changed after the defeat of Germany in the autumn of 1918, however. On
January 19, 1919, nationwide elections were held for a constituent assembly
(Verfassunggebende Nationalversammlung), the result of the fall of the monarchy
and the proclamation of the German Republic on November 9, 1918. These elections
were the first in Germany under universal male and female suffrage and the first
under the system of proportional representation. The main task of the constituent
assembly was the creation of a new democratic and republican constitution, which
came into force on August 11, 1919. It introduced many important changes in the
German constitutional framework, while maintaining the fundamental federal struc-
ture of the Reich. In some ways it can be seen as an intellectual child of the
Paulskirchenverfassung. The German Reich became a republic, with a directly
elected federal president having some far-reaching powers and a fully developed

5 ‘Überhaupt hätte das in § 126 FRV vorgesehene Reichsgericht fast die gleichen
Zuständigkeiten gehabt wie heute das Bundesverfassungsgericht nach Art. 93 GG’, Michael
Kotulla, Der Einfluss der Paulskirchenverfassung auf die spätere deutsche Verfassungen, (2015)
1 DTIEV Online 2015, 1–11 (10).
7 And if that is the case, the Grundgesetz is the intellectual grand-child of the 1849 constitution –
and perhaps far more so: ‘(d)ie Gegenüberstellung der Frankfurter Reichsverfassung und des
Grundgesetzes für die Bundesrepublik Deutschland (GG) vom 23. Mai 1949 ergibt – abgesehen von
den grundsätzlichen staatsformbedingten Unterschieden (konstitutionelle Monarchie/Republik)
immerhin äußerlich betrachtet einige bemerkenswerte Gemeinsamkeiten. Dies gilt insbesondere
mit Blick auf den Grundrechtskatalog wie auch die Einklagbarkeit der einzelnen Grundrechte als
parliamentary system, both on the federal and the state level. This new, far more
democratic constitution also introduced important new regulations concerning
constitutional review. In its Articles 13 and 19, it introduced two important new
features. Article 13 regulated the hierarchical superiority of federal law over state
law: ‘Reichsrecht bricht Landesrecht’. Under two, the Article continued by stating that
in case of doubt about the compatibility of state law with federal law, the competent
authorities of the federation or a state could bring the case before a superior court of
the Reich, to be determined and regulated by a federal act. The other important new
feature of the 1919 constitution was Article 19 RV. The Article stated that constitu-
tional disputes within a state, public law disputes between two or more states and
public law disputes between the federation and one or more states were to be solved
by a new court, the Staatsgerichtshof für das Deutsche Reich (RStGH). Since Article 13
RV only stated that the power to review the conformity of state law with federal law
was to be placed in the hands of ‘a superior court of the Reich’, the legislator could
have chosen to give this power to the RStGH. It did not choose to do so: in the federal
act of April 8, 1920,8 two superior courts of the Reich were empowered to decide
matters arising under Article 13: for state tax laws the federal financial court
(Reichsfinanzhof) was appointed, for all other cases the Reichsgericht. The decisions
of both courts were binding erga omnes. Only the federal government and the state
governments could bring a case before either court.

Only the cases arising under Article 19 RV were therefore under the reviewing
power of the RStGH.9 and even so, this new court had a supplementary role: if a state had created a state court to decide constitutional disputes on the state
level, the RStGH could not act. The same was true when a federal act appointed
another court to decide on constitutional disputes between different states or
between the federation and the states, such as the one foreseen by Article 13 RV.
Bavaria, Mecklenburg-Schwerin, Oldenburg and Thuringia created generally
competent constitutional courts that severely limited the competence of the
RStGH in their domestic legal orders.10 Most other states either did not create

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8 RGBl 1920, 510.

9 Strictly speaking this is not entirely true. In various parts of the constitution, additional
powers were given to the Staatsgerichtshof. The most important of those was the power to try
political offences by the federal president, the federal chancellor and federal ministers ex Article
59 RV. Since it falls outside the scope of this article and the RStGH had a different composition
in these cases (and was thus effectively a different court under the same name) it will not be
dealt with here.

10 It did not lead to a total exclusion of the RStGH in these states, however. Because the
definition of what exactly constituted a constitutional dispute within a state was not given by
their own courts, or specifically empowered the RStGH. The RStGH was instituted by the federal act of July 9, 1921. The Staatsgerichtshof was not envisioned by the legislator as a completely independent court. Rather, it was to be instituted at the planned Reichsverwaltungsgericht (superior federal administrative court) as an adjacent court, to be formed when the need arose. As long as the Reichsverwaltungsgericht was not yet formed, the RStGH was to be instituted at the Reichsgericht. The president of the Reichsgericht was the qq president of the RStGH. Since the Reichsverwaltungsgericht was never formed, the temporary solution became permanent and the RStGH remained under the wings of the Reichsgericht.

The constitution therefore regulated different forms of constitutional review: the compatibility of state tax laws with federal law was overseen by the Reichsfinanzhof, the compatibility of all other state laws with federal law by the Reichsgericht, and competence disputes within a state, between two or more states or between the federation and one or more states were decided by the RStGH, insofar as no other court was given competence in the matter. Compared to the powers envisioned for the 1849 Reichsgericht or those granted post-war to the BVerfGH, constitutional review was restricted: the most important judicial powers lacking in “Weimar” were, as we have already seen, the individual constitutional complaint of Article 93.1 under 4a GG; the settlement of conflicts between federal authorities of Article 93.1 under 1 GG; and the review of the constitutionality of federal law of Article 93.1 under 2 GG. In the following

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11 ibid.
12 RGBl 1921, 905.
13 For the constitutional developments leading to the enactment of the Gesetz über den Staatsgerichtshof für das deutsche Reich of July 9, 1921 see Wolfgang Wehler, ‘Der Staatsgerichtshof für das Deutsche Reich. Die politische Rolle der Verfassungsgerichtsbarkeit in der Zeit der Weimarer Republik’ (Diss Rheinische Friedrich-Wilhelms-University Bonn 1979) 56–68. Since the RStGH was not instituted as an independent and autonomous court, it did not have an autonomous budget either, nor its own bureaucratic staff. This, too, is of course a striking contrast to the status and organisation of the BVerfG. The 1921 federal act stipulated in its par 31 that, until such time as the Reichsverwaltungsgericht would be instituted, the president of the Reichsgericht would be its president and that it would further consist of three judges of the Reichsgericht and three administrative judges, one from the Prussian Oberverwaltungsgericht, one from the Bavarian Verwaltungsgerichtshof and one from the Saxonian Oberverwaltungsgericht.
paragraph, we will take a closer look at the development of the case law of the RStGH under Article 19 RV.

3 The RStGH as a constitutional court

As was discussed above, the Staatsgerichtshof für das Deutsche Reich was officially founded by the federal act of July 9, 1921. One of the first problems the Staatsgerichtshof had to deal with, already in its preliminary form before the 1921 act came into force, was to decide what exactly constituted a “constitutional conflict” (Verfassungsstreitigkeit) in the sense of Article 19 RV, especially when it came to constitutional conflicts within a state. As we saw above, this was the first of the three important judicial powers of the court. The classical view in monarchical Germany had always been that a constitutional conflict could only occur between the government on the one hand and parliament on the other hand. This was of course a rather limited view: and it fits a system in which the government, especially the ministers, were primarily the Monarch’s servants. Under the 1919 constitution this changed, however: the parliamentary rule of confidence was prescribed in Article 54 RV for the federation and in Article 17 RV for each of the states. A real constitutional conflict between parliament and government was henceforth only conceivable when a majority of parliament no longer supported the government. On the other hand, it became almost inconceivable when the majority of parliament supported the government. In this conception, parliamentary minorities become almost powerless to protect their view of the constitution – and the rights it might guarantee them.

The RStGH fully accepted the consequences of the changed constitutional make up of Germany and developed a case law in which a rather far-reaching number of complainants were acknowledged. In its decision of July 12, 1921, one of its first, the RStGH had to decide whether a fraction in the state diet of Brunswick could file a complaint against the state government. The RStGH decided to take the case and interpreted a constitutional conflict as any conflict that arose from a difference of opinion on the content of the constitution. This rather far-reaching interpretation of what constituted a constitutional conflict led to a similar, rather far-reaching group of possible complainants. Principally

14 ‘Verfassungsstreitigkeiten sind Streitigkeiten über die Auslegung oder die Anwendung der Landesverfassung. Entscheidend ist nicht, daß der Streit gerade zwischen Regierung und Volksvertretung stattfindet, wenn das auch häufigst der Fall ist, sondern daß der Gegenstand des Streites die Verfassung betrifft, wobei es wiederum gleichgültig ist, ob es sich um einen in der Verfassungsurkunde enthaltenen Satz handelt oder um einen in einem Verfassungsgesetz stehenden Satz’ RGZ 102, 415 ff.
speaking, the court found that standing before it was entitled to each entity that took part in the formation of the state’s political will. State governments and the state diets were therefore almost automatically given standing. But also parliamentary minorities and sole fractions could bring their case before the RStGH. Even political parties, including those not represented in a state’s diet, could argue their interests before the RStGH, albeit that the court limited these interests to cases arising under the states’ electoral codes.\(^15\)

In its later case law, it widened the scope of constitutional complaints even further. Already in 1922, the RStGH accepted that a municipality could bring a case before it, insofar as Article 127 \(RV\) granted them the right to autonomous competences within the scope of the law.\(^16\) The States’ Lutheran churches (\(Landeskirchen\)) were also accepted as having standing, specifically because of Article 137 \(RV\). The one great line the court never crossed was the acceptance of a right of constitutional complaint of individual citizens: the \(Verfassungsbeschwerde\) that forms such an important part of the powers of the \(BVerfG\) and is also among the principal powers of the Austrian Constitutional Court (\(VfGH\)) never became part of the constitutional framework of “Weimar”. The RStGH maintained that the protection of the rights of individuals was the competence of the civil and especially the administrative courts, not the competence or the duty of the \(Staatsgerichtshof\).\(^17\) This case law was not without risk; it lead to some fundamental criticism from legal doctrine (Carl Schmitt, for instance, argued that this widening of standing led to an almost complete fragmentation of the meaning, focus and scope of the term constitution), but could also provoke legal actions from states that questioned the wisdom of this case law.\(^18\)

This was balanced somewhat by the verdict of the RStGH that the meaning of the words \(constitutional complaint\) could and should be interpreted by the court solely within the scope of Article 19 \(RV\) itself, and therefore autonomously;

\(^15\) M Rüter, ‘Verfassungsstreitigkeiten innerhalb eines Landes vor dem Staatsgerichtshof für das Deutsche Reich’ (Diss Philipps-University of Marburg 1934) 4 f.

\(^16\) RStGH January 12, 1922, Lammers-Simons I, 368.

\(^17\) RGZ 122, annex, p 11 ff.

\(^18\) Because Article 19 \(RV\) gave the RStGH jurisdiction only insofar no alternative court existed, a state could exclude the court’s reviewing powers by granting them to some other court. Bavaria, uncomfortable with the direction the RStGH was going into, changed its own state law on the constitutional court in 1929 to grant the Bavarian \(Staatsgerichtshof\) the power to decide on all constitutional disputes arising under the Bavarian constitution, not just those arising between government and diet. Because of this, the RStGH became excluded (almost) entirely from taking on cases under Bavarian constitutional law. See for a more detailed analysis of this conflict Ekkehard Schumann, ‘Bayern als Vorreiter umfassender Verfassungsgerichtsbarkeit. Die Entstehung des Bayerischen Verfassungsgerichtshofs’ in Martin Löhning (eds), Zwischenzeit. Rechtsgeschichte der Besatzungsjahre (Rechtskultur Wissenschaft 2011) 99 (115 ff).
the interpretations of the state’s own courts on the meaning of that term for their own state constitution was irrelevant for the RStGH.\(^{19}\) Not just the state constitution itself was the relevant normative yard-stick for the court; also their legal norms, such as the electoral codes, the state’s diet standing orders or the government’s standing orders could be taken into account.\(^{20}\) Even relevant provisions in the federal constitution itself could be taken into account by the RStGH; especially when they structured or limited the constitutional autonomy of the states.\(^{21}\)

The second important power of the court was the settling of public law disputes between two or more states. Here of course, the focus of the court was not so much on the different state constitutions themselves, but on the provisions of the federal constitution outlining the states’ powers and their relationships. Only seven decisions were given by the RStGH on the subject of interstate disputes, but four of them were of great importance for the development of the German federal system in this respect.

The first of those was a conflict between Prussia and Bremen on the 1904 state treaty between the two states concerning the harbour area of Bremerhaven, of which Bremen claimed that it had a very negative impact on the Bremen economy and should be annulled because of this and because of the dramatic change of circumstances caused by World War I. The second case was a dispute between Baden and Prussia and Württemberg concerning the rights to the use of the water of the Danube on both sides of the river in a border area between the three states. The third case was a dispute between Bremen and Prussia, Brunswick and Thuringia concerning the pollution caused by potassium mines in those states on the river Weser, forcing Bremen to stop taking in drinking water from this river. The final case was a dispute between Lübeck and Mecklenburg-Strelitz on fishing and shipping rights in the Lübecker Bucht in the Baltic Sea.\(^{22}\)

The court took the same approach in all four cases. It stressed the obvious importance of the federal constitution, federal legislation and state treaties between the states for the regulation of their interstate relationships. But the RStGH also acknowledged that these norms could not always bring a satisfying

\(^{19}\) RStGH May 12, 1928, Lammers-Simons I, 352 ff.
\(^{20}\) Rüter (n 15) 21 ff.
\(^{21}\) Clear examples of this are Articles 17 RV (prescribing the structural content of each of the state’s constitutions and its electoral system) and 63 RV (regulating that the representation of a state in the Reichsrat took place through members of the state’s governments, but in Prussia for half of the Prussian votes through members of the provincial governments), RGZ 118, annex 5.
\(^{22}\) All four cases are published in Lammers-Simons I, on 198 ff, 178 ff, 207 ff and 220 ff, respectively.
solution. In those circumstances, the norms of international law regulating the relationship between states could and should be taken into account, because in a Rechtsstaat there can be no ‘constitutional gap’ (Verfassungslücke). The RStGH stressed that this also underlined the fundamental principle of German constitutional law that Germany’s states were structurally speaking still sovereign states in an international law-sense, albeit that their character and their relationship to each other were very heavily and fundamentally altered and limited by the fact that they were all integral part of the German Reich.²³ Article 4 RV was the legal basis for the internal application of international law.²⁴ The court stated on the other hand that the states of the German Reich were mutually obliged to treat each other on a more friendly and cooperative basis than is normally the case between two states, because they form part of the greater structure of the German Reich. Without using the term as such, the RStGH here points in the direction of the principle of federal loyalty (Bundestreue) later developed by the BVerfG. The Bundesverfassungsgericht has rejected the pre-war case law of the RStGH and categorically stated that the relationship between the states of the Federal Republic of Germany is solely and uniquely regulated by the federal legal order itself; although essentially speaking, the German states are indeed states, there is no place for the application of international law between them.²⁵ The unwritten principle of Bundestreue does, however, encompass almost everything that in the pre-war case law of the RStGH had been derived from the internal application of international law.

The third and final subject of constitutional review of the Staatsgerichtshof was the settlement of disputes between the federation and one or more states. As we saw before, in this field the RStGH was somewhat limited because it could not decide on the conformity of state law to federal law: that was the province of the Reichsgericht under Article 13 RV. And since the decisions of the Reichsgericht were erga omnes-decisions, the RStGH was bound by them when deciding disputes between federation and states.

In the first years of the Weimar Republic, the greater amount of cases arising under this provision dealt with the numerous legal questions that found their source in the transferal of the state railways and postal services to the Reich.

²³ Lammers-Simons I, 185. ‘[…] Die historische Stellung der Länder (war) auch nach der Weimarer Reichsverfassung bestehen geblieben, wenn auch in eingeschränktem Umfang’ Hoffmann (n 10) 94.
²⁴ ’Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts’.
²⁵ BVerfGE 34, 216. The Austrian federal constitution, the Bundes-Verfassungsgesetz (B-VG), does recognise the relevance of the use of Public International Law for interstate relations: see Article 15a B-VG.
Later, the RStGH started deciding other cases as well and focused more and more on the constitutionality of federal measures and legislation arising under Article 48 RV.

Article 48 of the 1919 constitution combined two important powers and put both of them in the hands of the federal president. The first was the power to enforce federal obligations upon an unwilling or uncompliant state, the so-called Reichsexekution. The second was the power to take all necessary measures when public order and security in Germany were threatened. In both cases, the president could make use of the armed forces and when using his emergency powers, he could also deviate from the most important fundamental rights enshrined in the constitution. Especially in the final years of the republic, president Von Hindenburg used his emergency powers more and more often, in many cases combined with those of the federal execution, to keep the machinery of state going with a dysfunctional Reichstag unable to form a parliamentary majority to ensure stable government on the federal level – and in many states, on the state level as well. This led to a continuous widening of the scope of Article 48, leading some to comment that the constitution had effectively been reduced to this one article. This was strengthened by the fact that Article 48 RV foresaw the enactment of a federal act to implement its provisions: this federal act never materialised, however, so that the president’s powers remained strangely limitless – especially when times became so uncertain that the need for almost unlimited emergency powers was felt more and more.

Especially when it came to emergency measures and decrees under Article 48.2 RV, German doctrine was of the opinion that the ordinary courts could not review their legality.\(^{26}\) The RStGH, however, considered itself entitled to do so in a dispute between the federation and one or more state whenever a measure of the president under Article 48.1 or 2 RV limited the autonomy of the respective state.

On January 30, 1931, the Bavarian government filed a complaint with the RStGH concerning an emergency decree by president Von Hindenburg from December 1, 1930. This so-called Dezember-Notverordnung contained, amongst other measures, a regulation that unified a number of tax laws and – provisions. This Steuervereinheitlichungsge-setz had been on the agenda of parliament for some time, but the Brüning government had not been able to get it passed. The law was seriously opposed by Bavaria, which saw it as an infringement of its own legal powers in the field of taxing. The principal position of the Bavarian government in this case was that by enacting the new tax law under Article 48.2

\(^{26}\) Wehler (n 13) 295.
RV, the federal government had breached the legislative division of power between federation and states laid down in Article 10 RV, that, however, the emergency powers of Article 48.2 RV could not empower the government or the president to do so, because Article 10 RV was not mentioned among the enumerated constitutional provisions that the president could deviate from. The federal government defended itself by stating that it was solely the federal lawgiver that could decide what was in the interest of the nation as a whole, not the states, and that it was irrelevant whether the federal lawgiver did so through an act of parliament or through an emergency decree under Article 48.2 RV, which was – in times of emergency – essentially the same.\footnote{Ibid 312 ff.} This question was of course, of a fundamental importance to decide on the limits of the president’s emergency power in relation to the federal character of the republic; The RStGH did not come to a decision, however, since the objections that Bavaria had against the measures could be solved through negotiations, so that the state government took back its complaint after the enactment of the presidential emergency decree of June 5, 1931, which took the Bavarian objections into account.

The court could, however, decide on these questions in an important case from the end of 1931, which was officially an intrastate dispute (between the city of Strelitz and the state diet fraction of the \textit{Deutschnationale Volkspartei} [DNVP] and the government of Mecklenburg-Strelitz), but which materially dealt with the constitutionality of the president’s emergency decree of August 24, 1931. The so-called \textit{Dietramszeller Notverordnung} enabled a state to deviate from its own constitution in taking emergency measures. The city of Strelitz had been united with the state capital Neustrelitz through a state emergency decree on the basis of this emergency decree and the city of Strelitz and the DNVP fraction claimed that this violated Article 17 RV, which put the relations between a state and its communities solely in the hands of the state, and therefore within the limits of the state constitution. The state constitution of Mecklenburg-Strelitz prescribed a state act to unify two or more communities. The complaint also wanted a decision on the temporality of presidential emergency decrees. The court ruled that the president did have a discretionary power in taking measures under Article 48 RV, but that this power was by its very nature limited and therefore subject to judicial scrutiny. Emergency decrees were also essentially temporal in nature.\footnote{Lammers/Simons V, 201 ff.} In both aspects the RStGH accepted that the president had acted within his powers and that the complaints therefore failed. In its later case law the court maintained this dual approach: on the one hand, it stressed the fact that
the emergency decrees the president enacted were within the scope of the court’s legal scrutiny, on the other hand this scrutiny seldom led to a verdict that declared an emergency decree unconstitutional.29

The most important decision in a dispute between the federation and the states concerning the powers of the president under Article 48 RV is without a doubt the famous – or infamous – *Preussenschlag*-decision of October 25, 1932.30

The case centered on the emergency decree of July 20, 1932 in which the president dismissed the government of Prussia and nominated federal chancellor Von Papen to federal commissar in Prussia, giving him all the powers that the Prussian constitution gave the state government, including the power to nominate and dismiss state civil servants, to oversee the Prussian provinces and to represent Prussia’s interests in the *Reichsrat*.

The situation was further complicated by the fact that the Prussian government, a coalition of the social democrat SPD, the Catholic *Zentrumspartei* and the liberal *Deutsche Staatspartei* under prime minister Otto Braun (SPD) had only caretaker status after the elections for the state diet of May 1932. The national socialists had become the biggest party, but were unable to nominate a new government, since under Prussian law the state diet had to vote for a new prime minister by an absolute majority of the members of the diet – a hurdle that the NSDAP could only pass with the support of the *Zentrumspartei*, which refused to do so. Prussia was therefore in a constitutional impasse: the outgoing government did not have parliamentary support, a new government could not be formed.31 The measures taken by the federal government against the Prussian caretaker government are still widely contested; according to some, it was the death-blow of the German democratic and federal system because it was aimed at the unification of Prussia and the *Reich*, putting the Prussian police force in

29 Wehler (n 13) 330 f.
30 RGZ 138, annex 1 ff.
31 Under Prussian constitutional law, the nomination of a new prime minister was not regulated in the state constitution, but in the standing orders of the diet. During the last session of the outgoing diet, in which the three coalition partners still had a majority, the standing orders were amended to change the nomination procedure; before, a majority of the votes cast had been sufficient to elect a new prime minister. The amendment was enacted purely to prevent the national socialists after their expected win from taking over the state government – and it succeeded in doing so. Of course, the standing orders could be amended back after the election – but the former coalition parties and the communist KPD refused to do so, effectively guaranteeing that under Prussian law, the Nazi’s could not take over the state government, and with that, the large Prussian police force (stronger than the German standing army), but also in the process preventing a new parliamentary government from being formed. See for a more detailed analysis of the process leading up to the *Preussenschlag* of the summer of 1932 Gabriel Seiberth, ‘Anwalt des Reiches. Carl Schmitt und der Prozess ‘Preussen contra Reich’ vor dem Staatsgerichtshof’ (Diss Free University Berlin, 2001).
the hands of the federal government and thereby paving the way for the Nazi take-over of Prussia and all other states in the spring of 1933, according to others, it was the last chance of preventing the Nazi’s from taking over Germany, because it put the Prussian police force in the hands of the federal government, giving it, at least potentially, a very strong weapon against national socialist attempts to take over power. The merits of the decision and its effects upon Germany’s fate half a year later fall outside of the scope of this article, however.32

The decision to remove the Prussian government from office lead to a constitutional complaint of said government on behalf of the state, several of the disposed ministers ex officio, the diet fractions of the Zentrumspartei and the SPD, and the states of Bavaria and Baden, all against the Reich itself, represented by the federal government. The arguments for and against the emergency decree focused on the question whether or not the said decree could be deemed within the scope of both Article 48.1 and 2 RV, because it had been founded on both provisions; had the Prussian government failed in its obligations towards the Reich, especially concerning the maintenance of public order in Prussia against the communists (as the Reich stated) and had there indeed been a sufficient threat to public order in Prussia to justify federal action under Article 48.2 RV? The complaint of Bavaria and Baden focused on the question whether or not the federal government could, when enacting emergency decrees, deviate from the fundamentals of the federal structure laid down in the constitution, especially concerning the representation of the state’s interests in the Reichsrat through federal commissars.

In the October decision, the later complaints were deemed inadmissible because both states lacked standing, since the emergency decree had not been directed against them. But the questions raised by Bavaria and Baden were nevertheless answered by the RStGH in its decision on the other complaints.

The court ruled that the federal government had failed to prove that Prussia had indeed not fulfilled its obligations under Article 48.1 RV; insofar as the emergency decree was based upon that provision, it was unconstitutional. The court did accept, however, the president’s judgment that a threat to public order and security existed justifying an emergency decree. The president had been entitled to nominate the federal chancellor to federal commissar in Prussia, giving him far-reaching powers; but this did not, according to the RStGH, justify

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32 The fact is, however, that the NSDAP was fundamentally opposed to the measures taken by the Von Papen government and feared that these would rob them of the chance to take over Prussia; and Seiberth argues convincingly that this was indeed the intent of the federal government, especially the Reich defence minister Von Schleicher.
the dismissal of all Prussian ministers. They remained in office; and they retained the power to represent Prussia in its contacts with the federal government, other states and the other Prussian state organs. Especially the power to represent Prussia’s interests in the Reichsrat could not be taken over by the federal chancellor in his commissary capacity, according to the verdict.

The Preussenschlag-decision of October 25, 1932 is both the highwater mark and the end of the case law of the RStGH; very shortly after the nomination of Adolf Hitler to federal chancellor on January 30, 1933 the enforced unification of the states under Reich leadership (Gleichschaltung der Länder) made the RStGH redundant, although it was never officially abolished. In it, the court tried to give an almost Salomonic decision on the question of the relationship between the German Reich and its largest composing state, Prussia. The RStGH made clear that it could, and would, scrutinise a claim by the federation that a state had not fulfilled an obligation towards the federation; and that even when the federation was entitled to act against a state, even in times of extreme public disorder, the autonomy of the state and its own constitutional authorities could not be taken away entirely. In that sense, the RStGH might not have been a true guardian of the constitution; but it was, we would argue, a guardian of the autonomy and the legal and political competences of the German states as long as the 1919 constitution had any relevance.

4 Dispute settlement in the Kingdom of the Netherlands: Development and present status

The Charter for the Kingdom of the Netherlands (Statuut voor het Koninkrijk der Nederlanden) is since its entry into force on December 29, 1954 the highest constitutional document within the Kingdom of the Netherlands. It established a new legal order within the Kingdom of the Netherlands which constitutionally was created in 1814. The Charter regulates, as mentioned earlier, the relations between the current four Countries of the Kingdom, being the Netherlands and the three overseas Countries of Aruba, Curaçao and Sint Maarten. The Charter was the decolonisation instrument with regard to the small former Dutch colonies in the western hemisphere that did not want to become fully independent.

33 Before 1954 it was the Constitution of the Kingdom of the Netherlands which regulated the relationship between the Netherlands and its overseas colonies and possessions.
The Charter was not intended to be a completely new constitution regulating the (constitutional) relations between the Countries of the Kingdom, since it complements the existing Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*), currently predominantly the constitution of the Netherlands proper. The Kingdom’s Charter restructures a few constitutional elements of the legal order of the Kingdom of the Netherlands fundamentally.34 In so doing, the Charter guarantees that representatives of the overseas Countries’ Governments can influence (although not decisively) the decision making in the Kingdom and to that end creates new Kingdom organs. Kingdom organs are, for instance, the Government of the Kingdom, the Council of Ministers of the Kingdom, and the Council of State of the Kingdom. Fundamentally, the organs of the Kingdom coincidence with their Dutch match. An example: the Council of Ministers of the Kingdom comprises of all ministers of the Government of the Country of the Netherlands – in their capacity as Kingdom ministers – and one Minister-Plenipotentiary for each overseas Country.35 A similar reasoning goes for the primary advisory organ of the Kingdom: the Council of State. The members of the Council of State of the Netherlands are also member of the Council of State of the Kingdom.36 Besides stipulating the few Kingdom bodies in the Charter, the Charter also explicates the powers of the Kingdom and in so doing implicitly indicates what the autonomous powers of the Countries are. The main powers of the Kingdom are enshrined in Article 3 of the Charter and constitute, *inter alia*, defence and foreign relations, Dutch citizenship, shipping regulations, immigration and extradition. Article 43 of the Charter mentions that safeguarding fundamental rights and freedoms, legal certainty and good governance also constitutes a Kingdom power. Powers which are defined nor labelled as Kingdom powers fall within the autonomous sphere of the Kingdom’s four Countries. Remarkably, the organisation of the judiciary is not an affair of the Kingdom. The judiciary and its legal structuring fall within the autonomous sphere of the Kingdom’s Countries. Although the judiciary constitutes a Country affair, by virtue of Article 23 of the Charter the jurisdiction of the Supreme Court of the

34 Preamble Charter for the Kingdom of the Netherlands.
35 The Minister-Plenipotentiary is appointed and removed by the Government of Aruba, Curacao and Sint Maarten and acts in the name of the Government of the concerned overseas Country; Article 8 Charter for the Kingdom of the Netherlands.
36 If the government of an overseas Country so desires, the King shall appoint a new member to the Council of State of the Kingdom, representing the concerning overseas Country. These representatives of the overseas Countries as member of the Council of State of the Kingdom take part in the activities of the Council of State for the Kingdom; Article 13 (2) Charter for the Kingdom of the Netherlands.
Netherlands (Hoge Raad der Nederlanden) is to be regulated by a Kingdom act. The Kingdom act on the Jurisdiction of the Supreme Court for Aruba, Curacao, Sint Maarten and for Bonaire, Sint Eustatius and Saba\footnote{Kingdom Act of July 20, 1961, Stb 212.} executes the aforementioned provision of the Charter. In general, the Kingdom Act entails that parties involved in civil or criminal cases in both the Caribbean Countries and the Caribbean public bodies of the Country of the Netherlands can appeal to the Supreme Court of the Netherlands. The Joint Court of Justice of Aruba, Curacao, Sint Maarten and of Bonaire, Saint Eustatius and Saba is the responsible court in the overseas islands in the first instance and in appeal.

In the constitutional tradition of Kingdom law, the topic of dispute settlement is relatively little reflected. The reasons for this reluctant approach towards this topic are according to the Kingdom legislature of 1954 firstly that the Kingdom, as mentioned before, does not have many powers and, thus, conflicts would not arise. The second reason was that the Countries of the Kingdom in 1954 were far away from each other. Back then, the Kingdom comprised of three Countries: the Netherlands (in Europe), the Netherlands Antilles\footnote{In 1954, the Netherlands Antilles comprised of six islands: Curacao, Aruba, Sint Maarten, Bonaire, Sint Eustatius and Saba. Aruba gained the status of an autonomous Country within the Kingdom in 1986, the Netherlands Antilles were dissolved in 2010.} (in the Caribbean) and Surinam\footnote{Surinam became a sovereign and independent republic in 1975.} (in South America). Consequently, according to the Kingdom the chance that disputes in the Kingdom would exist was lowered to a minimum. In so far there has been thought about dispute settlement, a general procedure has been established in 1954. This procedure is enshrined in Article 12 of the Charter. The conflict procedure Article 12 of the Charter refers to, takes place within the Council of Ministers of the Kingdom and can vary from discussions concerning how far Kingdom powers reach to decisions of the Council of Ministers with which one or more Minister-Plenipotentiary disagree(s).

Nevertheless, according to the Official Clarification of the Charter, Article 12 belongs to ‘the core elements of the Charter’.\footnote{Kamerstukken II 1953/1954, 3517, 2, 11.} The reason that Article 12 is labelled as a core element of the new legal order of 1954 is twofold. Firstly, this provision tries to safeguard the political, economic and other vested interests of the three overseas Countries. Secondly, Article 12 of the Charter tries to guard the unity of the Kingdom.\footnote{Kamerstukken II 1953/1954, 3517, 2, 11.} The conflict solving procedure of Article 12 has two aspects. The first aspect – the so called ‘local veto’ – is enshrined in paragraph
of Article 12 and guarantees the autonomy of the overseas Countries, while the second aspect – the so called ‘internal appeal’ – is enshrined in paragraphs 2 – 5 of Article 12 and guarantees the unity of the Kingdom as a whole. The following shall elaborate on both aspects.

The first aspect of Article 12 of the Charter, the local veto, becomes relevant when a Minister-Plenipotentiary disagrees with a proposed decision of the Council of Ministers which contains binding rules for the Country which is represented by the Minister-Plenipotentiary. He can indicate that his Country cannot be bound by the proposed decision if the latter would be seriously detrimental for his Country. According to paragraph 1 of Article 12 of the Charter the proposed decision cannot then be adopted in the Council of Ministers in such a way as to apply in the concerned overseas Country, ‘unless such a course would oppose the concerning Country’s ties within the Kingdom’. In other words, the local veto constitutes that if a Minister-Plenipotentiary does not desire a proposed binding rule to apply in his Country, he can in principle veto the proposed instrument. However, the second aspect pertaining to the unity of the Kingdom comes around when the Council of Ministers finds that the ties of the concerning Country with the Kingdom entail that the concerning proposed decision of the Council of Ministers should apply in the Minister-Plenipotentiary’s Country. If the Minister-Plenipotentiary of an overseas Country has serious objections to the initial opinion of the Council of Ministers concerning the provision referred to in paragraph 1 of Article 12, deliberations on the issue of the binding nature of the provision in an overseas Country shall continue at the request of the Minister-Plenipotentiary. These continued deliberations will be conducted by the Prime Minister of the Kingdom (also the Prime Minister of the Netherlands), two Ministers of the Kingdom (also ministers of the Netherlands), the concerned Minister-Plenipotentiary and a Minister or special representative to be designated by the Government of the concerned overseas Country. In particular from the Prime Minister c.q. the president of the continued deliberations, objectivity is expected. The procedure of Article 12 shall be completed with a decision of the Council of

42 Article 12.1 Charter of the Kingdom of the Netherlands.
43 Article 12.1 Charter of the Kingdom of the Netherlands.
44 Kamerstukken II 1953/1954, 3517, 2, 11.
45 Article 12.3 Charter of the Kingdom of the Netherlands.
Ministers of the Kingdom, which shall be in accordance with the results of the continued deliberations.\textsuperscript{47} The Minister Plenipotentiary can, thus, not deviate from the final decision of the Council of Ministers.\textsuperscript{48}

Since the Council of Minister in principle decides by unanimity, and if that is not possible by majority, according to the overseas Countries in practice it is up to the Kingdom Ministers and the Prime Minister – who all take part in the Government of the Netherlands and form a majority in the Council of Ministers of the Kingdom – to decide on the binding nature of a provision in the overseas Countries. From the opinion of the overseas Countries, therefore, the Netherlands has the upper hand when it comes to dispute settlement between the Kingdom and the overseas Countries. Even more, for conflicts of a public-law nature between two or more Countries, especially when the Netherlands as a Country is one of the parties, the procedure is completely unsuited because it hardly distinguishes between the Netherlands and the Kingdom. The dispute settlement procedure of Article 12 of the Charter, therefore, appears to be flawed.

Due to the dissolution of the Netherlands Antilles in 2010, the number of Countries rose from three (i.e. the Netherlands, Aruba, the Netherlands Antilles) to four (the Netherlands, Aruba, Curaçao and Sint Maarten). Because of the increase of the Countries and the desired intensified cooperation between the Countries of the Kingdom, according to the Government of the Kingdom there is a higher chance that disputes will arise between the Kingdom and the Countries or between Countries. Therefore, an effective dispute settlement was in a more need according to the Government of the Kingdom.\textsuperscript{49} In 2010, the Charter of the Kingdom was enriched with two Articles concerning dispute settlement: Articles 12a and 38a. The first provision concerned disputes between the Kingdom and one or more Countries, and the latter between the Countries of the Kingdom.

Article 12a of the Charter obliges the Kingdom legislature to adopt, by Kingdom act, facilities for dispute settlement between the Kingdom and the Countries. The nature of the disputes involved should also be appointed by the Kingdom act itself. The Charter is silent when it comes to the nature of the ‘provisions’ which should be regulated. Currently, almost eight years have passed since the entry into force of Article 12a Charter, however, the Kingdom

\textsuperscript{47} Article 12.5 Charter of the Kingdom of the Netherlands. \\
\textsuperscript{48} According to Article 25 of the Charter the overseas Countries have an absolute veto concerning the applicability of international economic or financial agreements in their Countries. Therefore, the dispute settlement procedure of Article 12 is not applicable to disputes pertaining to the applicability of international economic or financial agreements in the overseas Countries. \\
\textsuperscript{49} Kamerstukken II 2009/2010, 32213-(R1903), 3, 6.
The legislature has not created any provisions for the purpose of Article 12a of the Charter. The reason behind this state of affairs is the fundamentally different perception between the Countries of the Kingdom on how to give substance to the obligation of Article 12a of the Charter. The overseas Countries prefer that disputes between the Kingdom and the Countries will be solved by an independent judicial body.\textsuperscript{50} The Netherlands, on the contrary, wish for a different approach. According to the government of the Netherlands, after the so called continued deliberations elaborated above, the Ministers-Plenipotentiary should be allowed to seek an advice from the Council of State of the Kingdom.\textsuperscript{51} This proposed advice of the Council of State of the Kingdom will, however, not be binding on the Kingdom Government.

The disagreement between the Countries concerning Article 12a of the Charter focuses predominantly on the question who should resolve federal disputes. Inherent to this question is, indeed, what the character of the decision of the concerning body should be: binding or merely advisory. The Caribbean Countries believe that an independent judicial body should review disputes between the Kingdom and the Countries. Consequently, Aruba, Curacao and Sint Maarten interpret Article 12a of the Charter in such a way that the decision of the organ – which as said should according to the overseas Countries be judicial in nature – should be binding for the Council of Ministers of the Kingdom or any other Kingdom organ. As was discussed above, contrary to the Caribbean Countries, according to the Netherlands Article 12a of the Charter does not require a binding ruling of an independent body of judicial character.\textsuperscript{52} One of the reasons for this controversy between the Netherlands and the three overseas Countries on the interpretation of the new article is the fact that the actual text of Article 12a Charter does not explicitly mention what exactly should be understood by the term ‘provisions’. In the parliamentary history of the article, however, the Government of the Kingdom has said that Article 12a of the Charter entails an independent authoritative source to settle legal disputes between the Kingdom and the Countries.\textsuperscript{53} Three possible options which are mentioned in the parliamentary history suitable to practice this task are: the Council of State of the Kingdom, the Supreme Court of the Netherlands or a new

\textsuperscript{50} Kamerstukken II 2014/2015, 33845, 11, 3.
\textsuperscript{51} Kamerstukken II 2014/2015, 33845, 11, appendix.
\textsuperscript{52} Kamerstukken II 2014/2015, 33845, 11, 3–4, appendix.
\textsuperscript{53} Kamerstukken II 2009/2010, 32213 (R 1903), nr 11, 2–3. See also: Sillen (n 46) 43. On just one occasion the Government of the Kingdom has made explicit that Article 12a of the Charter requires an independent body to settle disputes. Gerhard Hoogers, Samenwerking en geschilbeslechting in het Koninkrijk der Nederlanden na 10 oktober 2010 in Irene Broekhuijse and others (eds), De toekomst van het Koninkrijk: een terugblik (Utrecht 2011).
judicial body which is merely charged with settling disputes between the Kingdom and the Countries.\footnote{Kamerstukken II 2014/2015, 33845, 9, 3–4.} The Caribbean Countries indicate that the Supreme Court of the Netherlands would be the best possible option responsible for dispute settlement in the Kingdom.\footnote{Kamerstukken II 2009/2010, 32213 (R 1903), 9, 8.} The Council of State of the Kingdom would, according to the overseas Countries, be improper since the Council of State of the Kingdom is already involved as an advisory body in many matters that concern the Kingdom, such as the realisation of Kingdom legislation. The Netherlands reject the Supreme Court of the Netherlands as the most suitable body in this framework and prefer to appoint the Council of State of the Kingdom as the dispute settler in the Kingdom, since according to the Dutch Government, the Council of State of the Kingdom has the most experience when it comes to settling constitutional conflicts.\footnote{Noteworthy in this context is that in the constitutional tradition of the Kingdom, constitutional review by a specialised court only exists in Sint Maarten. According to Article 120 of the Dutch Constitution, acts cannot be reviewed against the Dutch Constitution. Similar provisions can be found in both the Constitution of Aruba and the Constitution of Curaçao, be it with certain limitations.} A new judiciary body would according to the Dutch Government be inefficient, since new questions would rise concerning the composition and the constitutional position of this new organ \textit{vis-à-vis} other Kingdom organs.\footnote{Kamerstukken II 2014/2015, 33845, 11, 3.}

During the drafting of Article 12a of the Charter, it has repeatedly been suggested that the dispute settler should not be authorised to settle all possible disputes between the Kingdom and the Countries.\footnote{Kamerstukken II 2009/2010, 32213 (R 1903) 9, 3.} The Government of the Kingdom has made explicit that the dispute settler should settle ‘legal disputes concerning the interpretation of the Charter of the Kingdom’.\footnote{Kamerstukken II 2009/2010, 32213 (R 1903), 23, 5.} What, however, the boundaries of this vague sentence according to the Kingdom Government are, is not clear. For instance, what is covered by ‘legal disputes’ and under what circumstances a question pertains to the ‘interpretation of the Charter’? Again, there is a gap between the Netherlands and the three other Countries. The Netherlands do not want proposed or enacted Kingdom legislation to fall within the scope of the new provision, whereas Aruba, Curaçao and Sint Maarten believe that this should be the case.

The other new provision in the Charter due to the amendments of 2010, Article 38a, pertains to possible conflicts between the Countries of the Kingdom.
According to Article 38a of the Charter, the Countries of the Kingdom can enter into mutual agreements pertaining to the settlement of public law disputes arising between the Countries. Following the text of this provision, it is up to the Countries concerned how they resolve a possible conflict with each other. The Kingdom as a whole is, after all, not involved in these kind of settings since these conflicts cannot pertain to Kingdom powers.\(^{60}\) Contrary to Article 12a Charter, Article 38a does not oblige the Countries to create a dispute settlement procedure between the Countries – since this latter falls in the autonomous sphere of the Countries. Although every type of mutual agreement is possible, the second sentence of Article 38a Charter clarifies that the second paragraph of Article 38 Charter is applicable in this context. According to the second paragraph of Article 38 Charter, the Countries may decide by common consent that a mutual agreement shall be regulated by a Kingdom act or an order in Council of the Kingdom. Consequently, although Article 38a tries to provide a legal ground for facilitating dispute settlement between the Countries, it does not bring changes in the existing possibilities concerning dispute settlement between the Countries.\(^{61}\) It is not very surprising, looking at the principal differences between the Netherlands and the Caribbean Countries concerning Article 12a and the close interlinking between the two provisions that the progress on realising provisions under Article 38a of the Charter has been almost non-existing.

Furthermore, recent developments concerning the former involve that the Council of Ministers has assented to a new proposal which gives effect to the obligation of Article 12a of the Charter. The new proposal is drafted by the Minister of Internal and Kingdom Affairs – taking part in both the Government of the Kingdom and the Government of the Netherlands. In general, the proposal constitutes predominantly the wishes of the Government of the Netherlands: meaning that the Council of State of the Kingdom is appointed as the dispute settler which can provide a non-binding advice to the occurring conflict. Moreover, this new dispute settlement is limited, since proposals of Kingdom acts or orders in Council are excluded from the scope. This is peculiar, since disputes between the Countries and between the Kingdom and one or more Countries predominantly occur concerning proposals for Kingdom acts or proposals for orders in Council. The bill has been sent to the Council of State of the Kingdom for advice in 2017. It is not known whether the Council of State of the Kingdom has already given its opinion, since the bill has not been sent to the Second Chamber of parliament yet.

\(^{60}\) Kamerstukken II 2009/2010, 32212-(R1903) 3, 8.

The Kingdom Government has informed the Second Chamber that parliament will be informed about further developments before the summer of 2018.\textsuperscript{62}

5 The \textit{RStGH} as a possible model for the Kingdom of the Netherlands

From the above it has been shown that the Countries that make up the Kingdom of the Netherlands are at a stalemate concerning their dispute settlement regulations. In this paragraph, attention will be paid to the question whether the \textit{RStGH} could be a possible model for the dispute settlement in the Kingdom’s constitutional make up and, if so, how that would be an improvement for the Kingdom and its Countries. The Weimar Constitution regulated several forms of constitutional review. As we saw, the \textit{RStGH} was the competent constitutional court when it came to disputes between organs of a state, between two or more states or between the \textit{Reich} and one or more states, insofar as no other court was given competence in the concerned matter. Moreover, as observed above, especially after the amendments in the Charter in 2010 in the Kingdom, particularly disputes between two or more countries or between the Kingdom and one or more countries are unfinished frameworks. The question is if the model that the \textit{RStGH} provided for the Weimar Republic might provide a possible way out for the Kingdom of the Netherlands from its present constitutional deadlock.

The first supplementary competence of the \textit{RStGH} concerned \textit{Organstreitigkeiten}, i.e. the power to settle disputes between organs within a state. From the case law of the \textit{RStGH} follows that due to the far-reaching interpretation of what constituted a constitutional conflict, the group of possible applicants was extremely broad. According to the court, a constitutional conflict constituted any conflict that arose from a different opinion on the state constitution’s substance. Nonetheless, individual complaints were excluded from the \textit{RStGH}’s competence, since according to the court the protection of the rights of individuals was the competence of civil and administrative courts. As a result, the \textit{RStSGH} could also interpret the constitutions of the federal states. This competence of the court cannot easily be transposed to the Kingdom’s constitutional structure. Several reasons could be given for this. To begin with, disputes between organs of a Country within the Kingdom do not constitute a Kingdom affair, on the contrary, the competence to settle disputes between organs of a Country is a classic example of a Country affair, since this competence is not labelled by virtue of the Charter as a Kingdom affair. Additionally, the power to

\textsuperscript{62} Kamerstukken II 2017/2018, 34775 IV, 36.
interpret the constitutions of the Countries is in principle a sole activity of the
Countries, since this also constitutes an autonomous affair of the Countries. Sint
Maarten for instance, has introduced a Constitutional Court in its 2010 Constitution.
Since some provisions of the Dutch Constitution form part of the Constitution of the
Kingdom, this is an extra complication to determine the way in which such a power
would have to be regulated for the Netherlands itself; it would also mean a radical
breach from a long-standing constitutional tradition in the Netherlands to abstain
from judicial interventions in conflicts between national state bodies.63 This first
competence of the *Staatsgerichtshof*, therefore, does not fit the constitutional
makeup of the Kingdom very well.

The second relevant competence of the *Staatsgerichtshof* was settling public
law disputes between two or more federal states. From the court’s case law it
follows that the court generally qualified the states of the *Reich* as sovereign
states in an international law-sense, although the circumstance that these
federal entities were part of the German *Reich* fundamentally changed their
relationship with each other. This approach, where the states of the German
*Reich* were qualified by the *RStGH* as sovereign states in an international law-
sense, could fit in the Kingdom’s constitutional make up since both *de facto* and
to a large degree *de iure* the four Countries of the Kingdom function as separate
and autonomous entities, far more so than has ever been the case in federal
Germany. As from the latter paragraph, solving disputes between two or more
Countries of the Kingdom is an affair of the Countries of the Kingdom them-
selves. However, from the constitutional amendments of the Charter for the
Kingdom of 2010, it follows that there was a strong desire to embed a provision
on settling disputes between the Kingdom’s Countries. This provision is the
current Article 38a of the Charter, by virtue of which the Countries can enter
into mutual agreements with each other in order to deal with mutual disputes.

63 The Charter for the Kingdom of the Netherlands entered into force in 1954 and augments the
existing Constitution for the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der
Nederlanden*). This is currently predominantly the constitution for the Country of the
Netherlands, since the overseas Countries possess their own constitutions. However, the
Charter for the Kingdom augments the Constitution, since the Charter never was intended to
be a ‘fully fledged new constitution’. Herman Bröring and others, ‘In-depth analysis evaluating
the legal, political and institutional framework concerning offshore practices related to tax
evasion, money laundering and tax transparency in the Overseas Countries and Territories
(OCTs) of the Kingdom of the Netherlands, as defined in Annex II of the Treaty on the
Functioning of the European Union (TFEU), and the relations of the Kingdom of the
Netherlands with those OCTs’ in Isabelle Ioanides and others (eds), *Tax evasion, money launder-
ing and tax transparency in the EU Overseas Countries and Territories: Ex-Post Impact Assessment*
(European Parliamentary Research Service 2017) 93–144.
Remarkably, the second sense of the provision clarifies that to this end, the Countries can decide to regulate disputes between two or more Countries by a Kingdom act or an order in Council of the Kingdom. This ability to possibly regulate dispute settlement between two or more Countries, however, is not formulated as an obligation which rests on the Countries. On the contrary, it is up to the Countries to decide upon this matter. The circumstance, however, that there is specifically a legal ground in the Charter concerning dispute settlement between two or more Countries indicates that in principle the Countries are willing to cooperate on an uniform dispute settlement between the Kingdom’s Countries. Moreover, depending on the developments concerning the obligation to settle “provisions” in disputes between the Kingdom and one or more Countries, which Article 12a of the Charter refers to, progress could be achieved pertaining to dispute settlement between two or more Countries. It seems quite reasonable that once agreement has been reached on the proper set up for dispute settlement between the Kingdom and one or more Countries, the same organ could then be empowered to settle inter-Country disputes as well. Therefore, the willingness of the Countries to regulate dispute settlement between the Countries by Kingdom act or order in Council is crucial for the question whether the RStGH could function as a possible model within the constitutional framework of the Kingdom. If the Countries are willing to regulate the possibility to settle disputes between the Countries of the Kingdom through Kingdom act, especially if this is the same Kingdom act executing Article 12a, the RStGH could function as an example for the Kingdom, as will be illustrated in the following.

The final relevant competence of the Staatsgerichtshof was settling disputes between the federation and one or more federal states. The case law concerning this matter predominantly concentrated on Article 48 RV, such as observed in paragraph 3. By virtue of this provision, two important powers were given to the federal president. Firstly, the power to enforce federal obligations upon an unwilling or uncompliant state and, secondly, the power to take all necessary measures when the public order and security in the German Reich was jeopardized. A similar competence also exists in the Kingdom. By virtue of Articles 50 and 51 of the Charter, the Kingdom’s Government is empowered to nullify any legal provision in the legislation of the overseas Countries of Aruba, Curaçao and Sint Maarten if it violates Kingdom law, an international obligation of the Kingdom or other pivotal interests of the Kingdom, and to interpose itself when a public body of one of the overseas Countries does not fulfill its obligations under the Charter for the Kingdom, an international treaty or a Kingdom regulation. In the German Reich, it was up to the federal president to take all necessary measures when the Reich’s public order was threatened, while in the Kingdom it
is up to the Kingdom’s Government to take possible necessary steps when administrative and legislative measures are taken in the overseas Countries of the Kingdom which violate Kingdom- and/or international law. Until recently, the provisions of Articles 50 and 51 of the Kingdom’s Charter were never used by the Kingdom’s Government. However, the Kingdom’s Government intervened in March 2017 when the local interim-government of Curaçao tried to postpone the local elections. On the whole, the willingness to interpose itself in the autonomous sphere of the Caribbean Countries seem to be growing. A relevant difference between the German Reich and the Kingdom, however, is that in Weimar there was a neutral arbitrary court – the RStGH – who could review, for instance, the competences of the federal president. Such a neutral arbitrary lacks in the Kingdom’s constitutional framework, as observed in the latter paragraph, since it is generally up to the Kingdom’s Government – where the ministers of the Netherlands are in the majority – to decide on current disputes in the Kingdom. As was shown above, this settlement is deemed highly unsatisfactory by the three Caribbean Countries. A neutral arbiter like the RStGH could therefore be a workable solution to solve this dispute on dispute settlement.

The question arises, then, how the RStGH could be a working model for the Kingdom concerning dispute settlement between the Kingdom and one or more Countries. The possibilities within the Kingdom are open, since there are several provisions, both obligatory (Article 12a Charter) and non-obligatory (Article 38a Charter), which concern dispute settlement in the Kingdom. The obligatory provision of Art 12a of the Charter does not clarify who should be appointed as the settler of disputes between the Kingdom and one or more Countries. However, in the parliamentary history of Article 12a of the Charter, the Kingdom’s Government has stipulated that this provision necessitates an independent authoritative source which will solve disputes between the Kingdom and the Countries. This automatically entails that the Council of State cannot be qualified as an independent authoritative source, since the Council of State is involved in the legislative processes in the Kingdom when it comes to Kingdom acts and orders in Council. A new organ would, as mentioned by the Dutch Government, be inefficient, since new questions would arise concerning the constitutional position thereof in the framework of the Kingdom. A possibility would be a special chamber in the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). This ensures that new questions concerning the position of the Hoge Raad would not arise, since the Hoge

64 For instance, in November 2017 the Kingdom Government ordered the Governor of Sint Maarten to dismiss the caretaker Prime Minister of the Country.
Raad already operates in the legal order of the Kingdom. Furthermore, this meets the wish of the overseas Countries that a neutral judicial body would settle the disputes between the Kingdom and the Countries. It is, however, possible – in order to meet the wishes of the Dutch government – to appoint one or more members of the Council of State of the Kingdom to take a seat in this special chamber of the Hoge Raad entrusted with dispute settlement between the Kingdom and the Countries. The character of the decision of this chamber would, similar to the binding decisions of the RStGH, be binding upon the Countries and the Kingdom.

If the Kingdom act regulating Article 12a of the Charter would be framed according to these principles, it would most probably ensure that new attention would be given to the non-obligatory provision of Article 38a of the Charter concerning dispute settlement between the Countries. Similar to the RStGH, the abovementioned special chamber of the Hoge Raad could be appointed as the competent organ to settle disputes between the Kingdom’s Countries. In this way, equal to the Reich’s constitutional framework, it would be the same organ which would be entrusted with dispute settlement between two or more Countries of the Kingdom, and moreover, between one or more Countries of the Kingdom and the Kingdom. In addition, equal to the Reichsgericht, the Hoge Raad functions as the highest judiciary within the whole Kingdom in civil and criminal cases. Among the members of the RStGH were, as we saw, judges from the highest administrative courts of the three largest German States each – Prussia, Bavaria and Saxony. The Charter already makes it possible for the governments of the overseas Countries of Aruba, Curacao and Sint Maarten to request for a member, an extraordinary member or an advisory member to the Hoge Raad, which could be especially useful for this specialised chamber, giving it the same sort of “mixed membership” that the RStGH had. Therefore, the proposal concerning a special chamber of the Hoge Raad which would be responsible for disputes within the Kingdom stays within the legal possibilities of the Charter.

Another relevant question concerns the competence of the special chamber to review legislative measures within the Kingdom. Article 49 of the Charter pays attention to this subject. According to Article 49 of the Charter, rules may be established by Kingdom act with regard to the binding force of legislative measures which are in conflict with the Charter, an international regulation, a Kingdom act or an order in Council of the Kingdom. Similar to Article 12a of the Charter, this provision is formulated obligatorily. Nevertheless, such a Kingdom act does not exist. Therefore, the asymmetric federal framework of

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65 Article 23, paragraph 3 Charter for the Kingdom of the Netherlands.
6 Conclusions

The changes in the German constitutional framework as a result of the First World War were manifold and far-reaching. One of the lesser known changes was the introduction of a system of constitutional review that focused on the settlement of possible public law disputes between the German Reich and one or more states or between two or more states. Apart from disputes on the conformity of state law with federal law (which was entrusted mostly to the highest German ordinary court, the Reichsgericht), for most disputes of this nature a newly minted public law court was introduced, the Staatsgerichtshof für das Deutsche Reich, usually abbreviated as RStGH. The RStGH was originally envisioned by the founding fathers of the Weimar Constitution to be a specialised body attached to the planned superior Federal Administrative Court. But since this was never brought into existence, the RStGH became an ad hoc court with the Reichsgericht itself, and with a majority of members from the Reichsgericht; it convened only when appealed.

The 1949 Basic Law introduced with the Bundesverfassungsgericht a far-reaching, fully fledged and ambitious constitutional court that has borne a heavy influence on the German constitutional framework ever since. For many countries it has been a great source of inspiration and a model to follow. It has been one of the reasons why the system of constitutional review that had been introduced by the Weimar Republic has become heavily overshadowed and sometimes overlooked.

In this article, a different approach has been proposed. One can argue that the ‘Weimar model’, limited as it was, and focusing on the solving of disputes of a federal and public law nature, could be well suited for constitutional systems that are rooted in a long standing tradition of judicial restraint, precisely because of its limited nature. A possible example, and one that has been stressed, is the Kingdom of the Netherlands. The Dutch Kingdom presently comprises of four Countries, of which the Country of the Netherlands is by far the largest and most populous. The other three Countries are small Caribbean island nations that are former Dutch colonies. Although the Kingdom of the
Netherlands is quasi-federal in makeup, the enormous overweight of the Netherlands itself makes the Kingdom a very asymmetrical federation. In that sense, it bears similarities to the German Reich before 1933, when the state of Prussia was far larger than any other German state – and larger and more populous than all other states combined. One of the mechanisms to correct this imbalance was a neutral judicial arbiter between the Reich and the states and between the states in the form of the RStGH. By contrast the Kingdom of the Netherlands lacks a proper mechanism for dispute settlement. The regulation in place in the Charter for the Kingdom is of a political nature and leaves the final say in a dispute between the Kingdom and one or more Caribbean Countries in the hands of the prime minister of the Kingdom, who is also the prime minister of the Netherlands. A settlement for regulating disputes between two or more Countries is completely lacking. Since the important amendments in 2010, a new settlement for disputes between Kingdom and Countries is enshrined in the Charter of the Kingdom, and a dispute settlement for disputes between the Countries is made possible; the Kingdom legislature is empowered to regulate both. But fundamental disagreements between the Netherlands and the other three Countries have completely bogged down the realisation of these dispute settlements.

Through an analysis of the case law and the makeup of the RStGH, we have analysed whether this court could serve as a possible way out of this constitutional dilemma in the Kingdom of the Netherlands. We believe that it does. A separate chamber of the Dutch Supreme Court, the Hoge Raad der Nederlanden, that already acts for the other three Countries as the highest civil and penal court, enacted through Kingdom act and composed of a number of ordinary judges, specialised members of the Council of State of the Kingdom and a judge nominated by each of the three Caribbean Countries, could be a workable solution to regulate the long-overdue dispute settlements. It would be a chamber of the Hoge Raad itself, acting on an ad hoc basis, but its decisions would be final and binding on all parties. In disputes were the Kingdom or the Netherlands as a Country are a party, such a chamber would be a far more neutral arbiter than under the present framework in the Kingdom and would serve as a guarantor of the constitutional autonomy of the Caribbean Countries. It would not only fulfill a constitutional obligation placed upon the Kingdom legislator by the Charter, but would also enhance the legitimacy of the Kingdom’s governance, especially when legislative acts would be in the reviewing power of the dispute chamber.

In doing so, the Kingdom of the Netherlands would pay homage to an often forgotten chapter in the constitutional history of Germany and would show that limited systems of constitutional review like the RStGH can play a meaningful
role in the constitutional framework of asymmetrical federations that exist today. In our opinion, the Kingdom legislator would be wise to try it: the present deadlock cannot continue for much longer. In looking to the German constitutional history for inspiration, the Kingdom has nothing to lose and potentially a lot to win.