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Karapetian, Gohar

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Uniformity and Diversity: a Confrontation between French and Dutch Thought on Citizenship

Gohar Karapetian

1 Introduction

The unitary state of France is divided into several regions (*régions*), departments (*départements*) and overseas collectivities (*collectivités d'outre-mer*). Some of these regions and departments are located overseas, such as the former colonies of Guadeloupe and Martinique. Nonetheless, the residents of the overseas territories are French citizens. They therefore may move freely within the entire territory of the French Republic and they have the right to vote for members of the *Assemblée nationale*. The right to vote for a representative assembly would seem a basic and universal feature of citizenship. However, in the legal order of the Kingdom of the Netherlands, citizenship does not automatically come with voting rights. The Kingdom of the Netherlands comprises four countries: the Netherlands proper and the three overseas countries of Aruba, Curacao and Saint Martin.¹ Arubans, Curacaoans and Saint Martiners hold Dutch citizenship but, in contrast to their counterparts in the Netherlands, they lack the right to vote for the representative body of the Kingdom as a whole.² The difference in the French and Dutch treatment of citizens of overseas territories results from divergences in the development of each nation's constitutional system. This chapter explores the relevant constitutional history of the two nations in order to explain how they arrived at different conceptions of citizenship. Part 2 gives an overview of the origins of modern forms of citizenship in order to lay the groundwork for a discussion of France in Part 3 and then the Kingdom of the Netherlands in Part 4. The analysis demonstrates how the constitutional history of a state can powerfully impact the rights and obligations of citizens.

1 The island of Saint Martin is divided between the French Republic and the Kingdom of the Netherlands. In this chapter, the term "Saint Martin" refers to the Dutch part of the island. The French part of the island is referred to as "French Saint Martin".

2 The representative body of the Kingdom as a whole also functions as the representative body of the Country of the Netherlands, see Part 4.

2 Citizenship's Birth, Rebirths and Relevance

The institution of citizenship arose in Ancient Greece as a means to define who belonged to and, accordingly, who was excluded from the *polis*.³ The *polis* itself implied a distinct political unity.⁴ It required, therefore, an institution to reward active membership in favour of the well-being of the community,⁵ in other words a reciprocity between the individual member and the political state. In particular, the *polis* demanded military service from the members of the community when attacked by other powers. In exchange, individuals sought the protection of the *polis* so as to ensure their own safety.⁶ At the same time, it was not only heroic individuals who were eligible for reward: individuals who contributed economically, literary or socially to the community also benefited. In sum, the *polis* separated out individuals who made positive contributions and conferred upon those individuals a legal status with rights and privileges. In this manner, citizenship as a Western institution was born.⁷

Citizenship has always entailed a reciprocal relationship. The details of that reciprocal relationship have, however, varied over time and place. Different forms of government have necessitated different kinds of citizenship. Aristotle makes this point clear in his *Politica*.⁸ A democracy, for instance, involves different qualities of citizenship than are found in an aristocracy. Athenian citizenship predominantly focused on the rights of the citizen, such as the ability to vote *in personam* for or against a legislative proposal, to participate in the religious life of the *polis*, and to serve on juries. By contrast, Spartan citizenship

3 Paul Magnette, *Citizenship. The History of an Idea* (ECPR Press 2005) 7.

4 Philip Brook Manville, *The Origins of Citizenship in Ancient Athens* (Princeton University Press 1990) 36.

5 Peter Riesenberg, *Citizenship in the Western Tradition. Plato to Rousseau* (The University of North Carolina Press 1992) 3.

6 Riesenberg (n 4) 3.

7 Many scholars acknowledge Solon as a founder of the Western institution of citizenship. After Solon was elected archon in 594 BC he undertook a series of legal reforms, including dividing Attika's population into categories based on generated wealth. Each category came with distinct rights and privileges. Magnette (n 2) 10 ff.; Manville (n 3) 124 ff.

8 Aristotle, *Politics* (Historische Uitgeverij 2012) Book III: 'Now we see that governments differ in kind, and that some of them are prior and that others are posterior; those which are faulty or perverted are necessarily posterior to those which are perfect (...). The citizen then of necessity differs under each form of government; and our definition is best adapted to the citizen of a democracy; but not necessarily to other states. For in some states the people are not acknowledged, nor have they any regular assembly, but only extraordinary ones; and suits are distributed by sections among the magistrates'.

concentrated more heavily on the duties, particularly military obligations, that citizens were required to fulfil.⁹

The ancient conception of citizenship, focused on the relationship between the polity and its citizens, faced a significant challenge with the rise of Christianity¹⁰ in the fourth century¹¹ and the subsequent emergence of the feudal state. Christianity and feudalism both rejected the notion that an individual should be devoted to a worldly polity. Christian theologians developed a complete programme for what a good Christian should be, thereby displacing pagan moral beliefs and transforming the ancient ideal of the citizen as an active contributor to the worldly community. Instead, the ideal Christian citizen was the isolated monk with his absolute devotion to God.¹² Feudalism, for its part, emphasized the personal relationship between the vassal and the lord rather than allegiance to an organized state.¹³

A rebirth of citizenship occurred during the Renaissance. In the fourteenth century, humanists rediscovered the *litterae humaniores*, which had been neglected in the middle ages. Rather than emphasizing the importance of the ancient authors *per se*, however, humanists promoted the *studia humanitatis* as the means to becoming the *vir virtutis*, a refined and well-educated man who played an active role in the public domain of his community.¹⁴ The writings of prominent renaissance authors such as Marsilius of Padua¹⁵, Bartolus

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- 9 Riesenbergs (n 4) 6 ff.; Manville (n 3) 3 ff.; Magnette (n 2) 7 ff. In particular the poem 'Code of the Citizen Soldier' of Tyrtæus illustrates the importance of the military devotion of Spartan citizens.
  - 10 Christianity has its own citizenship in that the Bible recognizes Christians as citizens of God's Kingdom in Ephesians 2:19.
  - 11 In the fourth century, several states adopted Christianity as their state religion. The first state that adopted Christianity as its state religion was the Kingdom of Armenia in 301 AD. The Roman Empire followed in 380 AD.
  - 12 Several Christian theologians, such as Augustine, sought to reconcile worldly citizenship with Christian citizenship. Augustine, in his *De civitate Dei* and *Enerratio in Psalmum*, recognizes that each Christian is a fundamental element of his earthly state. As a consequence, the Christian-citizen should have a strong bond with his earthly legal order. In Augustine's words: '(Sinculi homines) sunt tanquam elementa et semina civitatum'. Aurelius Augustinus, *De stad van God* [De civitate Dei] first published 426 AD (Ambo 2011) IV, 3; Aurelius Augustinus, *Enerratio in Psalmum*, 1x:8.
  - 13 R.R. Palmer, J. Colton, L. Kramer, *A History of the Modern World* (McGraw-Hill 2007) 29. In the reciprocal relationship between the lord and the vassal, the lord protected the vassal and ensured the vassal received justice; the vassal contributed funds to the lord and provided also military service.
  - 14 James Gordly, *The Jurists. A Critical History* (OUP 2013) 111.
  - 15 Marsilius defines a citizen 'in accordance with Aristotle in *Politics*, Book III, Chapters 1, 3 and 7, as one who participates in the civil community in the government or the

de Saxoferrato¹⁶ and Baldus de Ubaldis¹⁷ all reflected this renewed conception of citizenship.

In the period after the Renaissance, however, a different phenomenon threatened the renewed focus on citizenship: the centralizing state.¹⁸ Beginning in the sixteenth century, the notion of citizenship lost importance in Europe for almost three hundred years as the growing territorial state altered notions of the relationship between the individual and the polity. Citizens became subjects of the monarch, whose power could reach people thousands of miles away. Still, a lingering conception of citizenship survived also the Age of Absolutism and after the French Revolution the term *citoyen* was widely invoked: there were Citizen-Ministers and Citizen-Bishops and even Louis XVI was known as the Citizen-King.¹⁹

In the modern era, the ancient notion of reciprocity—rights and obligations—proved an attractive element in constructing the state itself and took sharpened form in a set of specific rights such as to vote and to move freely around the territory. Some rights were codified in 1789 in the *Déclaration des droits de l'homme et du citoyen*. The first provisions of the *Déclaration* are quite general and concern sovereignty, liberty and the law. However, the provisions that follow take more specific form and include the right to participate in person or through a representative in the founding of the general will (Article 6) and the right to freely communicate ideas and opinions (Article 11). Of particular importance was the right to vote. Whereas in ancient times citizenship entailed the ability to vote in person for or against bills,²⁰ after the French Revolution the right to vote came to mean selecting one's political

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deliberative or judicial function according to his rank'. Marsilius of Padua, *Defensor Pacis* First published: 1324 (University of Toronto Press 1980) Part I, Chapter XII, 4.

16 Bartolus of Saxoferrato, *Consilia* 1.62, in: *Opera Omnia*; Julius Kirshner, 'Civitas Sibi Faciat Civem: Bartolus of Sassoferrato's Doctrine on the Making of a Citizen' (1973) 48 *Speculum* 4.

17 Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge University Press 1987).

18 Riesenbergs (n 4) 187.

19 Pierre Rétat, 'The Evolution of the Citizen from the Ancien Régime to the Revolution' in Renée Waldinger, Philip Dawson and Isser Woloch (eds), *The French Revolution and the Meaning of Citizenship* (Greenwood Press 1993) 13.

20 In political theory the link between citizenship and political representation preceded the French Revolution. See, for example, Niccolò Machiavelli, *Discorsi. Gedachten over Staat en Politiek* first published 1531 (Ambo 2007); Thomas Hobbes, *Leviathan* first published 1651 (Wordsworth Editions Limited 2014); Thomas Hobbes, *De Cive* first published 1642 (Cambridge University Press 1998); John Locke, *Two Treatises of Government* first published 1689 (Cambridge University Press 1988).

representatives.²¹ The right to select representatives quickly became understood as an essential component of French citizenship.²²

Since the time of the French Revolution, a basic assumption of the notion of citizenship in the French Republic is that citizens have the right to choose their representatives in the political assembly. As discussed in Part 3, this right extended to French citizens in the overseas parts of the Republic. Modern constitutions of other nations, including Denmark²³, Italy²⁴, Spain²⁵, Belgium²⁶, Greece²⁷ and Russia,²⁸ also recognize the right of citizens to choose their representatives in the parliament. On the other hand, as Part 4 shows, while in the Netherlands proper, citizenship is understood to include the right to choose representatives,²⁹ that right does not extend to the Dutch citizens of the overseas territories of the Kingdom of the Netherlands.

3 France and Its Overseas Territories: Uniformity in Citizenship Thought

European colonization dates back to the years of the Renaissance—the same period in which Europeans were rediscovering the teachings of ancient writers.

21 In *Du Contrat Social. Ou principes du droit politique*, Rousseau argued that small political units, such as the *polis* Sparta, where citizens vote in person for or against legislative proposals are the most admirable political entities. However, in his *Considérations sur le Gouvernement Pologne et sur sa réformation projetée*, Rousseau observed that citizens voting on laws in person was not practical in the growing territorial states of the 18th century and he argued in favour of the alternative of political representation. Jean-Jacques Rousseau, 'Du Contrat Social. Ou principes du droit politique' in Jean-Jacques Rousseau, *Œuvres complètes*, Livre IV, Chapitre II (Aux éditions du seuil): 'Le citoyen consent à toutes les lois même à celles qu'on passe malgré lui, & même à celles qui le punissent quand il ose en violer quelqu'une. La volonté constante de tous les membres de l'Etat est la volonté générale; c'est par elle qu'ils sont citoyens & libres'; idem, Livre IV, Chapitre I: 'J'aurais ici bien des réflexions à faire sur le simple droit de voter dans tout acte de souveraineté; droit que rien ne peut ôter aux citoyens; & sur celui d'opiner, de proposer, de diviser, de discuter, que le Gouvernement a toujours grand soin de ne laisser qu'à ses membres; [...]'.
 22 Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17 *Oxford Journal of Legal Studies* 75.
 23 Article 29 (1) of the Constitution of the Kingdom of Denmark.
 24 Article 48 of the Constitution of the Italian Republic.
 25 Article 23 (1) of the Constitution of the Kingdom of Spain.
 26 Article 61(1) of the Constitution of the Kingdom of Belgium.
 27 Article 51 of the Constitution of the Hellenic Republic.
 28 Article 32(2) of the Constitution of the Russian Federation.
 29 Article 54 of the Constitution of the Kingdom of the Netherlands.

Beginning in the early fifteenth century, Portuguese sailors explored the coast of Africa and the Atlantic Archipelagos³⁰ with the goal of finding valuable spices such as cinnamon and pepper and other scarce commodities, so that the ensuing trade would enrich the royal exchequer. The Portuguese soon established overseas settlements and took possession of the territories of Madeira, Azores and Cape Verde, among others. These successes convinced other European powers to venture overseas. Spain, for instance, financed the Italian Christopher Columbus to find alternative maritime routes to Asia, and after the Spanish *conquistadores* travelled west, Spain claimed Cuba, Hispaniola and other Caribbean islands. Competing with the Portuguese and the Spanish, France and the Dutch Republic built their own overseas empires in the late 16th and 17th centuries.

French colonial history is characterized by two periods of empire-building: *le premier empire colonial* and *le deuxième empire colonial*.³¹ The first colonial empire originated in the 16th century and lasted until the beginning of the 19th century.³² The second began in 1830 with the conquest of Algeria and ended with the decolonization process in the second half of the 20th century. The first colonial empire aimed to benefit from the Americas, the coast of Africa and the East Indies. Although, as a result of the French Religious Wars, colonization efforts in the 16th century largely failed,³³ the 17th century brought France considerable success. During the 17th century, France established colonies in the Americas, including in Canada and Louisiana; in the French West Indies, in Guadeloupe, Martinique, St. Barthelemy and French Saint Martin; and in French Guyana. France also established trading posts in Africa, notably in Senegal; in India, at Chandernagore and Yanam; and on the island of Réunion in the Indian Ocean.³⁴

However, not all territories acquired during *le premier empire colonial* remained in French hands. Several wars that involved France, including the Seven Years' War (1756–1763) and the War of the Austrian Succession (1740–1748), led to the collapse of the first French colonial empire.³⁵ Although Great

30 Palmer, Colton, Kramer (n 13) 100.

31 Jean-Yves Faberon, Jacques Ziller, *Droit des collectivités d'outre-mer* (LGDJ 2007) 14 ff.

32 For a comprehensive treatment of the French colonial empires, see: Bernard Gainot, *Les colonies françaises. De Richelieu à Napoléon* (Armand Collin 2015); J. Meyer, A. Rey-Goldzeiguer, J. Thobie, J. Tarrade, *Histoire de la France coloniale, Tome 1. Des origines à 1914* (Armand Collin 1991); N. Bancel, P. Blanchard, D. Thomas, *The Colonial Legacy in France. Fracture, Rupture, and Apartheid* (Indiana University Press 2017).

33 Elizabeth C Tingle, *Authority and Society in Nantes during the French Wars of Religion, 1558–1598* (Manchester University Press 2013).

34 Faberon, Ziller (n 32) 14 ff.

35 Faberon, Ziller (n 32) 16.

Britain captured certain of the French territories, in the 1763 Treaty of Paris France received full sovereignty over four islands, *les quatre vieilles colonies*: Guadeloupe, Martinique, French Guyana, and Bourbon (known now as Réunion).³⁶

The process of integrating the four old colonies into the French constitutional system began at the outset of the French Revolution, with deputies of the four islands called to sit in the revolutionary *Assemblée nationale*.³⁷ The 1795 Constitution declared the old colonies 'parties intégrantes de la République' and 'soumises à la même loi constitutionnelle'.³⁸ The 1798 *Loi concernant l'organisation constitutionnelle des colonies* provided specifically for integration of the four colonies.³⁹ For instance, according to this statute French executive power specifically extended to the four old colonies.⁴⁰ Further, the statute provided that individuals in the four old colonies were not foreigners but akin to those born in the metropole. The residents of the colonies enjoyed the very same rights as a citizen born in France proper if they met at least one of the following three conditions: 's'ils sont attachés à la culture, s'ils servent dans

³⁶ *ibid.*

³⁷ Jacques Binoche, *Les Parlementaires d'outre-mer* (Edilivre 2016) 7. Furthermore, the Convention of 1794 abolished slavery and declared that 'all men resident in the colonies, without distinction or color, are French citizens and enjoy all the rights assured by the Constitution'. The freedmen were, however, re-enslaved under Napoleon. It was not until 1848 that slavery was permanently abolished in the French colonies.

³⁸ Article 6 of the *Constitution du 5 fructidor an III*. The inclusive approach of France towards its old colonies is arguably explained by the Haitian revolution of 1791 which highlighted the question of whether French citizenship should be limited to just the metropole or should extend also to the overseas areas of the French empire. Jane Burbank, Frederick Cooper, 'Empire, droits et citoyenneté, de 212 à 1946', 63^e Année 3 *Annales. Histoire, Sciences Sociales* (2008); C.L.R. James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution* (Vintage 1989); Laurent Dubois, *Avengers of the New World. The Story of the Haitian Revolution* (Harvard University Press 2005).

³⁹ *Loi concernant l'organisation constitutionnelle des colonies, Du 12 Nivôse an 6* (1 January 1798). During the debates before the entrance into force of this Act, Laveaux, Chief Commander of the Republican Forces in the North, argued for the extension of French citizenship and its accompanying rights to the population of *les vieilles colonies*. He emphasized the fact that residents of the old four colonies contributed to the military campaigns of the Republic: 'Hasn't the cultivateur made himself as useful as the noir who has carried weapons? How would we have fed the army, if they had not wanted to cultivate the soil? France sent nothing to the colony of Saint-Domingue. (...) If we agree that the state of the cultivateur is pernicious for Europeans, let us honor this state to encourage the noirs to continue'. Laurent Dubois, *A Colony of Citizens. A Revolution & Slave Emancipation in the French Caribbean 1787–1804* (University of North Carolina Press 2004) 299.

⁴⁰ *Loi concernant l'organisation constitutionnelle des colonies, Du 12 Nivôse an 6* (1 January 1798) Titre 1.

les armées, s'ils exercent une profession ou métier'.⁴¹ French citizenship itself was not (yet) universally expanded to the four old colonies but residents who satisfied one of these three conditions could acquire it.

Building on the Constitution of 1795, the deputies of the old colonies made several attempts to turn the four overseas colonies into formal French departments. However, these early attempts failed⁴² and 'départementalisation' of the four old colonies did not occur until 1946.⁴³ Nonetheless, the extension of citizenship signaled from the outset a strong goal of full integration. Thus, in 1795, colonial administrator Victor Hugues was already referring to the inhabitants of Guadeloupe as 'our co-citizens in Guadeloupe'.⁴⁴ And in 1799, Etienne Laveaux, Chief Commander of the Republican Forces in the North, said:

In our colonies, everything is French. This system of absolute unity makes our disconcerted enemies go pale with rage, and from it the signal for colonial prosperity will be sent; you will soon hear it repeated by our brothers in the colonies, who will shout 'love for the law, the union, and for work'.⁴⁵

In 1848, with the emergence of the second French Republic, French citizenship was fully extended to the residents of the four old colonies.⁴⁶ Since then, residents of the old colonies, as French citizens, have been fully represented in the French assembly.⁴⁷ In 1854, the *Loi concernant l'organisation constitutionnelle*

41 *Loi concernant l'organisation constitutionnelle des colonies, Du 12 Nivôse an 6* (1 January 1798) Article xv, Titre III; Dubois (n 39) 299.

42 Faberon, Ziller (n 32) 31–32.

43 Loi n° 46–451 du 19 mars 1946 tendant au classement comme départements français de la Guadeloupe, de la Martinique, de la Réunion et de la Guyane française.

44 Dubois (n 39) 280.

45 *ibid* 300. This desire was, in the words of Girault, 'in the logic of the revolution': 'The Revolution had established the equality of all Frenchmen, and the rights which it proclaimed were in its thought the same for all men without distinction of latitude'. A. Girault, *Principes de Colonisation et de Législation Coloniale* (Librairie de la société du recueil gal des lois et des arrêts 1895) 178.

46 Frederick Cooper, *Citizenship between Empire and Nation. Remaking France and French Africa, 1945–1960* (Princeton University Press 2014) 21; Faberon, Ziller (n 32) 18.

47 Under Napoleon, representation of colonial residents in the metropolitan assembly was curtailed. Additionally, special executive decrees were promulgated to displace French law in the overseas areas. It was the Second Republic of 1848 that reestablished colonial representation in the metropolitan parliament. Martin Deming Lewis, 'One Hundred Million Frenchmen: The "Assimilation" Theory in French Colonial Policy' (1962) 4 *Comparative Studies in Society and History* 135.

des colonies of 1798 was replaced by the *sénatus-consulte*,⁴⁸ which extended key features of French civil and criminal law, political rights, and legal organizational structure to the colonies.⁴⁹ In essence, the law of the metropole became to a large extent fully applicable in the overseas old colonies.

Meanwhile, *le deuxième empire colonial* began in 1830, with the invasion of Algeria setting off a new period of French colonialism in Africa and Asia. During this second colonial period, France took control of vast new territories.⁵⁰ These included Algeria, several West African states, Laos, Cambodia, New Caledonia, Madagascar and Tahiti. While integration was the hallmark of France's relationship with the four old colonies, these newly conquered territories were kept at a distance—meaning that they were not integrated into the constitutional framework of metropolitan France. French metropolitan law therefore did not apply in the newly conquered territories. Two main reasons explain why these territories were treated differently from the four old colonies. First, the more populated territories captured in the 19th century had already experienced their own processes of state and nation building; this experience made their integration into the French nation more difficult. Second, the representative body of the Second French Empire, the *Corps législatif*, was not involved in the law-making process in the territories captured during the second colonial empire—a result of the fact that by virtue of the *sénatus-consulte* of 1854 the law of the metropole extended only to *les quatre vieilles colonies* and not to the subsequently acquired territories.

Thus, in 1946, during the process of 'départementalisation', the four old colonies were made *départements d'outre mer* (DOM) of France and thereby fully assimilated into the Republic's constitutional legal order as overseas departments equal to the departments of the metropole. By contrast, most of the territories acquitted during the second colonial empire were given the lesser status of *territoires d'outre-mer* (TOM). Other territories conquered during the second colonial empire were not directly part of the Republic but of the French Union, formed in 1946, the same year of the beginning of the Fourth French Republic, to replace the old colonial system. The Union comprised (1) the French Republic, consisting of the metropole,⁵¹ the *départements d'outre-mer*, and

48 A *sénatus-consulte* (in Latin *senatus consultum*) was an act of the Sénat with the force of law.

49 Article 2 of the *Sénatus-consulte* du 3 mai 1854 qui règle la constitution des colonies de la Martinique, de la Guadeloupe et de la Réunion.

50 For a specific list of the territories France invaded during the 19th century, see Faberon, Ziller (n 32) 18 ff.

51 In 1946, Algeria was considered part of the metropole. However, only non-Muslim citizens of Algeria were considered French citizens. Cooper (n 47) 21.

the territoires d'outre-mer; (2) the territoires associés, such as Togo and Cameroon; and (3) the états associés, such as Morocco and French Indochina.⁵² The Fourth French Republic and the French Union had distinct citizenships. Under Article 80 of the Constitution of 1946⁵³, all residents of the métropole, the DOM and the TOM were citizens of the French Republic.⁵⁴ Citizenship of the French Union was regulated by Article 81 of the Constitution⁵⁵ and it extended beyond the Republic to cover also residents of the territoires associés and the états associés. While citizenship in the Union guaranteed certain rights specified in the Preamble of the Constitution, including the right to free speech and protection from arbitrary arrest, it did not encompass the right to vote for the representative assembly of the Republic.⁵⁶

After the Second World War, many states in Asia and Africa gained independence from their European colonial rulers. With decolonization and the end of the Union in 1958, the overseas territory of France decreased significantly.⁵⁷ Existing French law provides for three categories of overseas holdings: (1) Départements et régions d'outre-mer (a category that includes the former DOM); (2) Collectivités d'outre-mer (COM) (including Saint-Pierre-and-Miquelon, the Wallis-and-Futuna Islands, French Polynesia, French Saint Martin and Saint Barthélemy); and (3) the four territorial authorities of New Caledonia.⁵⁸ The

52 For more information on the territoires associés and the états associés see Faberon, Ziller (n 32); Bancel, Blanchard, Thomas (n 33); Cooper (n 47).

53 Article 80 of the 1946 Constitution reads: 'Tous les ressortissants des territoires d'outre-mer ont la qualité de citoyen, au même titre que les nationaux français de la métropole ou des territoires d'outre-mer. Des lois particulières établiront les conditions dans lesquelles ils exercent leurs droits de citoyens'. Although the provision does not specifically define these citizens as 'French' citizens, they were understood as such. Cooper (n 47) 126.

54 The residents of the TOM were represented in the *Assemblée nationale*; Loi n° 46-2151 relative à l'élection des membres de l'Assemblée nationale, 5 octobre 1946, Journal officiel des établissements français de l'Océanie, 24 Octobre 1946, Titre VI.

55 Article 81 of the 1946 Constitution reads: 'Tous les nationaux français et les ressortissants de l'Union française ont la qualité de citoyen de l'Union française qui leur assure la jouissance des droits et libertés garantis par le préambule de la présente Constitution'.

56 According to 81 of the 1946 Constitution, the citizens of the French Union were entitled to the freedoms guaranteed by the preamble of the Constitution.

57 The constitutional successor of the French Union was the communauté française, a short-lived experience in French federalism. Equal to the French Union, nationals of the métropole, DOM and TOM possessed citizenship of the communauté. Although by the early 1960s the communauté française no longer existed, it was only eliminated from the French Constitution in 1995.

58 Alexandre Maitrot de la Motte, '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 (OCT) of France, as

first category is regulated by Article 73 of the Constitution, which makes metropolitan laws and regulations applicable⁵⁹ but allows for certain limited deviations in recognition of local conditions.⁶⁰ These deviations, however, cannot concern issues of French citizenship law, civil and political rights, the organization of justice, criminal procedural law, or public security and defense. Article 74 governs the second category, the COM, and by virtue of that provision, each collectivité is regulated by a separate statute.⁶¹ The Constitution deems New Caledonia a *sui generis* overseas area under French constitutional law with its own government and parliament.⁶²

All residents of all three categories—the DOM, COM and New Caledonia—are French citizens. The Constitution stipulates that the Republic recognizes the populations of all overseas areas within the French nation as united ‘in a common ideal of liberty, equality and fraternity’.⁶³ Overseas French citizens are represented in the French Parliament.⁶⁴ The *Assemblée nationale* consists of a maximum of 577 members with 556 members elected by French citizens in the departments (both metropole and overseas) and 10 members elected by French citizens in the COM and New Caledonia (and the remaining 11 elected by French citizens outside of the territory of the Republic).⁶⁵ A similar representational approach exists with respect to the indirect election of members of the *Sénat*.⁶⁶

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defined in Annex II of the Treaty on the Functioning of the European Union (TFEU), and the relations of France with those OCTs’ in Isabelle Ioannides, Jan Tymowski, *Tax Evasion, Money Laundering and Tax Transparency in the EU Overseas Countries and Territories. Ex-Post Impact Assessment* (European Parliamentary Research Service 2017) 50.

59 Article 73, first paragraph, of the 1958 Constitution reads: ‘Dans les départements et les régions d’outre-mer, les lois et règlements sont applicables de plein droit’.

60 Among other factors are the islands’ economic and social contexts, remoteness, insularity, small size and climate.

61 According to Article 74 of the 1958 French Constitution, the powers of the COM may not involve matters listed in paragraph four of Article 73, including French citizenship law and civil and political rights.

62 1958 Constitution of the French Republic, Titre XIII, ‘Dispositions transitoires relatives à la Nouvelle-Calédonie’; Loi n° 99–209 organique du 19 mars 1999 relative à la Nouvelle-Calédonie. According to Article 6-2 of the Loi n° 99–209 the powers of the New Caledonian government do not extend to issues of French citizenship or civil or political rights.

63 Article 72–3 of the 1958 French Constitution.

64 Code électoral, specifically Livre Ier, Livre II, Livre V, Livre VI.

65 Article 24 of the 1958 Constitution, specifically ‘Les Français établis hors de France sont représentés à l’Assemblée nationale et au Sénat’.

66 Article 24 of the 1958 Constitution, specifically ‘Il [le Sénat] assure la représentation des collectivités territoriales de la République’; Code électoral, Livre II (Election des sénateurs

In sum, the constitutional history of France involves an overall desire to integrate the overseas territories into the French metropolitan constitutional order and to provide their residents with representation in the parliament. In the words of Laveaux, a 'system of absolute unity' is a core feature of the French legal order.⁶⁷ While the history of France reflects a strong commitment to the idea that citizenship entails political representation, the Kingdom of the Netherlands provides a different approach.

4 The Kingdom of the Netherlands and Its Overseas Territories

Dutch colonialism traces to struggles against the political and religious hegemony of the Spanish King Phillip II in the sixteenth century. The seven Dutch provinces fought during the Eighty Years' War for independence and political and religious freedom from the Spanish branch of the Habsburg dynasty.⁶⁸ By the Act of Abduction in 1581, the seven provinces became the Republic of the Seven United Netherlands.⁶⁹ In order to finance the war against Spain, the Dutch went overseas. In 1602, the Dutch East India Company (*Vereenigde Oostindische Compagnie*) (VOC) was established with a monopoly in the spice trade east of the Cape of Good Hope. Nineteen years later the Dutch West India Company (*Westindische Compagnie*) (WIC) received a comparable trade monopoly with respect to the Atlantic, the Americas and the west coast of the African continent.⁷⁰ The two companies conducted a broad range of activities, including establishing outposts, signing treaties and even engaging in warfare. Initially, the VOC and the WIC sought not to colonize but only to engage in trade. Soon,

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des départements), Livre III (Dispositions spécifiques aux députés élus par les Français établis hors de France), Livre IV (Election des conseillers régionaux et des conseillers à l'Assemblée de Corse), Livre V (Dispositions applicables à la Nouvelle-Calédonie, à la Polynésie et aux îles Wallis et Futuna), Livre VI (Dispositions particulières à Mayotte, à Saint-Barthélemy, à Saint-Martin et à Saint-Pierre-et-Miquelon), Livre VI bis (Election des conseillers à l'Assemblée de Guyane et des conseillers à l'Assemblée de Martinique).

67 Dubois (n 39) 300.

68 On the Dutch colonial empire, see Allison Blakely, *Blacks in the Dutch World. The Evolution of Racial Imagery in a Modern Society* (Indiana University Press 1993); Charles Ralph Boxer, *The Dutch seaborne empire 1600–1800* (Hutchinson & Co. 1965); G.J. Schutte, *De Nederlandse Patriotten en de koloniën. Een onderzoek naar hun denkbeelden en optreden, 1770–1800* (Tjeenk Willink 1974).

69 The Republic of Seven United Provinces was recognized by Spain in 1648.

70 For a discussion of the VOC and the WIC, see Gert Oostindie, Bert Paasman, 'Dutch Attitudes Towards Colonial Empires, Indigenous Cultures, and Slaves' (1998) 31 *Eighteenth-Century Studies* 349–355.

however, colonization became a priority. The Dutch companies established Batavia⁷¹ (today, Jakarta) and other settlements around the Cape of Good Hope⁷² and settled as territories Ceylon, Colombo, Cochin, Mauritius and other locations. The WIC established colonies in Brazil, Surinam, and several islands in the Caribbean (including Curacao, Aruba, Saint Martin, Bonaire, Saint Eustatius and Saba).⁷³ These colonies were initially governed by the WIC⁷⁴ but in 1792 it was abolished and the colonies were brought under the direct rule of the Dutch state, and then under the authority of the King in 1814 with the establishment of the Kingdom of the Netherlands. By the 1840s, the Dutch colonial empire comprised the Dutch East Indies, Curacao and Dependencies, Surinam and the Dutch Gold Coast.⁷⁵ In sharp contrast to French practices of integration, during this entire period the Dutch treated their colonies as peripheral entities.

Constitutional amendments in 1848 altered the King's powers and required enactment of legislation to govern the overseas territories. Under Dutch constitutional law, legislation is a product of cooperation between the Government and the States-General and thus governing the colonies required the cooperation of the Dutch parliament.⁷⁶ Legislation enacted in 1848 established a Colonial Council (*Koloniale Raad*) for Curacao and Dependencies that had power, along with the Governor,⁷⁷ to issue colonial regulations. Importantly, members of this Colonial Council were not chosen by local residents but were appointed by the King.⁷⁸ Three key factors explained the arrangement: a belief that locals were not capable of effectively using a right to vote; a view that voting would generate disputes among locals; and a perception that the six islands of Curacao did not share common interests.⁷⁹ While in 1848 France

71 Batavia is the Latin name for the Netherlands.

72 Palmer, Colton, Kramer (n 13) 150.

73 Until 1945, the islands of Curacao, Aruba, Saint Martin, Bonaire, Saba and Saint Eustatius were referred to as 'Curacao' or 'Curacao and Dependencies'.

74 C. Borman, *Het Statuut voor het Koninkrijk* (Kluwer 2012) 1.

75 Since the current overseas countries and territories comprise the former Curacao and Dependencies, the focus in this Part is on the constitutional development of these territories and their residents within the Kingdom of the Netherlands.

76 Borman (n 75) 1.

77 The Governor represented the King in Curacao.

78 Borman (n 75) 1.

79 B. de Gaay Fortman, Over de bestuursinrichting van Curaçao, *De West-Indische Gids*, 6e Jaargang, 1924, p. 392; L.F.G.P. Schreuder, *Wet van 12 december 1892 (Staatsblad no. 268) op het Nederlandschap en het ingezetenschap met daaromtrent tussen de regering en de volksvertegenwoordiging gewisselde stukken en de in de beide Kamers der Staten-Generaal gevoerde beraadslagingen/verzameld en van aantekeningen voor de toepassing en uitvoering voorzien door L.F.G.P. Schreuder* (Loman & Funke 1984), 47–48.

extended citizenship and political representation to the residents of its four old colonies—and in 1946 gave the same benefits to residents of the TOM—under the Dutch approach, the overseas inhabitants of Curacao and Dependencies had no right to vote for their local representative organs much less for members of the Dutch parliament.

Constitutional reforms in 1922 altered again the status of Curacao and Dependencies. For the first time, these territories were referred to within the Constitution not as ‘colonies’ but as ‘Curacao’. Under the implemented reforms, the Constitution required the legislature of the Netherlands to adopt a statute for the constitutional organization of Curacao. Additionally, by virtue of the 1922 Constitution, Curacao was given a limited right of autonomy. Article 61 provided for a representative organ of Curacao to be involved in the Curaçaoan lawmaking process and specified that internal institutions should govern internal affairs. Pursuant to these requirements, in 1936 the legislature of the Netherlands adopted a Constitution of Curacao.⁸⁰ Again, the contrast with the French approach is striking. While in France, efforts focused on turning the old colonies into departments, in the Kingdom of the Netherlands, a grant of autonomy meant Curacao and Dependencies were further differentiated from the center.

The Dutch also applied rules of citizenship differently to residents of Curacao. Dutch citizenship law has its roots in the Dutch Civil Code of 1838.⁸¹ It provided that a person born within the territory of the Kingdom was a Dutch citizen if his or her parents resided within the Kingdom.⁸² The 1838 Civil Code also provided that the residents of the Kingdom’s overseas colonies and possessions enjoyed Dutch citizenship. Significantly, prior to 1848, political rights—and in particular, the right to vote—were not linked to citizenship. However, Article 5 of the 1848 Constitution specified that the exercise of political rights required possession of Dutch citizenship.⁸³ That provision might have been understood to mean that overseas residents were also citizens with the right to vote. But Article 7 of the 1848 Constitution foreclosed that understanding. It empowered the Dutch legislature to enact laws specifying who should be regarded as

80 Borman (n 75) 2.

81 KB of 10 April 1838, *Staatsblad* 1838, 12.

82 Slaves were excluded from the scope of the Dutch Civil Code of 1838. Zie G.R. de Groot, ‘De geschiedenis van het Nederlandse nationaliteitsrecht in de negentiende eeuw’ in A.M.J.A. Berkvens, Th.J. van Rensch (eds), *Wordt voor recht gehalden, Opstellen ter gelegenheid van vijftig jaar Werkgroep Limburgse Rechtsgeschiedenis* (Werken LGOG 2005) 399.

83 Article 5 of the 1848 Constitution: ‘Om enig burgerschapsrecht te hebben moet men Nederlander zijn’ [Dutch citizenship is required for obtaining any citizenship rights].

a Dutch citizen with political rights.⁸⁴ In 1850, the legislature enacted the Act on Dutch Citizenship.⁸⁵ It specified that Dutch citizens with political rights were those persons born in the European part of the Kingdom (i.e. the Netherlands) to parents residing in the Netherlands.⁸⁶ Residency in the Netherlands was thus made crucial to the possession of political rights. The end result was two types of citizenship: a civil citizenship by virtue of the Civil Code of 1838, and a political citizenship by virtue of the Act on Dutch Citizenship of 1850. Civil citizenship extended to all persons born in the Kingdom, including the colonies and possessions, to parents residing within the Kingdom. Political citizenship, by contrast, was limited to persons born in the Netherlands whose parents also resided in the Netherlands. Only those individuals had the right to vote for representatives in the Dutch Parliament.

This system of a bifurcated citizenship was simplified in 1892 with the Act on Dutch Citizenship and Residency.⁸⁷ Merging provisions of the Civil Code of 1838 and the Act of 1850, the 1892 law eliminated the distinction between civil and political citizenship and thus made residents of Curacao and Dependencies full Dutch citizens. Nonetheless, they still did not possess the right to vote for members of Parliament because the 1848 Constitution itself specified that representatives had to be elected by Dutch citizens who *resided* in the Netherlands.⁸⁸

Nonetheless, the 1936 Constitution for Curacao and Dependencies provided for a representative body of Curacao with fifteen members, ten elected by Dutch citizens of Curacao and the remaining five appointed by the Governor.⁸⁹ Revisions to the constitution in 1948 changed the name of Curacao to the Netherlands Antilles—comprising Aruba, Curacao, Saint Martin, Bonaire, Saba, and Saint Eustatius—and gave resident Dutch citizens the right to vote for members of their representative assembly.

Under the 1954 Charter for the Kingdom of the Netherlands there exist four autonomous countries: the Netherlands and the three overseas countries of Aruba, Curacao and Saint Martin.⁹⁰ The Charter guarantees each country the

84 Article 7 of the 1848 Constitution: 'De wet verklaart wie Nederlander is' [An Act regulates who is a Dutch citizen].

85 Act of 28 July 1850, Staatsblad 1850, 44.

86 Article 1 of the Act on Dutch Citizenship of 1850.

87 Act of 12 December 1892, Staatsblad 1892, 268 (Wet op het Nederlanderschap en het ingezetenschap). The Act entered into force on 1 July 1893.

88 Article B1 Dutch Election Act (Kieswet).

89 De Curacaosche Staatsregeling, Staatsblad no. 910, 1936.

90 Following 2010 reforms, the islands of Bonaire, Saint Eustatius and Saba are part of the Country of the Netherlands.

power to adopt its own constitution and to create its own parliament. The Charter further specifies (and limits) the powers of the Kingdom over the four countries.⁹¹ Significantly, among the Kingdom's specified powers is to establish a law of citizenship.⁹² In 1985, a new Kingdom Act on Dutch Citizenship was adopted to provide simply that an individual enjoys Dutch citizenship if one of his or her parents possesses it.⁹³ Since, under the Act of 1892 the residents of the overseas islands were Dutch citizens, they can pass citizenship to their descendants without any further requirements.

The Charter, however, was never intended to be 'a fully-fledged new Constitution' of the Kingdom because it supplements the Constitution of the Country of the Netherlands.⁹⁴ Several constitutional bodies operate within the legal order of the Kingdom—with varying representation for overseas citizens. The principal organ, the Kingdom's Government, comprises the King, all ministers of the Country of the Netherlands and a Minister-Plenipotentiary of each overseas Country. The States-General (*Staten-Generaal*) is the parliamentary body of the Netherlands and it also functions as a representative body on Kingdom matters. The members of its Second Chamber are chosen by adult Dutch citizens—but not Dutch citizens who reside in Aruba, Curacao or Saint Martin.⁹⁵ On the other hand, Dutch citizens living in foreign countries do have the right to vote for the members of the Second Chamber.⁹⁶

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91 The autonomy of the Countries is guaranteed by Article 41 of the Charter for the Kingdom of the Netherlands.

92 Article 3, paragraphs 1, a, b, c, Charter for the Kingdom of the Netherlands.

93 Article 3 Kingdom Act on Dutch Citizenship 1985.

94 H.E. Bröring, O.O. Cherednychenko, H.G. Hoogers, G. Karapetian, '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 Ioannides, Tymowski (n 57) 93–144. The constitution of the Netherlands, established in 1814, is named the Constitution of the Kingdom of the Netherlands. The Charter of the new legal order since 1954 is called the Charter for the Kingdom of the Netherlands.

95 Although residency in the Netherlands is not required to vote for the members of Second Chamber, Dutch citizens of Aruba, Curacao and Saint Martin explicitly lack this right under Article B1 of the Dutch Election Act.

96 The bodies of the overseas countries have certain powers with respect to the Kingdom's legislative processes. For instance, under Article 16 of the Charter, the *Staten* of the overseas countries have power to issue a written report on proposed Kingdom laws and under Article 17 the *Staten* may appoint delegates to participate in debates of the the States-General.

Dutch citizenship is, therefore, ostensibly uniformly regulated.⁹⁷ The power to decide who possesses Dutch citizenship is vested in the Kingdom. But the Kingdom's countries have certain powers to determine the rights and obligations that citizenship entails. In particular, civil and political rights, including the right to vote for members of the overseas *Staten* and the States-General's Second Chamber, are regulated by the countries and not the Kingdom as a whole. The arrangement stands in stark contrast to that of France where, as a matter of constitutional law, overseas departments and regions and collectivities have no authority to limit French citizenship law or to regulate civil and political rights. Not surprisingly, the denial of the right to vote for representatives in the Second Chamber is a source of considerable dissatisfaction among Dutch citizens of the overseas Countries and it is often described as a democratic deficit of the Kingdom. Yet legal challenges aimed to give these overseas citizens stronger voting rights have so far failed.⁹⁸

Distinctions within the Dutch concept of citizenship are not limited to political rights. Whether viewed from economic, social, educational, or public health perspectives, the overseas countries of Aruba, Curacao and Saint Martin on one hand and the Netherlands proper on the other are separate worlds. Some of the differences result from country-level regulations. For example, the overseas countries have adopted legislation on the movement and residency rights of Dutch citizens.⁹⁹ Thus, a Dutch citizen from the Netherlands or Aruba seeking to reside for more than 90 days in Curacao must acquire a residence permit. The French Republic finds itself on the opposite side of the scale in such matters. All French citizens have the right to freely move and reside anywhere within the territory of the Republic. The 1958 Constitution of France makes French the official language throughout the Republic. There is no comparable provision in the Kingdom's Charter. As a result, each country can recognize its own official language. In Saint Martin, both Dutch and English are recognized.¹⁰⁰ Hurricane Irma amply demonstrated the differences between France and the Netherlands. After Irma struck Saint Martin and French Saint Martin in September 2017, France quickly dispatched help to its overseas islanders while debates raged in the Netherlands as to whether there was any obligation to send disaster aid to Dutch citizens of the Kingdom's overseas countries.

97 G. Karapetian, *Morganatisch burgerschap* (Wolters Kluwer 2019).

98 ABRvS 21 november 2006, AB 2007, 121; ABRvS 25 januari 2017, ECLI:NL:RVS:2017:176.

99 The Country of the Netherlands has adopted legislation regulating residency only on its islands of Bonaire, Saint Eustatius and Saba. Wet toelating en uitzetting BES, *Stb.* 2010, 364.

100 Article 1(2) of the Constitution of Saint Martin (*Staatsregeling van Sint Maarten*).

To be sure, the French system of full integration is not without cost. Unemployment benefits and other welfare programs operate equally across the entire French Republic in a way that likely contributes to high unemployment rates outside of the metropole.¹⁰¹ In the Kingdom of the Netherlands, each country exercises control over its own welfare programs, and there is less variation in unemployment figures.¹⁰² More generally, the Kingdom's countries have greater flexibility than do the components of the Republic to adopt localized measures to address political and social issues and resolve domestic problems.

While various factors likely explain divergences between the French and Dutch approaches to citizenship and their modern-day effects, one important reason lies in the different purposes the two nations had for engaging in colonization. While a mere desire to possess and control overseas territories was a strong motivating factor in French colonization, it did not play a serious role in Dutch undertakings.¹⁰³ Instead, the overwhelming goal of Dutch colonizers was to profit from trade.¹⁰⁴ Trade, the Dutch believed, was entirely possible without assimilating overseas territories into the constitutional framework of the nation and without expanding full Dutch citizenship to the inhabitants of overseas holdings. By contrast, trade was not a primary goal of French colonization. Instead, the French sought to build an empire governed by the same laws that operated domestically. Integration was an important aspect of the plan.

5 Conclusion

This chapter demonstrates how the constitutional history of a nation can impact its conception of citizenship. The right to vote for representatives is often understood to be a key component of citizenship. However, a comparison of the ways in which France and the Netherlands understand and protect the rights of citizens of their overseas territories shows that linkages between voting and citizenship depend upon historical trajectories. While the

101 Y. L'Horty, La persistance du chômage ultramarin: un problème aux causes multiples, *Revue française des affaires sociales* (no. 4, 2014).

102 B. Hermans, L. Kösters, *Beroepsbevolking op de Nederlands-Caribische eilanden* [Statistische Trends 2019].

103 J.J. van Galen, *Afscheid van de koloniën. Het Nederlandse dekolonisatiebeleid 1942–2012* (Atlas Contact 2013) 33. See also H.B. van Aller, *Van kolonie tot koninkrijksdeel. De staatkundige geschiedenis van de Nederlandse Antillen en Aruba (van 1634 tot 1994)*, (Wolters Noordhoff bv 1994) 39.

104 Profit was not, of course, the only motivation. For example, the Dutch also sought to spread Christianity. Van Galen (n 105) 33.

integrationist approach of France eliminated differences in the political rights of residents of the territories and the metropole, the Netherlands has always treated its territories as separated entities, with important implications for the citizenship status and political rights of territorial residents. Commitments to political equality stemming from the French Revolution had little impact upon the Dutch approach to citizenship when it came to overseas territories. Even today, while the old distinction between civil and political citizenship has long been abandoned, Dutch overseas citizens are politically still not represented in the States-General when the States-General operate as the parliament of the Kingdom. As democracy has taken hold around the world, the Dutch approach is increasingly an aberration and the legislature of the Kingdom would be wise to address the democratic deficit it maintains. Modern principles of federalism also do not easily justify the differentiated status of Dutch overseas citizens. Under the Charter, they are constrained by central institutions and they are subject to Kingdom-level interventions even though they lack representation in the parliament. Because the ability of Dutch overseas citizens to govern themselves in Kingdom matters therefore remains limited, power is not truly shared in the way that federalism demands.

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