

TEACHING ON TERRITORIAL SCOPE IN CONSTITUTIONAL LAW: THE CASE OF THE KINGDOM OF THE NETHERLANDS

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I. INTRODUCTION

The Kingdom of the Netherlands is an independent nation formed by four autonomous countries: the Netherlands in Europe, and the islands of Aruba, Curaçao, and St. Maarten in the Caribbean. Each of the four countries has its own constitution, while the overall Kingdom structure is laid down in the Charter for the Kingdom of the Netherlands.¹ While this appears to be a federal system at first glance, there is an imbalance between the Netherlands on one side and the three Caribbean countries, which are all former colonies, on the other. The Charter for the Kingdom specifies, among other elements, that the Dutch Ministers for Defense and Foreign Affairs are the Ministers for the entire Kingdom,² that the Dutch Parliament also functions as the Kingdom Parliament,³ and one representative of each of the three Caribbean countries joins the full Dutch council of ministers to form the Kingdom Council of Ministers.⁴ This shows that there is inequality within the constitutional system, where one large entity, the Netherlands, has a much more prominent position than the overseas entities. It also shows that there are two levels of constitutional structure: the Kingdom level and the Country level.

On a comparative level of constitutional law, the structure of the Kingdom of the Netherlands is comparable to the constitutional structure of the U.S. territories. The U.S. territories are partially self-governing and have their own constitutional

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1. STATUUT NED [CHARTER].

2. *Id.* art. 3.

3. *Id.* art. 15.

4. *Id.* art. 10.

structures; they are not equal to the U.S. states, and the United States has its own Constitution.⁵

For both, teaching about these internal state systems should be prevalent in all constituting parts of the two countries because it could be the basis of making students and practitioners aware of the existence of differences and similarities. Lessons can be learned from the way the inequalities mentioned above are approached in the different curriculums. The website of the Dutch Ministry of the Interior and Kingdom Relations,⁶ which is in charge of all relations between the four countries within the Kingdom, only describes the Constitution of the Netherlands under the heading “Constitution and Charter.”⁷ It does not mention the Charter in the description at all. The editorial board of the largest national student law review, *Ars Aequi*, recently calculated the number of pages that textbooks on Dutch constitutional law mention the Charter and the constitutional systems of the other three countries.⁸ The largest and most prominent textbook, for instance, contains 1,024 pages, of which twenty-six pages are dedicated to the Charter, which is also the highest constitutional law of the Netherlands, and an additional seventeen pages are dedicated to the constitutional systems of the other three countries.⁹

First, the structure of the Kingdom of the Netherlands will be discussed, followed by the role of the territorial scope in the teaching of constitutional law. In order to be able to learn lessons from the good and bad experiences, it will be necessary to discuss techniques of comparative constitutional law after this. Using examples from practice, lessons can be learned from the Dutch experience.

5. See Michael Milov-Cordoba, *Territorial Courts, Constitutions, and Organic Acts, Explained*, STATE CT. REP. (Aug. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/territorial-courts-constitutions-and-organic-acts-explained>.

6. *Ministry of the Interior and Kingdom Relations*, GOV'T NETHS., <https://www.government.nl/ministries/ministry-of-the-interior-and-kingdom-relations> (last visited Jan. 23, 2025).

7. *Constitution and Charter*, GOV'T NETHS., <https://www.government.nl/topics/constitution/constitution-and-charter> (last visited Jan. 23, 2025).

8. Koen Haex & Daan de Vries, *Het Vergeten Koninkrijk*, 72 ARS AEQUI [AA] at 915 (Neth.).

9. *Id.*

II. THE CONSTITUTIONAL STRUCTURE OF THE KINGDOM OF THE NETHERLANDS

In order to understand why and how there is not only a constitutional territorial division of the Kingdom of the Netherlands, but an unequal one at that, some background information is necessary. In 1954, the Kingdom of the Netherlands decided on a post-colonial structure with its remaining (former) colonies, Surinam, Papua New-Guinea, and the Netherlands Antilles, with an autonomous position for the former colonies.¹⁰ Surinam and Papua New-Guinea have gained independence since then, leaving the Netherlands Antilles in the structure.¹¹ The decisions to come to the new structure were an exercise of the right to self-determination of all former colonies, meaning that all former colonies at the time opted for autonomy within the Kingdom.¹² For the islands of the now former Netherlands Antilles,¹³ the road to the present form of autonomy was formed by a series of different referendums as an exercise of the right of self-determination for each of the islands between 1977 and 2014.¹⁴ The Charter of the Kingdom has consequently been amended, the last time in 2010, when the remaining Netherlands Antilles split up.¹⁵ The Kingdom now consists of four equally autonomous countries: the Netherlands, Aruba, Curaçao, and St. Maarten. The smaller islands of Bonaire, Saba, and St. Eustatius have become special municipalities of the Netherlands and fall under the constitutional regime of the Netherlands.

This means that there is a common historical basis for all constitutional systems involved. Not only do the constitutional systems all stem from the same Dutch system at the moment of

10. See *History of the Kingdom of the Netherlands*, ROYAL HOUSE NETHS., <https://www.royal-house.nl/topics/history-of-the-kingdom-of-the-netherlands/history-of-the-monarchy> (last visited Jan. 23, 2025); *New Guinea*, BRITANNICA, <https://www.britannica.com/place/New-Guinea> (Jan. 11, 2025).

11. ARJEN VAN RIJN, HANDBOEK CARIBISCH STAATSRECHT 60–61 (Boom Juridisch Uitgevers 2019).

12. See, e.g., M.F. DA COSTA GOMEZ, OPDAT WIJ NIET VERGETEN 13 (Marie-Céline Hendrikse ed., 1993).

13. The Netherlands Antilles was formed by the Caribbean Leeward Islands Aruba, Bonaire and Curaçao and the Caribbean Windward Islands Saba, St. Eustatius and St. Maarten. See David Russell Harris & Harmannus Hoetink, *Netherland Antilles*, BRITANNICA, <https://www.britannica.com/place/Netherlands-Antilles#ref54770> (Oct. 1, 2024).

14. VAN RIJN, *supra* note 11, at 97–103.

15. See *id.*

the establishment of the Charter of the Kingdom, but the Charter also does not allow them to differ too much because of the inclusion of a *principle of concordance* laid down in Article 39 Paragraph 1 of the Charter.¹⁶ This principle rules all legislation concerning criminal law, most civil law, intellectual property law, and, for instance, legislation concerning the civil law notaries.¹⁷ The Dutch system, being the older one, is often used as a point of reference for the principle of concordance, but the effects of the principle can work both ways.

In addition, the Charter lays down which topics are Kingdom matters, i.e., can only be decided upon by the Kingdom as a whole, leaving all other topics to be matters on which the countries decide autonomously.¹⁸ Article 3 of the Charter contains a limitative list of the Kingdom matters, among which most prominently are foreign affairs, defense, general protection of human rights, nationality issues, and general rules concerning immigration.¹⁹

This means that on top of each constitutional system, there is always Kingdom law on specific topics. Yet, the principle of concordance means that for several categories of legislation there is an obligation to check what has been laid down in the other constitutional systems.²⁰ For all other types of legislation, the common history leads to options for comparison and lessons learned.

16. STATUUT NED [CHARTER] art. 39, para. 1 ("Het burgerlijk en handelsrecht, de burgerlijke rechtsvordering, het strafrecht, de strafvordering, het auteursrecht, de industriële eigendom, het notarisambt, zomede bepalingen omtrent maten en gewichten worden in Nederland, Aruba, Curaçao en Sint Maarten zoveel mogelijk op overeenkomstige wijze geregeld." ["Civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, industrial property, the office of notary, and provisions concerning weights and measures shall be regulated as far as possible in a similar manner in the Netherlands, the Netherlands Antilles and Aruba."]).

17. *Id.*

18. *Id.* art. 39, para. 2 ("Een voorstel tot ingrijpende wijziging van de bestaande wetgeving op dit stuk wordt niet bij het vertegenwoordigende lichaam ingediend - dan wel door het vertegenwoordigende lichaam in behandeling genomen - alvorens de regeringen in de andere landen in de gelegenheid zijn gesteld van haar zienswijze hieromtrent te doen blijken." ["Any proposal for drastic amendment of the existing legislation in regard to these matters shall not be submitted to or considered by a representative assembly until the Governments in the other countries have had the opportunity to express their views on the matter."]).

19. *Id.* art. 3.

20. *See id.* art. 39.

III. CONSTITUTIONAL LAW IN THE CURRICULUMS WITHIN THE KINGDOM OF THE NETHERLANDS

As stated above, there are noticeable differences between the attention for the Kingdom structure and the constitutional law of the other countries within the Kingdom, depending on the state of origin. When one is in the Netherlands, all emphasis is on the Netherlands; hardly any attention is paid to the Charter and the Kingdom structure, let alone the constitutional structures of the other three countries. Only two out of the nine law schools appear to have an elective course on Kingdom law,²¹ for instance, and one as an obligatory master course.²² Yet, the law programs in the three overseas countries teach constitutional law with Kingdom law as a starting point, then describe the *own* constitutional structure, while comparing elements with those in the other three constitutional systems.²³ Thus, the *own* constitutional system is always the focal point, together with the overarching Kingdom structure.

This is comparable to the experiences in the United States, where the overseas territories are hardly represented in the constitutional law courses in the United States, while the U.S. main systems are an integral part in the overseas territories when they have a law school.²⁴ It is important for this comparison to consider how all constitutional systems are incorporating experiences from the other countries in the Kingdom of the Netherlands.

The main lessons can be learned from the way constitutional law is taught in the three Caribbean countries of the Kingdom. It

21. *Law Study Guide*, VRIJE UNIVERSITEIT AMSTERDAM, <https://studiegids.vu.nl/en/Master/2024-2025/2024-2025-master-of-laws#/tab=3&code=&panel=Optional+Courses+level1> (last visited Jan. 27, 2025); *Studieprogramma Staats- en Bestuursrecht*, RADBOUD UNIVERSITEIT, <https://www.ru.nl/opleidingen/masters/staats-en-bestuursrecht/studieprogramma-staats-en-bestuursrecht> (last visited Jan. 27, 2025).

22. *Study Programme European Law and Global Affairs*, RADBOUD UNIVERSITEIT, <https://www.ru.nl/en/education/masters/european-law-and-global-affairs/study-programme-european-law-and-global-affairs> (last visited Jan. 27, 2025).

23. See, e.g., *Bachelor of Laws*, UNIV. CURAÇAO, <https://www.uoc.cw/academics/bachelor-programs/bachelor-in-sciences/bachelor-of-laws> (last visited Jan. 27, 2025); Flora Goudappel, Course Description for Introduction to Law, Univ. of Curaçao (on file with the Author); *Study Guide 2023-2024 Faculty of Law*, UNIV. ARUBA, <https://drive.google.com/file/d/1QNc9iA8zKwlsWKi9cUnCDjT1NhS0UHPP/view> (last visited Feb. 7, 2025).

24. See for instance the brief description on the website of Stetson Law School. *Juris Doctor Degree*, STETSON UNIV., <https://catalog.stetson.edu/law/juris-doctor/#fulltimedayprogramcurriculumtext> (last visited Jan. 27, 2025).

needs to be noted that the University of Curaçao offers its law programs not only in Curaçao but also in St. Maarten and Bonaire, with specialized masters running in Aruba and in the independent country of Surinam as well.²⁵ The University of Aruba offers its law programs in Aruba.²⁶ This Part will focus on the University of Curaçao because of its need to incorporate so many constitutional systems. Because the programs are taught in different constitutional systems simultaneously and because of the common origin, it was opted for an integrated way of teaching constitutional law.

The Curaçao legal system, along with the ones of Aruba and of St. Maarten is central in the Introduction to Law course, while the Charter for the Kingdom has a primary spot as a basis for explanation of the legal systems.²⁷ The Dutch system is used as a point of reference and described as such.²⁸ Because this approach is not covered in any of the textbooks in the Netherlands, a specific textbook had to be written by the course lecturers.²⁹ For many bachelor courses, the textbooks had to be specifically written for the legal systems of the overseas territories.³⁰ The approach in all these textbooks is similar: starting from the similarities, the systems are described by referring to all relevant elements in each of them.³¹ Elements specific for only one jurisdiction receive a special mention and description.³² When it concerns a “Kingdom affair,” the general description is valid for all systems, including the Netherlands.³³ Thus, all legal systems are covered in one description. Something similar happens for issues which fall under the principle of concordance. One general description is usually given, and the relatively small deviations of each system are

25. UNIV. CURAÇAO, www.uoc.cw (last visited Jan. 27, 2025).

26. *Faculty of Law*, UNIV. ARUBA, <https://www.ua.aw/fdr/> (last visited Jan. 27, 2025).

27. Flora Goudappel, Course Description for Introduction to Law, Univ. of Curaçao (on file with the Author).

28. *Id.*

29. PETER KLIK, *INLEIDING TOT DE RECHTSWETENSCHAP VOOR CURAÇAO, ARUBA EN SINT MAARTEN* (Peter Klik ed., Boom Juridisch Uitgevers 4th ed. 2023).

30. For the course Introduction to Criminal Law, see for instance: J.M. REIJNTJES & A.D. MARCHENA-SLOT, *ANTILLIAANSE STRAFRECHTSPLEGING, EEN INLEIDING* (J.M. Reijntjes & A.D. Marchena-Slot eds., Boom Juridisch Uitgevers 2016).

31. *See id.*; KLIK, *supra* note 29.

32. *See* REIJNTJES & MARCHENA-SLOT, *supra* note 30; KLIK, *supra* note 29.

33. *See* REIJNTJES & MARCHENA-SLOT, *supra* note 30; KLIK, *supra* note 29.

described.³⁴ Often, the Dutch system is used as the base of the general description because it is the oldest system.³⁵

For courses in constitutional law, the territorial scope comes even more into the picture. The courses on constitutional law taught in Curaçao and St. Maarten along with Bonaire need to incorporate the Dutch, Curaçao, and St. Maarten constitutional systems simultaneously. In the handbooks and textbooks specifically designed for these courses,³⁶ either one system is described in detail while the others are referred to specifically when an element is distinctly different, or all systems are described side by side without one being prioritized.³⁷ It can be concluded that in law programs in which a necessity for an internal constitutional comparison exists, either one system is described while the other systems are used as reference for similarities and differences, or systems are all described on an equal basis.

In the Netherlands, which is the leading constitutional system in many ways, the comparable constitutional systems within the Kingdom are hardly mentioned at best, let alone described in more detail in the textbooks. The constitutional structure of the Kingdom tends to be discussed briefly at the end of an average Dutch constitutional law textbook, after the detailed discussion of the Dutch constitutional system.³⁸ Thus, there is not even a mention of the other three constitutional systems or even the existence of differing constitutional systems there.³⁹ This is a missed opportunity. Compared to the students in the other three countries in the Kingdom, the students in the Netherlands are either not informed or only limitedly informed about the other constitutional systems, which are similar to theirs but not the same.⁴⁰ Therefore, when writing papers or doing research later on

34. See REIJNTJES & MARCHENA-SLOT, *supra* note 30; KLIK, *supra* note 29.

35. See REIJNTJES & MARCHENA-SLOT, *supra* note 30; KLIK, *supra* note 29.

36. For the first-year course, it is an Introduction to Curaçao constitutional law which starts with the Kingdom system along with the specificities of the Curaçao constitutional system, while incorporating and comparing with St. Maarten and the Netherlands. L.J.J. ROGIER, *BEGINSELEN VAN HET CURAÇAOSE STAATSRECHT* (Boom Juridisch Uitgevers 2d ed. 2018). The more advanced courses are all taught on the basis of a handbook on the combined Dutch Caribbean constitutional systems. VAN RIJN, *supra* note 11.

37. See, e.g., ROGIER, *supra* note 36; VAN RIJN, *supra* note 11.

38. See, e.g., ROGIER, *supra* note 36; VAN RIJN, *supra* note 11; C.W. VAN DER POT, *HANDBOEK VAN HET NEDERLANDSE STAATSRECHT* (D.J. Elzinga, et al. eds., 16th ed. 2014).

39. See, e.g., ROGIER, *supra* note 36; VAN RIJN, *supra* note 11; VAN DER POT, *supra* note 38.

40. See, e.g., ROGIER, *supra* note 36; VAN RIJN, *supra* note 11; VAN DER POT, *supra* note 38.

in their career, the possibility of looking at the other systems for ideas and developments is not given to them.

IV. TECHNIQUES OF COMPARATIVE LAW

To evaluate possible lessons to be learned from legal developments in overseas territories, the best method of legal comparison needs to be selected. This selection will give both the authors of textbooks on constitutional law and the students the best tools for understanding systems and placing developments in the right context. For such a *horizontal* legal comparison, there are five methods which are traditionally distinguished: classifying, contextual, historical, universalist, and functional comparisons.⁴¹

The classifying method, in short, means that legal systems are classified into legal families on the basis of origin or context.⁴² After the classification, a choice is made to compare within the legal family or between legal families, in order to find inspiration for the own legal system.⁴³ Although this is an almost logical choice when one wants to compare between systems which are as closely related as overseas territories are, the classifying method is more about the classification than about the actual comparison within or between legal families.⁴⁴

The contextual method, on the other hand, is based on the political and social contexts in which the systems to be compared function.⁴⁵ This method also has a positive and negative side for the way choices need to be made for the comparison at hand.⁴⁶ While it is a good method to be able to place developments within linked legal systems into context, it emphasizes the differences more than the comparisons.⁴⁷ The latter is also the case for the historical method. The history of a legal system can lay emphasis on a common history or on the differences that have developed on

41. Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 54, 55 (Michael Rosenfeld & András Sajó eds. 2012).

42. *Id.*

43. *Id.* at 57.

44. Barbara Dölemeyer, *Legal Families*, EUR. HIST. ONLINE (Dec. 3, 2010), <https://dnb.info/1020542942/34>.

45. Jackson, *supra* note 41, at 66–67.

46. *Id.* at 67.

47. See Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 319 (2010).

the basis of a common history.⁴⁸ The historical method also potentially offers a good basis for comparison, along with the universalist method, because this method emphasizes the elements in the compared legal systems which are similar.⁴⁹

Finally, the functional method is often used in constitutional comparisons because its starting point is to look at the function or role of a specific element within a legal system in order to compare developments, which could formally not be easily compared.⁵⁰

Overall, these methods demonstrate that there are different ways to compare legal systems. For a comparison of elements of constitutional systems, as is the case when one includes developments and features of overseas territories in order to learn from them, the way the comparison is made should always be considered. Thus, one can start from their own constitutional system, discuss elements which could be improved on the basis of lessons learned from the constitutional systems of overseas territories. By first explaining the basis of the systems to be compared and then the features from which the *own* system could benefit, a solid comparison would result.

V. LESSONS TO BE LEARNED

The descriptions above lead to lessons that can be learned on different levels. First, content-wise, the overall Dutch constitutional system shows that, when constitutional systems have developed from a common source or cannot differ too much, it is worthwhile checking whether lessons can be learned from similar developments and choices in other constitutional systems. Yet, this needs to be done by using comparative methodologies which take, among other elements, context and history into consideration.

It needs to be noted here that, from the point of view of the Netherlands, the Kingdom relations and the constitutional systems of the three Caribbean countries are of minor importance

48. Agustín Parise, *Comparative Legal History*, MAASTRICHT UNIV. (July 4, 2017), <https://www.maastrichtuniversity.nl/blog/2017/07/comparative-legal-history>.

49. Matteo Nicolini, *Methodologies of Comparative Constitutional Law: Universalist Approach*, MAX PLANCK ENCYC. COMPAR. CONS. L. (Dec. 29, 2020), <https://iris.univr.it/bitstream/11562/1033400/1/Nicolini%20Universalism.pdf>.

50. Francesca Bignami, *Formal Versus Functional Method in Comparative Constitutional Law*, 53 OSGOODE HALL L.J. 442, 442 (2016).

in constitutional practice.⁵¹ Yet, from the point of view of the three Caribbean countries, Kingdom relations and the constitutional system of the Netherlands are of major importance, next to their own constitutional systems.⁵² After all, all constitutional systems within the Kingdom of the Netherlands have a similar ancestry.⁵³

This is reflected in the textbooks, where the way constitutional law is taught in the overseas countries of the Kingdom is laid down. This is done either starting from the *own* system and placing the other systems side by side, especially when different choices have been made or different case law has developed, or simply describing all systems equally without giving priority to one or the other.⁵⁴

While the practice of including all constitutional systems as done in the overseas countries of the Kingdom provides an excellent example of how to use a comparison in order for students to gain knowledge of all systems, the law schools in the main constitutional system, the Netherlands, do not teach their students about it.⁵⁵ This is similar to the situation in the United States, where lessons from this example can be learned. Yet, there are many possibilities for the legal specialists in overseas territories to raise the awareness about the possibilities their constitutional systems offer. Publications in national journals help, and constitutional law professors could be invited to facilitate an introduction to the other constitutional systems. Thus, the experience of using the legal comparisons in constitutional law could become more common instead of being an exception.

51. *See supra* pt. III.

52. *See id.*

53. *See supra* pt. II.

54. *See supra* pt. III.

55. *See id.*