THE LEGAL SYSTEM OF
THE NETHERLANDS

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THE LEGAL SYSTEM OF THE NETHERLANDS

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THE SERIES

For over eighty years now, the Association Henri Capitant has endeavored to spread, update and promote the law of the European continent. Traditionally, it has done so with holding yearly international and national *Journées* (conferences), as well as other multilateral and bilateral meetings.

The many national Sections or Chapters of the Association have been urged to present, in concise books, the high points of their legal system. Though these books were originally written in French, they are now being translated into English so that they will be accessible to English-speaking audiences.

All the books translated into English follow the original French text as well as a standard format. In this way, the books expose the reader to the fundamental features and foundations of a variety of legal systems that make up what has become known as "continental law."

In all English versions of the books, the editors have attempted to use, where appropriate, the same civil or continental law terminology, and to adopt as simple and straightforward an English language as possible. In other words, these books are meant to make accessible the legal systems of continental law countries, states or provinces to as large a readership as possible.

The guiding purpose behind this Series is to present a comparative law survey of a variety of legal systems in such a way that the reader will be able to cross the confining frontiers of his own legal

system to better understand it and to find in other legal systems reasons and grounds to modify and, possibly, to improve its own legal system.

[*Editors' note*: every book written in French is translated in the country of origin, be it in the Netherlands, Romania, France . . . . The Editors' task is to bring cohesion and uniformity to the English texts submitted to them.]

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CHAPTER ONE

LEGAL HISTORY

1. CUSTOMARY LAW AND THE RECEPTION OF ROMAN LAW

The collapse of the western Roman empire led to the emergence of tribal laws in large parts of Europe. In the Netherlands, these consisted of the customary laws of the Franks, Saxons and Frisians. Some measure of unity was only achieved around 790, when Charlemagne ordered local customary law to be transcribed. A result of this is the Frisian book of law known as the *Lex Frisionum*, which consisted mainly of a catalogue of criminal sanctions. These records of local customary law are not codifications in the modern sense, given that they only recorded the law as it was applied at the time without pretention to systematization, completeness or exclusivity. Following the disintegration of the Carolingian Empire, centralised authority weakened as imperial officials known as vassals increasingly began to consider themselves as sovereigns. They regarded the territories they administrated as feudal property acquired under private law. State authority was further weakened by the grant of privileges and immunities to noble or clerical vassals, and to the emerging cities. Thus, every town and region acquired its own legal identity, not formed by sovereign central authority, but by custom and privilege. No two customs were entirely identical, but no two were completely different either. As a result, where local customs were recorded, for example in the Law Book of Bri-

elle (*Rechtsboek van Brielle*) drafted by the customary lawyer Jan Matthijssen around 1407, such books only had limited application.

Not surprisingly, the first leading Dutch lawyer, Philips of Leyden, had been trained in Roman law and Canon law at the universities of Orléans and Paris. In the service of the Count of Holland, around 1353, he claimed that the king was not bound by privileges granted in contravention of the state interest: *princeps legibus solutus est* ('the sovereign is above the law'). This policy of centralisation was taken up by the Burgundian and Habsburg rulers of the 15th and 16th centuries. It is important to bear in mind that the territories over which they ruled were only united by the chance circumstance of a common liege lord. Their desire for unification found expression in two ways.

First, the old royal conciliar courts were transformed into permanent courts of justice such as the Court of Holland in 1428, the Great Council of Malines in 1446–1473, the Imperial Chamber Court in 1495 and the Court of Utrecht in 1530. Councillors in these courts, such as the Frisian Viglius of Aytta (1507–1577), had been trained in Roman law. The courts were instructed to apply Roman law whenever local customary law provided no clear answer, as was frequently the case. The court practice led to the large-scale diffusion of Roman law from the 15th century onward. The rules of procedure were often derived from the model of the French parliaments.

Second, attempts were made to impose legal unity from above. In an attempt to end their autonomous force of law, the Holy Roman Emperor Charles Quint ordered in 1531 that all customary laws be transcribed and sent to him for approval (homologation). This order met with local resistance—which intensified following the proclamation by his son and successor Philip II of the *Criminal Ordonnances* of 1570, which were generally considered as constituting a violation of existing privilege. In combination with an economic recession and anger over the suppression of the Reformation, this resistance to the policy of centralisation sparked a revolt. At first this revolt was nominally aimed against the governor, but in

1581 the States General formally deposed Philip II as their sovereign. Attempts to find a new sovereign ceased in 1588 and the Dutch Republic (the Republic of the Seven United Provinces) attained independence. It was not until after the Peace of Westphalia in 1648, however, that Spain recognised the Republic as a sovereign state.

2. ROMAN-DUTCH LAW

Access to the southern, predominantly Catholic universities was cut off by the Dutch revolt, and so the States of Holland decided to found a university in Leyden in 1575. The other provinces soon followed suit, founding universities in Franeker in 1585, in Groningen in 1614, in Utrecht in 1636 and in Harderwijk in 1648. Almost every province in the Republic had its own university, and this particular fact is telling for the political relations in the Republic. The Revolt had been directed toward preserving privilege and against the formation of a unitary state. Sovereignty in the Republic lay self-proclaimed with the provinces, assembled in parliaments consisting of representatives from the cities and nobility, which sent delegates to the States General Congress (Etats Généraux). The States of Holland were the dominant force at the States General Congress because of their economic power, which was further strengthened by the chartering of trade companies under the auspices of the States General Congress, such as the Dutch East India Company (VOC, 1602) and West India Company (WIC, 1621). The sovereignty of the Provincial States was limited in turn. Although they could proclaim orders and decrees on specific issues, they did not have the power to set aside customary law as a whole in their territories. Each province had its own system of customary law, and often more than one. The only way of attaining a measure of unity was through the subsidiary application of Roman law, which itself derived its force from custom. Illustrative in this regard is the treatise written by Simon Groenewegen van der Made in 1649 on those parts of Roman law that had become obsolete in the province of Holland by way of a contrary custom.

The study of Roman law flourished at the universities in the Republic. The university of Leyden was quick to engage the famous French law professor Hugues Doneau (Donellus), and in the 17th century evolved into a university of international repute thanks to the presence of professors such as Arnold Vinnius, Johannes Voet and Gerard Noodt. Other leading scholars such as Ulrik Huber and Johan à Sande worked at the university of Franeker in Friesland. The study of Roman law was oriented both to humanist trends and to contemporary legal practice, but a fundamental opposition between the two approaches is not evident. Scholars such as Cornelis van Bijnkershoek, the President of the High Court of Holland and Zeeland, found them easy to reconcile with each other. This approach is known as that of Roman-Dutch law, after the title of a commentary on *Het Rooms-Hollands regt* written by Simon van Leeuwen in 1664. It had great influence in the fields of private law, conflict of laws and public international law. Roman-Dutch law was further spread through the chartered trade companies and deeply influenced the laws of South Africa and Sri Lanka. Scottish students studying in Leyden and Utrecht took the Dutch legal tradition home with them as well.

Hugo Grotius (1583–1645) deserves special mention here. He owes his status as one of the founders of international law in part to *Mare liberum* ('On the Free Sea,' 1609), which he was commissioned to write by the VOC in defence of freedom of trade with the East Indies, but above all to *De Jure Belli ac Pacis* ('On the Law of War and Peace,' 1625), a lengthy treatise on the law of war. For the history of Dutch law, however, his *Inleiding tot de Hollandsche Rechtsgeleerdheid* ('Introduction to Dutch law,' 1631) is in fact even more important. It is the first description of Dutch private law in vernacular language; an exercise that forced Grotius to invent a number of legal terms that remain in use today. In spite of his achievements, the 'miracle of Holland' (as he was called by Henry IV of France) died in exile in 1645.

3. CODIFICATION

The nature of the Dutch Republic ruled out the possibility of unifying law through codification. The Republic was not a unitary state but a federation of sovereign provinces. Towards the end of the 18th century, it became clear that this federation could no longer hold its own on the European stage. The economic decline coupled with lost trade wars and governmental nepotism sparked a series of isolated uprisings that were put down with the aid of the Prussian king. The 'Patriots,' inspired by Enlightenment thinkers, drew two lessons from the failure of their rebellion. First, sovereignty must reside in a unitary state, and secondly, outside support was necessary to establish such a unitary state. After the French Revolution of 1789, the source of such support was found in France, which conquered the Dutch Republic in 1795 and created the Batavian Republic as a vassal state. A coup staged by the 'Unitarists' with the backing of France led to the abolition of federalism in 1798. The new regime issued a constitutional decree (*Staatsregeling*) which in fact served as the first Constitution. It proclaimed that the Batavian Republic was an 'indivisible whole' and ordered the codification of civil, criminal and procedural law. Nevertheless, the work of the codification commissions was overtaken by political events.

In 1806, Napoleon Bonaparte transformed the Batavian Republic into a monarchy and installed his brother Louis Napoleon on the throne. The latter disagreed with the Emperor's wish to impose French legal codes on the country. As a result, in 1809, the kingdom of Holland acquired its own codes after the French model, but nonetheless adapted to local conditions and legal traditions. It did not last very long. In 1810, Napoleon announced by decree that 'Holland has been reunited with the Empire.' The French legal codes were consequently adopted in 1811. The restoration of Dutch independence in 1813 did not lead to the restoration of the previous legal system or a return to provincial sovereignty. The new

king William I wanted merely to replace the French legal codes with national codes. However, as a result of the union with Belgium, and subsequent partition in 1830, the whole process met with such delays that the Civil Code, the Commercial Code, the Code of Civil Procedure and the Code of Criminal Procedure were only enacted in 1838. Despite their 'national' character, the French influence was obvious throughout. The Criminal Code followed in 1886. In the meantime, the European revolutionary year of 1848 saw the birth of a new Constitution in The Netherlands, the brainchild of the liberal party leader Johan Thorbecke (1798–1872). It turned the country into a constitutional monarchy with a parliamentary democracy.

4. MODERN TIMES

As elsewhere in Europe, the 19th century witnessed the advent of urbanisation and industrialisation, as well as advances in technology and infrastructure. Under pressure from rising social movements, voting rights were extended, the first social legislation was adopted and the first steps were taken towards the emancipation of Catholics and women. The abolition of slavery nevertheless had to wait until 1859 in the Dutch East Indies and until 1863 in Surinam. The colonies were initially economically exploited for the benefit of the Dutch treasury under a policy of 'credit balance.' The influence of modern imperialism led to this policy being replaced by an 'ethical policy' of direct colonial rule. The process of decolonisation did not start until after the end of the Second World War, following pressure from the United Nations. After a colonial war, the Dutch government recognised the Republic of Indonesia in 1949, and New Guinea was subsequently incorporated in 1963. Surinam gained its independence in 1975. The laws of both countries are still greatly influenced by the Dutch Civil Code of 1838. In the Netherlands itself, following a long legislative procedure, this version was replaced in 1992 by a new Civil Code, most of which was drafted by a law professor, Eduard Meijers (1880–1954). The

final codification that took place in accordance with the Constitution was the promulgation of the 1994 Administrative Code, which received major additions in 1998 and was subsequently extended in 2013 to include the law of administrative procedure.

As a neutral nation, the Netherlands stayed out of the First World War. It became a member of the League of Nations after the war and housed the Permanent Court of International Justice in the Peace Palace in The Hague. The policy of neutrality was abandoned in the wake of the German occupation during the Second World War. The Netherlands joined the United Nations on 10 December 1945. As a founding member of the Council of Europe (1949) and the European Coal and Steel Community (1951), the Netherlands stood at the beginning of European cooperation. The country was also a founding member of the OECD (1948) and NATO (1949). A number of organisations operating in the field of international law have their seat in The Hague, including the International Court of Justice, the Permanent Court of Arbitration, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, Europol and Eurojust.