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VOLUME I

NATIONAL REPORTS

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NAURU · NEPAL · NETHERLANDS
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Contents

V

Vatican (*G. Astuti*) V-1

Venezuela (*A. R. Brewer-Carías*) V-5

W

Western Samoa (*C. C. Aikman*) W-1

Y

Yemen Arab Republic (*H. M. Al-Baharna*) Y-1

Yugoslavia (*B. T. Blagojević*) Y-5

Z

Zaire (*P. and Ph. Piron*) Z-1

Zambia (*N. Rubin*) Z-15

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Nauru

J. W. Davidson*

The island of Nauru, in the central Pacific, became an independent republic (Republic of Nauru) on 31 Jan. 1968. Prior to that date, it had been a United Nations Trust Territory. Under the Trusteeship Agreement of 1 Nov. 1947 (10 UNTS 3), the governments of Britain, Australia and New Zealand were designated a joint administering authority; and, by agreement between the three governments, administrative control was exercised by Australia. The Nauru Act, 1965 (no. 115 of 1965) enacted by the Australian Commonwealth Parliament, provided for the establishment of a Legislative Council with power to make ordinances for "the peace, order and good government of the Territory", except in relation to defence, external affairs and the phosphate industry. On these latter subjects, legislative power was vested in the Governor-General of Australia.

In May 1967 a Nauruan delegation began discussions with representatives of the governments of Australia, Britain and New Zealand, in which it sought full independence by 31 Jan. 1968 and agreement to the early establishment of a Constitutional Convention. These requests were accepted later in the year. In November the Commonwealth Parliament passed the Nauru Independence Act, 1967 (no. 103 of 1967) repealing the Nauru Act, 1965, and terminating the extension of all acts of the Commonwealth that exten-

ded to Nauru as a Territory of the Commonwealth, from a date to be fixed by proclamation. In December the General Assembly of the United Nations resolved that the Trusteeship Agreement should cease to be in force on 31 Jan. 1968. The Constitutional Convention, composed of the elected members of the Legislative Council and additional members specially elected to it, met on 3 Jan. 1968; and on 29 Jan. it took to itself the power to adopt and enact the Constitution of Nauru. On 31 Jan. the Constitution came into force; and, at the same time, a proclamation under the Nauru Independence Act terminated Australian powers of legislation, administration and jurisdiction in Nauru.

In the Constitution adopted on 29 Jan. 1968, it had been necessary to include a number of temporary provisions – in particular, to establish a Council of State to perform the functions of the Head of State and the executive government. The Constitution therefore provided that the Constitutional Convention should continue in existence until 30 June 1968, unless it should earlier dissolve itself. During this period, it was to have power to alter most of the provisions of the Constitution. In the event, it met again in April and, immediately before dissolving itself on 17 May, formally made a series of alterations. The following outline is thus of the Constitution in its permanent form.

I. CONSTITUTIONAL SYSTEM

1. Nationality

Art. 71 to 76 of the Constitution of Nauru provide that the following shall be Nauruan citizens: (i) Persons who, immediately before independence, were members of the Nauruan Community within the meaning of the Nauruan Community Ordinance; (ii) Persons born after independence of parents who are Nauruan citizens or, subject to specified reservations, of parents of whom one is a Nauruan citizen and the other a "Pacific Islander";

(iii) Persons born in Nauru after independence who would otherwise not possess the nationality of any country; (iv) Persons who have acquired Nauruan citizenship in accordance with any law.

2. Territorial Divisions

The traditional districts have a limited administrative significance, and the parliamentary constituencies are based upon them. There are no other territorial divisions.

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3. The State Organs

The Constitution of Nauru is, broadly, of the British parliamentary type. Legislative power is vested in a Parliament and executive power in a Cabinet consisting of the President and four or five ministers. The Public Service is under the general control of the Chief Secretary, who is appointed by, and responsible to, Cabinet.

The functions of Head of State are vested in a President, who is elected by the members of Parliament from among their own number. He remains a member of Parliament. An election to the office of President is held after a general election or the passage of a vote of no confidence and whenever a President ceases to hold office through death or resignation or by losing his qualification for membership of Parliament. The President exercises certain normal Head-of-State functions, such as the granting of pardons, but these are relatively few.

The Parliament consists of eighteen members, elected for a term of three years by Nauruan citizens who have attained the age of twenty years. The President may advise the Speaker to dissolve Parliament at any time; but the Speaker is required to refer this advice to Parliament before acting in accordance with it. A bill becomes law when

the Speaker certifies that it has been passed by Parliament.

The Cabinet – including the President – is collectively responsible to Parliament and ceases to hold office as soon as a new President has been elected.

4. The Judiciary

The Constitution (art. 48 to 55) established a Supreme Court, which exercises general jurisdiction and has exclusive original jurisdiction in relation to any question involving the interpretation or effect of the Constitution itself. The Chief Justice and any other judges are appointed by the President and have tenure on the English model for judges of superior courts. The only subordinate court is a District Court. The establishment of a Family Court is, however, under consideration. There is, at present, no provision for appeal from decisions of the Supreme Court; but plans are well advanced for the institution of a system of appeal to the highest court of another country.

The only administrative tribunal is the Public Service Appeals Board, consisting of the Chief Justice (as chairman), a member appointed by Cabinet, and a member elected by public officers.

II/III. SOURCES AND HISTORY OF LAW

The Constitution is "the supreme law of Nauru" (art. 2 (1)). In addition to providing the basic constitutional structure of the Republic, it contains provisions for the Protection of Fundamental Rights and Freedoms, and provisions on citizenship and other matters. It also provides for the continuance, subject to the Constitution itself, of the law in force immediately before independence (art. 85 (1)). That law had its basis in the legislative power conferred on the Administrator of the Territory by agreements between Australia, Britain and New Zealand in 1919 and 1923. The Laws Repeal and Adopting Ordinance, 1922–1967, adopted specified laws of England, the Commonwealth of Australia, the State of Queensland and the Territory of Papua, so far as they were applicable. It also continued in force all existing laws made during the British military occupation (from 1914), applied the principles and rules of Common Law and Equity in force in England, and accorded recognition to

Nauruan custom in relation, principally, to land tenure and inheritance. This body of law was added to by other ordinances made by the Administrator and, after the coming into force of the Nauru Act, 1965, by the Legislative Council of Nauru and the Governor-General of Australia. Under various ordinances, the power to make rules and regulations was conferred on the Administrator, the Administrator-in-Council and the Nauru Local Government Council.

The Custom and Adopted Laws Act, 1971 (no. 11 of 1971), which came into force in 1972, made important changes in the basic law. The Act provided that English law in force in Nauru should be that in force in England on 31 Jan. 1968, repealed much of the Laws Repeal and Adopting Ordinance and many of the statutes adopted by that Ordinance, and defined more precisely the recognition accorded to Nauruan custom.

IV./V. PRIVATE AND COMMERCIAL LAW

The system of private and commercial law is, in general, similar to that of the Commonwealth of Australia. The Corporation Act, 1972 (no. 5 of 1972), and other acts closely related to it, have, however, introduced a body of highly sophisticat-

ed provisions intended to provide the basis for the development of a finance industry and significantly divergent, in many instances, from those of Australian law.

VI. STATE DIRECTION OF TRADE

The phosphate industry is operated on a monopoly basis under the Nauru Phosphate Corporation Act, 1969 (no. 1 of 1969). Apart from the

licensing of trade stores and restrictions on the sale of liquor, firearms and poisons, there is no other state direction of trade.

VII. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT

The Patents, Trade-marks and Designs Act, 1932 (no. 70 of 1932) and the Copyright Act, 1963

(no. 7 of 1963) of the Commonwealth of Australia were adopted in Nauru before independence.

VIII. JUDICIAL PROCEDURE

Judicial procedure is based on that of the courts of the Australian Territories.

IX. PRIVATE INTERNATIONAL LAW AND THE INTERNATIONAL LAW OF PROCEDURE

No laws of Nauru deal with these matters.

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(Completed in March 1972)

Nepal

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Nepal is a unitary Hindu state. It has always been a monarchy but from 1846 to 1951 sovereign powers were exercised by hereditary prime

ministers belonging to the *Rana* family. After the overthrow of the *Rana* regime, sovereignty reverted to the King.

I. CONSTITUTIONAL SYSTEM

1. Nationality

The Law relating to nationality is contained in the Constitution (art. 7, 8) and the Nepal Citizenship Act, 1964. Citizenship is acquired by descent from a Nepali father, naturalization and as a result of incorporation of new territory. It may be lost by renunciation, voluntary acquisition of another citizenship, insurrection against the state or refusal to serve the state during war or other emergency.

2. The Territory

The territory of Nepal comprises the territory at the commencement of the Constitution and such other territory as may be acquired thereafter. The territory is divided into zones, which are subdivided into districts. A district is sub-divided into villages and/or towns.

3. The State Organs

Executive, legislative and judicial powers emanate from the King and are exercised by him through the organs established by the Constitution or by law, keeping in view the interest and wishes of the people (Const. art. 20 par. 2). The Constitution has established the *panchayat* system as the best means of securing popular participation in the state administration. The aims and objectives of this system are set out in Const. art. 19. It operates at four levels, viz., village or town, district, zonal and national. All the adult inhabitants of a village or group of villages form the village assembly (*gaun sabha*), which elects an executive committee called the village *panchayat*. The adult inhabitants of a town elect a town *panchayat*. The members of the village and town

panchayats elect a district assembly (*zilla sabha*), which elects an executive committee called the district *panchayat*. All the members of district *panchayats* in a zone form the zonal assembly (*anchal sabha*). The organization, functions and powers of all these bodies are prescribed by statute. There is a legal ban on the formation of political parties.

At the apex of the *panchayat* system is the national (*rashtriya*) *panchayat*, which consists of 125 members comprising elected representatives of the zonal assemblies (90), specified class and professional organizations (15), and university graduates (4) as well as nominees of the King (16). The national *panchayat* functions as the state legislature but no law can be enacted without the assent of the King.

There is a council of ministers, headed by a prime minister, to advise the King in the exercise of his executive functions. The ministers are appointed by the King from among the members of the national *panchayat* and are responsible to and removable by him. There is also a council of state (*raj sabha*) consisting of the ministers, certain high officials and nominees of the King, which performs certain functions on the infirmity, abdication or death of the King and may also be asked by the King for advice in certain matters.

Zonal administration is in the charge of a Zonal Commissioner, who is appointed by the King and is advised by a Zonal Committee, and district administration is in the charge of an Assistant Zonal Commissioner advised by a District Committee.

4. The Judiciary

There are separate courts for each district and zone, which exercise both civil and criminal

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jurisdiction. The organization, functions and powers of these courts are prescribed by the Judicial Administration Act, 1958. Cases against the state or state officials are triable only by zonal courts. All decisions of district courts are appealable to the zonal court. Certain limited judicial powers have been conferred on selected village *panchayats*.

At the apex of the judicial system is a Supreme Court whose organization, functions and powers

are prescribed by the Constitution and the Supreme Court Act, 1963. The Court entertains appeals from certain decisions of the zonal courts and also has power to issue writs for the enforcement of the fundamental rights granted by the Constitution and of legal rights in the absence of any other remedy. The decisions of the Supreme Court are binding on all courts including (except for pre-Constitution decisions) itself. Decisions of zonal courts are binding on district courts.

II. SOURCES OF LAW

The fundamental law is the Constitution which came into force on 16 Dec. 1962 and was extensively amended in 1967. It contains provisions relating to the state organs and a charter of fundamental rights. Certain rights have also been conferred by the Civil Liberties Act 1955. A unique feature is the imposition of certain fundamental duties on every citizen (Const. art. 9).

The sources of ordinary law are legislation, judicial precedents and custom. The legislation consists of the *muluki ain* or National Code, which is of a general nature, and statutes on particular subjects, which are consolidated in a collection called the *ain sanghra*. In the event of a conflict between the *muluki ain* and the *ain sanghra*, the latter prevails. Custom applies in the absence of a legislative provision or a judicial precedent.

The present *muluki ain* came into force in August 1963. The official texts of the *muluki ain*

and the *ain sanghra* are published only in the Nepali language but there are official English translations of the Constitution and of certain statutes in the *ain sanghra*. The statutes are cited in the Nepali language by number and Nepali year (*bikram sambat*) of enactment and in the English language by the corresponding year of enactment. The Nepali year begins approximately on 14 April and the year commencing April 1972 is 2029.

The official texts of new legislation are published in the *Nepal Raj Patra* (Nepal Government Gazette), which is issued at irregular intervals. The official texts of Supreme Court decisions are published monthly in the *Nepal Kanoon Patrika* (Nepal Law Journal), which also contains the official texts of new legislation and articles on legal topics. Both the gazette and the journal are published only in the Nepali language.

III. A CONCISE HISTORICAL EVOLUTION

A system of law based on Hindu customary law prevailed in Nepal in the *pre-Rana* period. Though courts existed, the highest judicial authority in both civil and criminal matters was vested in the King's council. In 1854, *Jung Bahadur*, the first Rana prime minister, promulgated a code called the *muluki ain*. This code represented a considerable reform of the existing law and showed traces of British influence. The highest judicial authority was vested in the prime minister. The 1854

Code, with modifications and additions, remained in force until 1963 when it was replaced by the present *muluki ain*. Towards the end, it began to be supplemented by statutes. The judiciary was completely separated from the executive in 1951 and a supreme court known as the *Pradhans Nyayalaya* was established. Both the present *muluki ain* and the statutes in the *ain sanghra* have been considerably influenced by English and Indian laws.

IV. PRIVATE (CIVIL) LAW

1. Concept

The conception of private (civil) law is similar to that in India.

2. Legal Capacity

Every person, except a minor and a lunatic, has full legal capacity. The age of majority is 16 years. A minor can, however, execute a valid contract provided the guardian is also a signatory to the deed. A minor cannot inherit property.

3. Legal Persons

Nepali law recognizes both natural and artificial legal persons such as companies.

4. Family Law

There is a uniform family law applicable to all religious communities, which is contained in the *muluki ain* (part III ch. 12-15). If the code is silent, the custom of the particular community applies. The main requirements for a valid marriage are free consent, a minimum age of 14 years for a female and 18 years for a male party and a maximum difference of 20 years between the ages of the parties. Polygamy is prohibited. There is provision for judicial divorce on grounds similar to those in English law and also for other matrimonial reliefs. A husband is obliged to maintain a divorced or separated wife and parents are obliged to maintain their children. The mother is the natural guardian of a child under three years of age and the father above that age. The law permits adoption of a boy or unmarried girl by either spouse. The law relating to Hindu joint families is broadly similar to that in India.

5. Ownership

The law relating to ownership is contained in the *mulukia in* (at various places) and is similar to that

in India except that property cannot be transferred in favour of an unborn person and the English rule against perpetuities does not apply. The Constitution confers on all citizens the right to acquire, enjoy and dispose of property. Private property can be compulsorily acquired or requisitioned by the state on payment of such compensation as it may fix.

6. Contracts

The law relating to contracts is broadly similar to that in India. It is contained in the *muluki ain* (part III ch. 17) and in the Contract Act, 1968. There are separate statutes dealing with the contracts of agency and partnership, *viz.*, the Agency Act, 1957 and the Partnership Act, 1964. The Railway Act, 1964 and the Civil Aviation Act, 1958 deal *inter alia* with the contracts of carriage by rail and air respectively.

7. Torts

There is no special law of torts. The *muluki ain* and various statutes, including the Transport Act, 1963, deal with different kinds of civil wrongs and an action in tort must be brought under the relevant legislative provision. In general, the provisions relating to torts are adapted from English law. The state is not liable for an unauthorized tortious act of a servant.

8. Inheritance

There is a uniform law of inheritance applicable to all religious communities, which is contained in the *muluki ain* (part III ch. 16). If the code is silent, the custom of the particular community applies. The law relating to testamentary succession and representation is similar to English law. A feature of the law of intestate succession is that female heirs (except for the widow) inherit only in the absence of male heirs.

V. COMMERCIAL LAW

1. Conception

The conception of commercial law is similar to that in India.

2. Companies

The law relating to companies is contained in the Companies Act, 1964 which is modelled on the

English Companies Act. There is provision for the appointment and functioning of a managing agent of a company. Winding up of a company is effected, subject to appeal to the Supreme Court, by the Department of Industry or another designated department of the government, which is also vested with certain controlling powers over companies. In addition to the Companies Act, banking companies are also governed by the Commercial Bank Act, 1964 or the Co-operative Bank Act, 1963, as the case may be, and insurance-companies by the Insurance Act, 1968.

3. Contract of Sale

The law relating to the contract of sale is contained in the *muluki ain* (part III ch. 17) and in the Contract Act, 1968 and is analogous to the Eng-

lish law of sale.

4. Negotiable Instruments

Negotiable instruments are governed by the *muluki ain* (part III ch. 17) and by custom. The provisions of the code are analogous to those of the Indian Act.

5. Bankruptcy

The law relating to bankruptcy is contained in the *muluki ain* (part III ch. 20) and is broadly analogous to Indian law. A significant difference is that Nepali law gives an option to a creditor to either recover his claim from the bankrupt's estate or to rely on the good faith of the bankrupt, after discharge, to pay the debt.

VI. STATE DIRECTION OF TRADE AND ECONOMY

The main vehicle for the control of industrial development is the Industrial Enterprises Act, 1961. The Act provides that basic industries will be operated by the government or by semigovernment organizations but leaves these industries to be designated by the government from time to time. Private enterprise is classified as small-scale, medium-scale and large-scale according to specified amounts of capital invested. The second is open to foreign investors on a limited basis and the third is freely open to foreign investors. The Act lists the facilities and incentives available to private enterprise and establishes an industrial committee to advise the government on granting additional facilities to a particular enterprise. An industrial development corporation has been established by statute to assist in the financing of new enterprises.

Among the important measures for the control of private enterprise are the Essential Commodities Act, 1960, the Export and Import Control Act, 1956 and the Foreign Exchange Regulation Act, 1962. The provisions of these statutes are analogous to those of the similar Indian statutes.

Economic planning in Nepal dates from the end of 1949 when a National Planning Committee was established to formulate a 15 year development plan. Nothing came of this effort however. Eventually a five year development plan was introduced in 1956 which has been followed by other plans. The two main planning authorities are the Ministry of Economic Planning, which was established in 1952, and the National Planning Council, headed by the prime minister, which was established by the Planning Council Act, 1958.

VII. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT

The law on these matters is contained in the Patent, Design and Trade-mark Act, 1963 and the Copyright Act, 1965. The provisions of these statutes are broadly similar to those of the Indian

statutes. Nepal is not a party to any international convention for the protection of industrial property or copyright.

VIII. JUDICIAL PROCEDURE IN CIVIL AND COMMERCIAL CASES

The general rules of civil procedure, evidence and limitation are laid down in the *muluki ain* (part II ch. 1). These rules are broadly analogous to those of Indian law. Certain statutes lay down a special procedure for suits brought under their provisions. The general rules provide for the appointment of a fact-finding commission if considered necessary by the court. Parties are allowed to adduce both direct evidence, *i.e.*, the evidence of a person who saw or heard an event or transaction, and indirect evidence, *i.e.*, the evidence of an account rendered by such a witness. A person under legal disability can sue or be sued through a legal representative. Cases, in which a party is a minor or over 75 years of age or

a prisoner, take precedence for disposal over other cases. The Civil Liberties Act, 1955 permits suits to be brought against the government for specified causes of action provided two months' notice of the intended suit has been given. The Court Fee Act, 1960 imposes a fee on the institution of a suit but also permits suits to be filed *in forma pauperis*.

There is no general law of arbitration. Certain statutes provide for arbitration in matters arising under them. In addition, parties to a contract may agree to refer disputes to arbitration. An award is only enforceable after a judgment in terms of the award has been obtained from a court.

IX. PRIVATE INTERNATIONAL LAW

Private international law is still in a rudimentary stage in Nepal as cases involving a foreign element are very rare. In general, Nepali courts follow the principle that if they have jurisdiction, they will apply Nepali law. Jurisdiction exists if either the cause of action arose wholly or partly in Nepal

or the defendant resides in Nepal. In cases involving property, both movable and immovable, *situs* within Nepal confers jurisdiction. There is no provision for the enforcement of a foreign judgment or a foreign arbitral award.

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(Completed in May 1972).

The Netherlands

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The Kingdom of the Netherlands (*Koninkrijk der Nederlanden*) consists of the territories of the Netherlands, of Surinam and of the Dutch Antilles. The three countries are bound together by a particular form of cooperation, which has been established by the Charter for the Kingdom (*Statuut voor het Koninkrijk der Nederlanden*, Stb. 1954 no. 503). The Charter came into force on 29 Dec. 1954. Its preamble states that the three countries will conduct their own interests and provide mutual assistance on the basis of equality.

Autonomy of the countries. – Each of the three countries has its own Constitution (*Grondwet van Nederland*, Stb. 1887 no. 212, now Stb. 1972 no. 193; *Staatsregeling van Suriname*, Stb. 1955 no. 133; *Staatsregeling van de Nederlandse Antillen*, Stb. 1955 no. 136). Members of the government of the country are responsible to the elected parliament of the country; in Surinam and the Dutch Antilles the inviolable King is represented by a governor.

Kingdom affairs are dealt with in cooperation between the three countries, according to the procedures set out in the Charter. The Charter enumerates these matters of common concern, the most important ones being defence, foreign relations and nationality. Only the whole Kingdom can conclude treaties and international conventions, not one of the three separate countries.

Procedures. – An important part is played by the Council of Ministers of the Kingdom. It consists of the Council of Ministers of the Netherlands, completed by two ministers plenipotentiary – one from Surinam and one from the Dutch Antilles. The Council of the Kingdom is the central coordinating institution. If provisions regarding Kingdom affairs are to be made by statute, as for example nationality questions or approval of

treaties, this statute takes the form of a “Kingdom Statute” (*Rijkswet*). In that case, discussion on the bill takes place in the parliaments of the three countries. The Parliament of the Netherlands, however, has to pass the bill; the ministers plenipotentiary may be present to explain the point of view of their country or to propose amendments to the bill. They may also take the initiative in proposing a Kingdom bill in the Parliament of the Netherlands. When a minister plenipotentiary states formally his opposition to a Kingdom bill, the matter is referred to the Council of Ministers of the Kingdom for continued deliberation. International treaties concerning economic or financial matters cannot be made binding upon Surinam or the Dutch Antilles unless the government of the country concerned consents to it.

Mutual assistance. – Within the sphere of their autonomy, the three countries will grant each other aid and assistance. According to art. 39 of the Charter they aim at harmonizing their legal systems as much as possible (principle of concordance). In fact, the three systems of law are closely akin. A Kingdom statute may provide that the Supreme Court of the Netherlands (*Hoge Raad*) shall act as a Court of Cassation for judgments delivered in Surinam and the Dutch Antilles; this possibility has been realized as far as judgments of the Antillian Court of Appeals are concerned.

In the rest of this chapter, reference will be made to the *legal system of the Netherlands* and not to that of the other constituent parts of the Kingdom, unless it is expressly stated that Kingdom questions are involved.

The Netherlands are a *unitary state*, with a large degree of decentralization. The form of government is that of a *constitutional monarchy*.

I. CONSTITUTIONAL SYSTEM

1. Nationality

Conditions for acquiring and losing nationality are fixed by the Dutch Citizenship Act of 12

Dec. 1892 (Stb. no. 268), as amended. There is only one nationality for the whole Kingdom, and the Act has the status of a Kingdom statute.

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a. *Acquiring nationality.* – A child acquires Dutch nationality at birth, if his father – or, in the case of an illegitimate child not being recognized by the father, if his mother – is a Dutch citizen. However, when Dutch nationality cannot be acquired in this way, the child born on the soil of the Kingdom becomes a Dutch citizen if his father – alternatively, in the aforementioned case, his mother – is living in the Kingdom at the moment of birth of the child, provided however that he or she are themselves born of a mother living in the Kingdom. Dutch nationality may be acquired at moments other than at birth by marriage, by adoption or by naturalization.

b. *Loss of nationality.* – Loss of Dutch citizenship is the automatic consequence of acquisition of another nationality, if the person concerned had the intention of acquiring that nationality; of having lived in foreign countries for ten years without ever notifying the wish to remain a Dutch citizen, but only if the person concerned was born outside the Kingdom; of entering into the service of a foreign state or of a foreign army without Royal permission. Besides, a person may be deprived of Dutch citizenship in certain other cases, e.g., if he has a double nationality owing to circumstances not dependent on his will.

2. Territorial Division

The Netherlands are divided into 11 provinces, more or less corresponding to the provinces of the earlier United Dutch Republic. Some new polders have not yet been attached to a province. There are between 800 and 900 municipalities, but their number is declining. The growth of urban districts and social change in rural areas have caused the legislature to combine several municipalities.

3. State Organs

a. *General structure.* – The Dutch monarchy has a parliamentary system. The King reigns, but does not govern; powers attributed to him are exercised through the responsibility of ministers, who cannot stay in office once they have lost the confidence of Parliament. The executive power is vested in the King; legislative powers are exercised by joint action of King and Parliament; the judiciary is independent. The most important and dignified advisory body is the Council of State (*Raad van State*). The government are obliged to ask its advice on any bill to be presented to Parliament, as well as on different kinds of Royal decrees.

b. *The Head of the State.* – Royal dignity is hereditary. The Constitution gives detailed rules on succession to the throne; these rules aim at preserving the national character of the Royal institution.

c. *Legislature.* – Any bill, whether presented by government or by a member of Parliament, has to be approved by both Houses of Parliament successively and to receive Royal assent, before attaining the force of law. It is published in the *Staatsblad*; it enters into force on the twentieth day after publication, unless the enactment itself provides otherwise.

Parliament bears the historical title of States-General (*Staten-Generaal*); it is divided into a First and a Second Chamber. The Second Chamber consists of 150 members, elected for a period of four years in free and secret elections by all Dutch nationals who are resident in the country and have attained the age of 18 years. The result of the poll is calculated under a system of proportional representation. The First Chamber, consisting of 75 members, is elected by the members of the provincial states (*infra e*). Only the Second Chamber has the right to amend a bill and the right to propose a bill (rights of amendment and of initiative).

d. *The government* consists of King and ministers together; the true meaning of this expression can only be understood in the light of the principles of ministerial responsibility and parliamentary system. Dutch constitutional law allows no Royal prerogatives: all powers attributed to the King are exercised by the government. These powers are far-reaching, as the Constitution empowers the King to make regulations by Royal decree (art. 57). Two conditions restrict this competence: firstly, certain important matters, like civil law, the levy of taxes, election system, powers of municipal authorities, budget etc., are expressly assigned to the legislature by different articles of the Constitution; secondly, regulations whose provisions are to be enforced by penal sanctions can only be made by virtue of a statute, and the statute itself shall then fix the sanction to be imposed. The controlling functions of the States-General, inherent in a parliamentary system, are exercised by different means: parliamentary questions, debates on the budget or on statements or memoranda submitted by the government, interpellations by one of the Chambers, and inquiries into certain actions of the government by means of parliamentary commissions.

e. *Territorial authorities.* – A unitary régime applies to the provinces, by virtue of the Provincial

Act (*Provinciewet* of 25 Jan. 1962, Stb. no. 17, as amended). In the same way, the Municipal Act (*Gemeentewet* of 29 June 1851, Stb. no. 85, as amended) provides a uniform regime applicable to the different municipalities. Provincial and municipal authorities can avail themselves of autonomous powers and of powers of self-government; powers to regulate and administer their own domestic affairs are called autonomous, those to help in executing regulations established by authorities at a higher level are called powers of self-government. Decrees and regulations of provincial and municipal authorities may be annulled by the King if they are contrary to the law or to the public interest; the Crown uses this competence in a cautious and reserved way. The main provincial and municipal functions are exercised by elected councils: the provincial states and the municipal councils. Management of daily affairs is taken care of by a board, composed of elected deputies and a chairman appointed by the King: governor in the province, burgomaster at the municipal level.

4. The Judiciary

a. *Constitutional judiciary*. – There are no special constitutional courts. It is not in the discretion of the courts to judge, whether Acts of Parliament are unconstitutional; according to the Constitution "statutes are inviolable" (art. 131). However, the Constitution makes an exception to this latter rule by providing that statutes shall not be applied by the courts should they be contrary to self-executing provisions of treaties (art. 66).

b. *Organization of law courts*. – The relevant rules are laid down in the Act on the Organization of the Judiciary (*Wet op de rechterlijke organisatie* of 18 April 1827, Stb. no. 20, as amended). The judiciary has competence in all civil and criminal matters, including commercial and labour litigations. It consists of 62 peace courts (*kantongerechten*), 19 district courts (*arrondissementsrechtbanken*), 5 courts of appeals (*gerechtshoven*) and one Supreme Court (*Hoge Raad*). The judge sits alone in the peace court, with one exception, and in some instances in the district court; when he sits on a bench, no separate opinions are published and the secret character of deliberations in chamber is ensured. The judges are professional and learned judges; the jury system is unknown. However, in cases concerning agricultural tenancy agreements, lay experts form part of the bench. The peace court has competence for petty offences and for petty claims. Appeals from it are brought before the district court. The latter court has, moreover,

a general competence of first instance in civil matters; it is a criminal court for all major offences. Appeals from the district court lie with the court of appeals. The Supreme Court acts as a Court of Cassation, its role being more or less comparable to that of the French and Belgian supreme courts.

c. *Administrative judiciary*. – In this respect, the situation in the Netherlands is complicated, as there is no uniform administrative judiciary. Different tribunals have been set up for different branches of administrative law: for complaints of civil servants, for matters relating to social security, for indirect taxes, and for complaints about decrees of the Minister of Economic Affairs and of public professional organs concerning certain matters of economic policy, like restrictive practices. – These tribunals cover only part of the administrative law; three other remedies exist in other cases. Firstly, in certain cases competence has been given to the ordinary judiciary, for example in litigations concerning direct taxes and voting rights. Secondly, in many cases the citizen who feels dissatisfied with a decision may apply to a higher organ of the administration itself. In this respect, applications to the Crown form an essential part of Dutch administrative machinery: not only because they are possible in a large number of cases, but also because proceedings have a semi-judicial character. The parties are heard by a special section of the Council of State (*Contentieux* section), which gives advice to the Crown in the form of a draft decree; the Crown is not bound by this advice, but if its decision goes to the contrary, some additional formalities must be complied with: second advice of the Council of State, publication of the decree – including its reasoning – in the Official Gazette. The third remedy consists of an action in tort against a public authority, to be brought before the ordinary courts. These, and especially the Supreme Court, interpret their competence as to civil affairs in a very broad way, so as to include actions for negligence against public authorities.

d. *The prosecution*. – Also the prosecution is regulated by the Act on the Organization of the Judiciary (*supra* b). Prosecution is in hands of the public ministry (*openbaar ministerie*). Members of the public ministry are not independent, with the sole exception of the Attorney-General at the Supreme Court: he is an independent adviser to the Supreme Court and it is also in his authority to prosecute ministers and some high civil servants for abuse of power (the Supreme Court tries these cases as a *forum privilegium*). The other

members of the public ministry may receive instructions from the Minister of Justice as to the two main aspects of their task: prosecution of offenders and execution of criminal judgments. It is in the discretion of the public ministry not to prosecute when reasons of public interest suggest it. In matters of investigation into criminal offen-

ces, the police is under its authority. Persons suspected of having committed a punishable act can be taken into custody for a period not exceeding four days; if custody for a longer period is necessary in the interest of investigation activities, only the courts can so order in the cases prescribed by statute.

II. SOURCES OF LAW

The most important parts of Dutch legislation are to be found in the Constitution, in the statutes required by the Constitution, and in the codes. There are five codes: Civil Code (1838), Commercial Code (1838), Code of Civil Procedure (1838), Penal Code (1886) and Code of Criminal Procedure (1926).

1. Legal Rules

Legal rules may have a national or an international origin. International legal rules spring either from treaties, which have been duly ratified by the King, have entered into force and have been published in a special gazette (*Tractatenblad*), or from decisions of international authorities to which legislative power has been attributed, as for example regulations of the Council of the European Communities. The Charter for the Kingdom is considered as a source of law in its own right.

Legal rules having a national origin consist of the Constitution and of statutes and furthermore of: regulations in the form of a Royal decree (*supra* I 3 d); decisions of a minister, to whom certain specified powers to give supplementary rules have been delegated by statute or by Royal decree; regulations of provincial states, of municipal councils and, in cases of emergency, by a burgomaster; regulations of other subordinate authorities to which regulatory power has been attributed (polder authorities and public professional organs).

2. Other Sources of Law

According to art. 3 of the *Wet Algemeen Bepalingen* (of 15 May 1829, Stb. no. 28, as amended), custom creates no law except in cases where the laws refer to it. Such cases are numerous in the field of property rights and contracts. Thus, the Civil Code provides that obligations arising from a contract are not only fixed by what the contract itself determines, but also by equity, custom and

the laws (art. 1375). In fact, customary law has found a more general recognition in civil and commercial law – but certainly not in criminal law –, though the courts always endeavour to look for some basis in written law. Moreover, the courts are inclined to apply general principles of justice, as far as these principles can be considered to underlie legal rules. The Civil Code helps them in this respect, by not defining some very important terms: “equity” as a source of contractual obligations (art. 1375); “good faith” to be observed in the execution of a contract (art. 1374), “illicit act” giving rise to an action for tort (art. 1401) etc.

Court decisions cannot legally be considered as a source of law, as the doctrine of binding precedent is not accepted. Nevertheless, lower courts very seldom depart from interpretations and opinions laid down by the Supreme Court.

3. Collections

Apart from the official gazette, there are no official collections of laws or of judicial decisions. The most important private collection of law is *Nederlandse wetboeken en aanverwante wetten* (published in looseleaf form by *Kluwer*, Deventer) (For translations of constitutions and codes, see *infra* X).

The most important private collections of judicial decisions are: *Nederlandse Jurisprudentie* (N.J.), published every week by *Tjeenk Willink* (Zwolle); it is the most general collection, containing decisions in civil, commercial and criminal matters; *Administratieve en Rechterlijke Beslissingen* (same publisher), containing judicial and administrative decisions in matters of public law.

The official gazette of Surinam is called *Gouvernementsblad*, that of the Dutch Antilles *Verordeningsblad*. Judicial decisions from the two countries are sometimes published in N.J., but most of them are to be found in the Surinam and Antillean law journals (see *infra* X).

III. HISTORICAL EVOLUTION

1. Codification

When the Netherlands became part of the French Empire, in 1810, they had to introduce the French codes. After the formation of the Kingdom of the Netherlands, in 1814, these codes provisionally remained in force, awaiting their replacement by national codes. On 1 Oct. 1838, the Dutch Civil Code, the Commercial Code, the Code of Civil Procedure and the Act on the Organization of the Judiciary came into force.

The civil and commercial codes were in many respects true copies of their French counterparts. With regard to some matters, however, the codes have been based on solutions of Germanic origin that were applicable in older Dutch law: marital property law, transfer of ownership in case of sale. Wholly new solutions have been relatively rare: divorce law is the most outstanding instance.

Each of the codes has had a different history since 1838. The Code of Civil Procedure has been submitted to a certain number of "partial revisions". The Commercial Code has so often been modified that practically nothing of its initial text has been left. The third book of the Code, on insolvency, was revoked when the Bankruptcy Act 1893 (*Faillissementswet*) came into force; the renewal of maritime law took place in the years 1924-1937; new legislation on limited liability companies took effect in 1928. Finally, the notion of "merchant", once the key to the question whether or not the Code should apply, was abolished in 1934. The Civil Code, however, conserved its original structure. Amendments have been made, some of them very important, for instance with regard to the marital property regime (1956), protection of children (since 1905), employment contracts (1907); but on the whole, the basic rules have been left untouched by the legislature. The adjustment of civil law to the requirements of modern society has been realized in two other ways: by the introduction of special statutes governing particular branches of civil law and by the process of judicial interpretation, adapting the meaning of the more flexible terms of the Civil Code to changed conditions.

2. Law and Economy

At the end of the nineteenth century, the extension of public law to economic matters was begun. In 1875 already, an act had forbidden the use of mechanical propulsion in industrial plants without a license from the municipal authorities.

This form of intervention set the pattern for many subsequent laws: they give an interdiction, from which exemption may or may not be granted under certain conditions. Thus, since 1901 the Housing Act (*Woningwet*) forbids the construction of any building without a preliminary license; municipal authorities shall issue this license if the building plan meets with certain hygienic and safety requirements and if it is not inconsistent with expansion schemes or other provisions of urban planning. Other laws, however, follow a different pattern: they may empower public authorities to nullify private agreements (e.g., restrictive practices), to extend the working of such agreements (in the case of collective bargaining), or to make them subject to approval. At first, interventions of this kind occurred more or less casually, but during the periods of crisis and scarcity that prevailed between 1930 and 1950, their number and scope have increased. The reasons for this development have not always been identical: protection of consumers, in the case of legislation on hire-purchase transactions; protection of small entrepreneurs against ruinous competition, in the case of inland transport regulations; protection of the home market, in the case of laws on agriculture.

3. The Post-War Period

a. *New Civil Code.* – In 1947, an attempt to recodify private law was launched. The New Civil Code is intended to become a *complete* code of private law: commercial law will be included, and so will special subjects of private law, now governed by separate statutes, like industrial property. It is clear from the drafts hitherto published that some important changes of substance will result from the introduction of the new code. Parts of the new code have already been passed by Parliament (Book II on Company Law, Stb. 1960 no. 205, and Book IV on Succession, Stb. 1969 no. 312). The first book, on family law, has been revised (Stb. 1969 no. 257) and has entered into force on 1 Jan. 1970. It is not yet sure at what moment the other eight books will enter into force; as things stand now, it seems likely that the coming into force of Book II may be expected before long.

b. *Economic law.* – The gradual establishment of a coherent economic policy has given rise to some legal developments. Firstly, existing powers have, more than before, been put into a certain frame-