Civil Code Revision in the Netherlands: General Problems

Joseph Dainow
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The civil code revision program of the Netherlands has been in progress since 1947 under the direction of Professor E. M. Meijers. Just prior to his death in 1954, there was published the proposed text and commentary of the first four books;\(^1\) and in 1955, the fifth book\(^2\) was brought out by the committee which was established to complete the work. One of the most interesting phases of the program was the articulation by Professor Meijers of certain policy problems in the form of questions which the Minister of Justice submitted to the Legislature for instructive answers to guide the actual drafting of the detailed provisions on these topics. This procedure and its significance, together with an English translation of all the questions and answers, forms the basis of another article.\(^3\)

In the presentation and the discussion of these important policy questions, there were many very interesting issues. Three of the general problems form the basis of the present article,\(^4\) namely, (1) the unprovided-for case (silence of the written law),

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3. For organization and procedure in Second Chamber (lower house) of the Legislature, see Dainow, *Civil Code Revision in the Netherlands: The Fifty Questions*, 5 Am. J. Comp. L. —— (1957). Although the final action was not conclusive and binding, it served a very practical purpose of ascertaining and crystallizing legal and public opinion, thereby establishing the kind of guiding principles which could not be overturned without adequate and appropriate reason.

4. Most of the information and material for this article is found in the reports of the legislature which were compiled into the document identified as Second Chamber, Zitting [Session] 1952-53, No. 2846. This is supplemented on the basis of personal conferences and discussions in the Netherlands, while the writer was there as Guggenheim Fellow in 1954.
(2) the extent of government participation in certain private contracts, and (3) the effect of custom as against legislation. In order to convey the flavor of the give and take in the discussions and exchanges of opinion, each phase of the procedure will be described separately. Other questions will be treated in subsequent articles.

I. THE UNPROVIDED-FOR CASE (SILENCE OF THE LAW)

A. The Problem

Although a civil code consists of a comprehensive system of interwoven principles and rules, it never purports to cover and to anticipate every possible future situation. At the same time, there is the classical civilian concept that the legislative body makes the law, while the function of the judiciary is to interpret and apply the law. This leaves the judge in a dilemma when he is confronted with a problem for which there is no specific law nor any basis for extension by analogy or otherwise. Such cases on which the law is silent or insufficient — the so-called "unprovided-for" cases — were not unforeseen by the codifiers. In some codes, there is a provision which constitutes the judge a legislator for the particular situation, or which gives him itemized instructions about successive methods to follow towards reaching a solution. The French Civil Code orders that a judge cannot avoid giving a decision on the pretext that there is no law. In the law of the Netherlands, there is a similar provision.

It is accordingly not unexpected that the problem of the unprovided-for case appears in the fifty questions which were submitted to the legislature in the process of the current civil code revision program.

B. The Question and the Recommended Answer

Question 23. Should there be a legal provision how law is to be found in case the [written] laws are silent?

By way of explanation, it was pointed out that, while different countries dealt with the problem in different ways, the gen-

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5. SWITZERLAND CIVIL CODE art. 1.
6. LA. CIVIL CODE art. 21 (1870); PUERTO RICO CIVIL CODE § 7.
7. FRENCH CIVIL CODE art. 4.
9. See note 4 supra, item no. 5, p. 1.
eral tendency was to give some indication to the judge for his instruction and guidance.

It was affirmed that the existing code which was promulgated in 1838 had recognized the problem but that the legislature had chosen the alternative of making no mention of it. The only reference to custom is in Article 3 of the law of May 15, 1829, containing general provisions on the legislation of the Kingdom: "Custom does not create law except in cases where the written law refers to custom."¹⁰

Nevertheless, the preliminary answer recommended by the Minister of Justice (and Professor Meijers) was an affirmative one, that there should be provision for finding the law in case of silence of the written law, with indication of the following order of reference: first, the legal principles upon which the [written] law is based; second, custom (usage); and third, equity.

In support of this recommendation were cited the texts and experiences of Switzerland, Spain, France, Louisiana, and others.

C. Issues Raised by the Legislative Committee¹¹

The legislative committee which studied the matter raised a number of questions and issues, along the following lines:

(1) A codification can never cover all cases. Would it not be "ultra vires" for the legislature to set out rules of public policy on methods to reach legal solutions in case of silence of the written law?

(2) Since it will sometimes be very difficult to decide whether the law is silent or not, is it not better to make no rules for these cases?

(3) If some rules are to be given, it might be desirable not to indicate any order of priority nor to attempt a complete list of all sources of law outside of legislation. It might be better to indicate how the legal solution can be found, rather than how it should be reached.

(4) The list of sources in the recommended answer is incomplete. For example, the statute (Article 38) of the Interna-

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¹⁰. Wet Algemene Bepalingen, May 15, 1829 (General Provisions on the Legislation of the Kingdom), art. 3.
¹¹. See note 4 supra, item no. 20, p. 1.
tional Court of Justice also lists international conventions, court decisions, and qualified writers as recognized sources of law.

(5) The recommended source of "legal principles upon which the [written] law is based" would seem to bind the judges to the ideas of the time that the written law was formulated. If these principles are crystallized, they will stand in the way of future legal development. A different formula, "the commonly accepted principles of law," might be preferable because it leaves to the judge the possibility of deciding according to the principles of law commonly accepted at the time of his decision.

(6) The order of priority indicated in the recommendation — (1) legal principles; (2) custom; (3) equity — does not appear consistent with the proposal in Question 25 (see infra) that a deviating custom should prevail over the written law. At the same time, the judge would presumably look to custom only if it conforms to equity.

(7) Is there any difference between the words "custom" and "usage"?

(8) In this context, what is meant by "equity"?

D. Reply by Minister of Justice

The Minister of Justice, assisted by Professor Meijers and by Mr. P. Eijssen, Advisor to the Minister, replied to these questions and issues raised by the legislative committee in the following manner, and corresponding to the questions.

(1) It is not "ultra vires" for legislation to incorporate policy rules for the guidance of judges, and this has always been done. Illustrations are found in Articles 1375 and 1401 of the Civil Code of the Netherlands as interpreted by the courts.

(2) The difficulty of determining whether there is any appropriate written law does not really have anything to do with the instructions concerning other sources of law after having

12. Id. item no. 25, p. 1.
13. Cf. FRENCH CIVIL CODE arts. 1135, 1382; LA. CIVIL CODE arts. 1903, 2315 (1870).
LA. CIVIL CODE art. 1903 (1870): "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect."
LA. CIVIL CODE art. 2315 (1870): "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it..."
decided that the case is one for which the written law is silent or insufficient.

(3) When giving instructions about other sources of law, it is necessary to state an order of priority because there may be contradiction or inconsistency between two of these sources.

(4) The recommended list of sources is complete for the purposes contemplated. (See also in item (8) below.) The inclusion of court decisions and the doctrines of famous jurists, as in Article 38(1) (d) of the statute of the International Court of Justice is not desirable in the Netherlands. It is not good to bind later generations to the decisions of earlier judges; even the current decisions of a higher court are not binding on the lower court judges.

(5) The “legal principles upon which the [written] law is based” are those principles which the written law might well have stated; while they are not specifically expressed, they are implicit and are generally ascertained by analogy. This formula is preferable to “commonly accepted principles of law” because the latter may be construed to include also foreign principles. There is no danger that the development of the basic principles would be frozen as of the time of a codification because legislation continues to fulfill its task and its basic principles are kept up-to-date.

(6) The priorities given in the recommended answer are based on the following reasons: (1) “legal principles upon which the [written] law is based” are placed first and should follow immediately after the written law because of the close relationship to it — “custom” (usage) cannot be placed first for the same reason that it cannot be ranked higher than written regulations (under legislative authority); (2) “custom” is placed above “equity” because it is a stronger source of law — sometimes custom may supersede a regulative law but equity cannot do so except under very special circumstances; the relation between custom and equity should be such that the former would not be applied if it would create a result contrary to equity in a given case.

(7) The words “custom” and “usage” are employed interchangeably. For example, contract clauses that are found in common use are generally considered as constituting a usage.
The meaning of “equity” will have to be defined so as to take into account both public and private interests, and also the legal convictions existing in the Dutch people. The proposed listing of sources is complete because equity comprises all those principles of law which are not expressed in the written law and which are not found in the general principles which are the basis of the written law or in custom.

In the drafting of the Introductory Title, Professor Meijers included a proposed Article 7, which reads as follows:

“When deciding what equity requires there should be taken into account the generally recognized principles of law, the legal convictions of the Dutch people, and the social and personal interests with regard to the particular case.”

E. Final Answer

When the legislative committee reported to the Second Chamber (lower house of the legislature), it stated its agreement with the answer originally recommended by the Minister of Justice and Professor Meijers. The discussion on the floor of the house did not raise any further issues, and the final action was the adoption of the original recommended answer. Although the Dutch judges may well have been doing in some measure what was here outlined, there had never been such an explicit provision in the written law, and this decision can be considered as a proposed new law.

F. Comparative Comments

The problem of the unprovided-for case — absence or insufficiency of written text in a civil law system — is by no means a new one.

14. See note 4, at 2865 et seq. (Sept. 8, 1953), supra.
15. Formal drafts of law have been presented to the Second Chamber for the adoption of the Introductory Title and Books I-IV of the new Civil Code (Second Chamber, Session 1954-1955, Nos. 3766-3771), and on some of the subjects there have been written discussions between the Minister of Justice and the Committee of the Second Chamber.

The policy decisions of Questions 23 and 25 discussed in this article are incorporated and implemented in the Introductory Title. The nature and substance of these provisions can be illustrated by a few loosely translated excerpts, as follows: “Neither custom nor equity can exclude the applicability of a mandatory law” (Art. 1); “The applicability of a regulatory law becomes invalid when contrary to common usage” (Art. 2); “A regulatory law or custom will not be applied where such application would be apparently inequitable” (Art. 3); “General principles of law which are the basis of the written law are considered as an application of the written law” (Art. 5).

In 1804, the French Civil Code incorporated the following provisions:

Civil Code of France, Article 4. "The judge who refuses to decide a case on the pretext that the law is silent, obscure or insufficient, is liable to be prosecuted for a denial of justice."

Article 5. "On cases submitted to them, judges are not allowed to decide by way of general or rule-making decisions."

A similar type of provision is contained in the Civil Code of Quebec and a slightly expanded one in the Civil Code of Mexico.

Another type of code provision which deals with this problem is the one which not only instructs the judge to make a decision but at the same time indicates the successive paths to take in the process. One such text is found in Louisiana:

Civil Code of Louisiana, Article 21. "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

A variation with elements of both preceding types of provision is found in Spain:

Civil Code of Spain, Article 6. "Any Court which shall refuse to render judgment upon the pretext of the silence, obscurity, or insufficiency of the law shall be liable therefor."

"When there is no statute exactly applicable to the point in controversy, the custom of the place shall be applied, and, in the absence thereof, the general principles of law."

A combination of all the aforementioned elements is found in Puerto Rico:

Puerto Rico 108 (1953); Dainow, La Méthode au point de vue de l'Interprétation Judiciaire—Louisiana, TRAVAUX DE LA SEMAINE INTERNATIONAL DE DROIT 411 (Paris 1950).

17. QUEBEC CIVIL CODE art. 11: "A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law."

18. MEXICO CIVIL CODE arts. 18, 19: "Art. 18. Silence, obscurity or insufficiency of the law does not authorize judges or tribunals to desist from deciding a controversy."

"Art. 19. Judicial controversies of a civil nature must be determined according to the letter of the law or its juridical interpretation. In the absence of law they shall be determined according to the general principles of law."
Civil Code of Puerto Rico, Section 7. "Any court which shall refuse to render a decision on the pretext of silence, obscurity or unintelligibility of the laws, or for any other reason, shall be held liable therefor.

"When there is no statute applicable to the case at issue, the court shall decide in accordance with equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration."

A somewhat different type of provision is found in Switzerland:

Civil Code of Switzerland, Article 1. "The written law governs all legal questions which fall within the letter or spirit of its provisions.

"When there is no applicable provision, the judge shall decide in accordance with the customary law, and in default thereof, according to the rules which he would establish if he were legislator.

"Herein he should be guided by approved legal doctrine and tradition."

At this point, it is of particular interest to note the developments that are taking place in France in the course of its current civil code revision program. It is not within the scope of this article to study the origin of the provision in the French Civil Code, nor to examine the way in which it has been utilized by the courts during a century and a half (although it might be very pertinent), but rather to observe the present reaction to the whole problem by the Civil Code Reform Commission of France.19

In a preliminary draft prepared by a subcommittee during the early stages of the Commission's work, there were contained the following proposed provisions:

Article 21: If the meaning of a legislative provision is obscure or ambiguous, the judge shall interpret the provision

by taking into account the purpose sought by the legislature, the social needs of the time, and equity.  

Article 24: In the absence of a legislative provision, a diplomatic treaty, or an administrative regulation, the judge shall decide according to custom, professional rules, usage, and equity.  

After lengthy deliberations, the Commission rejected the proposed articles. Likewise, the provisions of the existing code have disappeared; and no counterpart is found in the final draft (of the first part of the code) which the Commission recently submitted to the Minister of Justice.

Comparative studies often bring out interesting similarities and contrasts. Sometimes these are explained by the different processes of development on account of different historical bases and backgrounds and methods, sometimes the directions of legal evolution are produced by local economic and political conditions. However, it is not a frequent observation to find such a general issue as the one here examined receiving the curious treatment in two countries with current code revision programs wherein each is proposing the change of moving away from its former position and adopting the position relinquished by the other. It may be like the story of the two men who exchange their old suits — each one then feels like he has a new outfit.

At any rate, it is of considerable interest to note the reasons given by the French Commission in support of its decision to omit instructions for the unprovided-for case.

The final action of the French Commission, in this part of the Preliminary Book of the Code, presents exclusively the rules pertaining to the promulgation and the scope of application of legislation — the written law — as a source of law. There is no

21. Id. at 154.
reference to custom, jurisprudence (court decisions), equity, or any other sources of law. The Commission felt that a code is not a doctrinal work but a practical one, and comprises a totality of individual provisions which are legislative orders addressed to the individual. These orders must be precise and concrete. Furthermore, texts without much practical significance give the courts more embarrassment than guidance.

Even if the legislature concedes the existence of other sources of law, such as custom and equity, these do not obtain their force from any legislative authorization, and it is therefore improper to mention them. There are forces which derive from the social, moral, and economic order which function regardless of legislation. Interpretation and adaptation of a new code will begin immediately after its promulgation; it is not up to the legislature to curb or to control this evolutionary process.

Furthermore, it is well-nigh impossible to formulate adequate definitions of, and distinctions between, such concepts as custom and usage and judicial precedent. It is therefore better to leave out what would only be confusing anyway. Besides, there were apprehensions of two contradictory dangers: on the one hand, that the judge might be given excessive power to substitute his own ideas too much; and on the other, that the specific designations and priorities of custom and equity and so forth would interfere with judicial freedom and hamper the flexibility necessary for judicial decision. Furthermore, the members of the Commission could not cite a single Court of Cassation decision based on custom in a case of silence of the law.

The insertion, in the draft Article 21, of the phrase "social needs of the time" was meant to show a modern progressive attitude towards the future, but it received a battering in the discussions as being vague and variable as well as unnecessary.

The legislature must repose confidence in the courts. The inclusion or omission of directives for cases of silence or insufficiency of the written law does not really change the functions or the powers of the courts. In specific situations the Commission not only recognized but even asserted the importance of other sources of law, such as custom, equity, and precedent, especially
(thus far) in the concept of public policy,\textsuperscript{24} in conflict of laws,\textsuperscript{25}  
and in the abuse of rights.\textsuperscript{26} However, the objections against a  
general article gathered strength from different (and even oppo-
site) points of view so that the rejection of the proposed draft  
Articles 21 and 24 was unanimous.

With reference to Articles 4 and 5 of the existing Civil  
Code,\textsuperscript{27} the Commission likewise decided to drop them. The alter-
native, rather than cumulative, reasons were: (1) these texts are  
not useful because the principles they embody are not disputed,  
(2) they are unnecessary because contained in other codes, (3)  
they are out of place in the Civil Code because the denial of  
justice provision should be in the Code of Civil Procedure while  
the prohibition against general rule-making decisions should be  
in the constitution.

The final result is that the French Commission's draft has  
dropped the existing provisions and has rejected the proposed  
new ones, and therefore it contains nothing on the general sub-
ject of the unprovided-for case.\textsuperscript{28}

II. GOVERNMENT PARTICIPATION IN PRIVATE CONTRACTS

A. The Problem

The great modern codification movement is associated with  
the French Civil Code of 1804 and the beginning of the nine-

\begin{itemize}
  \item \textsuperscript{24} \textit{Avant-projet de Code Civil} 378, art. 35 (1953): "The juridical act  
      may not have an object prohibited by a mandatory provision of law, or contrary  
      to public policy especially to good morals."
  \item \textit{Id.} at 379, art. 43: "An act is not valid if the intention of its author, or  
      of one of its authors, has been determined by a motive contrary to a mandatory  
      provision of law or to public policy."
  \item \textit{Avant-projet de Code Civil} 218, art. 55: "Provisions of foreign  
      statutes which conflict with French conceptions of public policy in international  
      relations are inapplicable in France."
  \item Art. 57: "A person may not avail himself of a juridical situation created  
      pursuant to a foreign law which was rendered applicable only by a fraud on  
      French law."
  \item \textit{Id.} at 233, art. 147: "Every act or every fact which, by the intention of  
      its author, by its object or by the circumstances in which it occurred, manifestly  
      exceeds the normal exercise of a right, is not protected by the law and ultimately  
      incurs the responsibility of its author."
      "This provision does not apply to rights which by their nature or by virtue of  
      the law can be exercised in a discretionary manner."
  \item \textsuperscript{27} Page 279 \textit{supra}.  
  \item \textsuperscript{28} For a comprehensive discussion of this subject in several countries, includ-
      ing France, Belgium, Greece, Hungary, Louisiana, Mexico, Quebec, Roumania,  
      and Switzerland, see the reports and discussions on "La Méthode depuis le Code  
      Civil de 1804 au point de vue de l'Interprétation Judiciaire" in \textit{Travaux de la  
      Semaine International de Droit} 331-554 (Paris 1950).
\end{itemize}
teenth century. The objectives of the French Revolution and the subsequent reactions were incorporated into the Code Napoleon which, in turn, was the model followed by many other countries. Feudalism was abolished and the liberty of the individual was proclaimed. Restraints on ownership were eliminated and the sanctity of private property was enshrined. The freedom of contract translated into theory and action many of the most significant political and economic concepts of the time.

However, times change and the law must follow. During and after the war of 1914-1918, the French government had to impose rent controls which in effect interfered with the freedom of contract of individuals. The laws and regulations were called emergency and temporary, but each time they had to be extended. The truth of the matter is that the situation never improved enough to relinquish the controls. In the field of labor, the employment contract came under government regulation. In another area, the traditional basis of individual responsibility became inadequate to assure compensation of the risks under which men were placed by the machine developments of a new age. Social security and its incidents could only be handled by the government itself. At the same time, the freedom of contract is something which can be unduly taken advantage of by those individuals and associations that are economically strong over those that are economically weak; invariably, the latter category comprises most of the people.

B. The Question and the Recommended Answer

Question 24. Should the possibility be extended more than at present, that for specified contracts the applicable rules should not be provided by law but by the Crown or some other state authority in collaboration or after consultation with the interested parties?

In the Netherlands, as elsewhere, there already exists a certain amount of government interference or participation in private contracts. In some measure, this is a phase of the inevitable and natural development which is taking place in many modern countries. The immediate question is more particularly concerned with the nature and the extent of this participation, so as

29. See note 4 supra, at no. 5, p. 3.
to obtain a policy direction from the legislature for the guidance of Professor Meijers in the drafting of the revised civil code.

It was pointed out that in collective labor contracts such government participation exists through statutory rules of law in the nature of public policy. The rules governing employment and wages in the produce-organizations and in the principal trade-organizations are made in collaboration with the government. The objection that there is too much interference by the government in matters of private law is countered by the fact that the collaboration of the public authority is a guarantee that the parties’ contract will also take into consideration the general welfare of society.

The preliminary answer recommended by the Minister of Justice (and Professor Meijers) was in the affirmative, that for certain contracts there should be standard regulations. The standard regulations should be of a supplementary nature and not a matter of public policy. It was contemplated that a royal order-in-council might be necessary for this purpose.

C. Issues Raised by the Legislative Committee

On this problem, only two questions were asked:

(1) Of what use is it to make standard clauses containing rules which are merely supplementary in nature if the parties can by agreement derogate from these provisions?

(2) What is meant by “certain contracts”?

D. Reply by Minister of Justice

(1) Of what use is it to make standard clauses containing regulations established by the government and its agencies, and by trade organizations. In addition to these rules, which are matters of public policy and mandatory in their nature, it is proposed to create the possibility of having standard regulations which are supplementary or directory in nature.

This will prevent the formulation of standard clauses by the party (or the group) that is the strongest. While parties may agree to circumvent these rules, the moral value of standard regulations made with government participation will always

30. Id. no. 20, p. 2.
31. Id. no. 25, p. 4.
be a warning. Furthermore, if the deviation is too prejudicial for one party, the judge might find that there has been an abuse of circumstances.

(2) It is not timely yet to say for which contracts such standard regulations would be established by the participation of public authorities.

E. Discussion in the Chamber

When this Question 24 was reported by the legislative committee on the floor of the Second Chamber, members immediately raised the two issues which had been taken up by the Committee: (1) the directory nature of the proposed kind of rules, and (2) the enumeration of contracts to be affected.

In the discussion it was principally Professor Meijers who gave the explanations. On the first issue, he illustrated the importance and significance of rules of a directory nature by pointing out that the greater part of Book III of the present Civil Code on "Obligations" consists of such directory rules. The influence of directory rules must not be underestimated, especially when they are drawn up under the guidance of a neutral party. In the situations here contemplated, it can be expected that the agencies entrusted with the making of the directory rules will be neutral.

Nor should it be feared that parties will readily deviate from these directory rules and tend to make up their own standard clauses. That might happen if the rules were formulated without the consultation and collaboration of the interested parties; such would not be the case.

One argument directed against the existing system of rules established in the formal statute law is the difficulty to effect changes. In the system here proposed, the standard regulations made up under the supervision of appropriate public agencies will be much easier to change — if there is need to change.

On the second issue, Professor Meijers could not yet say for which contracts the proposed regulations would be established, except that they would probably not be extended to the contracts of sale and lease. Especially for the general rules of sale, it is better to remain with the existing provisions of the law. How-

32. Id. at 2873 (Sept. 8, 1953).
ever, this need not prevent the establishment of standard clauses for certain special kinds of sale, such as those in the grain trade.

A third issue raised in the discussion from the floor dealt with a matter which is of particular interest to the Netherlands and may not be very meaningful elsewhere. This pertained to the question of whether the establishment of standard regulations for certain contracts would impinge upon the field of the "public-trade-organizations." Professor Meijers answered that there was no intention to place difficulties in the path of the development of these organizations. It will take considerable time before they are able to cover many areas of social relations, and in any event there are some matters in which they have no power. These organizations can only make rules that are binding on their own members. If there should develop a sort of produce-guild, in which manufacturers, wholesalers and retailers would all be organized, it would be possible for both parties of a private contract to be bound by the rules of their single organization. In any event, there will always be numerous cases in which one of the parties does not come within the autonomy of the public-trade-organization, and for these cases the rules proposed under Question 24 would be applicable.

F. Final Action

At the conclusion of the house discussion, the vote taken adopted an answer substantially as recommended by the Minister and Professor Meijers, as follows:

*Answer 24.* The possibility should exist that for specified contracts the applicable rules should be prescribed by the Crown or some other state authority with the collaboration or after consultation with interested parties (standard regulations). Standard regulations should contain only facultative legal provisions.

Despite the existence of current government regulations and the marked measure of its participation in private contracts, the decision on this question constitutes the introduction of an additional and new phase of the subject.

G. Comparative Comments

In many countries, there has been the development since World War I, and especially during and after World War II,
of government controls in various forms ranging from fixed prices and standard clauses to the complete nationalization of a whole industry. These are too well known to need documentation and too numerous to need illustration. From a comparative viewpoint it is noteworthy that the continuation of some governmental controls in the Netherlands is assumed, and it is interesting to observe their method of approach and the preservation of individual protections which are in keeping with their existing institutions and economy. There are indications that the French project will incorporate a number of limitations on what had been the complete freedom of contract and the full protection of private property. It would seem that the same may well be expected in any modern civil code revision program, although the degree and the details will vary.

III. THE EFFECT OF CUSTOM AS AGAINST LEGISLATION

A. The Problem

The discussion of "custom" in the earlier part of this article concerned custom as a source of law in case of silence or insufficiency of legislation (written law). At this point, the situation envisaged is the case for which there is appropriate legislative provision. However, as already mentioned, times change and new activities emerge; in the daily life and routines of the market-place, new practices develop and those which prove satisfactory obtain more expanded and general usage. The problem here is whether under any circumstance a written law can become obsolescent and be superseded by the spontaneous practices which have become sufficiently widespread to be classified as custom.

In the common law, the historical development of case law and statute law, together with the contest between the courts and the legislature, might not leave much room to question the supremacy of legislation within the strict area of its application (pretermitt the judicial maneuvers of "interpretation" and "distinction"). However, in the civil law systems, legislation is treated more liberally so as to adjust the scope of application to a wider or narrower range. This may be due in part to the nature of civil code provisions which often state such broad general principles that courts are intended to have a considerable range of flexibility in making adjustments to the changing needs and practices of the times.
It would be a mistake to assume that the word "custom" means the same thing in different countries, or that it has a universally agreed meaning all the time in any one system. Likewise, definitions are difficult and different for "usage" and for "practices." In the present discussion, as in most cases, the meaning of the terms is to be understood primarily from the context and fact situations.

B. The Question and the Recommended Answer

Question 25. Should the rule be retained that a [written] law can lose effect only by a later law and not through falling into disuse?

In presenting this question, the Minister pointed out a number of different opinions that are currently held in the Netherlands.

To begin with, there is one opinion that custom is a source of law and has the same force as written law. Another opinion considers that custom can only be expressed by the people through the legislative process. By contrast, some modern writers who favor customary law think that the legislature should not have anything to do with it, because legislation requires strict obedience.

Since parties can agree upon provisions in their contracts whereby they deviate from rules of a directory nature, some maintain that custom can displace such supplementary or directory rules, but it cannot be recognized when contrary to mandatory rules of public policy.

Clauses in common use may sometimes be deemed to form part of a contract even though not expressly stipulated. In daily life, it is difficult to distinguish between clauses in common use and practices that amount to "usage." Accordingly, there is also the view that usage may be able to displace rules of a supplementary or directory nature.

In the light of these various opinions, it is necessary to have some clarification and a policy decision for guidance in the matter.

In the preliminary answer, the Minister recommended the retention of the rule that a (written) law can lose its effect...
only by virtue of a later law and not merely through falling into disuse. However, he added that rules of a directory nature can lose their force by a deviating usage.

C. The Legislative Committee and Final Action\textsuperscript{34}

On the whole, the committee agreed with the recommended answer and raised only one issue with reference to the word "can" in the last sentence. One view was that, without this word, it would express the thought that usage displaces law regardless of whether the parties have so stipulated (as distinguished from an express stipulation deviating from the rule). Another view preferred to retain the word "can" in order to express the thought that the judge is free to decide the question.

In his reply, the Minister explained that there are certain requirements before a particular pattern of behavior is considered to be a usage, and therefore the word "can" should be kept in the answer.

No further issues were raised, and the recommended answer was duly given final approval, as follows:

\textit{Answer 25.} The rule should be retained that a law can lose effect only by a later law and not through falling into disuse, but with the reservation that legal dispositions of a regulatory nature may be abrogated by a deviating usage.

The first part of this final answer repeats the existing law; the last part is new and constitutes a considerable relaxation of the strictness of the older rule. Even though it is a compromise solution, it indicates a significant move in the direction of more explicit recognition of usage and custom in the fabric of the growth of the law.

D. Comparative Comments

For several centuries before the Revolution, customary law prevailed in most of France. In fact, there were about 350 of these local "customs." The Civil Code of 1804 was, in one of its most significant aspects, a work of unification and the displacement of customs generally.\textsuperscript{35}

\textsuperscript{34} Id. no. 20, p. 2; no. 25, p. 6; no. 30, p. 1
The draft of the original French Civil Code contained in its proposed Preliminary Book three articles, as follows:

**Title I, Article 5.** Customs result from a long series of actions constantly repeated, which have acquired the force of a tacit and common agreement.

**Title VI, Article 2.** Laws are repealed either entirely or partially, by other laws.

**Title VI, Article 3.** The repeal is either express or implied. It is express when it is literally declared by a subsequent law. It is implied when the new law contains provisions contrary to those of the former laws.

These three proposed articles were victims of the French legislative process; they do not appear in the Civil Code that was adopted in 1804, although all three were picked up and preserved in Louisiana. No inference can be drawn from this omission, nor are the reasons necessary for this discussion. Their purport is clear, that a written law can only be rendered ineffective by a later law and that, while custom is recognized, its scope cannot infringe upon an area of express law. The same is true in Louisiana, where the French projet articles were adopted.

It is of interest to note that, in the current work of the French Civil Code Reform Commission, the previous position is being rigorously preserved. In fact, the Commission has reached back to the 1800 draft for a text to consolidate this position, as follows:

"A [written] law can be repealed or modified in whole or in part only by another law, saving the provisions of the Constitution relating to diplomatic treaties [international conventions]."

The commentary on this proposed article states that it "implicitly discards the repeal of a law through disuse."

Evidently, the decision in the Netherlands that a deviating usage can discard legal dispositions of a directory nature indi-

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36. **Projet de Code Civil** (1800).
37. **La. Civil Code** arts. 3, 22, 23 (1870).
38. Custom cannot be urged against a rule of law nor can it create a contract. **Albert v. R. P. Farnsworth & Co.**, 176 F.2d 187 (5th Cir. 1949).
39. **Avant-Projet de Code Civil** 210, art. 10 (1953).
40. Id. at 52 (Exposé des Motifs).
cates that, while they preserved the basic position, they did not adhere to it with the same strictness as the French Commission. Granted that the Dutch may not have gone very far and that their decision was a compromise, their move was in an opposite direction. Perhaps it reflects some influence from their Scandinavian neighbors.

The legal system of the Scandinavian countries has been described as differing from both the continental civil law on the one hand and the English common law on the other. The earliest codes of private law in Europe were those of Denmark, Norway, and Sweden, but these codes were not very comprehensive or detailed, and much was left to be filled in as need developed. There was always a great confidence in the judiciary, and the practices of the people became confirmed in the court decisions. The development of the law was based a great deal on the practices of the community rather than on the courts of the community. Custom, incorporating the general practices of the people and the confirming judicial decisions, still forms a principal source of law. All law is either in legislation or custom, and also in what is sometimes called the legal conviction of the people. If a custom develops which is different from the written law, there is a strong likelihood that the custom will be considered as representing the real needs and desires of the people and that it will be sustained over the unavailing written law. Recent legislation is not likely to be superseded, but a very old law would not have much chance of being sustained against a new and modern custom.

No conclusions are sought to be drawn from these experiences of the current civil code revision program in the Netherlands. Different people in different countries with different historical and legal backgrounds sometimes reach the same

41. Denmark's first code came into effect in 1240, and its modern code in 1688.
42. Norway's first code came into effect in 1275, and the revision in 1688 modelled on the Danish one.
43. Sweden's first code is dated 1387 and its revision 1734.
44. These brief generalizations are meant to identify a general position, and are not meant to be capsule descriptions of the separate legal systems in the several Scandinavian countries. For more information, see Orfield, The Growth of Scandinavian Law (1953), especially "customary law" in Denmark at p. 14, in Norway at p. 170, in Sweden at p. 252. Leivesstad, Custom as a Type of Law in Norway, 54 L.Q. Rev. 85 (1938); Munch-Peterson, Main Features of Scandinavian Law, 48 L.Q. Rev. 366 (1927); Von Eyben, Judicial Law-Making in Scandinavia, 5 Am. J. Comp. L. 112 (1956).
solution for a given problem, but sometimes they take different positions reflecting their reactions and decisions on the basis of their own circumstances. An attempt is made to understand and appreciate the nature of and the reasons for the respective solutions adopted. In some instances, this may emerge from objective facts and considerations; in other instances, it may seem like a rationalization of a more subjective or instinctive reaction. There is no implication herein of relative evaluations of good or bad in any of the comparative comments and observations. The purpose of this study is to try to understand some of the legal developments and the professional thinking in other countries.