‘Lawyer’s paradise’ or ‘paradise lost’? The Dutch civil code of 1992 as an exponent of the 19th century legislative tradition*

> “Bevor etwas zum Recht erhoben wird, muss es im Herzen Vieler Recht geworden sein”
>
> Fockema Andreae, NJV 1912

1. Introduction. The civil code and the Netherlands through the ages

In The Netherlands a new Civil Code was enacted in 1992, after 55 years of *Travaux préparatoires.* Both facts mentioned, understandably, require some explanation. As to its enactment, the new code replaced the 1838 Civil Code (which was identical to the French CC with minor Dutch supplements), which substituted the French Code which was in force since 1804 (followed by the 1809 edition), when Napoleon’s armies occupied the Low Countries. From the above it follows that the Dutch tradition definitely is based on codified law, and until recently, in the French style. Over the last years, it is observed, codification of the law internationally is becoming increasingly popular as a topic, and the bicentennial of the supreme code, the French Civil Code, is only in support of that trend.[1] The growing pains of the European Union, which calls for centripetal powers, makes the drafting of a (European) Civil Code [338] an issue which causes the rise of blood pressure of many academics in a range of countries. Although even hard-core *aficionado’s* of a European Code must confess that realisation may take 30 to 40 years (thus Basedow, in a Rotterdam lecture some years ago), the European dimension does add a distinctive element to the discussion of legislation and codification in jurisprudential circles, where that subject has always been on the agenda, and it also contributes to its relevance for society at large. This European dimension has appeared time and again in the re-codification debate in The Netherlands, and after the New Code came into force, it remained a relevant issue. For

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* In: Régine Beauthier and Isabelle Rorive (eds.), *Le Code Napoléon, un ancêtre vénéré? Mélanges offerts à Jacques Vanderlinden*, Bruylant: Brussel 2004, p. 337-362.

[1] The literature on codification, and legislation in general, is vast, in time and space. The following are some sources used for this paper, with an abundance of further references: R. Beauthier and I. Rorive, ‘Le paradis perdu de la codification… un Eden à reconquérir?’, *Revue de la Faculté de droit*, Université Libre de Bruxelles, 2003, p. 11; R. Cabrillac, ‘Recodifier’, *R.T.D. Civ.*, 1999, p. 833; *Les codifications*, PUF, Paris, 2003; Th. Veen, ‘‘En voor berisping is hier ruime stof’. Over codificatie van het burgerlijk recht, legistische rechtsbeschouwing en herziening van het Nederlandse privaatrecht in de 19de en de 20ste eeuw’, Bijlage bij *Pro Memorie. Bijdragen tot de rechtsgeschiedenis der Nederlanden*, 2001, afl. 2.

a Dutch lawyer, the similarities between the current debate on the need of a European Civil Code in academic circles and the discussion dedicated to drafting a new Dutch Civil Code in the past, are striking. In both areas an alternative to codification was proposed, namely restatement of the law, American style.[2] The European arena also contains less attractive phenomena, like the ostracising of opponents of codification, as happened to Pierre Legrand (Lille) a few years ago. The philosophy seems to be: those not in favour of the project are against it, and therefore its enemies, and must be treated as such. For a reason that is rather obscure, emotions are running high in codification debates, as always has been the case. It should be noted in advance, that the present author belonged to the ranks of opponents of the Dutch New Civil Code, and therefore is susceptible to such observations.

The drafting of the new Dutch code, as indicated, took the enormous time span of 55 years, an all-time record, it seems. What caused this lapse of time? Before entering into that question, I will give a brief overview of the Dutch history of codification of the law, to put the matter in context. After the French rule, in the early 19th century initiatives arose for drafting an own, Dutch Civil Code, to give credit to a new nation, the Kingdom of the Netherlands. The Kemper-Draft of 1816-21 failed; it was rejected for its extreme [339] lengthy and academic nature and complexity.[3] Subsequent proposals in 1870, 1890's, 1912 and 1938 (centenary of the old code) failed as well, in an early stage. After the war however, in 1947, the drafting of a new Civil Code was commissioned to Meijers, the renowned Leyden University professor. The first draft (Books 3, 4 and 5) appeared in 1954, the year of Meijers' death, further main drafts (Book 6) were published in 1961 and 1976 (revision). The severe problems encountered over the decades, of technical and political nature, will be discussed below. As will be found, the recodification originally was set up as a restatement of the law, and not a law reform,[4] to use a common distinction made in the literature ('codes-consolidation' and 'codes-réforme', respectively).[5]

In the same period of time, comparable projects for (re)codification in neighbouring countries, often only partial, had started, but were withdrawn over time. The French work on a new Code civil, commenced in the after-war years, was suspended in 1958, and replaced by piece-meal renovation of the code. In the

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[2] In the 1970's H. Kötz made the proposal in regard to an European CC; the present author did the same with respect to a New CC for The Netherlands, see J.M. van Dunné, 'Het werk aan het Nieuw BW; jeugdsentiment uit de jaren vijftig?', *NJB* 1977, p. 342, also in *idem, De dialektiek van rechtsvinding en rechtsvorming. Opstellen over rechtsvinding, Deel 1A*, 1984, p. 204, at p. 206 and sq. (further quoted as : *DRR;* also the Volume *Deel 1C*, of 1988, will be thus cited, *infra,* for my articles on codification).

[3] A common story is that the Belgian legal community (at the time, Belgium was part of The Netherlands) was against the Kemper-Draft and preferred the French CC. There was, however, predominantly an outspoken *Dutch* opposition (Daniel Meijer, *et al.*). Compare, H.W. Heyman, *Rm Themis* 1975, p. 428; Th. Veen, *op. cit.,* p. 16 and sq.; E.O.H.P. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijke Wetboek*, thesis Maastricht, 1995, p. 17 and sq.
There had been previous drafts, by Cras (1798-1804), and Van der Linden (1807-1808), which had failed.

[4] Thus, explicitly, J.H. Beekhuis, drafter of the revised Book 5, on Property, 'Herinneringen aan mijn werk voor het nieuwe BW', in E.A.A. Luijten, c.s. (ed.), *Goed & Trouw,* Zwolle, 1984, p. 330 and sq.

[5] Beauthier and Rorive, *op. cit.,* p. 22 and sq.

1970's the United Kingdom undertook codification of the law of contract, a plan which however was abandoned after some years; in Germany the re-codification of the law of obligations ('Überarbeitung des Schuldrechts'), after an impressive start in the 1980's, was put on the shelves. Outside of Europe, in Canada, Quebec is one of the few examples of a country, here a province, recently realising a codification, with its 1994 Civil Code (discussed elsewhere in this book by M. Tancelin).

From this overview, it may be concluded that the Dutch enterprise in codification, remarkable as it is regarding its aspiration and time schedule, may indicate difficulties that are common to codification in general and that may have occurred also in other [340] jurisdictions where similar projects were undertaken. Therefore, it is suggested to be of general interest to have a closer look at the backgrounds of the Dutch legislative project that occurred, an analysis of the causes of the tremendous delay that was involved. A delay that, time and again, for many came unexpected.

Finally, as the title of this paper suggests, perceptions of the Dutch New CC differ considerably. In the early 1980's the president of the Dutch Bar Association described the draft-code, with its abundance of novelties and obscurities as 'a lawyer's paradise'. On the other hand, those aware of the historic purpose and function of a code, were more inclined to think of 'paradise lost'. In the following, the reader will find clarifications of these judgments. However, the suggestion that legal innocence is lost, in every quarter, may be a correct observation for the moment.

2. Re-codification as a concept: purpose and value of a Civil Code to society. The case of the Dutch Civil Code: a law reform in guise

The need for a Civil Code in a country can be explained on legal grounds, the merits a code has for legal development, certainty of the law, et cetera, but as is illustrated in history, in reality political and psychological factors tend to be decisive. A successful revolution, a political upheaval, or the birth of a nation, may lead to a display of self-confidence (or to the contrary, the lack of it, as may be the case in developing countries). The harmonisation of laws of different regions may be sought, or it may be simply the cry for modernity, reaching out to an ultimate legal goal, and setting an example for other nations. All of this can be found in legal history; these aspects of codification are well treated in the literature of the past.[6] The French, Spanish, German, Swiss, and Italian Civil Codes, to name a few, are illustrations of the above, each in its own way, which I will leave to the imagination of the reader. To understand [341] the birth pains of the Dutch Civil Code, or rather its extreme period of pregnancy, we will have to borrow a central issue from the traditional debate on the use of codification for the development of the law, which is closely related to the discussion of the use of legislation in general. The issue being, the function of the legislation in comparison to

[6] Compare Beauthier and Rorive, *op. cit.*, p. 19 and sq.; Cabrillac, *op. cit.*, 2003. R. Badinter, *Le plus grand bien,* Fayard 2004, has taken the introductory words of Portalis as title for his book on the bicentenary of the Code civil: 'Dans le calme de toutes les passions et de tous les intérêts, on vit naître un projet de Code civil, c'est-à-dire LE PLUS GRAND BIEN que les hommes puissent donner et recevoir', p. 9.

the that of the judiciary, which is also known as the dichotomy of legal certainty versus permanent growth of the law. By tradition, the former concept by its adherents as a matter of course is connected to the legislator, whereas the latter by other lawyers is conceived in relation to the function of the courts. It is clear that we are confronted here with the legacy of the Godfather of legislation in the Western world: Montesquieu, and his *Trias Politica*, the division of powers, part of the subconscious mind of most lawyers. In our time, we are still wrestling with the coarse cleavage between legislator and judge, the result of an ill-conceived reading of *De l'esprit des lois*, which has left an unfortunate mark on almost all treatises on jurisprudence until our time. The paradigm of the judge acting as 'bouche de la loi', which for most lawyers still stands for mechanistic decision-making, based on black-letter law, whether approved or rejected by the author in question. Contrary to this common image of the role of the judiciary, it is noted that Montesquieu used that image as a *metaphor* for the judge as *lex loquens*, the speaking law, that is, applying the law in accordance with its 'esprit'. This spirit of the law is conceived by the author as the transcendental legal principles that are underneath and above any law, not subdued to time and place (although dependant on society and culture, as demonstrated so elegantly by Montesquieu). This concept - also accepted in the common law as *rex loquens*, where Montesquieu found so much inspiration - is going back to Cicero, and still is highly relevant to modern law, although the metaphor used (to evade the King's censors) in our time, unfortunately, is a dead metaphor.[7]

Reading Portalis' famous *Discours préliminaire au premier projet de Code civil* again, as I did for this paper, it struck me how the author in his lecture demonstrates his learning from the great [342] Master, Montesquieu.[8] This introduction to a new code, and its praise, at the same time is also an eulogy of the judge (and to a lesser extent, his assistant, the advocate). The role of the judge in applying the code, is taken very seriously, and is put almost on the same level as that of the legislator. Especially the passages in which the famous quotes that adorn essays on jurisprudence for generations are elaborated, and therefore are less known, are illuminating. A central element here is the working of the *spirit of the law*, whose influence may be realized through reason, equity or natural law.

Take for instance, after the classic one-liner: 'L'office de la loi est de fixer, par des grands vues, les maximes générales du droit: d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière', the following Montesquieu-style sentences:

> 'C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, d'en diriger l'application.
> De là, chez toutes les nations policées, on voit toujours se former, à coté du sanctuaire des lois, et sous la surveillance du législateur, un dépôt de maximes, de décisions et de doctrine qui s'épure journellement par la pratique et par le choc des débats judiciaires, qui s'accroît sans cesse de toutes les connaissances acquises, et qui

[7] See Van Dunné, 'Montesquieu revisited. The balance of power between the legislature and the judiciary in a national - international legal context', in M. Karlson, c.s. (ed.), *Law, Justice and the State, Beihefi 15, Rechtstheorie*, Berlin, 1993, p. 451, and sq.; compare also : K.M. Schönfeld, *Montesquieu en 'la bouche de la loi'*, thesis Leyden 1979.

[8] I have used the 1999 edition with a Preface by M. Massenet, editions confluences, 'Voix de la cité'.

> a constamment été regardé comme le vraie suppléent de la législation' (p. 19).

Comparing the science of legislation with that of the judiciary, Portalis observes, firstly, that the legislator has to find in every matter 'les principes les plus favorables au bien commun'. On the other hand :

> 'la science du magistrat est de mettre ces principes en action, de les ramifier, de les étendre, par une application sage et raisonnée, aux hypothèses privées; d'étudier l'esprit de la loi quand la lettre tue; et de ne pas s'exposer au risque d'être, tour à tour, esclave et rebelle, et de désobéir par esprit de servitude'.[9]

At the end of his lecture, Portalis elaborates on the principle of *équité* which is of assistance to the judge in deciding hard cases (p. 74 and sq.). The sense of equity is related to the learned judge's 'coup d'œil d'une raison exercée par l'observation, et dirigée par [343] l'expérience'. At the same time, it is part of an *équité morale.* As instruments the judge has maxims of law, usage, precedents and legal doctrine at his disposal. The last matter one finds intriguingly described as 'la véritable doctrine, qui consiste dans la connaissance de l'esprit des lois, est supérieure à la connaissance des lois mêmes'. To his relief, the academic lawyer, involved with legal doctrine and its development as we may hopefully presume, is placed here at the same level of judge and advocate, on the condition that he is willing to accept the *spirit of the law* as his guidance.

The role given to the judiciary in Portalis' view of the functioning of a code, is a prediction of the present state of the law with the 'arrêts de règlement' or 'jurisprudence législative', which found its origin in land slide decisions of the French Cour de cassation in the second part of the 19th century, putting in place concepts as abuse of law, strict liability, unjust enrichment, et cetera. A development which, as it was coined by a French author recently, is: 'la loi est devenue la bouche du juge'.[10] It could not but have pleased good old Montesquieu to hear this, I imagine, in which Portalis would have joined him.

The foregoing passage may seem to be an excursion - again a writer swept away by his compassions - but as will be made clear in a moment, the issue however is highly relevant for our subject. Supporters of (re-)codification, namely, generally have little trust in the judiciary as far as development of the law and legal certainty are concerned, whereas opponents of (re-)codification are strongly convinced that such matters with the courts are in good hands. The discussion in The Netherlands in the last two centuries proves no exception to that rule. In the debates of the 1820's, 1870, 1912 and lastly 1938, the core element time and again was whether to trust the judiciary as keeper of the law, or to leave that solely to the legislator in its foresight and wisdom. In the pre-war era, culminating in the book dedicated to the centennial of the 1838 Civil Code, two great lawyers serve as the apostles of the two distinct approaches to law: Meijers, of Leyden University, and Paul Scholten of the University of Amsterdam. It is a tale of two cities,

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[9] At p. 24. In the following passage, where one finds the famous expression: 'les codes des peuples *se font avec le temps*; mais à proprement parler, *on ne les fait pas*', Portalis elaborates on the difference between 'le droit' which is 'la raison universelle', and 'les lois' which are only 'le droit réduit en règles positives, en préceptes particuliers'.

[10] Ph. Rémy, 'La part fait au juge', 107 *Pouvoirs*, 2003, Special issue *Le Code civil*, p. 22, at p. 31.

[344] really, each professor followed by a number of disciples and colleagues.[11]

Scholten took the view, in a wording that became famous, that the legal world was in no need of a new code, since the existing law was a 'quiet possession'. The 1938 Civil Code was seen as an old mansion, ageing, parts of it even somewhat run-down, but everyone knew his way around and it was a familiar place, and pleasantly suitable for living. Meijers, on the other hand, had stressed the failures and gaps in the ageing code, which was in great need of repair. A well-known article of Meijers already in 1928 was cynically titled 'The faultless part of our Civil Code', providing a list of 100 failures of patrimonial law in the code (which easily could be doubled, according to the author).[12] As he wrote in 1938, the ratio for re-codification in his opinion was that the law outside of the existing code, the judge-made law, was increasing at a steady pace; thus precedents were overgrowing the body of the code, and its characteristics as a code of the law were getting lost, namely: *simplicity of the law, surveyability of the law, certainty of the law.* This pre-war exposition of Meijers' basic view on the matter was repeated by him after the work on re-codification had commenced, in 1948 and 1954, and it had become the foundation of the ambitious legislative project.[13] In the 1948 lecture, reporting on the progress of the draft, Meijers quoted the English lawyer Birrell, a statement made in 1900, which illustrates well the drafter's philosophy: 'Judge-made law has played its part. To statute law belongs the future. Let us pray for well drawn statutes'.[14] The Freudian element in the last sentence - *venenum in cauda est* - as we will see, was ominous.

It is interesting to note that J.H. Beekhuis, who took part in the drafting of the new code after Meijers' death, has made the keen observation that for Meijers the *raison d'être* of judge-made law [345] solely was the out-of-date character of the Civil Code, and that he expected the need for case law to be marginal with the use of a modern Code, which would be a bless for the certainty of the law. Beekhuis, however, sought the explanation of the growth of case law in the fact that relations developing in society steadily reveal a variation in nature, which makes it increasingly difficult to curb them in a statutory straight-jacket.[15]

The general opinion in Dutch legal circles before the war seemed to be not in favour of re-codification. The Netherlands Lawyers Association had put the issue on the agenda in 1912, and overwhelmingly voted against it (incidentally, the same happened in 1870), and in the decades that followed few authors joined Meijers in his proposal for a new code. In 1947, however, Meijers surprisingly received the commission to draft a new Civil Code. What has caused this major change of opinion? First of all, Scholten was deceased in 1945 (he died on board of a ship, on his way to give his first post-war lecture, at Harvard University), and

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[11] Meijers' legalistic approach to law, also outside the re-codification issue cannot be doubted. Veen, *op. cit.*, at p. 85 and sq., however, rejects that view, using as standard the strict legalism of 19th century authors as Opzoomer, which however is besides the point.

[12] See E.M. Meijers, *Verzamelde Privaatrechtelijke Opstellen I* (Collected Works in Private Law), Leiden 1954, p. 93. This volume contains 9 articles on re-codification.

[13] Ibid., at p. 146, and sq.; Introduction to 1954 Drafts. Compare also my articles on the subject, quoted infra.

[14] Meijers, *op. cit.* (note 3), at p. 158. In that article (a 1948 lecture) Meijers rejected a Restatement in American style in comparison to a traditional code, since the former lacked general legal principles.

[15] J.H. Beekhuis, 'Meijers en de vernieuwing van onze codificatie', *Rm Themis* 1959, p. 255; also in: *Geschriften van J.H. Beekhuis*, 1989, p. 118, at p. 126 and sq.

thus a strong spokesman for keeping the existing Civil Code had gone. Furthermore, there was a psychological aspect; the country had gone through bleak years of war and occupation and was entering a new era. Meijers, the famous law professor, as a Jew had survived the war and returned safely from the Nazi camps, and became a national figure. The time seemed right for Meijers to have another try at re-codification. The official story is that a member of the Senate - one Zegering Hadders, not a lawyer - in 1947 took the initiative to suggest the minister of Justice to entrust the commission for a new code to Professor Meijers, which found a positive reaction from the minister. In reality, that Senate member read his statement from a scrap of paper handed to him by another Senate member that was absent, Molenaar, who happened to a colleague of Meijers in Leyden.[16] It is hard to imagine that Meijers himself was not involved in this event. The result at any rate was a new code *in statu nascendi*; in human life conception generally is somewhat blurred and indeterminate too.

I would like to make two further remarks on the initial stage of drafting a new code, in search of an answer to the question what [346] political motives can be found to persuade the Dutch nation to accept the necessity of a new Civil Code, an idea which could not get a majority in public opinion in the preceding half a century. In addition to a general feeling that in the post-war period new initiatives would be welcome, contributing to a sense of national pride, it must be noted that there was a hang-over from the war, in the sense that the Dutch as a nation had not proved to be on the ethical correct side in its reaction to the German brutal treatment of its Jewish population. Of over a hundred thousand Jewish citizens deported to the camps without much opposition from the Dutch people, only a few thousand returned. In comparison to Belgium, Denmark or France, the Dutch war record in this area was nothing to be proud of, and a sense of guilt against the remainder of the Jewish population was a common feature. This feeling may have given a considerable support for the political decision to assign the drafting of a New Civil Code to Meijers, which was his all life passion.

Be that as it may, besides this psychological factor there was another aspect worth mentioning. At the time, it was common knowledge that Meijers over a number of years had reached considerable progress with the drafting of a code in private. Long before the war he was already engaged in the work (partly combined with drafts for Unidroit projects), and during the war he was able to continue to work on the project in the German camps of Westerbork (Netherlands) and Theresienstadt, where as a distinguished scholar he received special treatment, and library service was available.[17] As a consequence, it was generally expected that Meijers' work on a new code would at the most require a couple of years to complete. The minister of Justice who appointed Meijers in 1947, had expected a completion in three years. In his writings, Meijers had stressed the short period of time needed for such project, referring on purpose to the 4 months that it took Portalis and his partners to write the French Civil Code (incidentally, thereby disregarding years of preparatory work of the legislative staff, at [347] the time).[18] He

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[16] Compare Veen, *op. cit.*, p. 24.

[17] Beekhuis, *op. cit.*, p. 327; compare also articles in *NJB* in the period 1947-1954, and, extensively, Florijn, *op. cit.*, p. 104 and sq. Meijers' *Algemene Begrippen van het burgerlijk recht* (1948), the dogmatic basis for the new code, was written in captivity (see Foreword).

[18] See for the preparatory work, especially of Cambacérès (on Pothier): J.L. Halpérin, 'L'histoire de la fabrication du code. Le code: Napoléon?', 107 *Pouvoirs*, 2003, p. 11, at p.

even stated (in his 1928 article) that preferably, a new code should be drafted every ten years, to keep up with legal developments (a similar proposal was made by the father of the Austrian code, Zeiller, a century before). The brief period of time needed, combined with Meijers' position in the past that no completely *new* code was needed, only an up-dating of the existing code to bring it on line with present law as it had developed in case law and legal practice, thereby clarifying present law, gave reason to believe that in only a few years The Netherlands would have a New Civil Code, ready to face the future. Meijers had stressed, time and again, that his commitment as a drafter was based on a code characterised by: no experiments, a focus on existing law as proved satisfactory in practice, no new foundations are required for private law, which solely is in need of stability of the law.[19] In other words, no law reform was sought, only a restatement of the law.[20]

The above back-grounds of the conception period of the new code must be kept in mind for a better understanding of what followed, that is, firstly the extraordinary delay that occurred, and secondly, the criticism that arose in regard to the drafts that appeared, from the beginning and onwards. A criticism, that in itself contributed to further delay, and therefore all the way was discouraged strongly by the drafters and the ministry of Justice. From the initial drafts, of 1954, published in the year of Meijers' sudden death (on the day of his decease he had addressed the Netherlands Lawyers Associations' meeting), caused a shock wave through legal Netherlands. The criticism, however, was reduced in sharpness by the death of the author, but remained loud and clear to the perceptive reader *(e.g.* J.C. van Oven's review of the first drafts in 1955, in particular the novelty of the property law split, see *infra).* In 1954 the drafts on the Introductory Title and the Books 3 and 5, on Property Law (and Patrimonial Law in general), and Book 4, Law of Succession, were published, which was the result of considerable pressure put on [348] Meijers by a strong minister of Justice, Donker, who had difficulty to accept any further delay to the re-codification project which, unexpectedly, already had taken 7 years. In 1952, the minister had fixed the date of completion on mid-1956.

Upon publication, however, the 1954-drafts proved to be far from the expected up-date of the existing code, with no room for experiments and new foundations. To the astonishment of the legal world, the draft-code was no restatement of the law, in fact it was a completely *new* code, in contents and system of law; a code which furthermore was hard to read or understand, and was not convincing in its postulates and major choices on the system followed by the drafter.

A prime example, where a change of concept on purely dogmatic (if obscure) grounds, with far-reaching consequences for the whole system of the code, and its terminology, is the new definition of property.[21] At the out-set of Book 3,

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15; Badinter, *op. cit.*, p. 49.

[19] Meijers, General Introduction, Commentary to Books 1-4, 1954, at p. 6. See in that sense also his lectures in Paris and The Hague 1948, Louvain 1949, Oxford 1951, published in his Collected Works.

[20] Compare Beekhuis' observations how in the inter-play between drafter, advisers and ministry, the restatement model of the draft-code over time slipped into a law reform model, *op. cit.*, p. 330 and sq.

[21] For the following, see in more detail, with further references, my article 'Waar doet het pijn? De invoeringspijn van het Nieuw BW: oorzaken, verschijnselen en remedies', *Advocatenblad* 1987, p. 125; also in : *DRR 1C,* p. 39, at p. 49, and sq. As an indication of the sharp edges of the controversy around the new code, this article was refused for publication by the *Nederlands Juristenblad,* at the time.

Meijers presented a new set of concepts concerning property, things and patrimonial rights, (in French: 'les biens', 'choses' and 'droits patrimoniaux') leading to the division of *zaak* and *goed.* At the core of this conceptualisation is a new definition of a thing *(zaak),* as solely a '*corporal* object susceptible of human control' (Article 3:2 CC). In contrast, patrimonial rights *(vermogensrechten)* are rights which are transferable, or intended to produce material benefit to their holder, or have been acquired in exchange for actual or expected material benefit (Article 3:6 CC). Property *(goederen)* then is comprised of all things and all patrimonial rights (Article 3:1 CC). Surprisingly, there is hardly any explanation or scientific argumentation for this novelty, which had as its consequence the split between the Books 3 and 5, since all rights related to things, that is, corporeal objects *(zaken)* are restricted to Book 5 ('Real Rights'), whereas 'property' *(goederen),* consisting of things and patrimonial rights as well, are the subject of Book 3 ('Patrimonial Law in General'). As regards terminological consequences of the dogmatic dichotomy, terms as [349] 'owner', 'co-owner' and 'ownership' *(eigenaar, medeeigenaar, eigendom)* are out as general terms (since reserved for corporeal things only), the old term for real rights, *zakelijke rechten,* had to be replaced by *goederenrechtelijke rechten,* the common term for 'droit de suite', *zaaksgevolg,* was replaced by *goederenrechtelijk gevolg;* the word for 'real property', *onroerend goed* - one of the few legal terms all citizens are familiar with - had to be changed into the awkward term *onroerende zaak* (a change that was followed by the tax legislation after implementation of the new Code).

A few remarks on Meijers' argumentation for the unique switch of concepts, and system. The sparse references to literature made in the Commentary are firstly, to a completely obscure article of his hand of 1910, which had drawn no attention whatsoever in legal doctrine, let alone following, and furthermore to a treatise of Suijling, an eminent author on property law, which reference happens to be incorrect. An explanation might be Meijers' life-long animosity to the concept of incorporeal things and collateral concepts; he was inclined to stress material value and corporeal quality of legal concepts, subject to the complete will and discretion of the individual. The definition of patrimonial rights is a good illustration: transferability, *quid pro quo,* material benefit connected to it or given in its exchange; a right must be tangible and have market value. This view definitely is contrary to the one taken by Suijling, and also by another eminent writer on property law, Scholten, where one finds affective and societal values taken seriously. Incidentally, Meijers elsewhere had taken a comparable position, namely an outdated definition of ownership in Book 5, in the best tradition of individualism and conservatism - namely still seen as a 'droit inviolable et sacré' - which ultimately was corrected by Parliament. That view too, was not in agreement with leading writers on the subject; the acceptance of the concept of 'le but social' in this field was something Meijers had scorned in the past.

Already in 1955, in the first review of the draft-code, J.C. van Oven, brought severe criticism against the novelty contained in it. The 'imperfection' he found, basically was when the drafter was speaking of 'things', as corporeal, tangible entities: it cannot be denied that what is meant is 'a *right* concerning a thing', although in layman's thought and talk the both are identical. The expression: 'possessing a house', in fact is: 'having possession of a *right* [350] with re-

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The Dutch CC property law system was explained to the French legal audience at the Journées Savatier by A.V.M. Struycken, *P.U.F.* 1991, p. 83, and sq.

gard to a house'. The definition of the old Code was imperfect, but the same holds for that of the new Code, Van Oven finally observed. This may cause a lot of trouble in the future, he correctly predicted.[22] Thus the vast body of the new law of property, divided over the Books 3 and 5, and with it, the code's system and terminology is resting on one single definition, of a thing, as a pyramid turned upside-down. An impressive sight, that is for sure, but rather peculiar for a piece of legislation. The lack of enthusiasm found in other jurisdictions after publication of the Dutch Civil Code for a greater part may be caused by its uncommon and cumbersome system, legal concepts and language.[23] In this context, as regards the drafter's unfortunate definition of a 'thing', a remark made by Jean Carbonnier comes to mind: 'Une opinion couramment émise veut que définir soit l'affaire de la doctrine, non pas du législateur'.[24]

It is remarkable that the severe criticism, expressed at the very beginning of the re-codification project had drawn so little attention in literature. As late as the mid-1980's authors started to complain of the awkward terminology and system, which according to some writers 'approached the pain level' (Clausing, 1983; Hijma and Olthof, 1984). In majority, however, the new system was slavishly followed, above all in Academia. Perhaps the observation of Van der Linden, the *causa originis* of the present book, is accurate here, that interpreters of a code tend to be paralysed by veneration, known as the 'fetishism of the code'.[25] To my impression, the approach to the draft New Civil Code, can be characterised by that term for an overwhelming part of legal authors, and after implementation the situation has not changed much.

The same confused reception occurred in 1961, when the Book on Obligations, Book 6 of the Code, was published, a draft which was finished by a *triumviri*, disciples of Meijers, in his spirit.[26] The [351] existing law of obligations to a great extent was rewritten, and it was apparent that the German Civil Code had been the example used by the drafters (of which Jan Drion was an adept of German law). This was not exactly in conformance with Dutch legal practice and doctrine, and it came as a complete shock. Again, it demonstrated that the draft was a *new* code, containing a number of 'experiments'. A further analysis of the contents of the draft-code, and its criticism, is needed, in a broader setting, giving jurisprudence its due.

3. Ups and downs of re-codification. An analysis of drafting problems and problem shooting

In this paragraph I will first give a brief description of the way the drafting process of the new code had developed in the last decades, followed by an analysis of causes for delay and criticism of the drafts.

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[22] A comparable criticism of this definition and the related system was given by Kisch (1955), Beekhuis (Asser-Beekhuis, 1957) and Wéry (1961).

[23] See the amiable, but patent criticism of D. Tallon, 'The new Dutch Civil Code in a comparative perspective - a French view-point', *ERPL*, 1993, p. 189, at pp. 192-196.

[24] See Cabrillac, *op. cit.*, p. 223.

[25] J. Vanderlinden, *Comparer les droits*, 1995, p. 267.

[26] The members of the triumvirate were: Jan Drion, G. de Grooth and F.J. de Jong. Drion and De Grooth were Leyden colleagues of Meijers; De Jong was a Justice at the Supreme Court. Eggens, not of Leyden University, was involved in the drafting before, but had already given up his position.

The highly criticised draft-Book 6, on Obligations, underwent a thorough revision from a new draftsman, W. Snijders, who as a member of the Bench (ultimately, the Supreme Court) had obtained leave for some years to assist in the drafting process. The result, the 1976 Revised Draft, in the eyes of most readers went further than just a repair of the first draft; as Van der Grinten (Nijmegen) proclaimed, it was 'in reality a new draft'. Meanwhile also the Books 3 and 5 (property law and patrimonial law) had been revised considerably (by among others, Langemeijer and Beekhuis), and the question arose how the time frame could ever be managed. Van der Grinten, a distinguished law professor and highly influential in legislative and parliamentary circles, in 1976 successfully proposed the introduction of a light-weight parliamentary treatment of the drafts, to prevent a delay of possibly 10 years, a prospect that in his view would suffice to abandon the whole legislative enterprise. It so happened that the judicial committee of parliament needed only 2 days to discuss the three draft-Books, that is, a selected 20 issues, which in the 9 months after its publication notably had not received serious study from the academic world, let alone from legal practitioners. However, the minister of Justice happily proclaimed that the 'point of no return' for the new code had been [352] reached. In the mid-1960's Book 4, Law of Succession, was passed in an afternoon session of Parliament, against vigorous criticism in legal practice.

Thus, by the end of the 1970's it appeared that the re-codification project was in safe waters, but not for long. Although in 1980 the minister of Justice had fixed as date for enactment of the new code the magic year 1984 - a spell that was definitely needed - troubles had started to mount. In 1982 the ministry had organised large scale courses to introduce the new law to legal practitioners, which was preceded by training courses for teachers, drawn from Academia and legal practice. Both the training and the actual courses brought to light a load of well-founded criticism of the draft-law; as a consequence numerous adaptations were made, and even complete sections were withdrawn for revision. It was the first time that bread and butter-lawyers were confronted with the drafters' work, and it was abundantly clear that the outcome was not giving much comfort. The statements of practitioners in the law reviews were revealing, and formed an omen for what was to come in the use of the new code. An appeal justice's critical account was titled: 'A camel is a horse designed by a committee'; it contained the complaint that 'persons who are too bright had considered the ultimate consequences of exceptions that occur once every ten years and have designed unreadable rules for that purpose'. Another judge wrote that the audience was appalled by the extent of changes, not so much their number or importance, but by the shrewdness with which they have been hidden in the text of the draft-code. In addition, it is found that what has been learned as new law has only limited use in practice, and therefore is deleted from memory quickly. As a notary public once exclaimed: 'last week I still could understand it, and now its gone!'[27]

As a consequence, organisations of the Bar, the Bench, and commercial lawyers, were taking critical positions against the re-codification project, in which the expansion of the work load, and therefore costs of an already understaffed judiciary increasingly were used as political arguments. Thereupon the Bench

[27] In *NJB* 1983 and *Advocatenblad* 1983, see quotes in my 1984 article, 'Naar een spoedige invoering van het nieuw BW? Liever snel recht dan goed recht? Een reactie op Schoordijk', *NJB* 1984, pp. 669-676, note 29 (also in: *DRR 1A*, at p. 209 and sq).

received a supplement to its budget (good for some 70 judges), and a crisis was [353] prevented. A new minister of Justice in 1983 had proposed a 'General Scientific Discussion' to investigate the prospects of introduction of a new Civil Code. This revolutionary thinking, in the bosom of the legislation this time, was also brought down, by political horse-trading. The new date for enactment of the code was fixed on 1986.

Another crisis occurred in the years 1986 and 1987, when again, the new code was dangling on a silk string. In the previous years, in some circles a preparation for the new law was made. The law schools had based their teaching programme on the draft-code in 1982, with the exception of Rotterdam and Nijmegen, where the prevailing philosophy was that the new code would not be enacted before 1990. The insurance industry had presented confidential studies to the ministry of Justice, indicating alarming increases of premium costs if the new liability regime as envisaged in the draft-Book 6 would be realised. Also behind the scene, a significant lobbying took place from the side of legal publishers, a group obviously with a keen interest in a new code. At its head was Kluwer, which had started several New Civil Code series and kept the authors at close range to keep the spirit alive; it furthermore operated an effective net-work of authors, in all legal circles. A current joke at the time was that, but for Kluwer, the New Code adventure would have found an end.

At the ministry of Justice the situation was not promising, in those years. Attempts to have parts of the draft-code implemented in advance (sections on standard clauses and on the law of succession, the position of the remaining spouse), had failed, due to a forceful opposition from legal practice. Growing criticism of notaries public against the new law of succession as a whole was quashed by taking Book 4 out, and adjourning its revision and enactment to a date after implementation of the books on patrimonial law ('putting it behind the horizon', in the legislative jargon). An important element in the debate was the 'pain of implementation', that is, time and costs involved in introducing a completely new system of private law, which would hit society as a whole. Special attention was given to the intricacies of the law of transition, which proved to be extremely complicated. In another, last crisis, of 1989, the costs of re-codification were on the political agenda again, this time a real threat to the project, but in the end the horse-trading [354] prevailed once more, and the code was saved.[28] In the process, the law faculties, with Leyden at the lead, were playing an important role, pressing the argument that law students would have graduated on a curriculum based on the New Civil Code, and had to enter legal practice without any knowledge of the old Civil Code.

Also the highest court contributed to the New Civil Code lobbying; with W. Snijders as a senior Justice in its midst, it rendered a number of important decisions in which it operated in the shadow of the new code (in 'anticipation' of the new law). On the other hand, the Supreme Court at times refused to give a liberal

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[28] See for a contribution to the debate, J.M. van Dunné, E.A.A. Luijten, and P.A. Stein, *Kosten en tekortkomingen van het Nieuw Burgerlijk Wetboek (boeken 3, 5 en 6). Rapport uitgebracht aan de vaste Commissie voor justitie van de Tweede Kamer, Serie Rechtsvinding, Deel 7*, Arnhem, 1990.
A committee appointed by the minister of Justice in the late 1980's to assess the issue of abandonment of new code project, produced a report supporting its continuation. The committee consisted solely of lawyers in favour of the new code, which was by accident, to my information.

construction of articles of the old Code, indicating that a satisfactory solution could only be found under the New Code, which however was not in force yet. The reasoning did not always appear convincing, since it was based on a highly legalistic interpretation of the old code. Furthermore, the Court sometimes deliberately gave a strict interpretation of new rules of law contained in the draft-code, with the obvious purpose to reduce the anxiety of the bar and commercial lawyers that certainty of the law was futile under the broad legal principles that characterised the new law of obligations (e.g. the rule on *imprévision*, adaptation of contract under Article 6:258 New CC, in a decision of 1984[29]). Such political choices of the judiciary sometimes would be at odds with the result reached in the case at hand, as is well demonstrated in the last mentioned case.

4. Drafting problems: form and substance

In the above some of the difficulties encountered by the drafters as regards new legal concepts and terminology, and its critical [355] reception by the legal audience have been mentioned. Some further remarks are following here, putting the matter in a more theoretical context.

Some of the problems we have met, are of a general nature and are typical for any legislative product. It has been the subject of many legal writings in the past. If the legislative project is directed at drafting a new code, these problems will only multiply. To give an impression of the general character of the present issue, the following quotations will be helpful.

Bernard Grossfeld, in his article on 'Sprache und Recht', remarked in his conclusion:

> 'Ein Recht das - wie heute vielfach - unserem Sprachgefühl nicht entspricht, wird als fremd empfunden, als 'Normenflut' die über uns hereinbricht. Ohne Sorgfalt mit der Sprache bewirkt das positive Recht keine Rechtsgesinnung' *(JZ* 1984, p. 6).

The problem is not restricted to the civil law world; also common law authors have placed critical notes on legislation in this respect. As Edgar Bodenheimer once commented on American state and federal legislation:

> [they are] … 'usually drafted in a legalistic and hyper-complex language which poses difficult questions of understanding and interpretation not only to the layman but also to lawyers and judges'.[30]

For English legislation, Clarence Smith made a similar observation:

'The English legislative draftsman habitually excuses the contorted particularity of his style

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[29] HR 27 April 1984, *NJ* 1984, 679, note Van der Grinten, *Sipke Helder*. This decision is a landslide-case, a striking example of 'anticipation of the new code', also in respect of argumentation used, which is literally derived from the Commentary on Draft-Book 6, Obligations; its author, W. Snijders, was sitting as a Justice on the case, quoting his own work, so to speak. Another example of such quotes, on the same legal issue, is HR 23 June 1989, *NJ* 1991, 673, note Scheltema, *Gasbedrijf Centraal Nederland v. Nieuwegein*. See for these cases and their background, my treatise *Verbintenissenrecht, Vol. 1, Contractenrecht*, 5th ed., Kluwer, 2004, pp. 752 and sq., 771 and sq.

[30] 'Is Codification an Out-moded form of Legislation', *Am. Journal of Comparative Law* 1982, p. 19.

as being his only defence against the obstinate misinterpretation by the bench of clear drafting'[31].

In regard to codes, the comments made are of the same nature. Here we are confronted with the issue what character a code should have, a 'code savant' or a 'code populaire'? The former code is accessible to lawyers of all trades, the latter is also understandable for laymen. The French code, and recently, the Quebec code, belonged to the latter category; the Dutch code typically is a 'learned code', or as Denis Tallon has put it: 'Professorenrecht', like the German code of 1900. The Dutch Code originally was meant to [356] be comprehensible for laymen (the Swiss Code of 1911 that was sent to all citizens, was an example here), and later on, to lawyers in general. Over time, it has become directed at 'civilists', and finally it proved to be a matter only for specialists. In this context, it is worth wile noting what the father of the French code, Portalis, an admirer of Montesquieu, with foresight has written:

> 'Les lois ne doivent être subtiles; elles sont faites pour des gens de médiocre entendement; elles ne sont point un art de logique, mais la raison d'un simple père de familie'.[32]

Further elaborations of code texts were needed, though. As Eugène Huber, the father of the Swiss Code Civil, explained, more realistically:

> 'Les règles établies doivent avoir un sens même pour le profane, ce qui n'empêchera pas le spécialiste de leur découvrir un sens plus étendu ou plus profond que le profane'.[33]

In the same philosophy, in our time Gérard Cornu, the drafter of the new French Code of civil procedure (1975) and later the family law in the French Code civil, has observed and, more importantly, has realised in practice:

> 'Chaque fois qu'il est possible, le législateur doit s'exprimer de manière à être compris de tous… Chaque fois qu'il est nécessaire, le législateur doit utiliser la précision de son langage technique'.[34]

Meijers, the drafter, had the handicap that as a writer he did not excel in the use of language - he definitely was the lesser of contemporaries as Scholten or Suijling - which has left its mark on his drafts. The wording used in his drafts often was not quite appealing and lacked conciseness, as was observed later by a fellow-draftsman, Beekhuis.[35] In his view, Meijers had underestimated the work

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[31] J.A. Clarence Smith, 'Legislative drafting: English and Continental', *Statute Law Review* 1980, p. 14.

[32] *De l'esprit des lois*, quoted by Cabrillac, *op. cit.*, 2003, p. 218.

[33] See Cabrillac, *idem*, p. 221.

[34] *Linguistique juridique*, Paris, 2e ed. 2000, no. 83. See also his 2003 article, quoted before.

[35] J.H. Beekhuis, interview in J.M. van Dunné, P. Boeles and A.J. Heerma Van Voss (ed.), *Acht civilisten in burger*, Zwolle, 1977, p. 11, at p. 26; the same, in: *Geschriften van J.H. Beekhuis*, Zwolle, 1989, interview by Van Dunné, p. 1, at p. 20, and also, in: *Goed & Trouw*, 1984, at p. 338.

of a legal drafter, which means 'writing down a draft-article 18 times, and then on the 19th time discovering something wrong with it'. It is work of precision, needing a constant checking.

Meijers did not have a name to lose as a philosopher of law either, which also had its consequences for the New Civil Code project. His [357] draft-Introduction to the Books 1-4 of 1954, 7 articles containing general principles of relevance for the use of the code, was cut down by Isaac Kisch in a 1955 review, and consequently was withdrawn. Meijers' basic work on jurisprudence, *Algemene begrippen van het burgerlijk recht,* was not very influential in legal doctrine.[36]

The Dutch Civil Code is characterised by acceptance of general principles (open standards, or 'notions-cadres'), like reasonableness and equity, on the one hand, and a wealth of very technically complex and detailed articles, on the other hand. The relation between the two kinds of legal rules is hard to find in the general sphere, but also in specific parts of the code. In his review, in discussing the present subject, Tallon ominously quoted the well-known statement by Portalis (which was also quoted by Meijers several times in the past, in his 1948 lecture, for instance):

> 'l'office de la loi est de fixer, par des grandes vues, les maximes générales du droit, d'établir les principes féconds en conséquences et de non de descendre dans le détail des questions qui peuvent naître sur chaque matière. C'est au magistrat et au jurisconsulte, pénétré de l'esprit générale des lois, à en diriger l'application…'

Tallon then continues:

> 'A French jurist cannot but think that the NBW (the Dutch CC) sometimes 'descend (trop) dans le détail des questions qui peuvent naître sur chaque matière'… He is sometimes surprised by the minuteness of the drafting and feels an impression of heaviness - at least in the translation.
> And he could perhaps find somewhat paradoxical the attitude of the Dutch lawmaker who, on the one hand, confers to the judges very broad powers under the general clauses and, on the other hand, binds him by a very detailed drafting of the other rules' (p. 195 and sq.).

The issue is of all times, what level of detail is required from a legislator? Kant already gave attention to this question in his *Critique of pure reason:*

> 'Es ist ein alter Wunsch, der, wer weiss wie spät, vielleicht einmal in Erfüllung gehen wird da man doch einmal, statt der endlosen Mannigfaltigheit bürgerlicher Gesetzgebung, ihre Prinzipien aufsuchen möge; denn darin kan allein das Geheimnis bestehen, die Gesetzgebung, wie man sagt, zu simplifizieren'.

[358] We came across the same view when a report was given of the reception of the draft-code in Dutch legal practice, in the early 1980's; the criticism being that the drafters had given too much energy to describing all exceptions to the rule or variations to its application, whereas a healthy influence of general principles of law was lacking.

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[36] Compare Beekhuis, interview 1977, at p. 26; G.E. Langemeijer, *idem*, at p. 134, declared that he had never perceived the greatness of Meijers, which he reckoned to be his personal short coming.

Language is based on culture, legal language is based on legal culture, and on culture in general. This aspect makes any discussion on the relevance of language for legal drafting so hard, especially for the lawyer not familiar with jurisprudence (legal theory). The great French contemporary legislator, Gérard Cornu, has interesting things to say on the subject. In a recent article he cites the classic statement of Portalis on legislation, about offering the legal principles 'par des grandes vues, les maximes générales du droit', etc., and he then continues:

> 'Il devient évident que l'art législatif n'est pas un art formel mais, fondamentalement, un art de concevoir, une aptitude à saisir l'essentiel, élan qui emporterait tout le reste, comme si, le génie normatif produisant son langage, la hauteur des vues de la loi lui donnait d'exprimer beaucoup de choses en peu de mots. Ainsi, en législation comme en fait d'adages, l'économie serait tout à la fois le fruit de la sagesse et la loi de l'écriture'.[37]

It comes as no surprise that for this author the art of legislation finally 'conserve son mystère parce qu'il résulte de l'histoire, de la culture, et de la langue'. In conclusion, Cornu expresses the wish that 'chaque pays, en son génie, cultive pour son droit le jardin de ses Lettres'. It appears that The Netherlands perform better in growing flowers, than in cultivating its legal language, as the Civil Code demonstrates.

Many examples can be given of legal concepts that appeared in the Dutch code and were criticised before its enactment, and have caused difficulties thereafter. I refer to articles mentioned in footnotes before, for that purpose, and would like to restrict myself here to a few, illustrative topics.[38] One would be the way the concept of default *(verzuim)*, which may lead to breach of contract, is treated by the legislator. Already in 1988 Vranken, a foremost supporter of the new code, complained that he had difficulty to teach [359] the section concerned to law students and practitioners alike. His criticism basically was that an obscure border line case ('impossibility') was taken as the central element of the new rule, in an uncritical following of German law.[39] The difficulty became reality in practice; recently authors practicing law, complained that presently nobody knew anymore when it was required to give notice in case of breach of contract. That situation was characterised as either 'a lawyer's nightmare' or 'a lawyer's paradise', according to one's frame of mind or legal position.[40] This issue gave rise to a lengthy critical observation from a practitioner, Streefkerk, a Court of Appeal justice, with in conclusion a proposal for revision of the articles involved.[41]

In this area the Supreme Court in 2000 has given a decision relaxing the complicated set of rules in the code's section on breach and default (a popular

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[37] 'L'art d'écrire la loi', 107 *Pouvoirs*, 2003, p. 5, at p. 7.

[38] See, on the effects of the new Code on legal practice, also my article, 'Vijf jaar een nieuw BW. Is het niet allemaal reuze meegevallen? Ja en nee, sprak de dialecticus', *Trema* 1997, pp. 216-222.

[39] Article 6:81 CC, and sq. See for that matter my *Verbintenissenrecht 1*, pp. 610 and sq.; 632. Vranken had called the new default rules for the average practitioner 'a labyrinth of wrong tracks'.

[40] C.E. Drion and T.H.M. Van Wechem, *NJB* 2003, p. 465.

[41] C.A. Streefkerk, 'Ingebrekestelling bij verzuim en wanprestatie', *NTBR* 2004, p. 2. The comparison of law involved in this subject has received critical attention from N. Florijn, *Rechtsvergelijking in het wetgevingsproces*, thesis Tilburg 1993, p. 119 and sq.

source of exam questions at law schools), leaving it in the end to a reasonable solution. It is interesting to see that the courts are quoting the applicable article of section of the code incorrectly.[42]

It is my own experience as an arbitrator that many years after the new code came into force, lawyers still are not acquainted with it, even with cardinal parts of the law of contract or obligations in general. This holds not only for advocates from small law firms, but also those from the large firms. To give a simple example, the change of default rules has had its consequences for the debtor's obligation to pay legal interest, which obligation under Article 6:119 of the new Civil Code starts to run from the time of default (as indicated in the code, Article 6:81 and sq.), and not from the date the notice of breach was served (as was the law under the old Code). It occurred several times in arbitrations I was involved in, that the advocate was not aware of the new law, and, to the detriment of his client, claimed rent as from the date of the notice [360] of breach. Where large amounts of money are at stake, a few months in time already make quite a difference, let alone a few years. Here only a simple rule of law is concerned, it is not hard to see what effects are when more complicated rules are involved, which abound in the new code.

5. A New Civil Code: the Dutch connection?

It is time to come to conclusions. In my discussion of the Dutch recodification endeavour, which after 55 years so remarkably had resulted in the enactment of a new Civil Code (it is noted that until this time the work has continued on Book 4, Law of Succession, and Book 7, Special Contracts), most of the attention was given to the causes of delay and the reasons for criticism from the legal audience.

As regards the delay issue, in hindsight it is hard to understand the optimism and naïve belief that characterised draftsmen and politicians alike from the beginning onwards. Beekhuis, however, as a drafter belonged to the realists; already in the 1950's he was very sceptical that the time schedule would be reached, which he found completely unrealistic. His repeated warnings were in vain.[43]

The ground for such short-sightedness must lie in a policy that a realistic time schedule would not be helpful to get support for the codification. A term of 3 to 4 years is attractive; it is remarkable, that in that time a common saying at the ministry of Justice was, that 'any statute drafting will take 10 years' *('een beetje wet kost tien jaar'),* as Veen has noted, in amazement.[44] There is also a psychological reason, however. O.W. van Ewijk, a central person at the legislative department of the ministry for decades, once told me in an interview in 1976, that the work on the Civil Code and its timing reminded him of his time as a prisoner of war in the Japanese camps, where the common saying of the prisoners was: 'the liberation will be there in 3 months'. That kept the men going, all those years.

[361] The outcome of this survey might be relevant for other (re-)codification projects, whether from emerging nations or the European Union in

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[42] HR 6 October 2000, *NJ* 2000, 691, *Rowi Parket,* compare my *Verbintenissenrecht 1,* p. 624. Related problems concern rescission of contract, where the Dutch CC deviates from the Unidroit rule, see *idem,* p. 631.

[43] See his observations in the interview in *Geschriften van J.H. Beekhuis,* 1989, at p. 19. He mentioned Van Ewijk of the drafting staff, as the foremost optimist.

[44] Veen, *op. cit.*, at p. 79, where also an analysis of the delay is made.

search for a new identity. The relevance of obtaining a new Civil Code, in a world where harmonisation of law is increasingly on the agenda, to begin with in the EU, has been part of the dispute in The Netherlands from the out-set. It was a core issue in a famous debate of 1961 between two law professors, A. Pitlo (Amsterdam), an outspoken opponent of the new code, and J. Drion (Leyden), the inspired draftsman who took over the Great Work after Meijers' death, an issue that would remain a critical point.[45] In the same year, the two combatants simultaneously received a honorary degree from the University of Gent, which accounts for the sense of humour of the Belgians, or their wisdom. At the ceremony, the doctor father, Dekkers in his *laudatio* explained that Jan Drion received the degree for his great scholarship, and Pitlo for his common sense. Afterwards, Pitlo would comment that, of course, this did not mean that he lacked scholarship, or Jan Drion common sense. In his eyes, Drion was a tower of knowledge, and a typical dogmatic.[46]

After the new Dutch Civil Code came into force, euphoria ruled in some quarters, and the code was presented as an example to the world, soon to be followed by other countries. In publications Russia was mentioned as inclined to take over the new Dutch Code, and also some of the new republics in Eastern Europe or the former USSR, and after some time also China was named as a potential recipient country. For insiders it must have been clear from the out-set that tall talk had prevailed here. The Russian fairy tale was put to an end by the former drafter W. Snijders some years ago, and there are no signs of enthusiastic reception of the Dutch Code elsewhere, with perhaps the exception of a reported (planned) implementation in Uzbekistan.[47]

[362] There is no room for further reflection on the relevance of the conclusions that may be drawn from this overview of the Dutch codification history - that Game of Law Professors that became a Civil Code in the end - for a European Civil Code. That subject would easily fill another article.[48]

Over 12 years have passed since the Dutch Civil Code was enacted. The part of history involved in the code's making, already has the traits of a distant mirror. At the occasion of the introduction of the new French Code of civil procedure of 1975, the remark made by J. Heron seems appropriate to be cited here : 'la codification la plus réussie ne constitue dans la vie de droit qu'un moment d'équilibre, unique et merveilleux sans doute, mais instable'.[49] Many famous law-

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[45] For references, see my articles quoted before. Beekhuis had similar objections against re-codification at the start, see his 1989 interview, cited before. In 1983 Pitlo again debated with one of the drafters, this time R.S. Meijer, and the issue re-appeared. Pitlo, a disciple of Scholten, also referred to Portalis' famous statement that after completion of a code, 'mille questions inattendues viennent s'offrir aux magistrats'.

[46] Pitlo, interview in *Acht civilisten in burger*, 1977, at p. 230.

[47] Compare W. Snijders, 'De export-pretentie van het Nederlandse BW: de Russische ervaring', *Trema* 2002, pp. 430-436, and before : E.H. Hondius, *NTBR* 1997, p. 13, note 181. H.J. Snijders, *Retrocipatie*, Inaugural address Leyden 1995, referred to the planned acceptance of the Dutch CC in Uzbekistan.

[48] See for an up-date on the state of thought on a European Civil Code: Y. Lequette, 'Vers un Code civil européen?', 107 *Pouvoirs*, 2003, pp. 97-127. Compare also : P.A.J. van den Berg, 'De paradox van de codificatie: over de gevolgen van codificatie in Europa voor de rechtsvinding', *Rm Themis* 2002, pp. 195-203.

[49] In B. Beignier (ed.). *La codification*, Dalloz, 1996, p. 82; Cabrillac, *op. cit.*, 1999, p. 834.

yers preceded him in this observation; as mentioned by G. Timsit in his paper elsewhere in this book, in his day Windscheid described the German Civil Code - to many a tower of dogmatic (if not scholastic) legal wisdom - as only 'a ripple in a stream'. Perhaps Windscheid was aware of the maxim: 'Changer la loi, c'est une chose, changer des hommes c'est une autre chose'.

A code therefore, only has a relative value, with a judiciary in permanent vigil of the growth of the law, in the best tradition since Montesquieu - as 'bouche de *l'esprit de la loi'*. This is even more so, if one takes into consideration the increasing importance of rules of international law and European law.[50] Presently, the voice of a national legislator is only one in a choir of voices of law of different origins, where in the days of Montesquieu and his follower Portalis, only natural law was present to the educated legal mind, open to take the spirit of the law seriously.

[50] Compare also Ph. Rémy, 'La part faite au juge', in 107 *Pouvoirs*, 2003, p. 22, at p. 33 and sq. See also Portalis' interesting remarks on the relation between 'droit naturel', and 'droit des gens', *Discours préliminaire*, 1999, p. 24.