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CIVIL CODE REVISION IN THE NETHERLANDS: A SURVEY OF ITS SYSTEM AND CONTENTS, AND ITS INFLUENCE ON DUTCH LEGAL PRACTICE

*Arthur S. Hartkamp**

§ 1. INTRODUCTION

The invitation in 1975 to describe the developments concerning the revision of the Dutch Civil Code came at a propitious time. Due to some spectacular events in the past years (see § 2) the revision program, which had seemed to lead a slumbering existence in the sixties, regained full attention and in fact came substantially closer to its realization.

To begin with, there is a brief survey of the revision program and of the present state of affairs (§ 2), followed by a discussion of some more substantial questions, *i.e.*, the system of the new Code (§ 3) and a few important innovations which it contains, compared to the law in force. Among other things, this includes some issues which drew attention in foreign writings (§ 4). Finally, attention will be directed to the meaning of new Civil Code for Dutch legal development and practice, especially to the important role played by the courts (§ 5).

§ 2. THE REVISION PROGRAM: PRESENT STATE OF AFFAIRS

By Royal Decree of 1947 Professor Meijers of Leyden University, who had long been an advocate of Code revision and who was recognized as being one of the outstanding legal scholars of Europe, was commissioned to draft a new Civil Code. Various serious arguments could be advanced in favor of this commission. Our present Civil Code and Commercial Code date from 1838¹ and can be considered as outdated on

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1. It is the third Civil Code in force in the Netherlands. The first came into being in 1809 by order of King Louis Napoléon, brother of the Emperor. It had much in common with the French Code Napoléon, although not to such an extent as it is generally considered. In 1811, after the incorporation of the Netherlands into the French empire, it was replaced by the Code Napoléon itself. Immediately after the liberation in 1813 attempts were made to draft a national Code, which were finally crowned with success in 1838. Apart from a number of more or less important subjects in the law of persons

many points. This does not apply to a number of socially weighty subjects, in regard to which radical changes were accomplished both in the Code and in separate statutes: *e.g.*, juvenile law, rent, lease, labor-contract, hire-purchase, industrial and intellectual property, company law, and so forth. Unfortunately, however, the Dutch legislator failed to adapt the law of property and the law of obligations to modern standards. This omission is quite understandable when it is realized that—not to speak of social pressure—changes can be much more easily brought about in more or less independent parts of the law than in such general and interdependent parts as the law of property and the law of obligations. Here a partial revision is often not possible without necessarily touching upon so many other subjects, that it either does not arrive at any changes at all or at least not at all the changes required.

The gap in the development of private law resulting from this situation was subsequently filled for the greater part by judge-made law. Undoubtedly, the most spectacular example here is the law of torts which was almost completely a creation of the courts. Equally, in other fields, the courts have bridged the gulf between the Code and the rapid social developments of the present century; some other examples will be discussed later in this article. Much as this development can be welcomed in itself, it also proved to be a fatal influence on the legislator's unenthusiastic partial changes and their advocates.

On the one hand, voices grew ever louder from those who preferred to entrust the development of the law to the subtly differentiating and more concrete approach of the courts. On

and family law (notably the law of matrimonial property), the law of succession and the law of things, this Code is largely, often even *verbatim*, based upon the Code Napoléon. This does not hold true however for its system: since the Dutch Civil Code returned to the requirement of delivery for the transfer of property as known in Roman and ancient Dutch law, a clear distinction has been made between the law of things and the law of obligations; consequently they are set out in the 2nd and the 3rd book respectively. The law of succession is also included in Book 2. Besides, the Civil Code contains a 4th book with provisions on the law of evidence and the law of prescription. The system bears a striking resemblance to that of the Institutes of Gaius and of Justinian, and also (apart from Book 4) to the *INLEIDINGE TOT DE HOLLANDSCHE RECHTS-GELEERDHEID* (Introduction to the Dutch Jurisprudence) of 1631 by the famous Dutch lawyer Hugo de Groot (Grotius). The Dutch Commercial Code also dates from 1838. See *Mercantile Law*, text at §3 (6), *infra*.

the other hand, partial revisions became increasingly difficult: an innovation would not only have to fit into the Civil Code, but also in the much more complicated network of judge-made law, in which almost every provision of the Civil Code separately and the Code as a whole are interwoven. All this led to a situation in which the private law is unsurveyably laid down in partially obsolete Codes, many separate statutes and a great number of judicial decisions; a situation basically different from the intention of the Constitution which provides (since 1798): "the civil law and the commercial law shall be laid down by the legislator in general Codes, subject to his power to regulate specific subjects in separate acts" (art. 164 of the Constitution).

Professor Meijers thus got, at the already advanced age of 67, the commission to draft a new Civil Code. How new this Code is to be in comparison with the present one will be discussed later on in this article. It certainly will be new as far as the system is concerned. In the first place it will contain the contents of the present Civil Code as well as the Commercial Code, thus returning to the situation of Roman-Dutch Law, in which the commercial law was never dealt with separately from civil law. Furthermore, those parts of private law presently contained in separate statutes will be included in it. The Code, as intended by Meijers, will consist of 9 books (preceded by a preliminary title):

- I. The law of persons and family law (including the law of matrimonial property)
- II. Juristic persons (associations, corporations with limited responsibility, foundations)
- III. General law of the patrimony, *i.e.*, provisions applicable to all subsequent books
- IV. Law of succession
- V. Property and right *in rem*
- VI. General provisions on the law of obligations
- VII. Particular contracts
- VIII. Means of traffic and transport (by sea, inland waterways, air, road)
- IX. Law of industrial and intellectual property

This system will be discussed in the following section (§ 3); meanwhile the present discussion will continue with the legislative work since 1947.

Professor Meijers began his work by consulting a great

number of experts on many problems which were to be settled in the new Civil Code. It was decided that 52 of the most important subjects, especially those which had some political implications, should be submitted to parliament with a view to obtaining its conclusions as to the policies which should be followed. This first phase of the work need not be discussed here; three articles by Dainow were devoted to it.²

Although Meijers preferred to publish the draft as a whole, the Preliminary Title and Books 1-4 together with the Explanatory Commentary ("*Toelichting*") were published separately in 1954.³ This happened at the insistence of the Minister of Justice Donker, a convinced advocate of the recodification, who feared that the interest in the undertaking would flag if the first results were unduly long in forthcoming. A few months later, Meijers died suddenly. It was decided that the work would be continued by a "triumvirate",⁴ with the help of some assistants. The work on most of the other books could be continued on the basis of the more or less elaborated preliminary drafts of texts and commentaries, which Meijers had already prepared.

The triumvirate published the draft of Book 5 in 1955⁵

2. Dainow, *Civil Code Revision in the Netherlands: the Fifty Questions*, 5 AM. J. COMP. L. 595-610 (1956) (with an English translation of all questions and conclusions); Dainow, *Civil Code Revision in the Netherlands: General Problems*, 17 LA. L. REV. 273-93 (1957) (a discussion of questions 23, 24 and 25); Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW (Legal Essays in honor of Hessel E. Yntema), 172-189 (Leyden 1961) (a discussion of questions 10, 21, 21A, 3 and 8). See text at § 4 (1-3), *infra*.

For the procedure with regard to these questions, as well as for the motives which led to the revision of the Civil Code and for the procedure followed during the initial years of the revision program, see also the three lectures by E.M. Meijers, *Le réforme du Code Civil néerlandais, Case Law and Codified Systems of Private Law*, and *La révision du Code Civil néerlandais* in VERZAMELDE PRIVAATRECHTELIJKE OPSTELLEN VAN E.M. MEIJERS pt. I at 150-73, 181-93, 194-204 (Leyden 1954). For other publications in foreign languages, see notes 16 and 30.

3. ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK, TEKST EERSTE GEDEELTE, BOEK 1-4 (1954). (Draft for a new Civil Code, Text First Part, Books 1-4); TOELICHTING, BOEK 1-4 (Explanatory Commentary Books 1-4), (The Hague 1954).

4. J. Drion, Professor of Civil Law at Leyden University, J. Eggens, *Advocaat-Generaal* to the *Hoge Raad* (the Supreme Court) and F.J. de Jong, Vice-President and later President of the *Hoge Raad*. In 1957 Eggens was succeeded by G. de Grooth, Professor of Civil Law at Leyden University.

5. ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK, TEKST TWEEDE GEDEELTE, BOEK 5; and TOELICHTING, BOEK 5 (The Hague 1955).

and the draft of Book 6 in 1961.⁶ As to Book 7, the particular contracts, another procedure was decided upon.⁷ Because of the range of subjects and the specialized knowledge required for a number of the subjects to be dealt with in this Book, the Minister of Justice decided to divide the material among a number of jurists, who separately undertook to draft text and commentary of one or more of the 20 titles. One member of the triumvirate⁸ was commissioned to co-ordinate these drafts and to determine their final formulation. The draft was presented to the Minister in 1972.⁹ Book 8 was entrusted to a specialist in the field of maritime law.¹⁰ Its first part, containing general regulations for the contract of transport, maritime law and law of inland navigation, was published in 1972.¹¹

Deliberations in parliament of the drafts (each book is submitted and discussed as a separate bill so that properly speaking a Draft Civil Code does not exist) started in 1954, when the drafts of the Preliminary Title¹² and of Books 1-4 were introduced in the Second Chamber after having been modified by the Minister on certain points;¹³ Book 5 followed

6. ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK, TEKST DERDE GEDEELTE, BOEK 6; and TOELICHTING, BOEK 6 (The Hague 1961). For an English translation of this book, see note 30.

7. See ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK, TEKST VIERDE GEDEELTE, BOEK 7 I (The Hague 1972).

8. F.J. de Jong. See information at note 4, *supra*.

9. See citation at note 7, *supra*.

10. H. Schadee, Professor at the Erasmus University, Rotterdam.

11. ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK, TEKST VIJFDE GEDEELTE, BOEK 8, EERSTE STUK; TOELICHTING, BOEK 8 (The Hague 1972).

12. The parliamentary discussions on this title have been postponed until the legislative work on the Code will be brought to an end. The title contains on the one hand provisions concerning the relation between codified law and custom, equity and the principles of law underlying statutory provisions, and on the other hand cases in which rights and authorities may not be exercised (notably abuse of right). See text at §5(3)(d), *infra*.

13. The legislative power of the Netherlands rests conjointly in the government and the States-General (parliament) which consist of two bodies, the First Chamber and the Second Chamber. The Second Chamber (150 members, elected directly by universal suffrage for four-year terms) may be considered as corresponding roughly to the House of Commons of the English Parliament. Its powers comprise among others the right of amendment, which is denied to the First Chamber. For this and other reasons, the centre of gravity of the parliamentary discussion lies in the Second Chamber. The subsequent discussions in the First Chamber are confined to the general lines of the bill and therefore can be carried through much more quickly. The procedure is identical in both chambers. After the introduction of the draft

two years later. The draft of Book 6 was introduced unchanged in 1964. The first book was enacted in 1959, the second in 1960, the fourth in 1969. Unfortunately, practice has shown that much time passes between the moment that the act is passed and its promulgation. This promulgation is prepared by another act, called the "*Invoeringswet*" (the Introductory Bill) which contains (1) transitional law, (2) necessary adaptations of other Codes and statutes,¹⁴ (3) changes which are made in the act already passed.

An important question is whether it is possible and desirable to put into operation certain books apart from the others. The question was positively answered in the case of Books 1 and 2. The new maritime law (Book 8, first part) is likewise planned to be put into effect separately; this was already taken into account when the book was drafted in such a way that on the one hand the draft fits into the law presently in force, and that on the other hand it can be adapted to the new Civil Code without many difficulties. Things are different with the remaining books, especially Books 3, 5 and 6. These are so closely interlinked that it is considered impossible to put them into operation separately. It is not yet clear how this problem will be solved with Books 4 and 7. Plans exist to put into operation parts of it with priority;¹⁵ the remaining parts, however, will be put into effect together with Books 3, 5 and 6.

bill a commission of the Chamber renders a Preliminary Report, which the government answers by a Memorandum in Reply, if necessary accompanied with a Revised Draft. Subsequently, the commission presents a final report, followed by the discussions on the floor of the House. This procedure can vary depending on the complexity of the matter and the amount of criticism and suggestions of the commission or the Chamber as a whole. Thus, in the course of parliamentary discussions on parts of the Draft Code, hearings are held between the Minister (assisted by his civil servants or by special advisers to the government) and the Commission of the House, which can result in further changes of the drafts. The act being passed, this whole procedure is repeated in connection with the Introductory Act. *See* text at note 14, *infra*.

14. The number of these alterations is high. Thus, on the occasion of the putting into operation of Book 2, more than a hundred statutes had to be changed, apart from the necessary adaptation of the Codes.

15. With regard to Book 4 (law of succession), a draft is presently under consideration which equates the position of illegitimate and legitimate children; besides, it purports to strengthen the position of the surviving spouse. Title 1 of Book 7 (contract of sale) is intended to be put into effect in advance. The possibility of putting into operation a part of the Code in advance is considered merely as a matter of utility. Various factors are taken into consideration, especially the practical needs, the question whether it will fit

As to Book 1, discussions in parliament of the "*Invoeringswet*" started in 1965 and were concluded in 1969. The book was put into operation on January 1, 1970.¹⁶ Preparations for the promulgation of Book 2 started in 1970. Most probably the parliamentary discussions will be concluded this year, so that the book will be put into operation in 1976. Books 3, 5 and 6 have not yet made the same progress. As mentioned above, these books have to be dealt with as a unity, which puts a heavy burden on the Ministry of Justice and the Second Chamber. By Memorandum in Reply the minister introduced a Revised Draft of Books 3 and 5, in 1971 and 1972 respectively. This can be anticipated for Book 6 towards the end of this year, if the House can finish the Preliminary Report in time. These three books are intended to be discussed in 1977 on the floor of the Second Chamber.

Conclusion. Book 1 has been put into effect, Book 2 almost; Book 4 has been enacted but is not yet in force. Books 3, 5 and 6 are in an advanced stage of parliamentary discussion. The drafts of Book 7 and the first part of Book 8 have been published; there are serious plans for an anticipated promulgation of parts of those books.¹⁷ Accordingly, it may be said that important progress has been made. The work took considerably longer than was envisaged at the outset, but fortunately the fears of the active Minister Donker, that this would cause the interest in the work to vanish, both on the part of the politicians as well as on the part of legal science and practice, have so far not been confirmed.

§ 3. THE SYSTEM OF THE NEW CODE

1. *General Law of the Patrimony*

The most drastic change compared to the system of the present Civil Code—in fact also of any other codification in civil law countries—is formed by Book 3 "General Law of the Pat-

in with the existing law without creating too many problems, and the time required for these legislative activities.

16. A French translation has been published: L. F. Ganshof en Ch. J. J. M. Petit, *NOUVEAU CODE CIVIL NÉERLANDAIS: LIVRE 1, DROIT DE PERSONNES ET DE LA FAMILLE* (Deventer 1972). The consequences of this promulgation with reference to the impact of the rest of the draft on Dutch legal practice is discussed in §5 (1), *infra*.

17. On Book 9, see §3 (7), *infra*.

rimony."¹⁸ Its principle is twofold.¹⁹ On the one hand, corporeal and incorporeal things are considered as equivalent; consequently, rules which are related to both categories are brought together in one and the same book. Thus a great number of subjects which were traditionally—since Roman Law—treated as part of the law of things were transferred to Book 3, such as the provisions on transfer of corporeal and incorporeal things, possession, "*gemeenschap*" (community);²⁰ those rights *in rem* which can have as their object both corporeal and incorporeal things, *i.e.*, usufruct, pledge and mortgage;²¹ privileges and the right of retention; finally, general definitions of "assets" and "things",²² fruits, components of things, limited rights, and so forth, as well as related general regulations, notably the provisions regarding the public registers for registered goods.²³

On the other hand, in Book 3 some issues are settled which traditionally could be found in the law of contract and partially in the law of succession; these subjects however relate to the law of the patrimony as a whole. In the first place this applies to the concept of the juristic act: general requirements for its validity (will, capacity); protection of parties who in good faith rely on the appearance of a valid consent; conditions and terms; the effects of a juristic act contrary to law, *boni mores* or public order; conversion and par-

18. The term "patrimony" is the translation of the Dutch word "vermogen" which comprises all subjective rights having a money value. See Lawson, *Notes on Some General Problems in Terminology, in Unofficial Translation of Book 6 (Obligations)*, 17 NETHERLANDS INT'L L. REV. 225, 237-40 (1970) [hereinafter cited as Lawson]. Thus, Book 3 contains provisions pertaining to all patrimonial relationships (to be treated in the following books).

19. Cf. MEIJERS, TOELICHTING, BOEK 1-4, 15 *et seq.* & 159 *et seq.* (1954).

20. In the draft, the new term "*gemeenschap*" is chosen (which can hardly be translated) instead of the term "co-property," since the concept of "property" in Book 5 is limited to the rights on corporeal things, while "*gemeenschap*" also comprises the incorporeal things (limited rights, rights *in personam*, industrial and intellectual property).

21. In the terminology of the draft "*beperkte rechten*" (limited rights), since the "rights *in rem*" only concern corporeal things and are accordingly set out in Book 5. See note 5, *supra*.

22. The more narrow concept of "*zaak*" (thing) indicates solely corporeal things; the wider notion "*goed*" (asset) embraces incorporeal things as well. See explanation note 20, *supra*. For these and other terminological problems, see Lawson at 225-240.

23. The most important being immovable things, vessels, airplanes.

tial nullity; defects of consent; fraud of creditors; some forms of legal relief, ratification and convalescence. Secondly, the law of agency, which at present forms an incoherent and confusing part of the contract of mandate, will be laid down in this book (with the exception of some specific rules on the authority to act on behalf of a juristic person). Apart from these two groups of provisions, Book 3 contains two entirely new subjects.

First, a title is devoted to the fiduciary administration ("*bewind*"). It should be borne in mind that the concept of trust is unknown to Dutch law. In practice there do exist various forms of *fiducia cum amico*, which to some extent pursue the same ends. However, since the *fiducia* does not fit in with the civil law concept of property, it is suppressed in the new Civil Code. Instead ample possibilities for fiduciary administration are created.²⁴

The other new subject is formed by a number of general provisions on actions. Several considerations have induced this innovation. Meijers²⁵ felt that actions pertaining to a person are so closely connected with subjective rights that their adjudication must be rooted in the Civil Code. Besides, the judge by way of coercive measure can order the defendant to pay to the plaintiff, at the latter's request, a so-called penal sum ("*dwangsom*"), in case the former does not obey the court's decision. According to Meijers, this obligation should be included in the Civil Code, just like the stipulated penalty by which parties themselves can create a similar incentive to the fulfillment of a duty. The general provisions regarding actions concern *inter alia* the power to require judgment against a person who is obliged to fulfill a duty on behalf of the plaintiff; rules regarding specific performance; the provision that the judgment can act as the deed of the juristic act which the defendant was obliged to perform; the penal sum already mentioned; and finally the prescription of actions.²⁶

24. Cf. Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 185 (Leyden 1961). For the replacement of the *fiducia cum creditore*, see §4 (1).

25. TOELICHTING, BOEK 1-4, 11 & 297-98 (1954).

26. Apart from incidental provisions of a procedural character, especially those which grant certain actions in special cases, the draft of the Civil Code will no longer interfere with the law of civil procedure. The law of evidence,

2. *Law of Succession*

In the French Civil Code, the law of succession is considered as a mode of acquiring property and is therefore included in its third book. This view was followed in the Dutch Civil Code (art. 639), which was one of the reasons²⁷ for putting it in the second book (Law of things, including property).²⁸ The new Civil Code abandons this idea, because it is one-sided. Not only does property pass to the heirs, but the same is true of other rights *in rem*, possession, rights *in personam*, industrial and intellectual property as well as obligations. The law of succession concerns the patrimony of the decedent as a whole. Therefore it is the subject of a separate book (Book 4)²⁹ situated between the General Law of the Patrimony and the books containing the various kinds of subjective patrimonial rights. These rights are arranged according to their object: the rights in corporeal things, the rights *in personam*, and the rights in the products of the mind (traditionally called the rights of industrial and intellectual property).

3. *Law of Things*

The first of these categories is laid down in Book 5: the rights in corporeal things or "rights *in rem*". This book includes movable and immovable things, servitudes imposed by law, conventional servitudes, and some other rights *in rem* unknown to the French *Code Civil*, but derived from ancient Dutch law. As previously indicated, some rights now called rights *in rem* have been transferred to Book 3, since they are not restricted to corporeal things. These rights are desig-

presently in the Civil Code (*see note 1, supra*) will be moved to the Code of Civil Procedure; for this purpose a draft has already been submitted to the Second Chamber. However, while formulating the provisions of the new Civil Code, the consequences for civil procedure have often been taken into account, especially with regard to the burden of proof. Thus, an exception to a principal rule often begins with the word "unless," which implies that the person in whose interest this exception has been made, must prove its contents.

27. Another reason is to be found in the concept, originating from the German lawyer Hahn (16th century), that the right of the heir should be considered as a right *in rem*, at least as an absolute right. This view, which cannot be discussed here, was rejected a long time ago.

28. For the difference between the systems of the French and the Dutch Civil Code as to the law of things, *see note 1, supra*.

29. *Cf. TOELICHTING, BOEK 1-4, 17 (1954).*

nated as "limited rights"; of this *genus* the rights *in rem* of Book 5 constitute a *species*.

4. *Law of Obligations*

The law of obligations is contained in Books 6, 7 and the greater part of Book 8. Book 6 contains the "general part" of the law of obligations. However interesting a book, it shall be discussed only briefly since an English translation was published recently.³⁰ By way of introduction to this translation, H. Drion wrote a lucid survey of the contents of Book 6, its relations to the first four titles of Book 3 of the present Dutch Code, and the differences between the classification of these titles and the corresponding chapters of the French Code.

Book 6 consists of 5 titles. The first title "Obligations generally" contains provisions applying to all obligations regardless of their source. Many of these provisions are new, such as the general provisions on natural obligations, the greater part of those on joint obligations and plurality of creditors, a separate chapter on default of the creditor,³¹ and chapters on performance and the consequences of non-performance of obligations. There is also a chapter on liability for damages, which applies to both contractual and tortious liability, with the effect that a number of legal consequences of non-performance and torts can be harmonized.³² Moreover, it is intended that the Revised Draft will contain a chapter devoted to the obligations to pay a sum of money, in which attention will be paid to the rule of nominalism, payment by

30. *Unofficial Translation of Book 6 of the Draft of a new Netherlands Civil Code*, 17 NETHERLANDS INT'L L. REV. 225-74 (1970), with an introduction by H. Drion, Justice of the *Hoge Raad*, brother of the already mentioned "triumvir" J. Drion, and *Notes on some general problems of terminology* by F. H. Lawson. See also Lawson, 12 INT'L & COMP. L. Q. 1071-72 (1963); A. von Overbeck, in 1962 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 190 *et seq.* (1962). An English translation of the Explanatory Commentary on Book 6 will be published soon.

31. This set of provisions, which follows to a large extent the rules developed by the courts, will gain considerable importance because of the abolition of the ancient rule *periculum est emptoris*. In the new Code the risk will pass to the buyer at the delivery of the thing sold. Consequently, it is reasonable that the risk also passes to the buyer (and that the seller's liability is diminished) if the delivery cannot take place as a result of circumstances attributable to him.

32. For an example, see §4 (2). See also, Drion, *Introduction to "Unofficial Translation of Book 6"*, 17 NETHERLANDS INT'L L. REV. 225, 234 (1970).

postal transfer ("*giro*"), statutory interest for default in the payment of a sum of money, and debts in foreign currencies.

Title 2, called "Passing of claims and debts", also contains many innovations, such as those with regard to subrogation, the consequences of the transfer of claims, and the taking over of debts and contracts. The third title is devoted entirely to torts; some remarkable innovations are discussed below in § 4(6). Title 4 contains provisions on obligations from other sources than tort or contract, namely, *negotiorum gestio* (management of another's affairs), *solutio indebiti* (payment of a thing not due), and the general action for unjustified enrichment (§ 4 (5)).

Finally, title 5 is devoted to the general provisions on the law of contract. Among the many new rules are those on standard terms,³³ the extent to which a party is bound to general conditions (fixed by the other party and usually deposited at some public place) of which he did not know the contents at the time the contract was concluded, formation of contracts, effects against third parties of covenants concerning registered property, good faith, and unforeseen circumstances (§ 4(3)).

Although "more than half of Book 6 deals with questions on which the present Code is silent",³⁴ its size is not much larger than that of the four titles which it is to replace. The number of articles is even smaller. In spite of its great flexibility, characteristic of this part of the law, the present law of obligations undoubtedly belongs to the most obsolete parts of our codified law.

5. *Special Contracts*

Book 7 contains the special contracts. They are arranged in three successive groups:³⁵ (1) the contracts which lead to the transfer of a thing (sale, exchange, loan for consumption,

33. See DRAFT CODE art. 6.5.1.2; Dainow, *Civil Code Revision in the Netherlands: General Problems*, 17 LA. L. REV. 273, 283 *et seq.* (1957). For the method of numbering the articles, see Drion, *Introduction to "Unofficial Translation of Book 6"* 17 NETHERLANDS INTERNATIONAL LAW REV. 225, 231 (1970). For practical purposes every article of the Draft Code is identified by the number of the book where it is to be found, of the title of the book, of the chapter (if any), and of its own number in the chapter. In the final text each book will be separately numbered throughout.

34. Drion, *Introduction to "Unofficial Translation of Book 6"*, 17 NETHERLANDS INT'L L. REV. 225, 232 (1970).

35. Cf. TOELICHTING, BOEK 7, 834 (1954).

donation) and which grant the use of a thing (hire, lease, loan for use); (2) contracts concerning activities undertaken by one party on behalf of the other (charge (*opdracht*),³⁶ publishing contract, deposit, labor contract, collective labor contract, contract for a work, partnership); (3) other contracts (suretyship, contract of settlement (*vaststellingsovereenkomst*)³⁷, bills of exchange and cheques, and aleatory contracts including insurance). It will be clear from this enumeration what aims were pursued in compiling Book 7 and what substantial changes were made compared to the system of our present codified and statutory law. In accordance with Meijers' intention to bring private law as a whole into one Code, some contracts which are now classified in separate acts (*e.g.*, lease, collective labor contract) will be placed in Book 7. Besides, part of the Commercial Code will be transferred to Book 7 (see § 3 (6)). Finally, it contains some new contracts: publishing contract and the contract of settlement, of which "transaction" in the present Code only forms a *species*.

6. *Mercantile Law*

It has been pointed out previously that mercantile law will be incorporated in the Civil Code.³⁸ In Book 2, "Juristic Persons", corporations are dealt with, together with associations and foundations. Book 7 contains the remainder of mercantile law, except for the law of transport, which will be covered in Book 8. Thus a distinction is abolished which did not exist in the Dutch provinces before the French revolution: Hugo de Groot, in his "Introduction to Dutch Jurisprudence" (1631), deals with subjects of mercantile law together with civil law. The same was done by other ancient Dutch authors and even in the draft for the Civil Code which was made by the Dutch jurist Joannes van der Linden in 1807. Bringing together civil law and mercantile law is the logical

36. This new concept comprises various contracts, of which mandate is the most important.

37. This "contract of settlement" encompasses every contract by which the parties accept a settlement of their legal relationship in order to terminate or to prevent uncertainty or dispute about this relationship. The settlement can be effected by way of a transaction between the parties, but also by a decision to be taken by one of them or by a third person. This decision can be set aside on certain conditions when it is found to be contrary to reasonableness and equity. DRAFT CODE, arts. 7.15.1,7,8.

38. Cf. TOELICHTING, BOEK 1-4, 9-10 (1954).

outcome of a development which started in 1838. In fact, article 1 of the Commercial Code provides that, except for explicit deviations, the Civil Code applies to all subjects dealt with in the Commercial Code. Also, in 1838 the special Courts of Commerce, introduced in the Napoleonic era, were abolished. Subsequently, the law of bankruptcy was taken from the Commercial Code and arranged in a separate statute, no longer restricted to merchants (1893). Finally in 1934 almost all differences between merchants and others were banned from private law. Under these circumstances it is no longer appropriate to arrange civil law and commercial law in separate Codes.

The new Code will bring considerable changes on many issues, but it would lead too far afield to go into details here. By way of example, there are the completely new rules for such a socially important contract as life assurance: the seven totally obsolete provisions of the Commercial Code of 1838 will be replaced by some thirty articles adapted to modern requirements.³⁹

7. *Law of Industrial and Intellectual Property*

It was originally intended to devote the last book of the Code (Book 9) to the third category of subjective patrimonial rights: "*the rights on the products of the mind*". The statutes containing these rights (at that time: patents, trade mark, copyright, trade name) were to be split up. The provisions of a civil character would be included in Book 9, those of an administrative, procedural and penal character were to be placed elsewhere.

Since then the situation with regard to these rights has drastically changed. A unification of patent law is being prepared in the Common Market countries. With respect to the law of trademark a uniform law has been passed and put into operation for the Benelux⁴⁰; the same happened this year with the new law of designs and models.

It goes without saying that it is impossible to split up such uniform acts, as it was initially planned to do with the national statutes. It would not be elegant however to transfer these acts as a whole to Book 9 of the Civil Code, since they

39. DRAFT CODE chap. 7.17.3.

40. Benelux is the economic union between Belgium, the Netherlands and Luxembourg. One of its aims is the unification of parts of private law.

contain more than private law alone. Moreover, this would have the practical disadvantage that one and the same article would carry a different number in Book 9 and in the uniform acts. More important, these acts, which carry their own provisions for transfer, pledge etc., would badly fit into the system of the new Code. The once envisaged simplification and the better connection with the codified civil law would not be attained. For these reasons it is improbable that Book 9 will be brought out according to the original plan made for it. Since it would not be very appropriate to limit Book 9 to a rudimentary form, in which only the law of copyright and trade name is incorporated, the fate of this book seems to be sealed. However, an official decision has not yet been taken.

§ 4. SOME IMPORTANT INNOVATIONS

General Observations

The commission which Professor Meijers accepted in 1947 was brief: "the drafting of a new Civil Code." This wording allowed the greatest possible latitude to modify the law in force and to bring the Civil Code to the level of the day. It is clear that it was not intended for the new Civil Code to fundamentally change the existing law as developed by legislation and the courts. On the other hand, the work must not be misunderstood, like some opponents of the recodification have contended, as a mere restatement of the law with the aim to remove superfluous and obsolete provisions, and to codify judge-made law and statutory law. In the previous section it has been pointed out that Meijers decidedly did not approach his task in such a limited way, as far as the classification of the new Code is concerned. By means of some examples it will also be shown that the law itself will undergo many important and interesting innovations.

The examples will be restricted to the contents of Books 3 and 6 (general law of the patrimony, and general part of the law of obligations). To begin with, on account of the parliamentary conclusions devoted to them, three subjects which already drew attention in foreign literature: the use of movables as security without dispossession of the debtor, the effect of good faith to modify or extinguish obligations, and the

judicial power to mitigate damages.⁴¹ These will be followed by brief discussions of undue influence, unjustified enrichment, and some problems with regard to tortious liability.

1. *Security on Movables without Dispossession of Debtor*

In accordance with conclusion 6,⁴² the draft of Book 3, published in 1954, introduced the possibility of a "registered pledge" of business or professional movable assets, established by inscription in a register without delivery of possession.⁴³ With regard to these assets, also an unregistered non-possessory right of pledge was proposed, albeit merely as a security for business debts, with a right which would rank after both a possessory pledge and a registered pledge.⁴⁴ Since all security interests of a proprietary nature were suppressed elsewhere in the same draft,⁴⁵ it would no longer be possible to constitute a non-possessory security over movables other than these business assets.⁴⁶

Neither the Second Chamber, nor the legal profession expressed satisfaction with this set of provisions. Against the registered pledge, objections were raised which partially had already been voiced during the discussions in parliament on Meijers' preliminary questions. There were fears of unnecessary bureaucratic interference, of all the routine of officialism entailed by the new registers, and of the injurious influence this publicity might exert on the debtor's credit-

41. See Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 172-89 (Leyden 1961) (a discussion of questions 10, 21, 21A, 3 and 8). See § 4 (1)-(3), *infra*.

42. Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 172, 185 (Leyden 1961).

43. DRAFT CODE, arts. 3.9.3.1-5.

44. *Id.* art. 3.9.2.2.

45. *Id.* art. 3.4.2.2, par. 3. For some references on the transfer of movable property as a security in Dutch law, see Dainow, *Civil Code Revision in the Netherlands: the Fifty Questions*, 5 AM. J. COMP. L. 595-603 nn. 13-14 (1956). For a more detailed account see SAUVEPLANNE, SECURITY OVER CORPOREAL MOVABLES 163 *et seq.* (Sijthoff, Leyden 1974).

46. According to Meijers, this very limited interpretation of Conclusion 3 was not contrary to the intention of the Second Chamber. See TOELICHTING, BOEK 1-4, 212 (1954); this opinion proved to be incorrect. See also Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 184 (Leyden 1961).

rating. Furthermore, it was doubted whether the register would really create a guarantee for the creditors and other interested third persons and whether it would not in fact merely favor the major lenders, because only these were likely to consult it.

For these reasons the government went back on its intention in the Revised Draft of Book 3 (1971).⁴⁷ The registered pledge has been discarded and replaced by a right of non-possessory pledge, pertaining to all categories of movable assets and established by an authentic instrument, or a private document with registered date. If the debtor is not the owner of the thing or if the thing is already charged with limited rights, the creditor will only obtain a valid right of pledge when the thing enters into his (or somebody else's) possession, provided that he relies in good faith on the debtor's power to dispose of it at that moment.⁴⁸ Conversely, if the creditor allows the thing to remain in the hands of the debtor, a purchaser acquiring possession of it in good faith obtains full title.⁴⁹ Thus, because of the absence of any publicity, even of the "publicity" deriving from the fact that the thing has entered into the possession of someone else than the debtor, the creditor secured by a non-possessory pledge will have a rather weak position, just like the present-day fiduciary owner of movables.

2. *Judicial Power to Mitigate Damages*

The tenth Conclusion voted in the Second Chamber, regarding the judicial power to mitigate damages⁵⁰ has resulted

47. For a detailed survey of all the considerations involved, see W. Snijders, *Bezitloze zekerheid op roerende zaken*, in HONDERD JAAR RECHTSLEVEN 25-39 (Bundel N.J.V.; Zwolle 1970). The author collaborated in the preparation of the Revised Drafts of Books 3 and 5, and is presently Advisor to the Government for Books 5 and 6.

48. Arts. 3.9.2.2 and 2a of the Revised Draft. Art. 3.9.2.3 contains a similar rule on pledge of claims.

49. *Id.* 3.4.2.3a. See note 77, *infra*.

50. Translation of Conclusion 10: "The judge should be recognized as having a general power on the ground of special circumstances to mitigate an obligation to pay damages. This with the reservation that no mitigation is to be allowed where the debtor has taken out liability insurance, where he was under obligation to do so or where such coverage is customary." See Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 172, 175 (Leyden 1961); Drion, *Introduction to "Unofficial Translation of Book 6"*, 17 NETHERLANDS INT'L L. REV. 225, 234-35 (1970).

in an article in the chapter on liability for damages, which reads as follows:

Article 6.1.9.7:

(1) If an award of complete compensation would reduce the debtor to a state of emergency, the court may mitigate his duty to compensate, unless the damage was caused through the wilful intent or gross fault of the debtor.

(2) This power is lacking in so far as the debtor has not covered his liability with insurance although he was bound to do so.

(3) Any stipulation at variance with the provision of the first paragraph is void.⁵¹

It is evident that this provision differs from the Conclusion insofar as the power to mitigate the duty of compensation does not depend on special circumstances, like for instance the small degree of fault or even the total absence of it on the part of the debtor. According to the Commentary⁵² such a rule would not comply with the principles of contractual liability in case of non-performance⁵³ and consequently would lead to great uncertainty in the law of contract. Since things are judged to be different with regard to liability in tort, article 6.3.17 provides that if a person is liable without a tort being attributable to him, the court may mitigate the compensation according to the circumstances insofar as the liability was not covered by insurance and the debtor was not bound to take out such coverage. Thus, the provision protects those who are liable for damages caused by persons and things under their supervision: parents and employers, responsible for their children or employees; those possessing, using or producing things which cause damage because of unknown defects, and so forth.⁵⁴

This solution was criticized by the Second Chamber in its Preliminary Report. The Chamber judged it to be too limited and preferred a provision stating simply that the judge may mitigate the compensation when such a mitigation would be reasonable and just in view of the special circumstances of

51. Translation from *Unofficial Translation of Book 6, 17 NETHERLANDS INT'L L. REV.* 252 (1970).

52. TOELICHTING, BOEK 6, 565, 702 (1954).

53. DRAFT CODE, arts. 6.1.8.1-3. For discussion of art. 6.1.8.2, see §5 (3) (c).

54. See also §4 (6).

the case. Moreover, the exception which article 6.1.9.7 contains for damage caused through the wilful intent or gross fault of the debtor was considered inappropriate in the case of a disinterested debtor who commits a gross fault while giving his gratuitous services to the creditor.⁵⁵ Another objection which may be raised against the drafted rules is the possibility of a *concursum* of liabilities, notably of those based on non-performance of a contractual duty and on tort. In order to prevent difficulties created by such a concurrence, it is desirable to harmonize the legal consequences of all obligations to pay compensation for damages, which is precisely the aim of the new chapter 6.1.9. A special power to mitigate damages in the field of tortious liability without fault would be hardly compatible with this purpose. The Revised Draft will again have to take a position on this problem.

3. *Effect of Good Faith*

Conclusion 21, stating that the law should provide that good faith not only can supplement obligations arising from contract, but also can extinguish them or exclude their application,⁵⁶ has been amply elaborated in the draft of Book 6. Article 6.1.1.2 provides that "the parties to an obligation are bound towards each other to conduct themselves in accordance with the dictates of reasonableness and equity."⁵⁷ Paragraph 2 adds that "a creditor cannot exercise his right insofar as, in the given circumstances, he would be acting reprehensibly in holding the debtor to his duty." This provision applies to all obligations, whereas the present Civil Code restricts the operation of good faith to obligatory contracts and attributes to it only the first of the two functions mentioned in the Conclusion cited above.

55. In this case, DRAFT CODE, art. 6.4.1.2 par. 2 (*negotiorum gestio*) also allows mitigation of the liability of the *gestor*.

56. See Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 177 *et seq.* (Leyden 1961).

57. In the law of obligations, the term "good faith" will be replaced by "reasonableness and equity." The concept of good faith will be maintained in its "subjective function," *e.g.*, in the law of things (a person who in good faith relies on somebody else's authority to dispose of a thing, etc.). In the same way, the German Civil Code distinguishes between "*Treu und Glauben*" (art. 242) and "*guter Glauben*," (*e.g.*, art. 932) the Italian Civil Code distinguishes between "*regole della correttezza*" (art. 1175) and "*buona fede*" (*e.g.*, art. 1153).

The effect of good faith as to the law of contract is dealt with in some articles contained in chapter 6.5.3, regarding the legal effects of contracts. Articles 1 and 10 of this chapter extend the principles, as expressed in article 6.1.1.2, to the legal consequences of contracts, obligatory as well as all other contracts in the field of the law of things and the law of obligations; and according to article 6.5.1.6 these rules are applicable *per analogiam* to all other multilateral juristic acts with a patrimonial content.

The same is true of article 6.5.3.11 which elaborates Conclusion 21A⁵⁸ regarding the "*imprévision*." The first phrase of this article reads: "The court may at the suit of one of the parties vary a contract or set it aside in whole or in part on account of unforeseen circumstances which are of such a nature that the other party is not entitled to expect, according to standards of reasonableness and equity, that the contract should be maintained unchanged." Similar provisions have been drafted in several other parts of the new Civil Code.⁵⁹

4. *Undue Influence*

Just like the Code Napoléon (art. 1118), the Dutch Civil Code explicitly rejects the doctrine of *iustum pretium*: persons of the age of majority are not entitled to relief from their contracts by reason of lesion (art. 1486). This means that, apart from some specific cases mentioned in the Code, lesion does not play a role in Dutch law as a separate criterion for the annulment of juristic acts. Minors can ask relief from the contracts they have entered into without the assistance of their legal representatives (again apart from some exceptions); contrary to French law, it is not required that they

58. See Dainow, *Civil Code Revision in the Netherlands: Some New Developments in Obligations and Property*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 172, 179 (Leyden 1961).

59. Two of these, concerning the contracts of alimentation, have already been enacted DRAFT CODE, book 1, art. 159 par. 3, and art. 401 par. 3. The others concern, for example, fiduciary administration as constituted by a juristic act (art. 3.6.2.2, par. 3), the contract regarding the administration of a "*gemeenschap*" (art. 3.7.1.2, par. 3), legacies (art. 4.4.2.5a), testamentary charges (art. 4.4.3.3), the rights of servitude (art. 5.6.8), and hereditary tenure (art. 5.7.1.8a). See *id.* art. 6.5.3.12 in connection with art. 6.5.3.4. In general, on the rule of good faith ("reasonableness and equity") in the new law of obligations, see Drion, *Introduction to "Unofficial Translation of Book 6,"* 17 NETHERLANDS INT'L L. REV. 235-36 (1970).

should have suffered a financial loss. The same applies to the annulment of contracts on account of defects of consent (error, fraud, violence).

This limitation of the grounds for legal relief has long been criticized in the Netherlands. Many authors insisted upon the necessity of introducing a form of legal relief in the case of undue influence. Responding to this appeal, the draft of Book 3 of 1954, in accordance with the affirmative Conclusion of the Second Chamber,⁶⁰ contained a provision which recognizes "abuse of circumstances" as a ground for annulment if somebody has been induced by these circumstances to perform a disadvantageous juristic act. A number of relevant circumstances was enumerated in the draft: a situation of necessity, dependence, levity, abnormal state of mind, lack of experience. These examples make clear that the circumstances which may be taken advantage of not only include economic or factual necessity, but also a particular state of mind of the injured party.⁶¹

It will be clear that the Draft Civil Code does not introduce a modernized version of *iustum pretium*. Undoubtedly, the possibility of pecuniary losses has led to the drafting of the new provision, but nevertheless it is not the prejudice which determines the avoidance of the juristic act but the fact that certain circumstances have been taken undue advantage of. This results from the very context in which the rule has been placed: it is inserted in the same article as fraud and violence, and financial loss is not required for the avoidance of juristic acts on account of defects of consent. Accordingly Meijers' Commentary states⁶² that the prejudice contemplated in the provision will normally be of a patrimonial nature, without however (no more than in the case of violence) necessarily being restricted to it. To bring out this intention more clearly, the reference to the disadvantageous nature of the legal act, performed under the influence of abuse of circumstances, has been suppressed in the Revised Draft of 1971. This alteration complies perfectly with the development of judicial law since the publication of the draft of Book 3; this will be mentioned further in § 5(3)(b).

60. Conclusion 19. See Dainow, *Civil Code Revision in the Netherlands: the Fifty Questions*, 5 AM. J. COMP. L. 595-606 (1956).

61. "Memorandum in Reply," Book 3, p. 61.

62. TOELICHTING, BOEK 1-4, 192 (1954).

5. *Unjust Enrichment*

Neither the Code Napoléon nor the Dutch Civil Code contains a general provision obliging a person who has been unjustifiably enriched at the expense of another to make good the other's loss. Many authors have advocated the desirability of recognizing such a liability, based on unwritten law. Several arguments could be advanced in favor of this view. The existing Code contains a number of provisions imposing a duty of restitution in specific cases of enrichment. An important argument can be drawn from legal history: it is certain that Roman-Dutch law recognized the general action for unjust enrichment;⁶³ thus it may be argued that, the Civil Code being silent on the subject, this rule has never been abrogated and consequently still obtains today. Moreover, reference can be made to the law in a number of surrounding countries: in France and Belgium the rule has been introduced by judge-made law;⁶⁴ in Germany, Switzerland and Italy it has been expressly set forth in the Civil Code.⁶⁵ In spite of these arguments the Supreme Court of the Netherlands (*Hoge Raad*) has refused to recognize the general action for unjust enrichment as a part of the existing law.⁶⁶

The new Civil Code will modify this situation. Art. 6.4.3.1 provides: "Anyone who has been unjustifiably enriched at the expense of another is bound, insofar as is reasonable, to make good the other's loss to the extent of his enrichment. Insofar as the enrichment has decreased in the period during which the person enriched had no reasonable need to reckon with a duty to make good the loss, it is not taken into account."⁶⁷

The Commentary⁶⁸ remarks that an enrichment is not unjustified if it results for instance from a juristic act. If the

63. J.E. Scholtens, "The General Enrichment Action That Was," 83 S. AFR. L. J. 391-402 (1966).

64. France: Cass. req. June 15, 1892, D.1892.1.596; S. 1893.1.281 note Labbé. See CAPITANT, WEILL & TERRÉ, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE, no. 153. Belgium: Cass. req. May 27, 1939, Pas. 1909, I, 272.

65. Germany: BGB arts. 812 *et seq.*; Switzerland: O.R. arts. 62 *et seq.*; Italy: C. CIV. arts. 2041 *et seq.*

66. H.R. (*Hoge Raad*) Jan. 30, 1959, N.J. (*Nederlandse Jurisprudentie*) 1959, no. 548 (Quint vs. te Poel). Cf. Drion, *Introduction to "Unofficial Translation of Book 6,"* 17 NETHERLANDS INT'L REV. 223 (1970). See note 77, *infra*.

67. Cf. Conclusion 18; Dainow, *Civil Code Revision in the Netherlands: the Fifty Questions*, 5 AM. J. COMP. L. 595, 605 (1956).

68. TOELICHTING, BOEK 6, 730 (1954).

obligations arising from a contract of sale are not equivalent, one of the parties is enriched at the expense of the other, but this enrichment is justified because it is based on the contract. Thus it will not be possible to reintroduce the doctrine of *iustum pretium* (§ 4 (4)) on the basis of unjust enrichment. Statute law, too, can justify a patrimonial advantage: for example, the possessor in good faith may retain the fruits he had perceived. The addition "insofar as is reasonable" makes it possible to exclude, *inter alia*, the restitution of an enrichment forced upon somebody without his consent. The following example is often mentioned in this connection. I have my neighbor's house painted during his absence, knowing that he is opposed to it. Under these circumstances it would not be reasonable to oblige him to reimburse the expenditures I made. The same holds good for the improvements made in somebody else's property by a *mala fide* possessor. As in many other instances in the new Civil Code, the draft provision allows the courts a large discretion to develop the law, while taking into account the actual circumstances of each case and the contents and purport of the applicable statutory and contractual provisions.

6. Torts

The law of tortious liability, at present governed by some provisions of the Code and elaborated by judicial law,⁶⁹ will be set forth in title 6.3 of the new Civil Code. In accordance with legal developments in many other countries, the most important alterations in this area consist in the shift from liability based on fault to liability based on risk. The latter is not unknown in the existing law, but is mainly restricted to the vicarious liability for damage caused by employees, by the collapse of buildings, by vessels and (with some important restrictions) by motorcars. Furthermore, there are cases in which liability is based on fault but with the burden of proof reversed. Thus, parents are liable for torts committed by their children, unless they prove that the omission to take such measures for the prevention of loss to third persons as could reasonably have been required of them, cannot be imputed to them. But unlike French law, the courts have not

69. DRAFT CODE, arts. 1401 *et seq.* For a complete survey of the judicial law (and the legal literature) on these articles; see Drion *et al*, ON-RECHTMATIGE DAAD (losbladig) (Kluwer-Deventer).

deduced a liability based on risk from the article governing the liability for things.⁷⁰

Against this position the new Civil Code will provide a liability for "hazardous" things and materials, regardless of whether damages caused by defects of these things or materials can be attributed to the fault of their possessor or user (arts. 6.3.15 and 16). A different position is taken as regards product liability: here the producer will be liable for damages caused by unknown defects unless he proves that the defect was due neither to his own fault or to that of another who at his orders was engaged on the product, nor to the failure of the appliances used by him (art. 6.3.13).

Since the publication of the draft of Book 6, the number of those advocating a more severe liability has increased, notably with regard to the liability of parents for their children and of producers for their products. Since in modern society the views on liability in tort are subject to rapid development, it is not improbable that the Revised Draft of Book 6 will bring other innovations in this field.

§ 5. INFLUENCE ON LEGAL SCIENCE AND LEGAL PRACTICE

The draft of the new Civil Code is not merely a piece of work which will be completed and introduced in due time, leaving the legal practice untouched until that moment. On the contrary, the influence of the drafts and explanatory commentaries—the first ones having been published some twenty years ago—on Dutch legal practice has been considerable. To give an impression of the extent to which the draft casts its shadows ahead, the following observations indicate its relation to legislation, legal literature and, perhaps most interesting of all, to judicial law.

1. *Legislation*

In the Netherlands the correct position has always been taken that the preparation of the new Civil Code should not stand in the way of alterations of the law which cannot await its completion. Of course one has to be more prudent with partial alterations when recodification is on the way; the civil law does require a certain amount of stability so that alterations should not be produced in rapid succession. It is obvious

70. Cf. Drion, *Introduction to "Unofficial Translation of Book 6,"* 17 NETHERLANDS INT'L L. REV. 233 (1970).

that new legislation, if only for this reason, should be in harmony as much as possible with the new Civil Code.

The influence of the new Civil Code is greatest when, as happened various times, parts of it are introduced separately. The following examples may be given in illustration: the legal capacity of the married woman, adoption and the rules for foundations. As mentioned in § 2, Book 1 (law of persons and family law) has been recently put into operation as a whole; Book 2 (juristic persons) will follow soon.

On the other hand, there may be a partial alteration of the law which cannot be modeled on provisions of the new Civil Code. It is desirable that in such cases the subject concerned should not be changed again, or changed as little as possible, on the introduction of the new Code; this requires that the terminology and the system of the new Civil Code should be taken into account as much as possible. Both methods lead to the result that rules and concepts of the new Civil Code exert their influence, either directly or indirectly on legal practice by way of this "partial" legislation. Thus when terms and concepts of the new Code enter into the legislation by way of partial changes of the law, it is obvious that their meaning should be defined with regard to the context in which they appear elsewhere in the Draft.⁷¹

Apart from exercising influence on the contents of the new legislation, the Draft Code may set the pace at which it is brought about, especially when the legislator can make use of already completed drafts. Practice has shown that this applies not only to national legislation but also to international treaties. In the Benelux unification program it has happened several times that a text could be drafted much more quickly because of the already existing draft of the new Dutch Code. This equally holds good if the draft is deviated from, since the preparatory work on the Code can be of benefit anyway, notably from the study of comparative law underlying each part of the new Code.

2. *Legal Science*

The influence exerted by the new Code on legal writing is

71. Notably the putting into operation of Book 1 is of importance, for example, for the new terminology regarding "assets" and "things" (*cf.* note 22, *supra*), the "limited rights" (*cf.* note 21, *supra*), the term "registered goods" (*cf.* note 23, *supra*), and for the expression "reasonableness and equity" replacing the concept of "good faith" (*cf.* note 57, *supra*).

considerable. In the field of private law, there are no textbooks and almost no other publications in which the new Code is disregarded. Some manuals already treat their subject matter on the basis of the system of the not-yet-introduced books of the Draft Code. The number of writings which specifically submit the drafts to a critical inquiry is large. There exists a (certainly incomplete) survey of literature on the subject numbering over 200 pages. Few barristers neglect the opportunity to plead their cases on the basis of the new law, if this can be of avail to a greater chance of success. All this information regarding the new Code has its marked effect upon the courts; this will be discussed presently.

Indirectly, the Draft has given an impulse to the study of comparative law. Naturally, interest in this subject is not new in the Netherlands. In view of the provenance of our Civil Code it is obvious that in the past century much interest was devoted to the development of French law. This was followed by a period of increasing influence of German and Swiss legal scholarship, notably at the time when in those countries new Codes were drafted and put into operation. Presently, interest in Common Law is also growing.⁷² Repeatedly, judicial decisions (including those of the *Hoge Raad*) have been influenced by foreign law. A good example of this "harmonizing interpretation" is furnished by a decision of the Supreme Court of 1943,⁷³ in which the court considered "that, in accordance with what has of old been accepted in our country, and with what is nowadays accepted in neighboring countries under statutory or judicial law, compensation for non-material damage (*in casu* caused by a car crash) must be considered reasonable and just."

The interest in comparative law can be found in the new Code in a very pronounced form, notably in the law of obligations. It would lead too far afield to discuss the impact of foreign law on specific provisions or chapters, or to go into the question of what legal system exercised the greatest influence on the draft as a whole. Just one figure might indi-

72. Cf. Drion, *Introduction to "Unofficial Translation of Book 6,"* 17 NETHERLANDS INT'L L. REV. 228 (1970).

73. H.R. May 21, 1943, N.J. 1943, 445 (van Kreuningen vs. Bessem). For an ample discussion of this case, see Kisch, *Statutory Construction in a New Key: Harmonizing Interpretation*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 262 *et seq.* (1961).

cate, however, the extent to which foreign law has been taken into consideration. Pages 638-672 of the Commentary on Book 6, being exactly half of the explanatory commentary of title 6.3 (tort), contain 220 notes; 120 of these include references to statutory law, court decisions and literature of the following countries: Belgium, France, Germany, Greece, Italy, Switzerland, Hungary, England, the Scandinavian countries, Austria, Portugal, Canada, the United States of America, South Africa and Japan.⁷⁴ It is not surprising that also in legal literature, which generally examines the draft very closely, ever more attention is being paid to foreign law; the same applies to university teaching.

3. Judge-made Law

Very significant is the attitude assumed by the courts towards the draft of the new Civil Code. In the Netherlands, the interesting phenomenon can be observed that judge-made law is clearly influenced by the Draft and that this influence increases as the legislative activities are proceeding.⁷⁵ In the process of judicial development of the law, the draft is continuously being taken into account. In a number of cases this has resulted in an interpretation of statutory rules complying with solutions adopted in the Draft or in the Explanatory Commentaries, a mode of construction for which the telling term of "anticipating interpretation" has been found.

It is clear that there are certain limits to this kind of interpretation. The judge may not set aside a rule of compulsory law, while invoking a drafted provision.⁷⁶ From this it

74. There are also references to the history of law, both to domestic and foreign writers and legislation.

75. Cf. C.J. van Zeben, *Een koperen feest* (inaugural address Utrecht, 1966); G.J. Scholten, *Anticiperende interpretatie: een nieuwe interpretatiemethode?*, W.P.N.R. (Weekblad voor Privaatrecht, Notarisambt en Registratie) 5031, 5032 (1969). The phenomenon is not wholly new in the Netherlands. In 1919 the Supreme Court drew a most important definition of tort from a draft statute (presently taken over in its essentials in DRAFT CODE, art. 6.3.1, par. 2). That draft had thus fulfilled its function and was never enacted.

76. Compulsory law cannot be put aside, except for striking exceptions. Thus the Supreme Court ruled in 1972 (H.R. March 3, 1973, N.J. 1972, no. 339; *La Confiance vs. Maring*) that some provisions in our very obsolete law of insurance (cf. §3 (6), *supra*) have lost their force, because they are at variance with incompatible custom ("abrogating custom"). Equally, good faith can exclude the application of compulsory provisions, but only in special cases.

can be understood that the law of obligations offers the majority of examples of "anticipating interpretation," the law of persons and family law very few, while the law of things takes an intermediate position. Nor will the judge draw such rules from the Draft Civil Code whose application requires the legislative creation of new institutions like registers or other official devices. The same holds good for rules which do not fit in with the system of the law as it stands.⁷⁷

In spite of these limitations the courts have been able, by means of anticipating interpretation, to introduce a number of important rules into the body of the existing law. The following illustrations are limited to decisions of the Supreme Court (*Hoge Raad*) and, within this scope, to decisions in which the influence of the draft is evident or at least highly probable. Whether this influence has indeed been exerted can not always be ascertained beyond doubt, since the *Hoge Raad* (contrary to the lower courts) never refers explicitly either to legal literature or the draft or the explanatory commentaries.⁷⁸ For this reason it is not possible for instance to establish, in cases in which the court maintains an existing rule, whether this was so decided on the ground that the rule also complies with the new Code, whereas it otherwise would have chosen a different solution. On the other hand, it is conceivable that the court might decide contrary to the existing law and in harmony with the draft, where it might have taken the same decision under the influence of legal literature or of foreign law if the draft had not existed. Yet, the influence of the draft in such cases is highly probable, although strictly speaking it cannot be proved. However this may be, the influence is certain when the *Hoge Raad*, as happened already several times, adopts in its decision a wording occurring *verbatim* or nearly literally in the draft.

(a) In 1950 the *Hoge Raad* in one judgment decided two

77. This may have been an important consideration for the Supreme Court when denying the existence of the general action for unjustified enrichment (*see note 64, supra*). Many rules in the new Civil Code are attuned to this general provision and it has been continuously taken into account by the drafters of the Code. The introduction of so general a rule into the present law could lead to many unforeseen consequences.

78. In a recent case (H.R. February 2, 1973, N.J. 1973, no. 315; *Corporation of Amsterdam vs. Jumbo*) the plaintiff raised the question whether art. 6.3.13 (product liability, *see* §4 (6)) could be considered as an already operative rule; the Supreme Court was able to leave this question unanswered on procedural grounds.

questions which had been disputed since the enactment of the Civil Code of 1838.⁷⁹ In the first, it adopted the so-called causal system for the *transfer of property*, that is, it ruled that the title required by article 639 of the Civil Code for the transfer of property should be a *valid* obligatory relationship (e.g., a contract of sale); a title existing only in the imagination of the parties (*causa putativa*) was considered not to be sufficient. Secondly, the vague provision of article 2014 par. 1, taken from article 2279 of the Code Napoléon ("with regard to movables, possession is equivalent to title"), was construed in the sense that a person who acquires a movable thing in good faith from someone who is not entitled to dispose of it, is protected by law, so that he obtains the property of the thing. Both rules are in accordance with Book 3 of the Draft,⁸⁰ which was not published until four years later. It is generally held that the solutions Meijers intended to establish in the draft were already known to the Supreme Court in 1950, so that we find here an anticipating interpretation "*avant la lettre*".

(b) In § 4 (4) above, there is mentioned article 3.2.10 of the new Code which introduces the possibility of relief from juristic acts on account of *abuse of circumstances* (undue influence). In 1957 the relevance of abuse of circumstances was recognized by the *Hoge Raad*.⁸¹ In the case submitted to the court, one party to a contract had been compelled to accept a very onerous stipulation because the other party was in a monopolistic position. The *Hoge Raad* recognized in principle that a contract by which the injured party has accepted a highly unreasonable burden on account of compelling circumstances which the other party has taken advantage of, may be void, being contrary to *boni mores*. This construction differs from the one set out in the draft; apparently the court considered itself incompetent to introduce new forms of legal relief on account of defects of consent. But the

79. H.R. May 5, 1950, N.J. 1951, no. 1 (Damhof vs. the State of the Netherlands).

80. DRAFT CODE arts. 3.4.2.2, par. 2; 3.4.2.3a. It may be noted in passing that in the Revised Draft, contrary to the law currently in force, the latter provision extends its protection to the gratuitous transferee as well as to the purchaser of lost and stolen goods. However, in all cases the original owner will be entitled to sue the purchaser in a personal action and to claim that the property of the thing be transferred to him, provided that he is willing to restore the purchaser's price. This claim is lost after three years.

81. H.R. Jan. 11, 1957, N.J. 1959, no. 37 (Uijting en Smits vs. Mozes).

result is unmistakably inspired by the draft, as appears also from the wording of the decision. In a later judgment⁸² the *Hoge Raad* ruled that abuse of circumstances does not require a certain form or amount of prejudice, which means that a financial prejudice is not essential.

Not only does the draft influence judge-made law, but the contrary may happen as well: in the Revised Draft of Book 3, the reference to the disadvantageous nature of the juristic act performed under undue influence has been suppressed.

(c) With regard to *contractual liability*, the courts (including the Supreme Court) and the text writers nearly unanimously accepted the general rule that a debtor, irrespective of fault, is liable for damages caused by defects of the appliances, equipment and other things used by him while performing his obligations. The draft of Book 6 takes a different stand. In the Commentary,⁸³ so comprehensive a rule is considered to be untenable; for example, because a doctor may not be held liable on the sole ground that a serum delivered by a pharmaceutical factory later proves to be defective. Thus the debtor's liability for appliances is governed by the general principle of article 6.1.8.2, which provides that the shortcoming (*viz.*, in the performance of an obligation) cannot be attributed to the debtor (with the effect that he is not bound to make good the damage suffered by the creditor), if it is due neither to his fault nor to a cause for which he is liable by virtue of statute, a juristic act or opinions prevailing in society.

Accordingly, the *Hoge Raad* ruled in 1968⁸⁴ that the debtor's liability for defective appliances should be governed by the nature of the contract, the opinions prevailing in society, and by reasonableness. The case concerned a small transport contractor who had undertaken to hoist up a wing of an airplane from a ship onto a wagon. Because of a defect of the hoisting-crane, not due to the fault of the debtor, the wing fell on the ground and was seriously damaged. The debtor was not held liable for the damage. The *Hoge Raad* considered *inter alia* that on account of the smallness of the recompense it would be unreasonable to put the risk of such a large damage on the debtor, and that from the circumstance

82. H.R. May 26, 1964, N.J. 1965, no. 104 (Van Elmbt vs. Fejerabend).

83. TOELICHTING, BOEK 6, 541 (1954).

84. H.R. Jan. 5, 1968, N.J. 1968, no. 102 (Zentveld vs. Assicurazioni Generali); *cf.* H.R. Dec. 13, 1968, N.J. 1969, no. 174 (Cadix vs. A.E.H.).

that the creditor (the aviation-works) had covered this risk by insurance it may be inferred that according to opinions prevailing in society the risk should be borne by the creditor.

(d) In several older decisions⁸⁵ the Supreme Court held that the using of one's property will only constitute *abuse of right* and consequently entail liability in tort if the owner exercises his right without a reasonable interest and with the mere intention to harm another person. Thus, as soon as the owner has any interest of his own, small as it may be, he is not bound to take into consideration another's prejudice, great as this may be. This narrow and individualistic view was severely criticized by the legal authors. One of the critics was Meijers, who afterwards expressed his opinion in article 8 of the Preliminary Title. This article forbids the abuse of rights and provides that a right is abused if it is used either with the mere intention to harm another person, or with the aim to pursue another object than that for which the right has been granted, or finally because of the disproportion between the interest served and the interest affected according to standards of reasonableness. In a case submitted to the *Hoge Raad* in 1970⁸⁶ a person had built a garage which extended 30 inches beyond his property. The neighbor sued for removal of the garage, invoking his right of ownership of the land. The *Hoge Raad* in its decision adopted almost literally the third instance of abuse of right mentioned in article 8 of the Preliminary Title.⁸⁷

So much for the examples of "anticipating interpretation," which might easily be multiplied.

What explains this inclination of the courts to follow the draft? An answer is offered by Professor Scholten who gives four motives for anticipating interpretation:⁸⁸ "First, because a new Civil Code is considered as an important *desideratum*. The purpose has, as it were, been set constitutionally. We desire to achieve this end and this desire also governs the law in force. Secondly, because the drafters have great authority, more than just a scientific authority, since they have been

85. H.R. March 13, 1936, N.J. 1936, no. 415 (van Stolk vs. Van der Goes); H.R. Dec. 2, 1937, N.J. 1938, no. 353 (Teunissen vs. Driessen).

86. H.R. April 17, 1970, N.J. 1971, no. 89 (Kuipers vs. de Jongh).

87. As a matter of fact, this did not prevent the success of the action on procedural grounds irrelevant in this context.

88. See note 75, *supra*. See also W.C.L. van der Grinten, *De betekenis van de herzieningsarbeid voor de rechtsontwikkeling*, in HET ONTWERP B.W., 55-66 (Deventer-Antwerpen 1961).

commissioned by the government to draft the Code and since the draft passed a great number of collaborators and critics. Thirdly, on account of the form in which the drafted rules lie ready to be applied as legal provisions. This point is very important: legal literature never lies ready in the same way. The judge need not find the required formulation himself. And the fourth reason for anticipating interpretation is that it will facilitate the transition to the new Civil Code."