



# MODERN CODIFICATION OF PROPERTY LAW AND CONTRACT LAW

## The Dutch Experience

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### 1. Introduction

The former Dutch Civil Code (Burgerlijk Wetboek) became effective in the year 1838. It was largely a translation of the French Civil Code, with a number of adaptations and additions. After roughly one hundred years of service this codification, in the opinion of many, began to show signs of obsolescence. A government committee was appointed to correct the inaccuracies and to fill the gaps. At this stage, the idea was simply to develop 'repair-legislation'. The committee operated slowly. This got on the nerves of one of the leading scholars – in fact: the leading scholar – of that day, E.M. Meijers, professor at the University of Leiden. Meijers published a list mentioning as much as one hundred defects of the existing Civil Code, and added that he could quite easily show another hundred shortcomings. He criticised the inertia of the committee. On the other hand, he stated that the committee really did not have much of a chance, because patrimonial law is a coherent system and it is hardly feasible to repair some isolated parts while the rest of the Code remains as it is. Meijers argued that the only sensible solution was the development of a whole new Civil Code. This idea caught on. In 1947 Meijers himself was appointed as government commissioner with the assignment to write a new Code. In all probability he could have accomplished this enormous task on his own, but unfortunately Meijers died in 1954. He was succeeded by a group of lawyers, which obviously complicated matters. Since then a lot of time has leaked away, for different reasons. It was not before the first of January of 1992, that the New Dutch Civil Code (Nieuw Burgerlijk Wetboek) (below: DCC) came into force. Even on this very moment a few parts are not ready yet, but we are getting close. The texts are

accompanied by an elaborate government commentary, the total length of which amounts to one meter.

The New Civil Code has received a lot of international attention. Translations were published in English, in French, in German (partly), in Russian, and also in Spanish. The latter translation was made by Dr. J.G. Van Reigersberg Versluys, honorary consul of The Netherlands in Malaga (published on his own, in three parts: Malaga 1996, 1999, 2000).

## **2. Contents of the Civil Code**

How is the new Code structured? It consists of nine Books. A tenth Book, concerning private international law, will presumably be added in the future. One of the underlying ideas is that all private law shall be in the Civil Code. Formerly we had a Commercial Code too, dating from 1838 as well, but nowadays we no longer see a fundamental difference between a merchant and an ordinary civilian.

Books 1 and 2 deal with the law of persons: Book 1 with the natural persons (including family law), Book 2 with the legal persons. In Book 3 we get at the patrimonial law. Its heading is: 'Patrimonial Law in General'. Our former Code did not have a general part like this; it started directly with the provisions on property law, followed by those on the law of obligations. The modern legislator thoroughly and carefully considered the system of civil law, like the German legislator did at the end of the nineteenth century. After this general Book 3 we meet a couple of traditional books: inheritance law (Book 4), property law (Book 5); law of obligations (Book 6 ff.). Within the law of obligations, again there is a general part (Book 6) to begin with, followed by some more specialised parts (Books 7 and 8). Book 7 deals with the specific contracts, like the sale of goods, leasing, the labour contract, building contract, etc. Some of the contents of this Book are derived from European directives, like the ones on time-sharing, the medical contract and the travel contract. Book 8 is concerned with transport law, an area of the law which used to be in our Commercial Code, and which is strongly influenced by international treaties. Finally, Book 9 deals with the intellectual property rights (copyright, patent right, etc.).

## **3. Layered structure**

As far as the structure of the Code is concerned, an important feature is the 'layered structure'. For every subject the legislator had to deal with, he has given scrupulous thought to the question what the exact scope of the provision(s) should be. He defined different layers, starting with the general ones and gradually becoming more and more specific. Let us discuss an example. Suppose I buy a lovely painting, dated by the seller in the late 18th century. A friend of mine, who is an art expert, discovers that it is a fake, presumably painted a month ago. I am the victim of – probably – fraud. Which remedy or remedies do I have? Where should I look for the answer? Let us start at 'the bottom', so at the most specific level, being the special contract of sale and purchase (Book 7). Surely the answer will not be found there. After all, the problem of fraud is not a typical sale problem, but can occur at the conclusion of other types of contracts as well. Therefore a better place would be contract law, which is the latter part of our Book 6 regarding the law of obligations. But even at the level of contract law, the provisions on fraud are not to be found. The problem of fraud, after all, is not

limited to contracts either: an unilateral juridical act – e.g. the termination of a contract, the making of a testament – can also be obtained fraudulently, in which cases too a remedy should be given. We have to continue our journey, until we arrive at yet another location: the general law of juridical acts, in the first part of Book 3. There, finally, the provisions on fraud are found (esp. art. 3:44 (3) DCC).

So we see three different layers: the highest – most general – level is the law of juridical acts, the second is contract law, the third level is the law of sale. As mentioned, the provisions on fraud are located on the highest, most general, level. But if the disappointed party prefers to terminate of the contract because of non-performance, a typical contract law issue is at stake: the provisions about that issue are located in the law of contracts (middle level). To be more precise: in a second layer of the general contract law: the law on synallagmatic (reciprocal) contracts. Therefore, on balance even four layers can be distinguished: (1) juridical acts, (2) contracts, (3) synallagmatic contracts, (4) sale/purchase.

It is only one example out of many. This way of classifying, organising and grouping, is one of the fundamentals of our new Civil Code. Not only do we see it in contract law and the other law of obligations, but in property law as well, where first of all provisions regarding all kinds of property – material as well as immaterial – are given (Book 3), and afterwards specific provisions which deal with certain kinds of property only, like movable goods and immovable goods (Book 5).

I am sure this way of organising has its drawbacks, especially for those who are not very familiar with the system of civil law. Presumably, they will soon get lost. But for those who are familiar with the law, the layered system has definite advantages. Not only is it efficient and clear, moreover – by means of the general levels – it realises and stresses unity instead of suggesting diversity.

#### **4. Bridge-articles**

The strive for unity and uniformity also shows in another way: the so-called bridge-articles (or linking provisions). In some cases, the legislator is so convinced of the value of a given provision, that he extends its scope beyond that of the section of the code in which it is inserted. A couple of examples may illustrate this approach.

Book 3 contains the general provisions on the juridical acts, e.g. regarding consent (intention and declaration), vices of consent, nullity. The concluding article 3:59 DCC prescribes: ‘The provisions of this title apply *mutatis mutandis* (with appropriate adaptations, JH) to areas of the law other than patrimonial law, to the extent that they are not incompatible with the nature of the juridical act or relationship’. So by this written rule of analogy, the concepts of consent, fraud, undue influence, nullity etc. obtain a universal potential: they might prove useful in – for instance – family law or civil procedure law as well. And even in areas which are considered to be of a public law nature, like contracts between government bodies (cf. art. 3:14 DCC).

As far as property law is concerned the cited bridge-article is not really interesting, because the provisions it deals with are directly applicable at property law transactions. A second specimen of the bridge-articles however is important for property law. In our new Civil Code, the scope and influence of ‘good faith and fair dealing’ have broadened. In the old days this was considered a typically

contract law instrument, referring to the rules of unwritten law which govern the relationship between contracting parties. Our modern legislator holds the view that good faith and fair dealing should not only be applicable in contract law, but in the total law of obligations. And so he prescribed (art. 6:2 CC). But he added an interesting bridge-article, reading (art. 6:216 CC): 'The provisions of this section and of the next three sections (including art. 6:248 on good faith and fair dealing, JH) apply mutatis mutandis to other multilateral patrimonial acts, to the extent that the necessary implication of the relevant provisions, taking into consideration the nature of the juridical act, does not result in incompatibility'. As a consequence, the standard of good faith and fair dealing will also govern property law transactions, like the transfer of goods or the establishment of a limited real right (e.g. pledge, usufruct).

The importance of the bridge-articles lies in the fact that the legislator offers a bridge without forcing the judge to actually cross the river. As far as the areas at the other side of the bridge are concerned, the judiciary is positioned as an important player in the development of the law.

## 5. Open criteria

On a general level too, I think we may say that the relevance of the position of the judge and his judgement has grown substantially. A concise view of the material trends in our new Code, which I will reflect upon now, stresses this point.

The first trend I would like to mention is directly related to this role of the judge. I refer to the tendency to use more and more 'open criteria', the outline of which is provided by the legislator, but the actual contents of which are highly dependent of the appreciation – in the concrete case – by the judge. From many possible examples I mention but a few. In the first place: 'good faith and fair dealing', which, as discussed before, not only govern contract law, but also the rest of the law of obligations and by way of written analogy even (parts of) property law. In our modern law this notion is considered very fundamental. Not only is it a source of supplementation, but also a means of detraction: when a certain rule – whether arising from contract or from the code itself – is unacceptable according to criteria of good faith and fair dealing ('reasonableness and equity'), this rule simply is not binding in the circumstances, and the preliminary outcome is overruled. Naturally, this puts a lot of weight upon the shoulders of the judge, who after all is the one who decides whether the first outcome is acceptable or not.

The Code knows a lot of other, mostly less spectacular, open criteria. For instance various articles prescribe, that a person must do something – e.g. complain about the quality of goods received – 'within a reasonable time'. How long is a reasonable time? This again is for the judge to decide, considering the peculiarities of the case. Of course a legislator has alternatives. He can say 'within four weeks' or 'within six months'. But in one case this fixed period materially would be too long, whereas in other cases it could prove to be too short. Choosing for openness and variability on issues like this, in my opinion implies two things: firstly, a firm belief in the capacity of the judiciary, and secondly, the acknowledgement that legal certainty (here) is not the highest aim.

It is a historical fact that every trend sooner or later evokes a counter-trend. I think I should add that in the Netherlands critics argue that the law is becoming

too much of a hazard game, and that we should return to 'hard and fast rules'. But those voices are a minority, and I do not expect them to become a majority soon. In fact the use of 'open criteria' can be considered an international trend, which is still in full swing.

## **6. In-between-solutions**

A second trend, in some respects connected with the first, is the abandonment of thinking in terms of black and white, of fully yes or no. In a notable number of provisions, the legislator appears to favour (various) 'grey' solutions, between the extremes. The most spectacular examples are found in the area of contract law.

When a party buys goods under the influence of a mistake (art. 6:228 DCC), traditionally two options exist: either the party annuls the contract, or he does not use this remedy and leaves the contract as it is. Nowadays, there is an important third option (art. 6:230 DCC): upon the demand of one of the parties, the judge may, instead of pronouncing the annulment, modify the effects of the contract to remove the prejudice of (in this case) the buyer. So when a price of \$ 1000 was agreed upon, the judge can adjust the price to e.g. \$ 800 or \$ 700 as he sees fit. He can change the contract. From the point of view of the freedom of contract this may seem a rather dubious idea. On the other hand, entering a contract not only means that the parties are bound by what they explicitly or implicitly have agreed upon, but – in the modern approach – also means, that they both submit to the demands of good faith and fair dealing. Those demands include, that in certain cases one of the parties has to settle for less than agreed upon.

A second example of 'thinking grey' is art. 6:258 DCC, dealing with the occurrence of a change of circumstances. If after the conclusion of a contract the circumstances change fundamentally, in such a way that the other party cannot expect the contract to be maintained, the judge – again he – may modify the effects of the contract, or may set it aside in whole or in part. This is a contract law provision. But, through the bridge-article mentioned before (art. 6:216 DCC), it may – *mutatis mutandis*, so with appropriate adaptations – also be applied in the field of property law, e.g. with respect to the establishment of a limited real right.

## **7. Protection of third parties**

Another feature of the new codification is the structural protection of third parties in good faith. This is a trend which, by its nature, is especially visible in the area of property law. Of course the protection of third parties is not a recent phenomenon. But what is new about it, at least in our country, is the structural and coherent way in which it is implanted in the code. Formerly, we had to manage with a few scattered occasional provisions. There was an article on movable goods, adopting the concept that possession counts as title. And there was a rather vague other article, which was used – creatively – regarding other kinds of goods: immovable goods (houses, land plots) and immaterial goods (claims). Nowadays, the Code includes a firm and coherent complex of provisions for the protection of third parties in good faith. In this lecture I will focus on property law.

In the field of property law, different systems of protection are elaborated. In the first place: protection against the possible fact that the seller (alienator) lacks

the right to dispose of the property, so when the seller is not the real owner of the goods. The Code contains a number of articles on this problem: one for movable goods (art. 3:86 DCC), and another one – with slightly adjusted demands – for other kinds of property, like immovable and immaterial goods (art. 3:88 DCC). Apart from this, a second track of protection is introduced, directly linked to the system of the registration of land and other immovable property. In Holland, as in most countries, public registers are maintained. All kinds of juridical facts can be inscribed in those registers (art. 3:19 ff DCC). Given the fact that in our system the registrar is passive, some entries will be incorrect, and other relevant facts may not be entered at all. In such cases a third party (acquirer), who depended on the public register in good faith, will be protected (art. 3:24 ff DCC). Again, the Code does not settle for one general article, but it distinguishes between different kinds of problems (mainly: inaccurate registration versus non-registration) and thus provides almost tailor-made solutions.

Next to those two tracks, the Code contains a third one, in the form of a kind of general safety-net. Art. 3:36 DCC reads as follows: 'A third person who under the circumstances reasonably bases an assumption as to the creation, existence or extinction of a juridical relationship on a declaration or conduct of another, and has acted reasonably on the bases of the accuracy of that assumption, cannot have invoked against him the inaccuracy of that assumption by the other person.' Although it is only a safety net which will not be invoked very often, this general provision on the protection of third parties in good faith is important from a principal point of view. It should be noticed that here two elements are crucial: not only the good faith of the third party, but also causal conduct of the person against whom the good faith is invoked: necessary is an act or omission at his side, on which the third party grounded its (good) faith.

## **8. Further trends in the Code**

Naturally, a modern codification shows more trends than the few which were discussed so far. Our new Civil Code does so indeed. In this lecture, I can only mention a couple of them, in general terms.

a. Protection of so-called weak(er) parties against so-called strong(er) parties. Examples: consumer versus professional seller, patient versus doctor and hospital, traveller versus travel-organisation. These provisions often derive from European Directives, as consumer protection is one of the fields of civil law on which the European Union concentrates.

b. Expansion, particularly by means of a (one) fundamental general provision, of the idea that whenever an unjustified enrichment takes place, it should be countered (art. 6:212 DCC).

c. In tort law: a considerable growth of strict (i.e. no-fault) liability. Examples: strict liability for damage inflicted by one's children, employees, representatives, buildings, animals, products, motor-vehicles (art. 6:169 ff DCC).

d. Stimulation of trade and business by the elimination of possible obstacles in obtaining credit. Examples: the introduction of a pledge on movable goods without handing over, and of a pledge on claims without notification of the debtor (art. 3:236 ff DCC).

e. A certain smoothening of the formerly sharp distinction between property law and the law of obligations. Example: regarding immovable goods, the Code

makes it possible that certain contractual obligations are entered into the public register, and from that moment will be binding for third persons too (art. 6:252 DCC).

## 9. Further trends in legal practice

Next to those (and other) trends, visible in the legislation itself, I would like to draw attention to the fact that there are 'unwritten trends' as well, which may be no less important. One of the outspoken developments under our present law is the growing attention for the actual capacities and qualities of the respective parties. Are they experienced or inexperienced, professional or private, young or old, strong or weak? The way we see it nowadays, questions like these should be asked under many articles of the law, although not prescribed explicitly. For instance the provisions on mistake, interpretation, good faith and unforeseen circumstances can and will be applied differently in the case of a 80-year old private person than when a 30-year old businessman is concerned. The former will sooner be allowed to annul a contract for mistake, will sooner convince a judge that the contract shall be interpreted in a certain – for him favourable – way, will sooner be deemed to be in good faith, etc. At the opposite side of the spectrum, a large company or a government body will sparsely be granted a remedy for mistake and will often see the contract interpreted in its disadvantage. Capacity and quality have become key words in today's legal practice.

## 10. Conclusion

The trends I mentioned are present in and under the Dutch Civil Code of 1992. At the same time, I think we can safely say they will be present in any modern codification, especially as far as Europe is concerned. Today's law is certainly no set of hard and fast rules. The throne is taken by open, flexible rules, which facilitate the taking into account of the (relevant) circumstances of the case, including the qualities of the involved parties, and which often aim for in-between-solutions in stead of 'all or nothing'. Naturally, these characteristics do not express themselves in the same intensity in every field of the law. In property law – where legal certainty is a high aim – they may keep somewhat diffuse, but they blossom spectacularly in the law of obligations. Recently, an example of the latter is also available in the Principles of European Contract Law (PECL), published less than a year ago by the Lando-Committee. In many respects, these Lando-Principles get close to our New Civil Code.

For an important part, the trends coincide with an evolution in the position of the judiciary. Nowadays the judge is not simply 'the mouth of the (written) law'. He takes a central position in the implementation of the law, and plays a key role in its further development. Modern legislators tend to use this to their advantage. A solid partnership of legislator and judge, maybe that is what can be considered *the* characteristic of modern codification.